IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2021-000723
First-tier Tribunal No: EA/02099/2021

THE IMMIGRATION ACTS

Decision & Reasons Promulgated
On 27 February 2023

Before

UPPER TRIBUNAL JUDGE GRUBB
DEPUTY UPPER TRIBUNAL JUDGE DAVIDGE

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

ERHAN OZGUL

Respondent

Representation:
For the Appellant: Ms S Rushforth, Senior Home Office Presenting Officer
For the Respondent: No appearance

Heard at Cardiff Civil Justice Centre on 26 January 2023

DECISION AND REASONS

Introduction

1. Although this is an appeal by the Secretary of State, for convenience we shall refer to the parties as they appeared before the First-Tier Tribunal.

2. The Secretary of State appeals, with permission, against a decision of the First-Tier Tribunal (Judge S L Farmer) which allowed the appellant's appeal against the respondent's decision dated 20 January 2021 to refuse his application for settled status under the EUSS in Appendix EU of the Immigration Rules.

3. The appellant by emailed dated 11 January 2023 informed the UT that he did not intend to attend the hearing as he had already been granted leave and he

attached his Residence Permit showing a grant of leave on 12 August 2022 valid until 31 December 2024. The appellant invited us to take his email as his representations.

4. Ms Rushforth, who represented the Secretary of State, informed us that the leave was granted on the basis of Art 8 as his child had been granted leave under the EUSS. Because this was not leave under the EUSS scheme (i.e. under the "residence scheme immigration rules"), it did not have the effect of the appeal being "treated as abandoned" under reg 13(3) of the Immigration (Citizens' Rights Appeals) (EU Exit) Regulations 2020 (SI 2020/61). Ms Rushforth, therefore, invited us to determine the appeal in the absence of the appellant under rule 38 of the Tribunal Procedure (Upper Tribunal) Rules 2008 (SI 2008/2698). We were satisfied that the appellant had notice of the hearing and that, in all the circumstances, it was in the interest of justice to proceed with the hearing.

The Judge's Decision

5. The appellant applied under the EUSS on 5 October 2020 based upon his relationship with the sponsor, Fikret Arit, a Bulgarian national who had been granted pre-settled status on 14 August 2019. He relied upon his relationship with his partner over 5 years. He claimed that they were in "durable relationship" (making him a "durable partner") and so he was entitled to leave and pre-settled status under EU 14 of Appendix EU because he was a "family member of a relevant EEA citizen" as defined in Annex 1. The judge accepted that the appellant and sponsor were in a "genuine and durable relationship" (see [10]-[15]) and so satisfied the requirements of EU 14 (read with Annex 1) and allowed the appeal.

The Appeal

6. The respondent contends that the appellant could not succeed under the EUSS as a requirement of the definition of being a "durable partner" in Annex 1 is, so far as relevant to the appellant, that he has applied for or been granted (which he has not) a residence card as "an extended family member" under the Immigration (EEA) Regulations 2016 (SI 2016/1052) prior to the 'specified date', namely 11pm on 31 December 2020. Ms Rushforth relied upon the UT's decision in Celik (EU exit; marriage; human rights) [2022] UKUT 220 (IAC) Lane J, President and UTJs Hanson and McWilliam). Ms Rushforth submitted that, therefore, the judge had erred in law in allowing the appeal under Appendix EU and further the appellant could not rely upon the Withdrawal Agreement. She invited us to set aside the judge's decision and remake the appeal dismissing it.

Discussion

7. We accept Ms Rushforth's submissions. It is clear from the definition of a "durable partner" in Annex 1 of Appendix EU that an individual, in the position of the appellant, must not only establish that he is in a genuine "durable relationship" with the relevant EEA citizen at the date of application and the specified date (31 December 2020) but also he must establish that he held a relevant document for the relevant period and immediately before the specified date (i.e. a residence card as an "extended family member" under the 2016 EEA Regulations (see (b)(i)). In Celik, the judicial headnote sets out the UT's decision in relation to the application of the EUSS and Withdrawal Agreement to a person

who relies upon a 'durable partnership' to establish they are a "family member of a relevant EEA citizen" as defined in Annex 1:

> "(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."

8. The appellant has not applied for, or been granted, a residence card under the 2016 Regulations. His residence was not, therefore, being facilitated not had he made an application for such facilitation before the 'specified date'. In these circumstances, the appellant could not, and still cannot, succeed under the EUSS on the basis of being a "durable partner" and he cannot rely upon any right under the Withdrawal Agreement. As a consequence, the judge erred in law in allowing the appeal under the EUSS. The only lawful outcome of the appeal is that it should be dismissed.

Decision

9. For the above reasons, the First-Tribunal's decision to allow the appellant appeal under the EUSS involved the making of an error of law. We set that decision aside.

10. We re-make the decision dismissing the appellant's appeal.

Andrew Grubb

Judge of the Upper Tribunal
Immigration and Asylum Chamber

26 January 2023