IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Ce-File Number: UI-2022-001780
First-tier Tribunal No: EA/11494/2021

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On the 01st March 2023

Before

UPPER TRIBUNAL JUDGE MCWILLIAM

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

SAMED HAXHIJA
(NO ANONYMITY ORDER MADE)

Respondent

Representation:

For the Appellant/SSHD: Ms N Willocks-Briscoe, Senior Presenting Officer
For the Respondent: no appearance

Heard at Field House on 17 January 2023

DECISION AND REASONS

1. I shall refer to the Respondent as the Appellant as he was before the First-tier Tribunal. He is a citizen of Albania. His date of birth is 25 January 1993. On 26 April 2022 the First-tier Tribunal (Judge Saffer) granted permission to the SSHD to appeal against the decision of the First-tier Tribunal (Judge Atreya) to allow the Appellant's appeal against the decision of the SSHD on 1 July 2021 to refuse his Appellant's application for a family permit under Appendix EU (EU11 and EU14).

2. The SSHD's position was that the Appellant was unable to meet the requirements of Appendix EU. The Appellant did not provide a valid marriage certificate showing that the marriage took place on or prior to 31 December 2020. Moreover, the Appellant was not a documented durable partner and he had not

© CROWN COPYRIGHT 2023

been issued with a family permit or residence card under the EEA Regulations as either the spouse or durable partner of an EEA national.

3. The SSHD was not represented before the First-tier Tribunal. The Appellant was represented at the hearing. The judge identified the issue at paragraph 2 of the decision as follows:

> "The main issue before me was whether the appellant was a family member namely was he married before the specified date or was he in a durable relationship with an EEA national."

4. The Appellant and the Sponsor gave evidence at the hearing. The Appellant's evidence was that he entered the UK unlawfully in December 2017 and had been living in the UK since that time. He and the Sponsor intended to marry on 23 July 2020 but were prevented from doing so as a result of COVID restrictions. They married on 19 April 2021. The judge made findings at paragraphs 18 to 33, which can be summarised:-

    (1) The Appellant and the Sponsor are credible.

    (2) The Appellant is married to an EEA national at the date of the hearing.

    (3) They are committed to each other and gave notice of their intention to marry on 23 July 2020 well before the specified date but were unable to do so as a result of the COVID pandemic.

    (4) The inability to marry before the specified date was completely beyond the control of the Appellant and the Sponsor.

    (5) But for COVID restrictions, they would have married before the specified date on 31st December 2020.

    (6) There is significant evidence of a genuine, long-term, durable relationship.

    (7) The Appellant cannot meet the requirements for settled status as a family member of a relevant EEA citizen because he does not have a valid family permit or residence card issued under the EEA Regulations.

    (8) The Appeal is dismissed under Appendix EU of the Immigration Rules.

5. The judge went onto consider the appeal under the Withdrawal Agreement and made the following findings:

> "31. I accept that there was conspicuous unfairness caused to the appellant who can establish that he would have been entitled to a grant of limited leave to remain on the basis of marriage.
>
> 32. I accept there has been a failure for the respondent to consider the application in the context of the state imposed restrictions which caused conspicuous unfairness to the appellant

33. In those circumstances I allow the appeal to the extent I remit the appeal back to the respondent for further consideration.

Notice of Decision

34. I allow the appeal on a limited basis to the extent that it is sent back to the respondent for further consideration in light of my findings of conspicuous unfairness caused to the appellant."

The SSHD's Grounds of Appeal

6. The grounds of appeal assert that the judge made a material error of law. The determination lacks clarity. It was not open to the judge to allow the appeal under the Withdrawal Agreement and in any event the judge has reported to "remit" the matter to the Secretary of State on an unclear basis.

7. The Appellant is not within the scope of the Withdrawal Agreement with regard to Article 10(1)(a) because the scheme applies to those who were residing in accordance with EU Law before 31 December 2020. The Appellant was not doing so. He had not made an application for facilitation of his admission and residence pursuant to Article 3.2(b) of the Citizens' Directive. The Appellant's residence had not been facilitated and nor had he applied for facilitation before 31 December 2020. He did not come within the scope of the Withdrawal Agreement.

The Law

8. Since the decision of the First-tier Tribunal and the drafting of the Grounds of Appeal the Upper Tribunal has reported Celik (EU exit, marriage, human rights) [2022] UKUT 00220. 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.

(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."

9. The day before the hearing the Appellant through his representatives made an application to withdraw the appeal under Rule 17 of the Tribunal Procedure (Upper Tribunal) Rules 2008. I indicated to the parties that in the light of this being the SSHD's application it was not open to the Appellant to withdraw his

case at this stage; however the application would be considered if the UT set aside the decision of the judge to allow the appeal.

10. Neither the Appellant nor his representatives attended the hearing. I considered that it was in the interest of justice to proceed in his absence.

11. The Appellant has a right of appeal by virtue of Regulation 3 of the Immigration (Citizens' Rights Appeals) EU Exit Regulations 2020 against the decision of the SSHD. The grounds of appeal available are set out in Regulation 8. To summarise insofar as it applies to the decision in issue in this case, the grounds of appeal available to this Appellant are that the decision in not in accordance with the Immigration Rules (Appendix EU) or the decision is in breach of the Withdrawal Agreement. The judge dismissed the appeal under the Immigration Rules. There is no cross-challenge to this. In any event, the Appellant was unable to meet the requirements of the Immigration Rules.

12. The judge found that the decision was in breach of the Withdrawal Agreement. There is no need for me to set out in the reasoning in Celik. However, properly applying Celik this Appellant was not within scope of the Withdrawal Agreement. In any event, the judge was not entitled to dispose of the appeal in the way that he did. There is no jurisdiction to allow an appeal on a limited basis in order to send it back to the Respondent for further consideration. It was not open to the judge to allow the appeal either under the Withdrawal Agreement applying Celik and/ or on a limited basis. I set aside the decision to allow the appeal.

Notice under Rule 17 of the Tribunal Procedure (Upper Tribunal) Rules 2008.

13. The Appellant has applied for his case to be withdrawn. This application complies with Rule 17. His case is withdrawn pursuant to Rule 17. Thus there is no appeal before the Tribunal.

Joanna McWilliam
Judge of the Upper Tribunal
Immigration and Asylum Chamber

Joanna McWilliam
6 February 2023