



IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case Nos.: UI-2022-003262

First-Tier Tribunal Nos: EA/15032/2021

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On 23rd May 2024

Before

UPPER TRIBUNAL JUDGE L SMITH
DEPUTY UPPER TRIBUNAL JUDGE KELLY

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

And

MARINA GABRIELLE GOMES BATISTA

Respondent

Representation:

For the Appellant: Ms A Everett, Senior Home Office Presenting Officer

For the Respondent: Ms Batista did not attend and was not represented

Heard at Field House on Tuesday 14 May 2024

DECISION AND REASONS

1. This is an appeal by the Secretary of State. For ease of reference, we refer to the parties as they were before the First-Tier Tribunal. The Respondent appeals against the decision of First-Tier Tribunal Judge D Birrell promulgated on 12 May 2022 ("the Decision") allowing the Appellant's appeal against the Respondent's decision dated 30 March 2021 refusing her status under the EU Settlement Scheme ("EUSS") as the durable partner of an EEA national.
2. The Respondent refused the Appellant's application on the basis that she had not applied for facilitation of her residence as a durable partner prior to 31 December 2020. Accordingly, the Appellant was not recognised as a family member or

extended family member prior to the date of the UK's departure from the EU and could not benefit as such under either the rules relating to EUSS (Appendix EU) or the withdrawal agreement between the UK and the EU on the UK's departure from the EU ("the Withdrawal Agreement").

3. The Judge accepted an apparent concession by the Respondent that the Appellant did not require a document to establish a right of residence. She also accepted that the Appellant and her partner were in a durable relationship and had been prevented from living together until April 2020 due to the pandemic. The Judge appears to have accepted that the Appellant could for those reasons meet Appendix EU.
4. The Respondent appealed on the basis that the Judge had failed to have regard to Appendix EU and had failed to explain how the Appellant could meet those rules given that she had not applied for facilitation of her residence prior to 31 December 2020. Although recognising that a concession had apparently been made by the Presenting Officer that no document was required to establish a right of residence, the Respondent submitted that the Judge should not have accepted a concession which on the face of Appendix EU and the Withdrawal Agreement was wrongly made.
5. Permission to appeal was granted by First-Tier Tribunal Judge Dempster on 9 June 2022 in the following terms:

"1. The in time grounds assert that the judge made a material misdirection of law by finding that the appellant met the definition of a 'durable partner' in allowing the appeal against the refusal to grant an application under the EU Settlement Scheme.

2. At paragraph 13 of the decision, the judge referred to the concession made by the Home Office Presenting Officer that possession of a relevant document was not a requirement of the Rules. It was common ground that the appellant did not possess a relevant document.

3. The definition of a 'durable' partner in Annex 1 of Appendix EU of the Immigration Rules require, in addition to being in a durable relationship, that the applicant holds a 'relevant document'.

4. There is an arguable error of law."

6. The Appellant filed a Rule 24 Reply dated 28 July 2022 seeking to uphold the Decision. It was argued that the Appellant did not require a relevant document if she had another lawful basis of stay in the UK, that the Respondent ought not to be permitted to withdraw the concession and that the Appellant could succeed in the alternative by reliance on the Withdrawal Agreement. We observe that there is no finding in the Decision that the Appellant was, at the date of application, in the UK lawfully. According to [18] of the Decision, the Appellant entered the UK with her partner in April 2020 and, if that was as a visitor, as appears to be asserted, she would no longer have had leave at the time of application in February 2021.
7. The matter was due to come before this Tribunal at an error of law hearing on 24 February 2023 but was adjourned and stayed behind the case of Celik (EU exit;

marriage; human rights) [2022] UKUT 00220 (IAC) ("Celik"). By then, the Tribunal's decision was the subject of an appeal to the Court of Appeal. The Tribunal therefore granted a stay and did not determine the error of law issue.

8. The Tribunal's guidance in Celik was subsequently upheld by the Court of Appeal ([2023] EWCA Civ 921). Following the Court of Appeal's judgment, the Respondent made submissions on 19 August 2023, inviting the Tribunal to find an error of law in the Decision, to set that aside and dismiss the Appellant's appeal.
9. On 14 November 2023, directions were issued by Upper Tribunal Judge Macleman, inviting the parties to agree a consent order to dispose of the appeal. If that were not agreed, the appeal would be listed for hearing.
10. By an email dated 4 December 2023, the Appellant's representative confirmed that the Appellant wished the appeal to continue before this Tribunal.
11. The appeal was therefore listed before us for hearing on Tuesday 14 May 2024. By an email dated 1 May 2024, the Appellant's representative informed the Tribunal that in spite of trying to contact the Appellant by telephone, email and post, she had been unable to obtain instructions and therefore ceased to act.
12. There was no appearance before us by or on behalf of the Appellant. We were satisfied that the Tribunal had given notice of the hearing to the Appellant's last known address by post on 19 April 2024. It was also evident from the email from the Appellant's representative that she too had tried in vain to contact the Appellant in order to pursue her case.
13. There was no application by the Appellant for adjournment of the hearing nor any explanation for her absence. We therefore decided that it was in the interests of justice to proceed with the appeal in the Appellant's absence.
14. We are satisfied that the Appellant's case is hopeless in light of the decision and Court of Appeal judgment in Celik. Although the Appellant is not married to her (same-sex) partner, she claims to be entitled to reside as a durable partner. She made an application after 31 December 2020 under the EUSS. She did not make any prior application under the Immigration (European Economic Area) Regulations 2016 for facilitation of her residence as a durable partner. As such, she could not meet Appendix EU or the Withdrawal Agreement (see (1) of the headnote and [68] and [71] of the judgment in Celik). The Respondent's concession recorded in the Decision was wrong in law and should not have been accepted by the Judge.
15. In those circumstances, we find an error of law in the Decision, we set aside the Decision and we re-make the decision by dismissing the Appellant's (Ms Gomes Batista's) appeal.

NOTICE OF DECISION

The Decision of Judge Birrell promulgated on 12 May 2022 involved the making of an error of law. We therefore set aside that Decision. We re-make the decision by dismissing the Appellant's (Ms Gomes Batista's) appeal.

L K Smith

Judge of the Upper Tribunal
Immigration and Asylum Chamber
15 May 2024