IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2022-002916
First-tier Tribunal No:
EA/15225/2021

THE IMMIGRATION ACTS

Heard at George House,
Edinburgh
On the 14 December 2022

Decision & Reasons Promulgated
On the 21 February 2023

Before

UT JUDGE MACLEMAN

Between

UZOMA VITALIS AGWU

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

For the Appellant: Mr A J Bradley, Solicitor, Glasgow
For the Respondent: Mr A Mullen, Senior Home Office Presenting Officer

DETERMINATION AND REASONS

1. By a decision dated 26 October 2021, the respondent refused the appellant's application because he did not hold a "relevant document" under the EU Settlement Scheme (the "EUSS").

2. The appellant appealed to the FtT, saying in his grounds that his wife and children had pre-settled status, and that he would provide marriage and birth certificates.

3. The case came before Judge Prudham on 5 April 2022. His decision promulgated on 27 April 2022 records at [14] that the respondent's presenting officer "said that if there was no valid document then the appellant can submit other evidence to prove a relationship". At [18] the Judge took this also to be in line with "Home Office Guidance". He was satisfied that relationships were as claimed, concluded at [21] that notwithstanding the absence of a relevant document the appellant "meets the requirements of a durable partner" under the EUSS, and allowed the appeal.

4. The SSHD sought permission to appeal to the UT on the grounds that the Judge "overlooked the requirement … to hold a relevant document". Permission was granted on 20 May 2022 by FtT Judge Singer.

5. Shortly before the hearing in the UT, Mr Mullen drew attention to *Celik v SSHD* (EU exit; marriage; human rights) [2022] UKUT 00220, promulgated on 19 July 2022, which is headnoted thus:

> (1) A person (P) in a durable relationship in the United Kingdom with an EU citizen has as such no substantive rights under the EU Withdrawal Agreement, unless P's entry and residence were being facilitated before 11pm GMT on 31 December 2020 or P had applied for such facilitation before that time.
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> (2) Where P has no such substantive right, P cannot invoke the concept of proportionality in Article 18.1(r) of the Withdrawal Agreement or the principle of fairness, in order to succeed in an appeal under the Immigration (Citizens' Rights) (EU Exit) Regulations 2020 ("the 2020 Regulations"). That includes the situation where it is likely that P would have been able to secure a date to marry the EU citizen before the time mentioned in paragraph (1) above, but for the Covid-19 pandemic.
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> (3) Regulation 9(4) of the 2020 Regulations confers a power on the First-tier Tribunal to consider a human rights ground of appeal, subject to the prohibition imposed by regulation 9(5) upon the Tribunal considering a new matter without the consent of the Secretary of State.

6. Mr Mullen submitted that this was conclusive on the need to hold a relevant document; the law had to be applied as it came to be understood, even retrospectively; and the outcome of the appeal should be reversed.

7. Mr Bradley submitted that the respondent should not be permitted to withdraw a concession, or to raise an argument not made to the FtT. He relied upon *Bilal Ali v Khatib and others* [2022] EWCA Civ 481. Alternatively, if set aside, he said the case should be remitted to the FtT

for remaking of the decision on full consideration of updated family circumstances, including the best interests of the two children.

8. Mr Mullen replied that the UT was bound to apply its decision in *Celik,* and there was no scope for reconsideration in wider terms of proportionality.

9. I reserved my decision.

10. The outcome of this case would not have been the same, had *Celik* been available to the FtT.

11. Mr Bradley said that the respondent's decision leading to these proceedings contemplated a case being established other than by a relevant document; but I cannot glean that interpretation from the various phrases used in the decision.

12. However, the respondent does not dispute the Judge's citation at [18] of Guidance from the respondent that an applicant might prove a case by means other than a relevant document.

13. The respondent's grounds of appeal to the UT blandly assert that the Judge overlooked the requirement, but they ignore the express concession to the FtT that other means were available. The outcome of the application for permission might have been different if that had been dealt with explicitly, as it ought to have been.

14. By coincidence, the same Presenting Officer has been sent to the UT to make the opposite submission. (Although I did not enquire into the matter, I suspect that in accordance with usual Home Office practice, the application for permission will have been prepared by another hand.)

15. The circumstances of this case differ from *Bilal Ali* and from the further cases cited therein. However, even if this is "a pure question of law not raised at first instance", the respondent has not referred to any authority to the effect that the UT is obliged to ignore not only a failure to argue the point but a concession directly to the contrary and the terms of published guidance provided for applicants.

16. I consider that the UT has discretion whether to allow a concession to be withdrawn and whether to allow a new point to be argued; and that on the peculiar history of this case, it would be unconscionable to deprive the appellant of the decision in his favour.

17. The decision of the FtT shall stand.

18. No anonymity direction has been requested or made.

H Macleman

19 December 2022
UT Judge Macleman

NOTIFICATION OF APPEAL RIGHTS

1. A person seeking permission to appeal against this decision must make a written application to the Upper Tribunal. Any such application must be **received** by the Upper Tribunal within the **appropriate period** after this decision was **sent** to the person making the application. The appropriate period varies, as follows, according to the location of the individual and the way in which the Upper Tribunal's decision was sent:

2. Where the person who appealed to the First-tier Tribunal is **in the United Kingdom** at the time that the application for permission to appeal is made, and is not in detention under the Immigration Acts, the appropriate period is **12 working days (10 working days, if the notice of decision is sent electronically).**

3. Where the person making the application is in detention under the Immigration Acts**, the appropriate period is 7 working days (5 working days, if the notice of decision is sent electronically)**.

4. Where the person who appealed to the First-tier Tribunal is **outside the United Kingdom** at the time that the application for permission to appeal is made, the appropriate period is **38 days (10 working days, if the notice of decision is sent electronically).**

5. A "working day" means any day except a Saturday or a Sunday, Christmas Day, Good Friday or a bank holiday.

6. The date when the decision is "sent' is that appearing on the covering letter or covering email.