IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2022-002735
First-tier Tribunal No: EA/14574/2021

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On the 27 June 2024

Before

UPPER TRIBUNAL JUDGE HANSON

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

DRILON RUCI
(NO ANONYMITY ORDER MADE)

Respondent

Representation:
For the Appellant: Mr Diwnycz, a Senior Home Office Presenting Officer.
For the Respondent: In person.

Heard at Phoenix House (Bradford) on 19 June 2024

DECISION AND REASONS

1. The Secretary of State appeals with permission a decision of First-tier Tribunal Judge O'Hanlon ('the Judge'), promulgated on 9 March 2022, in which the Judge allowed Mr Ruci's appeal against the refusal of his application for a residence card under the EU Settlement Scheme, on the basis he was a family member of a relevant EEA citizen, a Polish national who was granted indefinite leave to remain in the United Kingdom under Appendix EU of the Immigration Rules, on 1 October 2020.
2. Mr Ruci is a citizen of Albania born on 20 February 2023.
3. The Judge's findings are set out from [17] of the decision under challenge.
4. It is not disputed Mr Ruci married the EU national on 20 June 2021, which the Judge found was supportive of the claim that his relationship with his wife is a durable relationship as defined within Appendix 1 of Appendix EU of the Immigration Rules [27].

5. The Judge accepts that Mr Ruci did not hold a relevant document as a durable partner of the relevant EEA citizen but, notwithstanding, concluded it was not necessary for him to have the relevant document referred to in subparagraph (B)(i) of the definition of a durable partner in Appendix 1.
6. At [29 – 30] Judge writes:

> 29. Having considered all of the evidence before me in the round, I find to the requisite standard of proof that the Appellant is a durable partner of his wife, a relevant EEA citizen, and that accordingly is a family member of a relevant EEA citizen and therefore entitled to either pre-settled status or settled status under the EU Settlement Scheme. I note that in his witness statement the Appellant states that he entered the UK in March of 2016 and if that were the case, the Appellant would not have satisfied the necessary five year period for settled status under Rule EU11 but would be entitled to pre-settled status under Rule EU14 of Appendix EU of the Immigration Rules. Accordingly, I allow the Appellant's appeal.
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> 30. In the skeleton argument and indeed in the submissions made before me by the Appellant's Representative, it was suggested that Article 8 ECHR, the right to family and private life, applies to this appeal. I do not find that this is the case. No application had previously been made pursuant to Article 8 ECHR and I do not find that a decision had been made by the Respondent in relation to Article 8 ECHR to form the subject matter of an appeal under Article 8 ECHR.

7. The appeal was therefore allowed on the basis Mr Ruci was said to have satisfied the requirements for settled or pre-settled status under the EU Settlement Scheme (EUSS), it being for the Secretary of State to determine the nature of the status granted.
8. The Secretary of State sought permission to appeal which was granted by another judge of the First-tier Tribunal on 6 May 2022, the operative part of the grant being in the following terms:

> 2. The grounds assert that the Judge erred in concluding that the Appellant was a "durable partner" of their EEA Sponsor for the purposes of Appendix EU to the Immigration Rules when they did not hold a "relevant document".
> 3. It is arguable that the Judge so erred: there was no dispute that the Appellant did not hold a "relevant document" and the Judge's decision does not identify clearly how the Appellant came within paragraph (b)(ii) of the definition of "durable partner" as would have been necessary, given that they held no "relevant document". Nor is it apparent why that conclusion might have been reached.
> 4. There is therefore an arguable error of law as asserted.

9. In its decision promulgated on 19 July 2022, the Upper Tribunal had found in Celik (EU exit, marriage, human rights) [2022] UKUT 00220 that:

> (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.

10. On that basis the Judge clearly erred in law. Permission to appeal was, however, granted to the Court of Appeal against the Upper Tribunal's decision as a result of which these proceedings were stayed. On 9 December 2023 directions issued by Upper Tribunal Judge Pitt were sent to the parties requiring them to reconsider their respective positions in light of the Court of Appeal judgement, reported with neutral citation Celik v Secretary of State for the Home Department [2023] EWCA Civ 921, which upheld the decision of the Upper Tribunal. The directions provided a time by which compliance with the terms of the directions was expected.
11. As a result of there being no response to Judge Pitt's directions, a listing direction was given resulting in the matter coming before me today to enable me to consider whether the Judge has erred in law in a manner material to the decision to allow the appeal and, if so, whether it is appropriate for me to substitute a decision to either allow or dismiss the appeal.

Discussion and analysis

12. The Secretary of State's application for permission to appeal asserts the Judge materially erred in law by failing to properly consider the provisions of Appendix EU of the Immigration Rules.
13. The Grounds assert Mr Ruci made his application for status under the EUSS as a family member of the relevant EEA national but he could not succeed as a spouse as his marriage had taken place after the specified date of 11 PM 31 December 2020 ('the specified date'). That statement is legally correct as has been accepted in the case law.
14. As Mr Ruci could not succeed as a family member the only available route to him was as a durable partner. That rule, however required a "relevant document" as evidence that residence had been facilitated under the Immigration (EEA) Regulations 2016 ('the 2016 Regulations'). It was accepted by the Judge that no such document was held by Mr Ruci, as no application for facilitation had been made prior to the specified date, meaning he was not lawfully resident under EU law at the specified date.
15. The formal requirements referred to in the Secretary of State's grounds are not new but merely reflect the position as it was prior to the Withdrawal Agreement. It was accepted by the Court of Appeal that the Withdrawal Treaty effectively froze in time rights that previously existed rather than creating any new rights for a durable partner/extended family member.
16. It was settled law under 2016 Regulations and Directive 2004/EC/38, the Free Movement Directive, ('the 2004 Directive'), that an extended family did not have an automatic right to enter the UK in the same way that a family member of an EU national did. The right to enter and reside had to be facilitated by the host Member state. That is clearly set out in Article 3.2 (b) of the 2004 Directive.
17. Mr Ruci made no application for his entry or right to reside as an extended family member to be facilitated and therefore could not show he had acquired a "relevant document" as at the specified date, nor that there was an application on that basis pending at the specified date on which a decision was still required to be made.
18. I find in light of the formal requirements set out in the Withdrawal Agreement and Appendix EU of the Immigration Rules, with reference to the clear findings relating to the date of marriage and lack of a relevant document, that the Judge

has erred in law in a manner material to the decision to allow the appeal, as the correct interpretation and application of the law shows that Mr Ruci could not satisfy the requirements of Appendix EU and that the Judge's finding at [22] – [29] of the determination that Mr Ruci was lawfully in the United Kingdom is wrong.

19. I set the decision of the Judge aside.
20. Although there is no challenge to the nature of the relationship or the fact Mr Ruci was married to the EEA national partner, that is not the issue. As there is no evidence that he is able to satisfy the requirements of the Withdrawal Agreement or any element of the EUSS, there is only one outcome. On that basis I substitute a decision to dismiss the appeal.
21. If he has not already considered taking advice on his immigration status Mr Rusi would be advised to do so without delay. The facts before the Judge showed a genuine and subsisting marriage between Mr Rusi and his wife who has status in the UK. That indicates the existence of family life recognised by Article 8 ECHR. It may be appropriate for him to make an application under the Immigration Rules or on human rights grounds based upon his family life. Whether that will succeed will depend upon the facts as shown to exist in any application. If he does nothing he may find himself liable to removal.

Notice of Decision

22. I find the Judge has erred in law in a manner material to the decision to allow the appeal. I set the determination aside.
23. I substitute a decision to dismiss the appeal.

C J Hanson

Judge of the Upper Tribunal
Immigration and Asylum Chamber

19 June 2024