Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: EA/12157/2021
UI-2022-002640

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 23 September 2022	**On 9 November 2022**

Before

UPPER TRIBUNAL JUDGE FRANCES
DEPUTY UPPER TRIBUNAL JUDGE COTTON

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

BEKIM PALLUCI
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:
For the Appellant: Ms D Clarke, Home Office Presenting Officer
For the Respondent: Mr J Collins, instructed by Sentinel Solicitors

DECISION AND REASONS

1. This is an appeal by the Secretary of State for the Home Department. For ease, we refer to the parties as they were in the First-tier Tribunal. The appellant is a citizen of Albania born on 15 January 2017. He applied to the respondent under the EU Settlement Scheme ('EUSS') on 16 June 2021. The respondent refused the application by letter dated 13 August 2021 and the appellant appealed this decision. First-tier Tribunal Judge Morgan ('the FtT') allowed the appellant's appeal under the Withdrawal Agreement in a decision promulgated on the 11 February 2022.

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2. At [10] of the decision the FtT found:

> "On the particular facts of this appeal I find that the respondent's decision is disproportionate. I find that the couple were in a durable relationship prior to the end of the transition period. The couple are now married. I find that the couple are in a genuine and durable relationship and note that had they applied prior to the end of the transition period, on the basis of their durable relationship, I would have allowed the appeal under the EEA regulations. This route is no longer open to them however it would be disproportionate in my judgement to deny the appellant leave under the withdrawal agreement because the couple waited until they were married before applying under the Scheme."

3. The respondent appealed on the grounds that the FtT had materially erred in law in two respects:

   a. By finding that the appellant had satisfied the requirements of Appendix EU of the Immigration Rules, despite the appellant not holding a "relevant document". Appendix EU requires a "relevant document" because it shows that residence had been facilitated under the Immigration (EEA) Regulations 2016 ('the 2016 Regulations') which transposed Article 3.2(b) of Directive 2004/38/EC ('the free movement Directive'). In other words, the FtT erred in finding that Appendix EU was satisfied despite the fact that the appellant's residence in the UK was neither facilitated, nor had he applied for facilitation before the UK's exit from the EU on the 31 December 2020; and

   b. By considering whether the appellant's decision was proportionate. Art 10(1)(e) of the Withdrawal Agreement confirms that beneficiaries are those who were residing in accordance with EU Law as of 31 December 2020. The appellant was not, did not come within the scope of the Withdrawal Agreement, and so had no recourse to complaining that the respondent's decision was disproportionate, which is a requirement under art 18(1)(r) of the Withdrawal Agreement. Alternatively, the FtT's analysis of proportionality was inadequate. The FtT had accepted the appellant's "hard luck" story of not being able to get married by the 31 December 2020 in the guise of a proportionality exercise and failed correctly to give reasons for the finding on proportionality.

4. The respondent stated in her grounds of appeal that the question of whether the relationship between the appellant and his wife was "durable" within the meaning of the Immigration Rules is immaterial, because Appendix EU cannot be satisfied by a durable partner whose residence has not been facilitated.

5. Permission to appeal was considered by the FtT on 5 May 2022. The FtT granted permission on the grounds above for the following reasons:

> "Absent any authority on this matter, it is arguable that the provisions of Withdrawal Agreement do not apply in respect of an individual who

has not made an application for "entry to be facilitated" under The Immigration (European Economic Area) Regulations 2016."

Relevant law

6. Article 10 of the Withdrawal Agreement states:

> 2. Persons falling under points (a) and (b) of Article 3(2) of Directive 2004/38/EC whose residence was facilitated by the host State in accordance with its national legislation before the end of the transition period in accordance with Article 3(2) of that Directive shall retain their right of residence in the host State in accordance with this Part, provided that they continue to reside in the host State thereafter.
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> 3. Paragraph 2 shall also apply to persons falling under points (a) and (b) of Article 3(2) of Directive 2004/38/EC who have applied for facilitation of entry and residence before the end of the transition period, and whose residence is being facilitated by the host State in accordance with its national legislation thereafter.
>
> 4. Without prejudice to any right to residence which the persons concerned may have in their own right, the host State shall, in accordance with its national legislation and in accordance with point (b) of Article 3(2) of Directive 2004/38/EC, facilitate entry and residence for the partner with whom the person referred to in points (a) to (d) of paragraph 1 of this Article has a durable relationship, duly attested, where that partner resided outside the host State before the end of the transition period, provided that the relationship was durable before the end of the transition period and continues at the time the partner seeks residence under this Part.
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> 5. In the cases referred to in paragraphs 3 and 4, the host State shall undertake an extensive examination of the personal circumstances of the persons concerned and shall justify any denial of entry or residence to such persons.

7. Article 3(2) of the free movement directive states:

> 2. Without prejudice to any right to free movement and residence the persons concerned may have in their own right, the host Member State shall, in accordance with its national legislation, facilitate entry and residence for the following persons:
>
> > (a) any other family members, irrespective of their nationality, not falling under the definition in point 2 of Article 2 who, in the country from which they have come, are dependants or members of the household of the Union citizen having the primary right of residence, or where serious health grounds strictly require the personal care of the family member by the Union citizen;
> >
> > (b) the partner with whom the Union citizen has a durable relationship, duly attested.
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> The host Member State shall undertake an extensive examination of the personal circumstances and shall justify any denial of entry or residence to these people.

8. Article 18 of the Withdrawal Agreement (as far as is relevant) states as follows:

> 1. The host State may require Union citizens or United Kingdom nationals, their respective family members and other persons, who reside in its territory in accordance with the conditions set out in this Title, to apply for a new residence status which confers the rights under this Title and a document evidencing such status which may be in a digital form.
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> Applying for such a residence status shall be subject to the following conditions:
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> …
>
> (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.

9. 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.
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> (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.

10. The judicial headnote of Celik (EU exit; marriage; human rights) [2022] UKUT 00220 (IAC) states:

> (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.

11. We were also referred to specific paragraphs of the judgment in Celik, which we consider convenient to repeat here:

> 61. The appellant places great reliance on Article 18.1(r) of the Withdrawal Agreement. As we have seen, this gives a right for "the applicant" for new residence status to have access to judicial redress procedures, involving an examination of the legality of the decision as well as of the facts and circumstances on which the decision is based. These redress procedures must ensure that the decision "is not disproportionate".
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> 62. Ms Smyth 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.
>
> 63. The nature of the duty to ensure that the decision is not disproportionate must, however, depend upon the particular facts and circumstances of the applicant. The requirement of proportionality may assume greater significance where, for example, the applicant contends that they were unsuccessful because the host State imposed unnecessary administrative burdens on them. By contrast, proportionality is highly unlikely to play any material role where, as here, the issue is whether the applicant falls within the scope of Article 18 at all.
>
> 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.
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> 65. Against this background, the appellant's attempt to invoke the principle of proportionality in order to compel the respondent to grant him leave amounts to nothing less than the remarkable proposition that the First-tier Tribunal Judge ought to have embarked on a judicial re-writing of the Withdrawal Agreement. Judge Hyland quite rightly refused to do so.

12. We were referred to the Upper Tribunal Immigration and Asylum Chamber Guidance Note 2011 No 2, and in particular to this part of paragraph 10:

> 10. … In the absence of a starred case the common law doctrine of judicial precedent does not apply and decisions of the AIT [now UT IAC] and one constitution of the Chamber do not as a matter of law bind later constitutions. Judges of the First-tier Tribunal Immigration and Asylum Chamber are, however, expected to follow the law set out

> in reported cases, unless persuaded that the decision failed to take into account an applicable legislative provision or a binding decision of a superior court…

The hearing

13. The respondent's submissions were that this case falls on all fours with Celik. The appellant cannot satisfy the requirements of Appendix EU of the Immigration Rules relying on his marriage because it took place after the 31 December 2020, and he could not have succeeded under the route of a durable partner because his stay in the UK was not facilitated. On a correct application of the Immigration Rules and the law, the requirement for his presence in the UK to have been facilitated is a requirement that the FtT could not ignore.

14. Whilst Celik considered the question of proportionality, that was in respect of the redress procedures needing to be proportionate – that there has to be a right of redress and the redress procedure was not to have barriers to its use.

15. The appellant's submissions were that both Celik and Batool are under appeal. Neither are technically binding on the Upper Tribunal (UTIAC Guidance note 2011 No 2).

16. The appellant submitted that [62] of Celik showed the UT considered proportionality did have a role to play. The UT had decided that a submission that "since the appellant could not bring himself within Article 18, sub-paragraph (r) simply had no application" went too far. Further, at [63], the Tribunal found that "[t]he nature of the duty to ensure that the decision is not disproportionate must, however, depend upon the particular facts and circumstances of the applicant."

17. A correct reading of the reasoning of the UT in that case was that proportionality is 'in play'. Proportionality does not compel the granting of leave, but the FtT should have taken all circumstances into consideration. In this case, that includes the fact that the appellant and his spouse could not have married before the 31 December 2020 because of the public health restrictions in place at the time.

18. Turning to principles of public law, the appellant sought to distinguish the current case from that of Celik by highlighting that he does not say the respondent should have treated the appellant's marriage as if it had taken place before 31 December 2020. The appellant instead takes the position that the decision maker should properly take into account the disruption caused by COVID-19 and the fall out in cases such as this one. Decision making by public authorities generally had to take into account the effects of the pandemic. It would be illogical not to do so.

19. For those reasons, said the appellant, we can depart from the approach in Celik.

Conclusions and reasons

20. The excerpt of paragraph 10 of the Upper Tribunal Immigration and Asylum Chamber Guidance Note 2011 No 2 captures the law on whether we are bound by previous decisions of the Upper Tribunal. Mr Collins' submissions to us were in line with that note and the respondent did not seek to suggest otherwise. We are not bound by previous decisions of the UT, but they may be of use when carrying out our own analysis.

21. The provisions of the free movement Directive and the Withdrawal Agreement combine, in our judgment, as follows. Article 3(2) of the free movement Directive provides a right of residence for family members and partners with whom the Union Citizen is in a durable relationship. Art 10(2) of the Withdrawal Agreement preserves this right beyond the UK's exit from the EU on condition that the person's residence was facilitated by the UK (or that facilitation had been applied for).

22. The Immigration Rules transpose these requirements, and the requirement for 'facilitation' appears in the Immigration Rules as a requirement for an applicant to hold a 'relevant document' (here a family permit or residence card) in order to qualify as a durable partner. It was not in dispute before the FtT (or before us) that the appellant did not hold a 'relevant document'. The FtT erred in law in failing to consider this.

23. We agree with the sentiment at [62] of Celik that the drafting of Art 18.1(r) of the Withdrawal Agreement is intended to apply more widely than to those who can show themselves as being within the EUSS. We adopt the approach in Celik that the nature of the duty to ensure the decision is not disproportionate must depend on the particular facts and circumstances of the applicant.

24. The FtT was therefore faced with an appellant whose circumstances were (in summary) that he could not marry before the 31 December 2020, his stay was not facilitated and no application for facilitation had been made. The appellant cannot satisfy the requirements of Appendix EU.

25. It is within those tight bounds that the FtT had to interpret the requirement of proportionality. The FtT cannot dis-apply the clear requirements of the EUSS.

26. In the circumstances of this appellant, we find that the outcome of his appeal is the same as is expressed in paragraph 2 of the judicial headnote of Celik: without a substantive right under the EUSS, this appellant cannot invoke the concept of proportionality in order to succeed in his appeal.

27. The FtT did not have the benefit of Celik or Batool when he made his decision. The FtT erred in law in this case on both the grounds of appeal and the FtT decision is set aside.

28. At the hearing we indicated that, should we find a material error of law, the matter would remain in the Upper Tribunal. We therefore remake the decision as follows.

29. We adopt the reasoning of Celik. The appellant did not have a relevant document and is therefore excluded from the definition of a 'durable partner' within the Immigration Rules Appendix EU. Equally his presence was not 'facilitated' so as to bring him within art 10(2) of the Withdrawal Agreement and he cannot otherwise benefit from the Withdrawal Agreement.

30. The Home Office decision did not breach the appellant's rights under the Withdrawal Agreement and the Home Office decision was in accordance with the Immigration Rules. We dismiss the appellant's appeal under the Immigration (Citizens' Rights) (EU Exit) Regulations 2020.

Notice of Decision

The Secretary of State's appeal is allowed.

The decision of 11 February 2022 is set aside and remade.

The appellant's appeal is dismissed under the Immigration (Citizens' Rights) (EU Exit) Regulations 2020.

Signed D Cotton Date: 26 October 2022
Deputy Upper Tribunal Judge Cotton

TO THE RESPONDENT
FEE AWARD

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

Signed D Cotton Date: 26 October 2022
Deputy Upper Tribunal Judge Cotton

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.