



**Upper Tribunal
(Immigration and Asylum Chamber)
2022-003176**

**Appeal Number: UI-
(EA/16168/2021)**

THE IMMIGRATION ACTS

**Heard at Cardiff Civil Justice
Centre
On 8 December 2022**

**Decisions & Reasons
Promulgated
On 12 February 2023**

Before

UPPER TRIBUNAL JUDGE GRUBB

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT
Appellant

and

SANDEEP KUMAR
Respondent

Representation:

For the Appellant: Ms S Rushforth, Senior Home Office Presenting Officer

For the Respondent: No appearance

DECISION AND REASONS

1. The Secretary of State appeals with permission against a decision of the First-tier Tribunal (Judge Browne) which allowed the appeal of the respondent (hereafter “the claimant”) against a decision of the Secretary of State refusing to grant him pre-settled or settled status under the EU Settlement

Scheme (“EUSS”) in Appendix EU of the Immigration Rules (HC 395 as amended).

2. The claimant made his application under the EUSS on 15 April 2021 after the “specified date” and the end of the transition period at 11pm on 31 December 2020 following the UK’ exit from the EU. The claimant relied upon his durable relationship with an EU national prior to that date under the EUSS. The judge was satisfied that the relationship was as claimed and rejected the argument that the claimant could only succeed under the terms of the EUSS if he had been issued with a residence document prior to 31 December 2020 under the Immigration (EEA) Regulations 2016 (SI 2016/1052 as amended) (“the EEA Regulations 2016”) or his entry and residence was being facilitated prior to that date. The claimant had not been issued with a residence document under the EEA Regulations 2016 and an application made on 13 October 2020 had been rejected as invalid on 30 October 2020.
3. The Secretary of State’s position was, and is, that without a residence document or pending application under the EEA Regulations 2016 prior to 31 December 2020, the claimant could not succeed under the EUSS and could not rely upon any right in the Withdrawal Agreement. As a result, the claimant’s appeal should have failed under the relevant grounds of appeal in reg 8 of the Immigration (Citizens’ Rights of Appeal) (EU Exit) Regulations 2020 (SI 2020/61) (“the 2020 Regulations”). The judge, therefore, erred in law in allowing the appeal which should be set aside and remade to dismiss the appeal.
4. On 7 October 2022, the claimant was granted leave to remain as a Family Member under Appendix FM of the Immigration Rules as a parent under the 10-year route to settlement.
5. By e-mail dated 18 November 2022, the claimant’s legal representatives (Charles Simmons Immigration Solicitors) informed the UT that the claimant wished to withdraw his appeal as he had recently been granted leave to remain. A letter dated 17 October 2022 and signed by the claimant was attached confirming that position.
6. On 21 November 2022, a UT lawyer informed the parties that the appeal hearing would go ahead as the Secretary of State wished to proceed with her appeal.
7. On 24 November 2022, a further email from the claimant’s representatives again confirmed that the claimant did not wish

to proceed with the appeal and that they were no longer instructed in the appeal matter.

8. On 8 December 2022, the appeal was listed for hearing at the Cardiff Civil Justice Centre. The claimant did not attend and was not represented. The Secretary of State was represented by Ms Rushforth. The claimant having been given notice of the hearing and in the light of the representatives' correspondence with the UT, I considered it in the interests of justice to proceed with the hearing in the absence of the claimant under rule 38 of the Tribunal Procedure (Upper Tribunal) Rules 2008 (SI 2008/2698 as amended) ("the Procedure Rules 2008").
9. Ms Rushforth relied on the grounds and the UT's decision in Celik (EU exit, marriage, human rights) [2022] UKUT 220 (IAC) and invited me to conclude that the judge had erred in law in allowing the appeal under the EUSS and she invited me to re-make the decision dismissing the appeal.
10. The fact that the claimant has been granted leave to remain does not result in his appeal being treated as abandoned under s.104(4) of the Nationality, Immigration and Asylum Act 2002 (as amended) because that provision is not applicable in appeals under the 2020 Regulations against EUSS decisions (see reg 11 and Sched 2 to the 2020 Regulations). Likewise, the specific abandonment provisions in reg 13 of the 2020 Regulations only apply to a person granted leave under the "residence scheme immigration rules" as defined in s.17(1) of the European Union (Withdrawal Agreement) Act 2020 which, in effect, means the EUSS or immigration rules relating to withdrawal from the EU. That does not include Appendix FM of the Rules under which the claimant was granted leave.
11. The claimant has sought to withdraw his appeal. He cannot, of course, do so because it is the Secretary of State's appeal in the UT. I understand his position to be that he does not wish to pursue his appeal and to that extent HE wishes to withdraw his "case" defending the FtT's decision under rule 17. I consent to that under rule 17(2) of the Procedure Rules 2008.
12. I have set out the Secretary of State's position in para 3 above. I agree with it and I accept Ms Rushforth's submissions that, following Celik, the claimant could not succeed under the EUSS or rely upon any breach of the Withdrawal Agreement (see Celik at [52]-[53], [64] and [74]). He has not been issued with the required residence card as a "durable partner" under the EEA Regulations 2016 nor was he seeking "facilitation" by

having a pending application made prior to 31 December 2020. Those were the only relevant grounds of appeal under reg 8 of the 2020 Regulations. The claimant's appeal should, therefore, have been dismissed by the judge. The judge erred in law in allowing the claimant's appeal under the 2020 Regulations. I set aside that decision and re-make it dismissing the appeal.

Decision

13. For these reasons, the decision of the FtT to allow the claimant's appeal involved the making of an error of law. I set that decision aside.
14. I remake the decision dismissing the claimant's appeal under the 2020 Regulations.

Signed

Andrew Grubb

Judge of the Upper Tribunal
8 December 2022