IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2022-006215
First-tier Tribunal No: EA/03336/2022

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On the 01 May 2023

Before

UPPER TRIBUNAL JUDGE McWILLIAM

Between

KLEDI SELENICA
(NO ANONYMITY ORDER MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr R Rashid, Counsel instructed by Eric Smith Law Limited
For the Respondent: Mr C Avery, Senior Home Office Presenting Officer

Heard at Field House on 30 March 2023

Order Regarding Anonymity

Pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008, [the appellant] (*and/or any member of his family, expert, witness or other person the Tribunal considers should not be identified*) is granted anonymity.

No-one shall publish or reveal any information, including the name or address of the appellant, likely to lead members of the public to identify the appellant (*and/or other person*). Failure to comply with this order could amount to a contempt of court.

DECISION AND REASONS

1. The Appellant is a citizen of Albania. His date of birth is 6 August 1986. On 28 December 2022 the Appellant was granted permission to appeal by the First-tier Tribunal (Judge Grimes) against the decision of the First-tier Tribunal (Judge Manuell) to dismiss his appeal against the decision of the Secretary of State on

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22 February 2022 to refuse his application for settlement under the EU Settlement Scheme (EUSS).

2. The matter came before me to determine whether or not the judge erred in law. The application was refused by the Secretary of State on the basis that the Appellant had not shown that he had been in a durable partnership for a continuous period of five years with reference to Regulation 15(1)(b) of the Immigration (European Economic Area) Regulations 2016 ("the EEA Regulations 2016"). The Appellant's case was that he had been in such a relationship between 2013 and 2018 with his durable partner, a Spanish citizen, Ms Gonzalez.

3. The judge took into account that there were no witness statements from friends or family and there was a lack of evidence in support of the Appellant's evidence that he was in a durable relationship with Ms Gonzalez at the relevant time and/or that she was exercising treaty rights during this period.

4. As a matter of fact, which the judge was aware of, this Appellant had been granted a residence card under EU law following a successful appeal in 2014. He had applied for a residence card as the unmarried partner of Ms Gonzalez. While the application was refused by the Secretary of State, his appeal was allowed by the First-tier Tribunal and he was subsequently issued with a residence card.

5. Judge Manuell stated as follows:

> "The tribunal was not provided with a copy of the determination by which the Appellant's appeal was allowed in 2014. In any event such findings as were then made were historic and based on the evidence then available. The present tribunal has the advantage of much more evidence as well as material from which inferences can properly be drawn. As has already been indicated, the tribunal is unable to accept the Appellant as a reliable witness. The tribunal finds that the Appellant has not shown that he ever had a genuine romantic relationship with Ms Gonzalez, let alone a durable partnership which lasted from 2013 to 2018".

The judge went on to dismiss the Appellant's appeal.

The Grounds of Appeal

6. The main thrust of the grounds of appeal is that the judge erred in failing to apply the guidance set out in Devaseelan [2002] UKIAT 702.

7. It is asserted that the First-tier Tribunal ignored the previous determination where it was accepted that the Appellant was in a durable relationship. The determination in 2014 was an authoritative assessment of the circumstances at that time which was a time during the period on which the Appellant relied. The judge erred and therefore the Appellant did not have a fair hearing (with reference to paragraph 34 of Devaseelan)

Error of Law

8. I am persuaded that the judge materially erred having heard oral submissions from both Mr Rashid and Mr Avery. It was clear that the judge was aware that the First-tier Tribunal had allowed the Appellant's appeal and had therefore found him to be a credible witness at that time (2014). I have considered the content of

paragraph 30 of the judge's decision and whether what is said is a departure from the Devaseelan guidance. I find that it is because the judge's starting point was not that the Appellant was found credible and to be in a durable relationship in 2014. I appreciate that the relevant period, as far as the First-tier Tribunal in 2022 was concerned is 2013–2018, and it is not sufficient to meet the requirements of the Rules under Appendix EU for the Appellant to have been found to be in a durable relationship in 2014. I also take into account Mr Avery's submissions in relation to credibility issues properly raised by the judge, however I cannot rule out that had the judge properly directed himself in respect of Devaseelan and started his assessment of credibility from the Appellant having been found to be a credible witness and in a durable relationship in 2014 he would have reached the same conclusions, notwithstanding the properly raised credibility issues and the problems with the evidence before the First-tier Tribunal.

9. The judge said that he did not have the 2014 decision. The grounds of appeal assert that this was not correct. Mr Rashid at the hearing before me submitted that the hearing was conducted by CVP and that he emailed the judge a copy of the decision and made submissions on it. The respondent in the Rule 24 response agrees that the decision was with the judge and makes reference to it to being in the Appellant's bundle. Mr Avery at the hearing before me resiled from this position. He said that the 2014 decision was not in the bundle and was not before the judge. Whilst this raises a possible procedural fairness issue, the Appellant has not sought to adduce evidence to support that the 2014 decision was with the judge. However, it is not necessary for me to determine the issue of whether the decision was with the First-tier Tribunal and whether the judge inadvertently did not refer to it because it is clear that the judge was aware of the decision.

10. From the 2014 decision I can see that the Appellant and his partner gave evidence and were found to be credible by the judge. That decision should be the starting point for the next judge determining the Appellant's appeal and properly applying Devaseelan.

11. The judge materially erred. The error goes to the heart of the assessment of credibility. I set aside the decision of the judge. I remit the decision to the First-tier Tribunal for a fresh hearing.

Joanna McWilliam

Judge of the Upper Tribunal
Immigration and Asylum Chamber

24 April 2023