IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: **UI-2022-003720**
First-tier Tribunal No:
EA/02731/2022

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On the 24 March 2023

Before

UPPER TRIBUNAL JUDGE LANE

Between

Secretary of State for the Home Department

Appellant

and

DIAMANT CAKRAJ
(NO ANONYMITY ORDER MADE)

Respondent

Representation:
For the Appellant: Mr Diwnycz, Senior Presenting Officer
For the Respondent: Ms Atas

Heard at Phoenix House (Bradford) on 9 December 2022

DECISION AND REASONS

1. I shall refer to the appellant as the 'respondent' and to the respondent as the 'appellant' as they appeared respectively before the First-tier Tribunal.

2. The appellant is a male citizen of Albania who was born on 12 April 1999. His partner, Angelina Gazeta, was granted indefinite leave to remain on 11 March 2020. On 19 June, 2021 the appellant made an application for an EU Settlement Scheme (EUSS) Family Permit under Appendix EU (Family

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Permit) as a durable partner of a relevant EEA National, namely, Ms. Gazeta. He was refused by a decision of the Secretary of State dated 17 February 2022. The Secretary of State considered that the appellant had failed to prove that he was a family member of his sponsor as defined in Annex 1 of Appendix EU as at 31st December 2020. The appellant appealed to the First-tier Tribunal which, in a decision promulgated on 1 July 2022, allowed the appeal. The Secretary of State now appeals, with permission, to the Upper Tribunal.

3. The parties before the Tribunal agree that the appeal turns on a single issue; could the appellant's application to the Secretary of State succeed when he did not have a residence card issued to him prior to 31 December 2021 (the termination of the post-EU exit transition period) and did not meet the requirements of Annex 1 of Appendix EU of the Immigration Rules?

4. The appellant was represented by Ms Atas before the Upper Tribunal. On the morning of the initial hearing, she sent a revised skeleton argument by email to myself and Mr Diwnycz.

5. The facts in the present case are similar to those in *Celik (EU exit; marriage; human rights*) [2022] UKUT 220 (IAC). In that case, the appellant applied for leave to remain under the EU Settlement Scheme before the end of the transition period but was refused in March 2021 on the ground that he 'had not been issued with a registration certificate, family permit or residence card under the Immigration (European Economic Area (Regulations) 2016 as an extended family member (durable partner) of the Romanian national; and therefore did not meet the requirements of the EUSS as a family member of a relevant EEA citizen.' An issue arose in *Celik* concerning the claimed inability of the appellant to marry his partner before the end of the transition period on account of the Covid pandemic which is not relevant here. Paragraphs [1-2] of the headnote, which are directly relevant to the instant appeal, read 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.*
>
> *(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.*

6. Although the First-tier Tribunal judge appeal promulgated its decision shortly before *Celik* was reported, it is apparent that, if correct, the decision in

Celik shows that the First-tier Tribunal erred in law. This is not a case where the First-tier Tribunal was following jurisprudence which was subsequently shown to incorrect; Celik represented the first authoritative guidance on this issue following the United Kingdom's departure from the EU.

7. Ms Atas submits that *Celik* was wrongly decided. First, she submits that the Upper Tribunal wrongly held that an individual in durable relationship with an EU citizen has no substantive rights under the Withdrawal Agreement unless their entry was facilitated before the end of the transition period of had applied for facilitation before that date. She also submits that the Upper Tribunal was wrong to find that such a person cannot invoke proportionality under EU law as a reason why the refusal of EUSS leave in their case was contrary to the Withdrawal Agreement. That submission appears at [11(iv)] of Ms Atas's skeleton argument but is not referred to again nor did she raise proportionality in her oral submissions.

8. Ms Atas cites Article 10(2-4) of the Withdrawal Agreement which considers the position of 'Other Family Members', that is 'extended family members' under Article 3(2) of Directive 2004/38/EC:

> 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.
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> 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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> 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.

Ms Atas submits that Article 10(4) is a 'catch all' provision intended to cover all durable partners whose relationships began before the end of the transitional period and continued at the time the partner made an EUSS application. She submits that Article 10 does not specify that the persons

covered needed to have been residing outside the host State at the end of the transition period nor does the Article 'specify the 'before' period'.

9. I disagree with Ms Atas. Taking her second point first, her submission, if valid, would effectively strip Article 10(4) of meaning and purpose. The words 'where that partner resided outside the host State before the end of the transition period' are unlikely to be wholly otiose. The appellant's argument suggests that the provision would apply provided that the partner had at some time in the past resided outside the United Kingdom; it is reasonable to assume that the vast majority of such partners will have resided outside the United Kingdom at some point in their lives. I acknowledge that the provision could have been more clearly drafted but I consider that it is tolerably clear that Article 10(4) refers to those partners who were living outside the United Kingdom immediately before the end of the transition period. Those were not the circumstances of the appellant in the present appeal.

10. Secondly, I find that *Celik* provides a correct statement of the law. At [52], the Upper Tribunal held:

> 52. There can be no doubt that the appellant's residence in the United Kingdom was not facilitated by the respondent before 11pm on 31 December 2020. It was not enough that the appellant may, by that time, have been in a durable relationship with the person whom he married in 2021**. Unlike spouses of EU citizens, extended family members enjoyed no right, as such, of residence under the EU free movement legislation**. The rights of extended family members arose only upon their residence being facilitated by the respondent, as evidenced by the issue of a residence permit, registration certificate or a residence card: regulation 7(3) and regulation 7(5) of the 2016 Regulations. [my emphasis]

If Ms Atas is correct, then the Withdrawal Agreement would confer on extended family members rights which they had never enjoyed under EU free movement legislation during the United Kingdom's membership of the EU. Moreover, if Article 10 (4) is a 'catch all' provision then Article 10 (2) and (3) would have no purpose; all those in durable relationships before and after the end of the transition period would be able to remain in the United Kingdom irrespective of any facilitation of a right to reside which they had obtained from the host State. I prefer the Upper Tribunal's analysis to that of Ms Atas.

11. Ms Atas's second submission is that Celik, if correct, would give rise only to 'illusory' appeals as 'most, if not all refusals under the EUSS occur, because of historic failure to apply for residence permit.' I disagree. The Withdrawal Agreement seeks, in part, to identify 'large and important classes of persons whose positions in the host State are protected, following the end of the transition period clearly' as the Upper Tribunal observed in *Celik*. If other 'classes of persons' are unable to appeal successfully that is simply the consequence of the terms of the agreement. In any event, Article 10(3), for example, does provide a remedy (and a right of appeal) for an

applicant who 'had applied for facilitation of entry and residence before the end of the transition period' but whose application may be refused (see *Celik* at [53]).

12. Ms Atas's third and final submission cannot succeed in the light of the findings I have reached above. She submits that Article 18(n) prevents the host State from requiring an applicant 'to present supporting documents that go beyond what is strictly necessary and proportionate to provide evidence that the conditions relating to the right of residence.' She argues that the applicant is required to do no more than prove that he is a durable partner so requiring him to present any document (for example, a residence card) would breach Article 18(n). Given that I agree with the reasoning in *Celik*, I reject that submission.

13. In the circumstances, the Secretary of State's appeal is allowed. The First-tier Tribunal erred in its interpretation of the Withdrawal Agreement although I fully acknowledge that the judge did not have the benefit of the guidance of *Celik.* The appellant, like Mr Celik, has no substantive rights under the Withdrawal Agreement because his residence in the United Kingdom had not been facilitated before 31 December 2021 nor had he applied for facilitation before that date. It follows that I should remake the decision and dismiss the appellant's appeal.

Notice of Decision

The Secretary of State's appeal is allowed. I set aside the decision of the First-tier Tribunal. I remake the decision dismissing the appellant's appeal against the decision of the Secretary of State dated 17 February 2022.

C. N. Lane

Judge of the Upper Tribunal
Immigration and Asylum Chamber

Dated: 10 January 2023