



IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM
CHAMBER

Case No: UI-2022-003051
First-tier Tribunal No:
EA/16000/2021

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On the 15 April 2024

Before

UPPER TRIBUNAL JUDGE O'CALLAGHAN

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

EMIRJAN HASANI
(NO ANONYMITY ORDER MADE)

Respondent

Representation:

For the Appellant: Mr T Lindsay, Senior Presenting Officer
For the Respondent: No Attendance

Heard at Field House on 15 March 2024

DECISION AND REASONS

Introduction

1. The Secretary of State has been granted permission to appeal a decision of the First-tier Tribunal (Judge of the First-tier Tribunal Khawar) allowing Mr Hasani's appeal by a decision sent to the parties on 17 March 2022. Mr Hasani seeks pre-settled status under the European Union Settlement Scheme ('EUSS').

Proceeding in the absence of Mr Hasani

2. Mr Hasani did not attend the hearing at Field House. Observing rule 38 of the Tribunal Procedure (Upper Tribunal) Rules 2008. I decided it was in the interests of justice to proceed with the hearing in his absence. For the reasons detailed below, I was satisfied that a notice of hearing was sent to and received by Mr Hasani's legal representatives, Waterstone Legal, on 23 February 2024.

Relevant Facts

3. Mr Hasani is an Albanian national who is presently aged 29. He married his EU national spouse on 10 June 2021. The Secretary of State refused his application for pre-settled status under the EUSS by a decision dated 13 September 2021, observing that the marriage took place after the 'specified date' of 23.00 GMT on 31 December 2020 and Mr Hasani did not possess a 'relevant document' on the specified date in respect of his durable relationship with his then EU national partner, now spouse.
4. Judge Khawar heard the appeal on 16 March 2022, and his decision was promulgated on 17 March 2022. The Judge did not benefit from several subsequent decisions and judgments: *Celik (EU Exit: Marriage: Human Rights)* [2022] UKUT 220 (IAC), [2022] Imm AR 1438 (19 July 2022); *Batool (Family Members: EU Exit)* [2022] UKUT 219 (IAC), [2022] Imm AR 1382 (19 July 2022); *Celik v. Secretary of State for the Home Department* [2023] EWCA Civ 921, [2023] Imm AR 1599 (31 July 2023); and *Siddiqa v. Entry Clearance Officer* [2024] EWCA Civ 248 (14 March 2024).
5. The appeal was allowed on the basis that the Judge accepted Mr Hasani to be in a genuine relationship with his now wife, who was at the time pregnant with their child. The Judge concluded, at [22]-[23]:
 - '22. On the totality of the evidence before me and above legal considerations, I conclude the respondent's decision is not proportionate and fails to take into account the exceptional circumstances which prevented the appellant and sponsor from being married. The evidence clearly supports the conclusion that the appellant and sponsor were involved in a durable relationship as at 31 December 2020, albeit there was no evidence of a 'relevant document' to support that conclusion. I conclude therefore that the appellant meets the criteria of a 'family member of a relevant EEA citizen' or 'durable partner' - as defined in a convoluted fashion, under Appendix EU - in

particular, there is no suggestion whatsoever that this is/was a 'partnership of convenience'.

23. Accordingly, on the totality of the evidence and the above considerations, I am satisfied the appellant has discharged the burden of proof to establish that he satisfies the criteria of being a family member and/or in a durable relationship as at the date of application, as required under the Appendix EU to the Immigration Rules and that the respondent's refusal decision is disproportionate in all the circumstances of this case. Therefore, this appeal is allowed.'
6. By directions sealed on 10 December 2023 Upper Tribunal Judge Sheridan directed the parties to reconsider their positions consequent to the Court of Appeal judgment in *Celik*. The Secretary of State wrote to Waterstone Legal on 15 December 2023 inviting Mr Hasani to concede the appeal by means of signing an attached consent order.
7. Waterstone Legal wrote to the Upper Tribunal and the Secretary of State on behalf of Mr Hasani on 15 December 2023 stating, "As mentioned previously we are agreed to consent to the withdrawal as our client has been granted leave under Human Rights route."
8. On 10 January 2024, Waterstone Legal again wrote to the Upper Tribunal and the Secretary of State observing that this was not Mr Hasani's appeal to withdraw, and it was for the Secretary of State to withdraw the appeal with the consent of the Upper Tribunal.
9. By an email dated 11 January 2024 Waterstone Legal confirmed that they were no longer instructed by Mr Hasani, who considered this appeal to be abandoned after his having been granted leave consequent to a human rights application.

Ground of Appeal

10. The Secretary of State's challenge is founded upon Judge Khawar failing to lawfully consider the relevant provisions of Appendix EU. The appeal was bound to fail as Mr Hasani's marriage took place after 2300 GMT on 31 December 2020 and at the relevant time he did not possess the required 'relevant document'.
11. Permission to appeal was granted by Judge of the First-tier Tribunal Froom on 31 May 2022.

Discussion

12. At the hearing Mr Lindsay confirmed that the Secretary of State wished to pursue his appeal, as the decision of Judge Khawar could not properly stand. The appeal was therefore not withdrawn under rule 17 of the 2008 Rules.
13. Mr Hasani previously confirmed through Waterstone Legal that he had no interest in defending the appeal.
14. The 2008 Rules make provision for abandonment at rule 17A:

'Appeal treated as abandoned or finally determined in an asylum case or an immigration case

17A

- (1) A party to an asylum case or an immigration case before the Upper Tribunal must notify the Upper Tribunal if they are aware that—

...

- (b) the appellant has been granted leave to enter or remain in the United Kingdom; ...

- (1A) A party to an appeal under the Immigration (Citizens' Rights Appeals) (EU Exit) Regulations 2020 ("the 2020 Regulations") before the Upper Tribunal must also notify the Upper Tribunal if they are aware that the appeal is to be treated as abandoned under regulation of those Regulations.

- (2) Where an appeal is treated as abandoned pursuant to section 92(8), 104(4) or (4A) of the Nationality, Immigration and Asylum Act 2002 or regulation 13(3) of the 2020 Regulations], or as finally determined pursuant to section 104(5) of the Nationality, Immigration and Asylum Act 2002, the Upper Tribunal must send the parties a notice informing them that the appeal is being treated as abandoned or finally determined.

...

15. Rule 17A(1) does not aid in this matter, as the appeal was brought under the Immigration (Citizens' Rights Appeals) (EU Exit) Regulations 2020 and not under section 82(1) of the Nationality, Immigration and Asylum Act 2002. Consequently, it is not a matter to which section 104(4A) of the Act 2002 applies:

'104.

- 4A. An appeal under section 82(1) brought by a person while he is in the United Kingdom shall be treated as abandoned if the appellant is granted leave to enter or remain in the United Kingdom ...'
16. Section 104 is not one of the provisions listed in Schedule 3 to the 2020 Regulations as applying in an appeal of this nature.
17. Rule 17A(1A) is applicable in an EUSS matter, and so the only potentially relevant abandonment provision in this appeal is regulation 13(3) of 2020 Regulations:
- ‘(3) An appeal under these Regulations is to be treated as abandoned if the appellant (“A”) is granted leave to enter or remain in the United Kingdom by virtue of residence scheme immigration rules.’
18. As regulation 13(3) applies only where an appellant has been granted leave to remain under the EUSS, and Mr Hasani secured leave on human rights grounds, rule 17A(1A) is not applicable to this matter.
19. Consequently, the two statutory regimes that underpin rule 17(1A) are not applicable in this matter, and so the issuing of leave to remain on human rights grounds does not require the Upper Tribunal to treat as abandoned an EUSS appeal brought under the 2020 Regulations.
20. I am therefore required to consider the substantive appeal.
21. I note the ratio of the decisions and judgments referenced at paragraph 4 above. The Court of Appeal confirmed in *Celik* that on the proper interpretation of article 10 of the Withdrawal Agreement an appellant who had married an EEA citizen after the end of the post-European Union exit transition period did not have any right to reside in the United Kingdom. The fact that their marriage had been delayed due to the COVID-19 pandemic did not alter the interpretation of the Agreement. The principle of proportionality, whether as a matter of general principle, or under article 18(1)(r), was not intended to lead to the conferment of residence status on people who would not otherwise have any rights to reside.
22. The position in law is therefore clear. Mr Hasani married his EU national spouse after the end of the transition period. The fact that he was prevented from marrying earlier consequent to the closure of registry offices during the pandemic is irrelevant. He made no application for facilitation of residence as a durable partner before the end of the transitional period, nor was he granted a residence card in that capacity. He therefore does not fall within the personal scope of the

Withdrawal Agreement and cannot rely upon the principle of proportionality.

23. Judge Khawar materially erred in concluding that Mr Hasani could succeed on either of the grounds which were available to him under the 2020 Regulations.
24. In the circumstances, the only course open to me is to set aside the decision of Judge Khawar, save for the finding at [20] that Mr Hasani was in a durable relationship with his now wife, as this finding was not challenged by Mr Lindsay. I proceed to remake the decision on the appeal by dismissing it.
25. As Mr Hasani did not attend the hearing, and is now unrepresented, I consider it appropriate to confirm in writing that the conclusions I have reached above have no effect on his leave to remain. That leave was granted on a different legal basis and will continue until its identified expiry date. I have preserved the finding as to the genuineness of his relationship with his now wife. That finding is not disturbed by anything in this decision, which turns on questions of law relating to the United Kingdom's withdrawal from the European Union.

Notice of Decision

26. The decision of the First-tier Tribunal sent to the parties on 17 March 2022 is subject to material error of law and is set aside, save for the finding of fact at [20] which is preserved.
27. The decision is remade. Mr Hasani's appeal is dismissed.

D O'Callaghan
Judge of the Upper Tribunal
Immigration and Asylum Chamber

4 April 2024