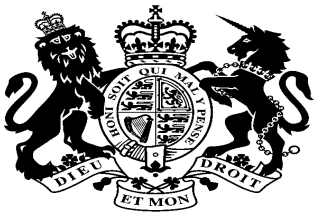

Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: UI-2022-003014**

EA/11724/2021

THE IMMIGRATION ACTS

Heard at Field House	**Decision and Reasons Promulgated**
On 8 November 2022	**On 22 December 2022**

Before

Upper Tribunal Judge NORTON-TAYLOR
Deputy Upper Tribunal Judge MANUELL

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

Mr WALI HASAN KHEL
(NO ANONYMITY DIRECTION)

Respondent

Representation:
For the Appellant: Ms A Everett, Senior Home Office Presenting Officer
For the Respondent: Mr S Mahmud, Counsel
(instructed by Greystone Solicitors)

DECISION AND REASONS

1. Permission to appeal was granted to Secretary of State by First-tier Tribunal Judge Evans on 7 May 2022 against the decision to allow the Respondent's appeal made by

First-tier Tribunal Judge Dhaliwal in a decision and reasons promulgated on 10 March 2022. The Respondent had applied under for pre-settled status under Appendix EU claiming to be the durable partner of a relevant EEA citizen. The judge found that he was a durable partner as there was sufficient evidence to substantiate the relationship although it had not yet lasted two years. The Respondent could not meet the definition of durable partner within Appendix EU because he did not have a specified document. The judge had gone on to allow his appeal on proportionality grounds under the Withdrawal Agreement.

2. The Respondent is a national of Afghanistan, born on 1 January 1986. He was granted refugee status in Italy. He entered the United Kingdom in 2017. He applied for pre-settled status under the EUSS on the basis that he was the durable partner of Ms Monika Balogh ("Ms Balogh"), an Hungarian national who was granted pre-settled status on 16 November 2021. The Respondent and Ms Balogh claimed that they had been durable partners since April 2020. They married in the United Kingdom on 10 April 2021. The Respondent's application was made on 15 April 2021 and was refused on 14 July 2021.

3. Permission to appeal was granted because it was considered arguable that the First-tier Tribunal Judge had erred by failing to consider the scope of the Withdrawal Agreement and whether the Respondent was able to benefit from it in the absence of the relevant document. By implication there was arguably no proper consideration of whether the Respondent's residence in the United Kingdom was being facilitated by the United Kingdom under its national legislation, or whether an application had been made before the relevant date.

4. Mr Mahmud for the Respondent applied for a stay, alternatively an adjournment of the appeal, pending the hearing of an appeal against Celik (EU exit, marriage, human rights) [2022] UKUT 00220 (IAC). This was in effect an oral renewal of an application which had been refused on the papers by Upper Tribunal Judge Norton-Taylor on 7 November 2022. Mr Mahmud submitted in summary that Celik had caused some consternation and affected many people. It was wrong for the Respondent to be put to further costs while the issues the case raised were unresolved. There was also the impact of the Covid lockdown. A stay was the right course. Ms

Everett formally opposed a stay or an adjournment, but was content to leave the matter to the panel.

5. The renewed application was refused because:

   (a) Celik (above) was a considered and authoritative statement of the law which the Upper Tribunal was bound to apply;

   (b) There was no firm evidence that an application for permission to appeal to the Court of Appeal had actually been made, let alone granted;

   (c) If permission to appeal were granted by the Court of Appeal it was uncertain when a decision would be made on any such application but it was probable that the period would be prolonged;

   (d) Costs were a fact of almost all litigation;

   (e) If the Upper Tribunal's decision were overturned at some future date, it would be possible for an application to be made to set aside any decision adverse to the Respondent, if necessary out of time;

   (f) The President of the Upper Tribunal had made no direction that appeals affected by Celik should be stayed and a consistent approach across the tribunal was needed.

6. Ms Everett for the Appellant relied on the grounds of appeal submitted and the grant of permission to appeal. The Respondent did not hold the required relevant document and there was no facilitation of his presence. The Withdrawal Agreement had no application. Celik (above) applied. There was a misunderstanding by the judge and the reasoning was defective. The judge had not grasped the distinction between family members, who had automatic rights, and extended family members, whose rights could only be conferred by successful application. The decision should be set aside, remade and the appeal dismissed, as it had to be.

7. Mr Mahmud for the Respondent relied on his skeleton argument. The First-tier Tribunal judge had been well aware that the Respondent held no relevant document. By the time the appeal was heard the Respondent and his durable partner had married, and the appeal was decided on the facts as they existed at the date of the hearing. It was a question of the circumstances which applied to the couple, and the facts could be distinguished from Celik. Article 18 of the Withdrawal Agreement was applicable, as the judge had found. The

rights of the Respondent's wife as an EU citizen were taken into account and there had been discrimination which the judge had found was disproportionate. The decision should stand.

8. Ms Everett wished to add nothing by way of reply. She indicated that if the panel found a material error of law, the decision should be remade and dismissed.

9. Mr Mahmud submitted that if a material error of law were found, any remaking of the decision should await a ruling from the Court of Appeal on Celik. If that course were not acceptable then he requested a resumed hearing as the Respondent might have further submissions to make.

10. The Tribunal's error of law decision was reserved and now follows. The panel had some difficulty in following Mr Mahmud's submissions, which in our view were misconceived. Among other matters, the facts of Celik were not materially different from those of the present appeal and so that binding decision cannot be distinguished as Mr Mahmud proposed.

11. The Tribunal noted that the Respondent's EUSS application was made after 31 December 2020, but prior to 30 June 2021, i.e., after the transitional period but within the grace period. But as the Respondent was within the United Kingdom without any form of leave to enter or leave to remain, that did not help him. Because the Respondent's presence in the United Kingdom had not been facilitated by the Appellant under any relevant EU provision, the Respondent had no separate rights accruing under the Withdrawal Agreement, which had no application to him. Proportionality had no scope.

12. As Ms Everett submitted, there is a fundamental difference in EU/EEA law between family members, a category of persons specifically defined and limited in number, whose rights are automatic, and extended family members/other family members. Extended family members are potentially unlimited in number, and have always required recognition following a successful application for admission to the host state, i.e., facilitation of entry.

13. The Tribunal accordingly ruled that the First-tier Tribunal Judge had misdirected herself. The judge did not have the benefit of the guidance in Celik and, as the President of the Upper Tribunal recognised, this is not a

straightforward area of law. The point on which the Respondent had succeeded was not available to him. There was no disproportionality within the terms of Article 18 of the Withdrawal Agreement. The decision was accordingly set aside.

14. As no further findings of fact were required, the decision was remade. The situation was clear in the light of Celik:

    (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) 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.

15. It follows that the Respondent, who could not meet Appendix EU of the Immigration Rules, had no rights under the Withdrawal Agreement. His appeal must be dismissed.

DECISION

The Secretary of State's appeal to the Upper Tribunal is allowed.

There were material errors of law in the First-tier Tribunal's decision and reasons, which is accordingly set aside.

Following a summary rehearing, the original decision was remade.

The original appeal is dismissed. There can be no fee award.

Signed **R J Manuell** **Dated** 10 November 2022

Deputy Upper Tribunal Judge Manuell