Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: UI-2022-004026**
EA/01976/2022

THE IMMIGRATION ACTS

Heard at Field House
On the 19 December 2022

Decision & Reasons Promulgated
On the 23 January 2023

Before

UPPER TRIBUNAL JUDGE RIMINGTON
DEPUTY UPPER TRIBUNAL JUDGE SYMES

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

ALEJANDRA TEJERINA ARAMAYO
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:
For the Appellant: Ms A Ahmed Home Office Presenting Officer
For the Respondent: Mr P V Thoree, Thoree & Co Solicitors

DECISION AND REASONS

1. The application for permission to appeal was made by the Secretary of State but nonetheless for the purposes of this decision, hereinafter, the parties will be described as they were before the First-tier Tribunal ("the FtT").

2. The Secretary of State appealed, with permission, against the decision of First-tier Tribunal G Clarke, ("the judge"), who allowed the appellant's appeal under the Immigration Citizens' Rights Appeals (EU Exit) Regulations 2020. The appellant, a citizen of Bolivia, applied on 25th May 2021, under the EU Settlement Scheme as the spouse of Erlan Cardenas, a Spanish national, who had been granted indefinite leave to remain on 9th May 2019 under the EU Settlement Scheme. The couple married on 9th April 2021 and had a child on 22nd November 2020.

3. Ms Aramayo had appealed against the decision of the Secretary of State dated 3rd February 2022 refusing her settled and pre-settled status under the EU Settlement Scheme as the family member of an EEA citizen under Appendix EU 11 and 14. The refusal stated that the appellant did not have the relevant evidence such as the marriage certificate prior to the specified date as required in Annex 1 of Appendix EU (2300 GMT 31 December 2020). Nor had the appellant shown evidence to confirm she was a 'durable partner'.

4. The judge found at [23] that the couple were not married before the specified date and could not therefore meet the definition of 'family member of a relevant EEA citizen' under Annex 1 of Appendix EU on 31st December 2020.

5. In the alternative, however, the judge found that the appellant was a 'durable partner' and noted the birth of the child in November 2020. The judge set out the definition of 'durable partner' in Annex 1 of Appendix EU and found that although the appellant was unable to point to any relevant document issued to her (she had apparently made no such application), found she could meet the legal definition at paragraph b(ii)(bb) with reference to (aaa) of the definition of 'durable partner'.

6. The judge stated at [32]

> *"I point to the middle part of the paragraph and what follows the word "unless" and find that the implication of this exception is that an appellant can satisfy the definition of durable partner if she was present in the UK before the specified date and had a durable partnership but did not hold a relevant document or lawful basis to stay'.*

The judge added at [33]

> "*The appellant was resident in the United Kingdom but did not hold a relevant document and did not have a lawful basis to stay in the United Kingdom even though she was in a durable relationship with her EEA Sponsor*"

As the appellant fulfilled those requirements it was found she satisfied the definition of 'durable partner' under Annex 1 of Appendix EU. That said, the judge found the decision was not disproportionate because the

appellant and her sponsor had ample opportunity from 2017 onwards to marry but did not.

7. The Secretary of State's grounds for permission to appeal asserted that

(a) the judge misinterpreted the regulations under Appendix EU which required either a document or an application within Article 3.2(b) of the Directive 2004/38/EC to have been made. None was made. The interpretation by the judge was incompatible with the Withdrawal Agreement. The judge's interpretation would mean that the requirements to have been lawfully resident under EU law as of 31st December 2020 would be obsolete and hence the requirement to show lawful residence as of the specified date. The appellant was not lawfully resident in the UK under either EU law, or any other capacity contained with the Immigration Rules as of 31 December 2020.

(b) Paragraph b(ii)(bb)(aaa) applies to those who were lawfully resident in another capacity (eg student) and who were prior to the specified date in a durable relationship.

The respondent's guidance EU Settlement Scheme: EU, other EEA and Swiss citizens and their family members Version 17.0 stated at page 120

"*when considering whether a person with another lawful basis of stay in the UK and islands before the specified date was the durable partner of a relevant EEA citizen before the specified date, only the period for which the person had another lawful basis of stay in the UK and islands before that date can be considered for the purposes of assessing whether the partnership was durable before that date*"

...

"The effect of the above provisions is that, where, at the specified date, a person was continuously resident in the UK and islands as the durable partner of a relevant EEA citizen (where that relevant EEA citizen is their relevant sponsor) and did not hold a relevant document as that durable partner, they must (unless they otherwise had a lawful basis of stay in the UK and islands for that period, for example as a student) break their continuity of residence in the UK and islands before they can apply as a joining family member and the durable partner of the relevant sponsor. They can then rely on the evidence required in the previous paragraph. In such a case, the persons continuous qualifying as a joining family member of a relevant sponsor can only have commenced on or after the 1st of January 2021"

Analysis

8. The Upper Tribunal issued guidance on the application of the EU withdrawal agreement in Celik (EU exit, marriage, human rights) [2022] UKUT 00220 as follows:

> *"(1) A person (P) in a durable relationship in the United Kingdom with an EU citizen has as such no substantive rights under the EU Withdrawal Agreement, unless P's entry and residence were being facilitated before 11pm GMT on 31 December 2020 or P had applied for such facilitation before that time.*
>
> *(2) Where P has no such substantive right, P cannot invoke the concept of proportionality in Article 18.1(r) of the Withdrawal Agreement or the principle of fairness, in order to succeed in an appeal under the Immigration (Citizens' Rights) (EU Exit) Regulations 2020 ('the 2020 Regulations'). That includes the situation where it is likely that P would have been able to secure a date to marry the EU citizen before the time mentioned in paragraph (1) above, but for the Covid-19 pandemic.*
>
> *(3) Regulation 9(4) of the 2020 Regulations confers a power on the First-tier Tribunal to consider a human rights ground of appeal, subject to the prohibition imposed by regulation 9(5) upon the Tribunal considering a new matter without the consent of the Secretary of State".*

9. Celik is good law, promulgated on 19th July 2022 (a week before the decision under consideration), and there is no indication of any grant of appeal on Celik to undermine its authority which was determined by a Presidential panel.

10. The appellant made her application under the EU Settlement Scheme after 31st December 2020 (and not under the Immigration (European Economic Area) Regulations 2016) and married after the 'specified date'.

11. As accepted in the decision of the judge the appellant could not therefore fulfil the immigration rules as a spouse or as a durable partner under Appendix EU with reference to b(i) because she did not fall within that definition of 'family member' by the specified date.

12. The judge, however, found that the appellant could satisfy the requirement for 'durable partner' under b(ii)(aa) and (bb)(aaa) which sets out in so far as material the following:

> *b(ii) where the person is applying as the durable partner of a relevant sponsor … (as described in sub-paragraph (a)(i)(bb) of the entry for 'joining family member of a relevant sponsor' in this table),*
>
> *and does not hold a document of the type to which sub-paragraph (b)(i) above applies, and where:*
>
> *(aa) the date of application is after the specified date;*

and

(bb) the person:

(aaa) was not resident in the UK and Islands as the durable partner of a relevant EEA citizen (where that relevant EEA citizen is their relevant sponsor) on a basis which met the definition of 'family member of a relevant EEA citizen' in this table,

or, as the case may be, as the durable partner of the qualifying British citizen, at (in either case)

any time before the specified date,

unless the reason why, in the former case, they were not so resident is that they did not hold a relevant document as the durable partner of a relevant EEA citizen for that period (where their relevant sponsor is that relevant EEA citizen) and they did not otherwise have a lawful basis of stay in the UK and Islands for that period;'

13. Paragraph b(ii)(bb)(aaa) was not considered in **Celik** and does not appear to have been raised. The definitions in (aaa) above is written in tortuous and convoluted terms with a series of negatives. We conclude, however, that even if one accepted that the appellant had made an application as a 'joining' family member because she was not resident '*on a basis which met the definition of 'family member of a relevant EEA citizen' in this table (where that relevant EEA citizen is their relevant sponsor) at any time before the specified date*' (see definition of joining family member' in annex 1 Appendix EU), the final negative after 'unless' in (aaa) serves to exclude those who were in the UK unlawfully prior to the specified date. As seen, on the findings by the judge, the appellant, had no lawful status within the UK prior to the specified date and she is excluded from benefitting from (aaa).

14. We therefore find an error of law in the judge's decision and set aside the conclusions in relation to the 'durable partnership' although we preserve paragraphs [27] and [28] which found that the essence and nature of the relationship itself, did qualify as a durable partnership.

15. For the hearing before us Mr Thoree submitted a Rule 24 response, which submitted that in fact the appellant had a derivative right of residence owing to the existence of the child. Mr Thoree thus set out an alternative basis on which the appellant might have been considered to have had lawful status prior to the specified date. The underlying decision of the Secretary of State had not addressed the issue of the child or the matter of the derivative right of residence. We pointed out that we found this matter had not been raised before the FtT and would be considered as a new matter. Under regulation 9(5) of the Immigration (Citizens' Rights) (EU Exit) Regulations 2020 there is a prohibition on considering a new matter without the Secretary of State's consent.

16. Ms Ahmed did not give consent to this matter being considered before us because the Secretary of State had not had the opportunity to consider the 'new matter' or issues pertaining to it. We were not given details by Mr Thoree of how this argument would be proffered and although we struggle to identify the legal basis for that submission, we were, however, invited by both representatives to remit the matter to the FtT so that the Secretary of State might consider whether to give 'consent' on a new matter. We further note that the appellant's appeal had been allowed and in the circumstances, we have decided to remit the matter to the FtT for a hearing to address the issue in relation to derivative right and 'durable partner' only.

Notice of decision

17. The Judge erred materially for the reasons identified. We set aside the decision pursuant to Section 12(2)(a) of the Tribunals Courts and Enforcement Act 2007 (TCE 2007). Bearing in mind the nature and extent of the findings to be made the matter should be remitted to the First-tier Tribunal under section 12(2) (b) (i) of the TCE 2007 and further to 7.2 (b) of the Presidential Practice Statement. As indicated, we preserve paragraphs [27] and [28].

Directions

(i) The Secretary of State is to indicate whether she grants consent on the new matter of the derivative right of residence by the date of the substantive hearing in the FtT.

(ii) Any further evidence and skeleton arguments should be filed and served at least 14 days prior to any hearing.

No anonymity direction is made.

Signed Helen Rimington Date 21st December 2022

Upper Tribunal Judge Rimington