Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: EA/12076/2021
UI-2022-001508

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 30 September 2022	**On 13 November 2022**

Before

UPPER TRIBUNAL JUDGE FRANCES

Between

FLORIND CANI
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr B Hawkins, instructed by Wimbledon Solicitors
For the Respondent: Mr D Clarke, Home Office Presenting Officer

DECISION AND REASONS

1. The appellant is a citizen of Albania born on 20 May 1991. He appeals against the decision of First-tier Tribunal Judge Hyland ('the judge') promulgated on 2 February 2022 dismissing his appeal against the refusal of pre-settled status under the EU Settlement Scheme ('EUSS').

2. The appellant entered the UK illegally in June 2015. He married his Italian national partner on 22 April 2021 and applied for pre-settled status under the EUSS on the same day. The application was considered on the basis the appellant is a family member (spouse or durable partner) of an EEA

national and was refused on 19 July 2021 because the appellant did not hold a relevant document.

3. The judge dismissed the appellant's appeal under the Immigration (Citizens' Rights Appeals) (EU Exit) Regulations 2020 ('the 2020 Exit Regulations') because the appellant did not meet the definition of family member and did possess the relevant documents under Appendix EU. The judge found the appellant could not meet the alternative definition of durable partner (see b(ii)(bb)(aaa) set out below) and she was not required to consider Article 8 because this was an entirely new case not within the scope of the appeal.

4. Permission to appeal was granted by Upper Tribunal Judge Grubb on 1 August 2022 for the following reasons:

> "The grounds raise an important, and difficult, issue not yet resolved in the UT, namely whether in the circumstances of the appellant (whether claiming as a spouse or durable partner) they must hold an EEA document (residence card or family permit) in order to qualify under the EUSS scheme. The issue may be resolved by the UT prior to this case being heard. However, for present the ground is arguable.
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> Further, as the appellant appears to have raised an Art 8 claim in response to a s.120 notice, it is arguable this was a matter/ground which the FtT should have considered even if it would not otherwise be a ground of appeal under the Appeal Regulations 2020."

Relevant law

5. The definition of durable partner in Annex 1 of Appendix EU is as follows:

> "(a) the person is, or (as the case may be) for the relevant period was, in a durable relationship with a relevant EEA citizen (or, as the case may be, with a qualifying British citizen or with a relevant sponsor), with the couple having lived together in a relationship akin to a marriage or civil partnership for at least two years (unless there is other significant evidence of the durable relationship); and
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> (b) (i) the person holds a relevant document as the durable partner of the relevant EEA citizen (or, as the case may be, of the qualifying British citizen or of the relevant sponsor) for the period of residence relied upon; for the purposes of this provision, where the person applies for a relevant document (as described in sub-paragraph (a)(i)(aa) or (a)(ii) of that entry in this table) as the durable partner of the relevant EEA citizen or, as the case may be, of the qualifying British citizen before the specified date and their relevant document is issued on that basis after the specified date, they are deemed to have held the relevant document since immediately before the specified date; or

(ii) where the person is applying as the durable partner of a relevant sponsor (or, as the case may be, of a qualifying British citizen), or as the spouse or civil 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; or

(bbb) was resident in the UK and Islands before the specified date, and one of the events referred to in sub-paragraph (b)(i) or (b)(ii) in the definition of 'continuous qualifying period' in this table has occurred and after that event occurred they were not resident in the UK and Islands again before the specified date; or

(ccc) was resident in the UK and Islands before the specified date, and the event referred to in sub-paragraph (a) in the definition of 'supervening event' in this table has occurred and after that event occurred they were not resident in the UK and Islands again before the specified date,

the Secretary of State is satisfied by evidence provided by the person that the partnership was formed and was durable before (in the case of a family member of a qualifying British citizen as described in sub-paragraph (a)(i)(bb) or (a)(iii) of that entry in this table) the date and time of withdrawal and otherwise before the specified date; ….

6. In Batool and others (other family members: EU exit) [2022] UKUT 00219 (IAC), the Upper Tribunal held:

"(1) An extended (oka other) family member whose entry and residence was not being facilitated by the United Kingdom before 11pm GMT on 31 December 2020 and who had not applied for facilitation of entry and residence before that time, cannot rely upon the Withdrawal Agreement or the immigration rules in order to succeed in an appeal under the Immigration (Citizens' Rights Appeals) (EU Exit) Regulations 2020.

(2) Such a person has no right to have any application they have made for settlement as a family member treated as an application for facilitation and residence as an extended/other family member."

7. In Celik (EU exit; marriage; human rights) [2022] UKUT 00220 (IAC), the Upper Tribunal held:

"(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."

Appellant's submissions

8. Mr Hawkin relied on the grounds of appeal in which it was submitted the appellant did not require a residence document because he satisfied the definition of durable partner at b(ii)(bb)(aaa).

9. Mr Hawkin relied on his skeleton argument and submitted the judge erred in law in failing to consider proportionality in accordance with [63] of Celik. The judge was under a duty to consider all facts and circumstances, but she failed to take into account the detailed witness statements because she did not consider proportionality at all. The judge also failed to consider the respondent's policy guidance: 'EU Settlement Scheme: EU, other EEA and Swiss citizens and their family members Version 15.0, 9 December 2021'.

Respondent's submissions

10. Mr Clarke submitted the appellant has been in the UK illegally since 2015. He could not satisfy the requirements for a joining family member because he did not have documentation and he was resident in the UK unlawfully

before the specified date. There was no error of law in dismissing the appeal under the 2020 Exit Regulations.

11. In relation to Article 8, following Celik, it could be raised as a new matter with the consent of the respondent. However, there was no section 120 notice and the respondent had not given consent.

12. Mr Clarke submitted the judge was not required to consider proportionality because the appellant could not bring himself within Article 10 of the Withdrawal Agreement ('WA'). The appellant had exercised his right of appeal. Following [65] of Celik, the judge quite properly refused to embark on a judicial re-writing of the WA. The appellant could not bring himself within Article 18.1 WA.

Conclusions and reasons

13. It is not in dispute that the appellant did not apply for facilitation of entry or residence before the end of the transition period and his residence in the UK was not facilitated by the respondent prior to 11pm on 31 December 2020. The appellant cannot not satisfy Article 10(2) or 10(3) WA. The appellant entered the UK prior to the end of the transition period and therefore cannot not satisfy Article 10(4). Following Batool and Celik, the appellant cannot rely on the WA.

14. The appellant cannot satisfy paragraph (b)(ii)(bb)(aaa) of the definition of durable partner under Appendix EU because the appellant was resident in the UK illegally before the specified date. This interpretation is consistent with Home Office guidance of 13 April 2022: 'EU Settlement Scheme: EU, other EEA and Swiss citizens and their family members' which states as follows at 119:

> "Joining on or after 1 January 2021
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> Where the applicant is applying after the specified date as a joining family member who is the durable partner of a relevant sponsor (or of a qualifying British citizen), they can provide a relevant document as the durable partner of the relevant sponsor (or qualifying British citizen) for the period of residence relied upon, and evidence which satisfies you that the durable partnership remains durable at the date of application (or did so for the period of residence relied upon). Otherwise, the applicant must either:
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> - not have been resident in the UK and Islands in any capacity before the specified date
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> - not have been resident in the UK and Islands as the durable partner of the 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 Annex 1 to Appendix EU (or 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 example as a student) for that period – this means that a durable partner who did not hold a relevant document as the durable partner of a relevant EEA citizen (where their relevant sponsor is that relevant EEA citizen) for a period of residence in the UK and Islands before the specified date, and who did not otherwise have a lawful basis of stay in the UK and Islands for that period, cannot qualify as a joining family member on this basis…

15. This case is on 'all fours' with Celik. The appellant has no substantive right under the WA and he cannot satisfy Appendix EU. Article 8 was a new matter and the respondent had not given her consent. There was no material error of law in the judge's decision to dismiss the appeal under the 2020 Exit Regulations.

Notice of Decision

Appeal is dismissed.

J Frances

Signed Date: 3 October 2022
Upper Tribunal Judge Frances

TO THE RESPONDENT
FEE AWARD

As I have dismissed the appeal, I make no fee award.

J Frances

Signed Date: 3 October 2022
Upper Tribunal Judge Frances

NOTIFICATION OF APPEAL RIGHTS

1. A person seeking permission to appeal against this decision must make a written application to the Upper Tribunal. Any such application must be **received** by the Upper Tribunal within the **appropriate period** after this decision was **sent** to the person making the application. The appropriate period varies, as follows, according to the location of the individual and the way in which the Upper Tribunal's decision was sent:

2. Where the person who appealed to the First-tier Tribunal is **in the United Kingdom** at the time that the application for permission to appeal is made, and is not in detention under the Immigration Acts, the appropriate period is **12 working days (10 working days, if the notice of decision is sent electronically).**

3. Where the person making the application is in detention under the Immigration Acts**, the appropriate period is 7 working days (5 working days, if the notice of decision is sent electronically)**.

4. Where the person who appealed to the First-tier Tribunal is **outside the United Kingdom** at the time that the application for permission to appeal is made, the appropriate period is **38 days (10 working days, if the notice of decision is sent electronically).**

5. A "working day" means any day except a Saturday or a Sunday, Christmas Day, Good Friday or a bank holiday.

6. The date when the decision is "sent' is that appearing on the covering letter or covering email.