



IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2022-003426
First-tier Tribunal No:
EA/00899/2022

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On the 15 April 2024

Before

UPPER TRIBUNAL JUDGE HANSON

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MICHAEL DOMINIC
(NO ANONYMITY ORDER MADE)

Respondent

Representation:

For the Appellant: Ms Young, a Senior Home Office Presenting Officer.
For the Respondent: In person.

Heard at Phoenix House (Bradford) on 3 April 2024

DECISION AND REASONS

1. The Secretary of State appeals with permission a decision of First-tier Tribunal Judge Singer ('the Judge'), promulgated following a hearing at Taylor House on 13 June 2022, in which the Judge allowed Mr Dominic's appeal against the refusal of his application made under the EU Settlement Scheme ('EUSS') as a durable partner of an EU citizen, an Italian national ('the Sponsor').
2. The application was refused as Mr Dominic did not have a valid family permit or residence card issued under the Immigration (EEA) Regulations 2016 ('the 2016 Regulations') and had not applied for his entry or leave to remain in the UK to be facilitated before the specified date of 11 PM 30 December 2020 on this basis.
3. The Judge's findings are set out from [32] of the decision under challenge. There was no dispute before the Judge of the genuineness of the relationship that Mr Dominic has with his partner.
4. In relation to whether he could succeed under the Immigration Rules the Judge records at [45] that it was common ground that Mr Dominic could not meet the

- definition of a “family member of a relevant EEA citizen” in Annex 1 based on marriage because he was not married to the Sponsor.
5. The Judge then moved to consider whether Mr Dominic came within the definition of a “durable partner” in Annex 1 of Appendix EU to the Immigration Rules from [46].
 6. The Judge conducted an analysis of relevant provisions of the Rules before concluding that as the facts of Mr Dominic’s case matched the requirements of the Rules, he satisfies the definition of a durable partner, leading to it being found that he met the requirements of EU 14 in Appendix EU, and the appeal being allowed.
 7. The Secretary of State sought permission to appeal which was granted by Upper Tribunal Judge O’Callaghan on a renewed application on 17 January 2023, the operative part of the grant being in the following terms:
 1. The appellant is a national of Nigeria. He seeks pre-settled status under the EUSS as the durable partner of an Italian national. The EUSS application was made in April 2021 (see §9 of the First-tier Tribunal decision).
 2. I observe the reported decision of Celik (EU exit; marriage; human rights) [2022] UKUT 00220 (IAC), [2022] UKUT 220 (IAC) where it was confirmed that a person in a durable relationship in the United Kingdom with an EU citizen has as such no substantive rights under the EU Withdrawal Agreement, unless the person’s entry and residence were being facilitated before 11pm GMT on 31 December 2020 or the person had applied for such facilitation before that time.
 3. It is not the appellant’s case that he sought facilitation before the United Kingdom left the European Union. The appellant did not make his application under the EUSS until April 2021 and so could not succeed as he was not in possession of the required relevant document – valid registration certificate/ family permit or residence card.
 4. The requirement for a relevant document is rooted in other (or extended) family members not enjoying automatic residence under European Union law. Domestically, prior to 31 December 2020, they were required to firstly satisfy the definition under the Immigration (European Economic Area) Regulations 2016 and then, secondly, they were required to be the beneficiary of a positive exercise of discretion by the respondent, recognised by the grant of residence documentation. Such discretion cannot be exercised after 31 December 2020 as no substantive rights continue to exist. Consequently, there is a mandatory need for the appellant to possess the required relevant document.
 5. Further, it is arguable that the First-tier Tribunal erred in its consideration of proportionality: article 18(1)(r) of the Withdrawal Agreement. There was an arguable failure by the First-tier Tribunal to identify what the assessment of proportionality was directed to. It would properly be directed towards article 10 of the Agreement and the appellant clearly does not fall within any of the identified personal scope provisions. Consequently, it is arguable that the First-tier Tribunal has materially erred in its application of EU proportionality principles: R (Lumsdon) v. Legal Aid Board [2015] UKSC 41, [2016] AC 697.
 8. The case was then stayed to await the decision of the Court of Appeal to whom the decision of the Upper Tribunal in Celik had been challenged. Judgement was given on 31 July 2023 which dismissed the appeal against the decision of the upper Tribunal. The Court of Appeal decision is reported as Celik v Secretary of State for the Home Department [2023] EWCA Civ 921. Permission to appeal that decision to the Supreme Court has been refused.
 9. On 16 November 2023 further directions were given by the Upper Tribunal directing the parties to reconsider their respective positions in light of the Court of Appeal judgement.
 10. The matter was listed for disposal on 3 April 2024 and hearing notices sent out on 9 March 2024.

11. On 11 March 2024 correspondence was received from the Newcastle Legal Centre on behalf of Mr Dominic confirming that he had been granted leave to remain by the Home Office on 5 February 2024 on human rights grounds, did not wish to pursue this appeal, and had provided instructions that the appeal should be withdrawn.
12. The appeal could not be withdrawn at that stage as it is an appeal by the Secretary of State.
13. It is clear in light of the case law that is now available, and particularly the guidance provided by the Upper Tribunal, that the Judge has erred in law in a manner material to the decision to allow the appeal. Mr Dominic's right to reside or enter had not been facilitated as a durable partner prior to 11 PM 30 December 2020. Even though his relationship was accepted as being genuine it had not been facilitated by the Secretary of State. He could not therefore satisfy the definition of a durable partner.
14. I set the decision of the Judge aside.
15. In terms of the future management of the appeal, it now becomes Mr Dominic's appeal against the original refusal. He was asked to confirm whether he wished still to withdraw the appeal which he confirmed was the case. Permission was granted to Mr Dominic to withdraw his appeal against the decision to refuse his application under the EU Settlement Scheme.

Notice of Decision

16. The First-tier Tribunal Judge has materially erred in law. I set that decision aside.
17. In light of Mr Dominic confirming he wishes to withdraw his appeal against refusal of his application under the EU Settlement Scheme, and permission having been granted to him to do so, there is nothing extant before the Upper Tribunal upon which a decision can or needs to be made.

C J Hanson

Judge of the Upper Tribunal
Immigration and Asylum Chamber

3 April 2024

