Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: UI-2022-003571
EA/01072/2022

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 29 September 2022	**On 14 November 2022**

Before

UPPER TRIBUNAL JUDGE STEPHEN SMITH

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MUHAMMAD ANWARUL AZIM
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:
For the Appellant: Mr T. Melvin, Senior Home Office Presenting Officer
For the Respondent: Mr M. Biggs, Counsel, instructed by Temple Solicitors

DECISION AND REASONS

1. This is an appeal by the Secretary of State against a decision of First-tier Tribunal Judge Shakespeare ("the judge") dated 17 June 2022. The judge allowed an appeal against a decision of the Secretary of State dated 17 January 2022 to refuse an application for pre-settled status under the EU Settlement Scheme ("the EUSS"). The appeal was brought under regulation 3 of the Immigration (Citizens' Rights Appeals) (EU Exit) Regulations 2020 ("the 2020 Regulations").

2. Although this is an appeal by the Secretary of State, for ease of reference I will refer to the appellant before the First-tier Tribunal as "the appellant".

3. At the hearing, I allowed the Secretary of State's appeal and set aside the decision of the First-tier Tribunal. I remade the decision, dismissing the appellant's appeal. I summarised my reasons for doing so. I now give them in full.

Factual background

4. The appellant is a citizen of Bangladesh born on 20 February 1985. On 18 November 2021, he made an application for settled status under the EUSS as the durable partner of Mrs Nahima Tondra Alam, a citizen of Italy ("the sponsor") who enjoys settled status. The Secretary of State refused the appellant's application on the sole ground that he had not provided the required evidence of the family relationship with the sponsor. He had not provided a valid EEA family permit or residence card issued under the Immigration (European Economic Area) Regulations 2016 ("the 2016 Regulations") as the durable partner of an EEA national. Accordingly, the Secretary of State concluded that he did not meet the requirements for leave to remain under Appendix EU of the Immigration Rules.

The decision of the First-tier Tribunal

5. The hearing before the judge took place on 27 May 2022 via CVP. The Secretary of State was not represented. The judge's decision summarises the law and the submissions advanced by Mr West, counsel who then represented the appellant.

6. The tribunal's operative findings commenced at paragraph 17. The judge reached a number of findings of fact that have not been challenged: the appellant and sponsor met in early 2019 and moved in together in June or July 2020. They wanted to get married but struggled to secure an appointment due to the pandemic. They eventually undertook a civil ceremony on 7 February 2022. The judge found that the appellant was a "durable partner" of the sponsor on 31 December 2020, notwithstanding the fact they had cohabited for only six months at that point, rather than two years.

7. At paragraph 24, the judge noted that the definition of "durable partner" in Appendix EU of the Immigration Rules required an applicant to hold a "relevant document", namely an EEA family permit or a residence card issued under the 2016 Regulations. On that basis, the judge dismissed ground 1 of the appeal, which was that the decision was not in accordance with the EUSS provisions of Immigration Rules.

8. The second ground of appeal before the judge was that the decision was contrary to the EU Withdrawal Agreement, in particular paragraph 18(1)(r), concerning proportionality. At paragraph 27, the judge distilled the essential question before the tribunal into the following terms:

> "The question is therefore whether or not the refusal decision is disproportionate taking into account all the facts and circumstances on which the decision is based."

9. The judge's operative reasons for allowing the appeal were as follows, at paragraph 29:

> "I have found that the appellant and sponsor were in a durable relationship as at 30 December 2020. They are now married. I also accept that they intended to marry earlier but were prevented from doing so by the circumstances of the pandemic. Self-evidently, this was through no fault of their own. Had they been able to marry when they wanted to the appellant would most likely have met the definition of a spouse under appendix EU, as at 30 December 2020 [*sic*]. Looking at the evidence and the round I consider that the refusal of the appellant's application is disproportionate."

10. The judge allowed the appeal.

Permission to appeal

11. The sole ground of appeal advanced by the Secretary of State was that the judge erred by extending to the appellant the benefit of Article 18(1)(r) of the Withdrawal Agreement. The appellant was not within the personal scope of the Withdrawal Agreement since he was not residing in the UK in accordance with EU law on 31 December 2020. That was because his residence as a "durable partner" had not been facilitated by the Secretary of State under the 2016 Regulations.

12. Permission to appeal was granted by First-tier Tribunal Judge Karbani.

Submissions

13. Mr Melvin relied on the decisions of this tribunal in *Batool and others (other family members: EU exit)* [2022] UKUT 219 (IAC) and *Celik (EU exit; marriage; human rights)* [2022] UKUT 220 (IAC). He submitted that it was simply not open to the judge to rely on proportionality as a purported basis to allow the appeal.

14. Mr Biggs relied on his admirably succinct skeleton argument dated 29 September 2022. He accepted that "in principle" there was merit to the Secretary of State's submissions, although observed that part of the discussion in *Celik* at paragraph 62 appeared to be consistent with the judge's approach. That paragraph provides:

> "62. Ms Smyth [counsel for the Secretary of State] submitted at the hearing that, since the appellant could not bring himself within Article 18, sub-paragraph (r) simply had no application. Whilst we see the logic of that submission, we nevertheless consider that it goes too far. The parties to the Withdrawal Agreement must have intended that an applicant, for the purposes of sub-paragraph (r), must include someone who, upon analysis, is found not to come within the scope of

> Article 18 at all; as well as those who are capable of doing so but who fail to meet one or more of the requirements set out in the preceding conditions."

15. Mr Biggs also submitted that the Secretary of State's grounds of appeal failed fully to reflect the submissions advanced by Mr Melvin. It is important that this tribunal expects all litigants to demonstrate procedural rigour, he submitted. I should resist the Secretary of State's attempts to stray beyond the grounds of appeal and the basis of the grant of permission.

16. The appellant has not sought to challenge the dismissal of his appeal under the EUSS through the provision of a rule 24 notice taking issue with those findings of the judge.

17. In the event that I was minded to set the decision aside, Mr Biggs submitted that there had been no challenge by the Secretary of State to the findings of fact reached by the judge. He invited me to preserve those findings and to remake the decision in this tribunal. To that end, Mr Biggs indicated that the appellant would seek to rely on Article 8 of the European Convention on human rights ("the ECHR"). If the Secretary of State was not minded to provide her consent to enable the tribunal to do so, that would be inconsistent with her policy on the conduct of appeals before the immigration and Asylum chamber. That being so, Mr Biggs invited me to adjourn the proceedings for a short period to enable the appellant to bring judicial review proceedings against the Secretary of State's decision to refuse consent. Mr Biggs added that the appellant had already made a human rights claim to the Secretary of State which he understood to be under consideration.

Legal framework

18. The 2020 Regulations make provision for applicant to bring an appeal against a refusal to grant leave to remain under the EUSS. Regulation 3(1)(c) provides that a right of appeal exists where the Secretary of State decides not to grant any leave to enter or remain in response to an application under the EUSS.

19. Regulation 8 provides, in summary, that the available grounds ground of appeal are that (i) the decision breaches any right which the appellant has by virtue of the EU withdrawal agreement; and (ii) that the decision is not in accordance with the EUSS Immigration Rules.

20. Article 10 if the EU Withdrawal Agreement is entitled "personal scope". It lists the persons – and relationships – within the scope of the Agreement. Article 10(1)(a) to (d) concern Union citizens. Article 10(1)(e)(i) extends the agreement's scope to the "family members" of Union citizens listed in sub-paragraphs (a) to (d). Article 10(1)(e)(i) thus provides:

> "1. Without prejudice to Title III, this Part shall apply to the following persons:

> […]
>
> (e) family members of the persons referred to in points (a) to (d), provided that they fulfil one of the following conditions:
>
> (i) they resided in the host State in accordance with Union law before the end of the transition period and continue to reside there thereafter…"

The "transition period" referred to in Article 10(1)(e)(i) was the period that came to an end on 31 December 2020 at 11PM.

21. Article 18 of the Withdrawal Agreement is entitled "*Issuance of residence documents*". It makes provision governing the issue of residence documents to those within the scope of the agreement. It provides at sub-paragraph (r):

> "(r) the applicant shall have access to judicial and, where appropriate, administrative redress procedures in the host State against any decision refusing to grant the residence status. The redress procedures shall allow for an examination of the legality of the decision, as well as of the facts and circumstances on which the proposed decision is based. Such redress procedures shall ensure that the decision is not disproportionate."

Discussion

22. By way of a preliminary observation, nothing in the submissions of Mr Melvin strayed beyond the grounds of appeal, or the observations of the permission judge. I reject Mr Biggs' submissions that the requirements of procedural rigour are such that I should not entertain the Secretary of State's submissions.

23. Turning to the substance of the appeal, the judge was bound to dismiss the appeal insofar as it contended that the decision was not in accordance with the EUSS provisions of the Immigration Rules. The appellant's residence as a "durable partner" had not been facilitated by the Secretary of State prior to 11PM on 31 December 2020. That being so, he was incapable of meeting the durable partner requirements of the EUSS regime, since he had not been issued with a residence card in that capacity.

24. Mr Melvin relies on *Celik* as being determinative of the appeal. In his submission, the headnote summarises why it was not open to the judge to allow the appeal by relying on the principle of proportionality to make good the appellant's inability to succeed under the EUSS provisions of the Immigration Rules:

> "(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."

25. Mr Biggs did not press his reliance on paragraph 62 of *Celik*. He was right not to do so. Indeed, he readily accepted that he could see the force in the position adopted by Ms Smyth, counsel for the Secretary of State, in *Celik.*

26. At paragraph 62, the then President held that there would be a class of persons who do not come within the scope of Article 18 who nevertheless enjoy the benefit of the procedural and other protections that it guarantees. Assuming that that is right (and noting that I did not hear any argument concerning the correctness of paragraph 62, which in any event was *obiter* the operative reasoning of *Celik*), I consider that Mr Biggs' (tentatively advanced) written submissions fail to recognise that the situation of the appellant in these proceedings is on all fours with that of the appellant in *Celik* as summarised at paragraph 64:

> "In the present case, there was no dispute as to the relevant facts. The appellant's residence as a durable partner was not facilitated by the respondent before the end of the transitional period. He did not apply for such facilitation before the end of that period. As a result, and to reiterate, he could not bring himself within the substance of Article 18.1."

27. Like the appellant in these proceedings, the appellant in *Celik* had contended that he had been unable to marry as a result of the Covid-19 restrictions then in force, and later went on to marry his EEA sponsor after the expiry of the transition period at 11PM on 31 December 2020. Whatever room for manoeuvre *Celik* preserved under paragraph 62 for other cases, it was not applicable to a person in the circumstances of this appellant. Mr Biggs did not press the point.

28. I therefore accept Mr Melvin's submissions that *Celik* is dispositive of the error of law appeal in the Secretary of State's favour. The appellant before the First-tier Tribunal had not had his residence "facilitated" by the Secretary of State as a durable partner before 11PM on 31 December

2020. That being so, he was not a person within the personal scope of the Withdrawal Agreement. He does not benefit from the principle of proportionality under Article 18(1)(r) of the Withdrawal Agreement and it was an error of law for the judge to allow the appeal pursuant to it.

29. Mr Biggs also submitted that the Secretary of State had not challenged the judge's proportionality assessment. In my judgment, it was not necessary to do so: the Secretary of State advanced a more fundamental challenge whereby she contended that the judge purported to perform a proportionality assessment in circumstances where the underlying Treaty which conferred the right to a proportionate decision was not engaged.

30. I find that the decision of the judge involved the making of an error of law. I set it aside.

Remaking the decision

31. There was no challenge to the judge's findings of fact. No further matters of fact require resolution ahead of the decision being remade. I therefore exercise my discretion to retain the appeal in this tribunal and remake the decision by virtue of section 12(2)(b)(ii) of the Tribunals, Courts and Enforcement Act 2007.

32. It was common ground that in relation to the EUSS ground of appeal, the only option open to me was to dismiss the appeal; the appellant's residence was not facilitated as a durable partner prior to the end of the transition period. He does not enjoy the ability to rely on the principle of proportionality under Article 18(1)(r) of the Withdrawal Agreement. I therefore dismiss the appeal under the 2020 Regulations.

33. Mr Biggs invited Mr Melvin to consent to the tribunal considering Article 8 ECHR matters. He submitted that the Secretary of State's guidance, *Rights of appeal*, version 13.0, 22 September 2022 militated in favour of the Secretary of State granting permission.

34. Mr Melvin refused to consent to the tribunal considering Article 8 ECHR matters.

35. As indicated above, Mr Biggs invited me to adjourn the proceedings before remaking the decision, in order for the appellant to consider whether to bring judicial review proceedings against the Secretary of State for declining to provide her consent. I refused to do so, for the following reasons:

    a. The Secretary of State's approach, through Mr Melvin, appeared to be entirely consistent with the guidance given to the Secretary of State's officials in *Rights of appeal*. Page 62 deals with EUSS appeals (referred to as a 'Citizens' Rights Appeal'). It states:

> "It will not normally be appropriate for a new matter that raises protection or human rights grounds to be considered by the SSHD

> so that it can be heard as part of the Citizens' Rights Appeal unless it has been made through a relevant application. Where the person is directed to make a new application, the Presenting Officer should normally maintain the position that the Citizen's Rights Appeal should proceed to hearing and not be delayed."

b. This point was considered in *Celik,* which held at paragraph 98:

> "As the respondent submits, if the appellant now wishes to claim that he should be permitted to remain in the United Kingdom in reliance on Article 8, he can and should make the relevant application, accompanied by the appropriate fee."

c. Mr Biggs confirmed that the appellant had already made a human rights claim to the Secretary of State.

36. In light of the above factors, I concluded that adjourning to enable the appellant to consider whether to bring judicial review proceedings against the Secretary of State for refusing to consent to the tribunal considering Article 8 ECHR matters would have been an entirely futile step. The Secretary of State's refusal of consent appeared to be entirely consistent with her published policy, with the approach of the Presidential panel in *Celik* and, moreover, would not deprive the appellant of consideration of any human rights claim he may otherwise enjoy. I therefore declined to exercise my discretion to adjourn the proceedings. The overriding objective of this tribunal is to deal with cases fairly and justly (rule 2(1), Tribunal Procedure (Upper Tribunal) Rules 2008). That includes avoiding delay, so far as compatible with proper consideration of the issues.

Conclusion

37. The appellant's appeal against the decision of the Secretary of State to refuse his application for leave to remain under the EUSS is dismissed. Since the appellant had not been issued with a relevant document, his appeal is dismissed to the extent he contended it was not in accordance with the Immigration Rules concerning the EUSS. He has not demonstrated that the decision of the Secretary of State dated 17 January 2022 was in breach of the Withdrawal Agreement.

38. I remake the decision of Judge Shakespeare by dismissing the appeal.

Notice of Decision

The decision of Judge Shakespeare involved the making of an error of law and is set aside.

I remake the decision and dismiss the appeal.

No anonymity direction is made.

Signed Stephen H Smith Date 3 October 2022

Upper Tribunal Judge Stephen Smith