Upper Tribunal
(Immigration and Asylum Chamber) Appeal Numbers: EA/12635/2021
UI-2022-002780

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 18 October 2022	**On 4 December 2022**

Before

UPPER TRIBUNAL JUDGE McWILLIAM

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

SAIMIR NELAJ
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:
For the Appellant: Ms A Everett, Senior Home Office Presenting Officer
For the Respondent: Mr A Rahmen, Counsel instructed by Haven Green Solicitors

DECISION AND REASONS

1. I shall refer to the Respondent as the Appellant as he was before the First-tier Tribunal.

2. The Appellant is a citizen of Albania and his date of birth is 29 May 1984.

3. In a decision of 16 May 2022 the First-tier Tribunal (Judge I Burnett) granted the SSHD permission to appeal against the decision of the First-tier Tribunal (Judge Barker) to allow the Appellant's appeal against the

decision of the SSHD on 18 August 2021 to refuse his application (made on 26 May 2021) for settled status under the EU Settlement Scheme (EUSS) as the spouse of a relevant EEA citizen.

4. The SSHD's decision was based on the Appellant not meeting the Immigration Rules under Appendix EU because he did not hold a relevant document confirming his right of residence as the spouse or durable partner of an EEA national.

5. The Appellant exercised his right of appeal under Regulation 3 of the Immigration (Citizens' Rights Appeals) (EU Exit) Regulations 2020 ("the Exit Regulations 2020") on the grounds available to him under Reg 8(2)(a) of the same. In short the Appellant appealed on the basis that the decision was not in accordance with the Immigration Rules (Appendix EU) and that it breached his rights under the Withdrawal Agreement.

6. The judge recorded that the parties agreed that the Sponsor in this case was a relevant EEA citizen with settled status and that the Appellant and the Sponsor were legally married after the specified date of 31 December 2020. It was agreed that the Appellant did not hold a relevant document.

7. The issues in dispute were identified by the judge at [23] as follows; (1) whether it was necessary for the Appellant to hold a relevant document in order to meet the requirements of Appendix EU, and (2) whether the Appellant and the Sponsor were in a durable relationship before the specified date. The judge recorded the SSHD's representative accepted that the Appellant and the Sponsor were in a durable relationship before the specified date.

8. The judge stated the following at [24]:-

> "Whilst Miss Billen [the representative on behalf of the Secretary of State before the First-tier Tribunal] stated that she could not make any concessions on behalf of the Respondent, she did accept that as far as the issue identified in paragraph 23.b above is concerned, [whether the Appellant and the Sponsor were in a durable relationship before the 31 December 2020], if I find that the Appellant and the sponsor were in a durable relationship before the specified date, then she could not argue that the appeal should be dismissed, as it was accepted that refusal in those circumstances would be disproportionate and a breach of the Withdrawal agreement."

9. At [34] the judge found that the Appellant was not resident as the durable partner of an EEA citizen because he did not hold a relevant document having considered Annex 1 of Appendix EU. The judge said at [35] that it followed that the Appellant did not meet the relevant Rules under Appendix EU. However, the judge identified at [36] that this was not determinative of the appeal because the Appellant also relied on the Withdrawal Agreement.

10. In relation to the Withdrawal Agreement the judge stated as follows:-

> "37. The purpose of the Withdrawal agreement is to protect the rights of those people who are entitled to be in the UK, and ensure that those who did come within the terms of the EEA Regulations pre-Brexit were offered that same protection post-Brexit.
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> 38. Article 10 of the Withdrawal Agreement deals with the scope of the agreement, and confirms that it applies to those people who fall within 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, and that they shall retain their right of residence in the host State in accordance with the Withdrawal agreement providing that they continue to reside in the host State thereafter.
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> 39. Paragraph 3 of Article 10 confirms that the above will also apply to those people who fall within points (a) and (b) of Article 3(2) of the same Directive, 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.
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> 40. For the avoidance of any doubt, Article 3(2) of the Directive includes family members and durable partners.
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> 41. I interpret the detail above, to mean that as long as the Appellant's residence in the UK was in accordance with the UK's national legislation before the end of the transition period in accordance with Article 3(2) of that Directive, and he made an application for residence or entry to the UK before the time allowed for such applications (which was extended to 30th June 2021 by the Respondent for those who were resident in the UK before the end of the transition period on 31st December 2020), he is entitled to the protection of the Withdrawal agreement.
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> 42. Whilst of course, proof of a timely application alone is not sufficient to demonstrate that the Appellant is entitled to the protection of the Withdrawal agreement. The real issue, is whether the Appellant's residence was in accordance with its national legislation before the end of the transition period in accordance with Article 3(2) of that Directive.
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> 43. Having considered this, I am entirely satisfied that the Appellant and sponsor were in a durable relationship before the specified date. Whilst it is accepted that the Appellant and the sponsor only began living together on 29th May 2019, which is less than two years by the specified date of 31st December 2020, the definition of 'durable partner' clearly states that this is not a

necessary requirement if I am satisfied that there is other significant evidence of the durable relationship. I am so satisfied.

44. Having had the benefit of hearing the Appellant and sponsor give oral evidence, I am wholly satisfied that they were credible and reliable witnesses. They gave accounts which were consistent with each other, but most significantly, consistent with the documentary evidence provided to me. They answered all questions asked of them without difficulty, and provided a clear and cogent account of their relationship. Whilst the sponsor was clearly nervous, in my judgment this did not detract from the cogency of her account, which I accept without hesitation. Both the Appellant and the sponsor impressed me as witnesses who were determined to provide an honest and truthful account, and gave no indication at any point that they were doing anything other than that.

45. In those circumstances, I find that I am entitled to attach significant weight to their oral evidence.

…"

11. The judge accepted that the Appellant would have married before the specified date but for the pandemic and that they in fact had a wedding ceremony booked on 7th November 2020. The judge stated as follows:-

"49. There is no suggestion from the Respondent, as confirmed by Miss Billen during the hearing, that the parties are not in a genuine relationship, or that their marriage is contrived in any way to gain an immigration advantage."

12. The judge stated:-

"51. In my judgment, in those circumstances, the Appellant can take advantage of the safeguards set out in Article 15 and Chapter VI of Directive 2004/38/EC, as set out in Article 21 of the Withdrawal Agreement, and can legitimately argue that before his marriage to the sponsor he fell within its scope as a durable partner who was resident in the UK as such, prior to 31st December 2020.

52. Whilst it is agreed that there is no right of appeal against the Respondent's decision on human rights grounds, the Withdrawal agreement, and specifically Article 18 dealing with residence documents, provides that applicants shall have access to redress procedures against any decision refusing to grant residence status, and such redress procedures must ensure that the decision is not disproportionate.

53. I acknowledge that the Appellant was initially in the United Kingdom illegally, and in fact made no application for a relevant document before the end of the transition period.

54. However, in my judgment my findings about the nature and timing of the relationship between the sponsor, and in particular the unchallenged evidence that the Appellant and sponsor had given notice of their intention to marry long before the 31st December 2020 and the circumstances that led to their marriage ceremony being delayed as it was, are significant.

55. Notwithstanding the strong public interest in maintaining effective immigration controls, and my findings that the Appellant does not meet the requirements of the rules, I find that the Respondent's refusal decision solely on the basis of a lack of relevant documentation, is disproportionate.

56. In light of those findings, I find that the Respondent's decision is in breach of the Withdrawal agreement."

The Grounds of Appeal

13. The grounds of appeal assert that the judge materially erred in failing to properly apply the provisions of the Withdrawal Agreement. It is asserted that the Appellant does not come within the Withdrawal Agreement with reference to Articles 10(1)(e), Article 10(2) and Article 10(3). It is asserted that beneficiaries of the agreement are those who were residing in accordance with EU Law as of 31 December 2020 (the specified date). The Appellant in this case had not had his residence facilitated in accordance with the Immigration (European Economic Area) Regulations 2016 ("the 2016 Regulations"). The judge at [53] acknowledged as much while stating that the Appellant was in the UK illegally and had not made an application for a relevant document before the end of the transition period. The decision that the Appellant was residing in the UK in accordance with the requirements of Article 3.2(b) of Directive 2004/38/EC was irrational.

14. The judge erred in a finding that the Appellant fell within the personal scope of the Withdrawal Agreement despite only making an application for facilitation after the transition period had ended.

15. There was no entitlement to the full range of judicial redress including Article 18(1)(r) which requires the decision to be proportionate. In any event the judge's consideration of proportionality is wholly inadequate in the context of an applicant who did not meet the applicable Immigration Rules. Whether the Appellant was in a durable relationship by 31 December 2020 was irrelevant.

Celik (EU exit; marriage; human rights) [2022] UKUT 00220

16. The First-tier Tribunal did not have the benefit of the guidance by the Upper Tribunal in Celik. The headnote of Celik reads 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.
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> (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.
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> (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."

17. The UT in Celik specifically engaged with the issue of proportionality with reference to the Withdrawal Agreement (Article 18.1(r)) and fairness and stated as follows:

> "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.
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> 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.

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.

66. We also agree with Ms Smyth that the appellant's interpretation of Article 18(1)(r) would also produce an anomalous (indeed, absurd) result. Article 18 gives the parties the choice of introducing "constitutive" residence schemes: see Article 18.4. Article 18.1(r) applies only where a State has chosen to introduce such a scheme. If sub-paragraph (r) enables the judiciary to re-write the Withdrawal Agreement, this would necessarily create a divergence in the application of the Withdrawal Agreement, as between those States that have constitutive schemes and those which do not. This is a further reason for rejecting the appellant's submissions."

67. Closely linked to the appellant's submissions on proportionality is his attempt to invoke the principle of fairness. The appellant's case is that he would have secured a date for his wedding to take place before 31 December 2020, but for the Covid-19 pandemic. Although there is nothing in the exchanges with the Register Office that confirms this assertion, we shall take the appellant's case at its highest and assume that this was so.

68. Even on that assumption, however, the principle of fairness cannot assist the appellant. As is the case with proportionality, it does not give a judge power to disregard the Withdrawal Agreement."

Error of law

18. Mr Rehman relied on his Rule 24 response. Ms Everett relied on the grounds and Celik.

19. The Appellant's case is that but for the pandemic and ensuing COVID -19 Regulations, he would have married the Sponsor before the relevant date, 31 December 2020. The case is on all fours with Celik. The reasoning of the judge is at odds with the findings of the UT and guidance given in Celik. This Appellant does not fall within the scope of Article 10 of the Withdrawal Agreement. His residence was not facilitated by the Respondent before 11pm on 31 December 2020. It was not enough for the Appellant to have been in a durable relationship to come within Article 10 of the Withdrawal Agreement. The Appellant does not come within the scope of the Withdrawal Agreement and has no substantive rights under it. The issues identified by the judge at [23] and the concession recorded at [24] are misconceived. The purported concession has no legal basis and cannot be sustained.

20. The judge erred at [41]. The relevant date is and has always been 31 December 2020 by which time an Appellant must have met the relevant requirements. The extension to the 30 June 2021 applied to the making of a late application under the EUSS and not to the Appellant's status at the relevant date. This Appellant does not have a substantive right under the EU agreement and cannot invoke the concept of proportionality in Article 18 (r) or the principle of fairness to succeed in an appeal under the Exit Regulations 2020. I reject Mr Rehman's submissions which run contrary to what was said in Celik (specifically at [60] – [65]).

21. The judge correctly concluded that the Appellant cannot meet the requirements of Appendix EU and to dismiss the appeal under the Immigration Rules (IR).

22. The judge materially erred when allowing the appeal under the Withdrawal Agreement. I set aside the decision of the First-tier Tribunal to allow the appeal on this basis. Neither party had anything to add concerning re-making.

23. I dismiss the appeal under the Immigration Rules and the Withdrawal Agreement.

24. No anonymity direction is made.

Signed *Joanna McWilliam* Date 1 November 2022

Upper Tribunal Judge McWilliam