



IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2022-006362
First-tier Tribunal No: EA/14678/2021

THE IMMIGRATION ACTS

Decision & Reasons Issued:

25th October 2023

Before

UPPER TRIBUNAL JUDGE KOPIECZEK
DEPUTY UPPER TRIBUNAL JUDGE CHAPMAN

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

HANAA OSAMA AHMED AHMED SWILAM
(ANONYMITY ORDER NOT MADE)

Respondent

Representation:

For the Appellant: No appearance

For the Respondent: Ms H. Gilmour, Senior Home Office Presenting Officer

Heard at Field House on 13 October 2023

DECISION AND REASONS

1. The Appellant, to whom we shall refer as the Claimant, is a national of Egypt, born on 21 March 1994. On 29 April 2021 she married an Italian national, Mr Amro Bayoumi. On 9 June 2021 she applied for admission to the United Kingdom as a family member of an EEA national with the right to reside in the United Kingdom.

This application was refused in a decision dated 30 September 2021 and the Claimant appealed against that decision.

2. The appeal came before Judge Mulholland for hearing on 15 March 2022. In a decision and reasons promulgated on 28 April 2022, the Judge allowed the appeal under the provisions of the Immigration (Citizens' Rights Appeals) (EU Exit) Regulations 2020, finding *inter alia* as follows:

"23. The Withdrawal Agreement was designed to, among other things, protect the rights held by EEA nationals and their family members prior to the withdrawal of the UK from the EU and to ensure that they continue to be protected after withdrawal (see Preamble to the Agreement). I have found that the Appellant was, in fact, a durable partner of an EEA national as at 31 December 2020. The additional requirement for a particular document in this case interferes with a primary aim of the Withdrawal Agreement.

24. I accept that the Appellant would have married before the specified date had it not been for the pandemic. This was entirely outwith their control. Overall, taking all matters into account, I find that the Respondent's decision was disproportionate and accordingly I am satisfied that it breaches the Withdrawal Agreement.

25. Accordingly, the appeal is allowed."

3. The SSHD sought permission to appeal to the Upper Tribunal, in time, on 10 May 2022 on the basis of the following grounds:

"1. Making a material misdirection of law on any material matter.

a) It is respectfully submitted that the First Tier Tribunal Judge (FTTJ) has materially erred in law by failing to properly consider the provisions of the Withdrawal Agreement, when allowing the Appellant's appeal.

b) It is asserted that the Withdrawal Agreement provides no applicable rights to a person in the Appellant's circumstances. Article 10(1)(e) of the Withdrawal Agreement confirms that beneficiaries of the Agreement are those who were residing in accordance with EU law as of 31 December 2020 (the specified date).

c) The Appellant was not residing in accordance with EU law as of the specified date, as she had not had her residence facilitated in accordance with national legislation (The Immigration (European Economic Area) Regulations 2016). It is not in dispute that the Appellant was also not married to her spouse prior to the specified date. This requirement to have residence as a 'durable partner' facilitated is in accordance with Article 3.2(b) of Directive 2004/38/EC. Article 10(2) of the Withdrawal Agreement permits the continued residence of a former documented Extended Family Member, with an additional transitional provision in Article 10(3) for those who had applied for such facilitation before 31 December 2020.

d) It is noted that the FTTJ finds at [16] of the determination that the Appellant did not hold a 'relevant document' as her residence had never been facilitated in accordance with national legislation.

e) It is therefore submitted that the Appellant does not come within the personal scope of the Withdrawal Agreement. Accordingly, there was no entitlement to the full range of judicial redress including the Article 18(1)(r) requirement that the decision was proportionate. As no such right is conveyed to the Appellant by the relevant parts of the Withdrawal Agreement, there can be no conceivable breach of rights in this Appellant's case.

f) Therefore, it is submitted that the FTTJ has materially erred in law by finding that the decision to refuse the Appellant's application under Appendix EU, due to her inability to marry prior to the specified date, is in breach of the Appellant's rights under the Withdrawal Agreement.

Permission to appeal is respectfully sought."

4. Permission to appeal was granted by FtTJ Chowdhury in a decision dated 20 January 2023 in *inter alia* the following terms:

*"(2) In light of **Batool [2022] UKUT 00219 (IAC)** and **Celik [2022] UKUT 00220** and the findings of the Upper Tribunal i.e. that it is incumbent on an applicant in a durable relationship with an EU citizen to apply for entry/facilitation before the end of the transition period (i.e. 31 December 2020) the Appellant is prevented from relying on the EEA Regulations, Appendix EU or proportionality under the Withdrawal Agreement.*

(3) Permission granted on all grounds."

Hearing

5. At the hearing before the Upper Tribunal there was no appearance by or on behalf of the Claimant. However, Mr Amro Bayoumi was present and he informed the Upper Tribunal that he was now divorced from the Claimant since 22 April 2022. He confirmed that the Claimant is still in Egypt and that he had not been in contact with her for a long time. He stated that, in light of their divorce, he was no longer seeking to support his ex-wife's application to join him in the United Kingdom.
6. In her submissions, Ms Gilmour relied upon the grounds of appeal dated 10 May 2022 and the judgment of the Court of Appeal in Celik [2023] EWCA Civ 921, which postdated the grounds of appeal. Ms Gilmour submitted that a spouse who married after 30.12.20 does not meet the requirements of artic 10 of the Withdrawal Agreement and that the findings of the First tier Tribunal Judge were, as a whole, infected as a consequence of this material error.
7. Mr Amro Bayoumi was invited to make submissions but had nothing further to add.

Decision and reasons

8. It is clear that throughout the material period the Claimant has been residing in Egypt and has never been a person residing in accordance with EU law in the United Kingdom by 31 December 2020. Even if, as the Judge found, the Claimant could be considered the durable partner of Mr Bayoumi, she neither sought nor was given permission to reside in the United Kingdom during the transition period ie before 31 December 2020 and her marriage to Mr Bayoumi in Egypt on 29 April 2021 postdated the transition period. The judgment of the Court of Appeal in *Celik (op cit)* makes abundantly clear that in these circumstances it is not possible for a Claimant to succeed in her appeal.
9. It follows that the First tier Tribunal Judge erred materially in law in her decision to allow the appeal. We set that decision aside and re-make the decision, dismissing the Claimant's appeal.

Rebecca Chapman

Deputy Upper Tribunal Judge Chapman

13 October 2023