IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2023-002709

First-tier Tribunal No: EA/11617/2022

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On 31st May 2024

Before

UPPER TRIBUNAL JUDGE LINDSLEY

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MEGILIAN KALARI
(NO ANONYMITY ORDER MADE)

Respondent

Representation:
For the Appellant: Mr T Muman, of Counsel, instructed by J.M. Wilson Solicitors
For the Respondent: Mr K Ojo, Senior Home Office Presenting Officer

Heard at Field House on 21 May 2024

DECISION AND REASONS

Introduction

1. The claimant is a citizen of Albania born on 11th April 1995. He applied for leave to remain as the durable partner of Adriana Alexandra Carcuin, a citizen of Romania, on 29th December 2020. He appeals against the decision of the Secretary of State dated 4th June 2021 refusing him under the EUSS. The appeal was allowed by First-tier Tribunal Judge Phull in a determination promulgated on the 28th April 2023 on the basis he was within the personal scope of the Withdrawal Agreement.

2. Permission to appeal was granted by Judge of the First-tier Tribunal RA Singer on 7th June 12023 on the basis that it was arguable that the First-tier judge had erred in law in treating an application under Appendix EU as an application for facilitation as the claimant's application was arguably not an application under the Immigration (EEA) Regulations 2016 and so the First-tier Tribunal errs in law by failing to follow the reported cases of Celik (EU exit; marriage; human rights) [2022] UKUT 220 and Batool and others (other family members; EU exit) [2022] UKUT 2019.

3. On 21st November 2023 Upper Tribunal Judge Blum issued an order and directions to the parties concerning the case of Tanjina Siddiqa, which had been granted permission to appeal to the Court of Appeal, asking for submissions as to whether the appeal should be stayed behind this case. No response was received beyond a letter from the claimant's solicitors that he wished to pursue his appeal, although actually it is not his appeal but that of the Secretary of State. The judgement in Siddiqa v ECO [2024] EWCA Civ 248 was promulgated by the Court of Appeal on 14th March 2024.

4. The matter came before me to determine whether the First-tier Tribunal had erred in law, and if so to decide if any such error was material and whether the decision should be set aside.

Submissions – Error of Law & Remaking

5. In the grounds of appeal it is argued for the Secretary of State as follows. It is contend that the First-tier Tribunal materially erred in law because the application the claimant made was as a family member under Appendix EU and so the First-tier Tribunal made an error of fact amounting to an error of law that a Immigration (EEA) Regulations 2016 was made prior to the 31st December 2020. The claimant did not marry his partner until after the specified date and so he was not a family member of an EEA national under the Immigration Rules. He was also not a durable partner under Appendix EU because he did not have a relevant document facilitating his residence issued prior to the specified date, namely 31st December 2020.

6. In accordance with Siddiqa (other family members: EU exit) [2023] UKUT 47 an application under Appendix EU made prior to 31st December 2020 is not an application for facilitation under the 2016 EEA Regulations. The First-tier Tribunal erred in the determination of this issue and the appeal is bound to fail on its facts applying Celik and Batool. Mr Ojo added that checks with the Secretary of State's ATLAS database of applications showed that the application of 29th December 2020, which was refused on 4th June 2021, was one made under the EUSS and not one made under the Immigration (EEA) Regulations 2016. There were no details of any second application on the database.

7. Mr Muman argued that there were two applications made by the claimant. The first on 29th December 2020 and the second on 19th April 2021. He argued that the refusal notice in the appeal relates to the second application as the refusal decision includes reference to the marriage of the claimant which took place on 15th April 2021 and so contains details which were only included in the second application. Mr Muman argued that it was therefore open to the First-tier Tribunal to conclude that the first application was one made under the Immigration (EEA) Regulations 2016 and that the claimant therefore came within the ambit of Celik because he had applied to facilitate his residence as a durable partner prior to the specified date/ 31st December 2016. Mr Muman drew attention to the language used by the First-tier Tribunal, which referred to a residence card having been applied for prior to 31st December 2016 at paragraph 7 of the decision, and it is on this basis that the claimant is found at paragraph 17 of the decision to have come within the personal scope of Article 10.3 of the Withdrawal Agreement. Mr Muman therefore submitted that the decision did not err in law and was in accordance with Celik.

Conclusions – Error of Law & Remaking

8. The First-tier Tribunal finds, at paragraph 17 of the decision, with no reasoning on this issue, that the evidence showed that the claimant had applied for facilitation of entry before the 31st December 2020 and thus was entitled to succeed as per the first point of the headnote in Celik even though it is found at paragraph 7 that the application he made was for an EUSS residence card.

9. The documentation, as contained in the Secretary of State's bundles, before the First-tier Tribunal provides no evidence that an application was made under the Immigration (EEA) Regulations 2016. There are two undated acknowledgement letters regarding EUSS applications at B1 and C1 and one relating to an EUSS application on 19th April 2021 at C3; there is a biometric enrolment application marked EUS at A1 which refers to an application for pre-settled status which is clearly therefore under the EUSS; the refusal letter of 4th June 2021 at B3, from which the appeal arises, relates to an application under the EUSS; the administrative review application of 5th June 2021 is made under the EUSS and does not refer to a 2016 Regulations application as making this decision wrong. There are no details of any 2016 Regulations application given in the claimant's bundle including in the witness statements of the claimant and his wife. Mr Ojo has also confirmed that the Secretary of State's ATLAS database only registers one application by the claimant which was made on 29th December 2020 and refused on 4th June 2021 and was under the EUSS.

10. I find that the First-tier Tribunal erred materially in law. There was no evidence that the claimant had applied for facilitation under the Immigration (EEA) Regulations 2016 prior to the 29th December 2020 before the First-tier Tribunal.. It may be that two applications were

made under the EUSS, the second one submitting the marriage documents, and that they were treated as one made on 29th December 2020 by the caseworker. It was an error of fact amounting to an error of law to find that a pre 31st December 2020 Immigration (EEA) Regulations application for facilitation as a durable partner had been made and/or the finding is insufficiently reasoned. I find that the application made on 29th December 2020, and thus prior to the 31st December 2020 was under the EUSS, and was, as per the document at A1 for pre-settled status under Appendix EU of the Immigration Rules. The claimant was not a family member under this scheme as he was not married prior to the specified date as correctly found by the First-tier Tribunal at paragraph 9 of the decision.

11. He was also not entitled to have the EUSS application made on 29th December 2020 treated as an application under the Immigration (EEA) Regulations 2016 for facilitation as a durable partner, applying the decision in Siddiqa, and he had not otherwise obtained a relevant document/ residence card as a durable partner prior to the specified date. As a result he could not and cannot succeed under Appendix EU on the basis he was a durable partner because the Annex 1 definition of a durable partner requires him to be in possession of a relevant document prior to the specified date; and to come within the personal scope of the Withdrawal Agreement he had at least to have applied to facilitate his residence prior to the 31st December 2020, applying Celik, which I find he had not done.

12. As a result I find that the claimant cannot succeed in his appeal either under the Immigration rules or by application of the Withdrawal Agreement.

13. I note that in the decision of the First-tier Tribunal there are findings that factually the claimant and his partner were in a durable relationship prior to 31st December 2020 at paragraphs 12 to 15 of the decision. These findings do not assist the claimant in succeeding in this appeal but are not challenged as being unlawfully made by the Secretary of State.

Decision:

1. The making of the decision of the First-tier Tribunal involved the making of an error on a point of law.

2. I set aside the decision of the First-tier Tribunal allowing the appeal under the Withdrawal Agreement.

3. I re-make the decision in the appeal by dismissing it both under the Withdrawal Agreement and the Immigration Rules.

Fiona Lindsley

Judge of the Upper Tribunal
Immigration and Asylum Chamber

21st May 2024