IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI- 2022-003113
First-tier Tribunal No: EA/12386/2021

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On the 10 March 2023

Before

UPPER TRIBUNAL JUDGE STEPHEN SMITH
DEPUTY UPPER TRIBUNAL JUDGE HARIA

Between

Secretary of State for the Home Department

Appellant

and

Orgest Basha
(NO ANONYMITY DIRECTION MADE)

Respondent

Representation:
For the Appellant: Mr S. Whitwell, Senior Home Office Presenting Officer
For the Respondent: Mr J. Collins, Counsel, instructed by Sentinel Solicitors

Heard at Field House on 11 January 2023

DECISION AND REASONS

1. This is an appeal by the Secretary of State against a decision of First-tier Tribunal Judge Anthony ("the judge") promulgated on 29 March 2022. The judge allowed an appeal against a decision of the Secretary of State dated 12 August 2021 to refuse the appellant's application for leave to remain under the EU Settlement Scheme ("the EUSS").

2. We will refer to the appellant before the First-tier Tribunal as "the appellant" for ease of reference.

Factual background

3. The appellant is a citizen of Albania born on 13 August 1992. He does not appear to hold leave to remain, or to have otherwise been lawfully granted entry to the United Kingdom. In December 2019, he began to cohabit with Sonia Anisoara Raducanu, a citizen of Romania ("the sponsor"). They got engaged in 2020 and wanted to get married as soon as possible. They attempted to make arrangements to do so in June and July 2020, and later throughout the year, but were ultimately unable to do so because, on their case and the judge's findings, of the Covid-19 situation pertaining in the UK at the time. They eventually got married on 17 May 2021.

4. On 26 May 2021, the appellant applied for pre-settled status under the EUSS. That application was refused by the Secretary of State for the following reasons. First, the marriage between the appellant and the sponsor took place after the conclusion of the "implementation period" ("the IP") under the EU-UK Withdrawal Agreement ("the WA"), namely 11PM on 31 December 2020. Secondly, he could not succeed as a "durable partner" in the alternative, since he had not been issued with a "relevant document", namely a residence card or an EEA family permit in that capacity under the Immigration (European Economic Area) Regulations 2016 ("the 2016 Regulations").

5. The appellant appealed to the First-tier Tribunal. The judge found that, had Covid-19 not disrupted their plans, they would have married before the conclusion of the IP "and most likely would not be in the position that they find themselves now" (para. 23).

6. The judge's operative analysis focussed on the definition of "durable partner" contained in Annex 1 to Appendix EU. She examined the constituent provisions of the definition in turn, reaching unchallenged findings that the appellant and the sponsor were in a genuine relationship (para. 34). She accepted that the appellant could not meet the requirement contained in para (b)(i) of the definition to have been issued with a "relevant document", and her analysis therefore focussed on the provisions of the definition which address applicants who had not been issued with a relevant document, namely the criteria contained in paragraph (b)(ii) and following.

7. The crux of the judge's operative analysis lay in her interpretation of paragraph (b)(ii)(bb)(aaa) of the definition, which provides that a "durable partner" was a person who:

> "(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…"

In this decision, we refer to this paragraph as "para. (aaa)". The judge supplied the above emphasis, which we have replicated.

8. At para. 41 the judge said:

> "The sentence which follows from "unless" appears to provide for circumstances in which someone who is not resident can still satisfy the definition of a durable partner."

9. There appears to have been extensive discussion at the hearing before the judge as to whether para. (aaa) applied only to persons from abroad (see para. 42). The appellant's representative was unable to shed any light on the meaning of the provision (see para. 43), and the Secretary of State's guidance was, found the judge "most unhelpful", as it simply reiterated para. (aaa) without any further explanatory notes (para. 44).

10. Against that background, the judge found that the word "otherwise" in para. (aaa) was a "reference to a lawful basis of stay in any other capacity, not under the [2016] Regulations." The judge interpreted the "unless" clause in para. (aaa) as rendering the absence of any lawful status a positive attribute, pursuant to which an applicant could meet the definition of a "durable partner". The judge concluded her analysis on this point in the following terms, at para. 46:

> "Therefore, I find the appellant satisfies requirement (b)(ii)(bb)(aaa) because the appellant was 'not resident' as he did not hold a relevant document as the durable partner of a relevant EEA citizen who is his sponsor and he did not otherwise have a lawful basis of stay in the UK for the period prior to the specified date."

11. The judge allowed the appeal on the above basis. However, before concluding her decision she added, at para. 48:

> "In the alternative, I agree with Mr Azmi [the appellant's representative's] principal submission that the respondent's decision is not in accordance with the Withdrawal Agreement as the Withdrawal Agreement does not require the appellant to possess a family permit or a residence card before an application can be made under Appendix EU. I agree with Mr Azmi that to require the appellant to do so is an unreasonable burden and contrary to the Withdrawal Agreement."

12. The judge allowed the appeal, observing that the appellant was entitled to pre-settled status.

Grounds of appeal

13. The grounds of appeal contend that that the judge erred in her understanding of para. (aaa), adopting an incorrect interpretation of the provision which rendered the requirements of the WA for a putative durable partner to have been lawfully resident on 31 December 2020 obsolete. Secondly, the WA confers no substantive rights on a person in the appellant's circumstances. Pursuant to Article 10(1)(e) WA, only those who were residing in accordance with EU law at 11PM on 31 December 2020 are within the scope of the agreement.

14. Permission to appeal was granted by First-tier Tribunal Judge L J Murray, who considered that it was arguable that the judge's interpretation of para. (aaa) was flawed.

Submissions

15. Mr Whitwell relied on the grounds of appeal, noting that they were settled before the decision of this tribunal in *Celik (EU exit; marriage; human rights)* [2022] UKUT 220 (IAC). *Celik* underlined the need for a putative durable partner to have their residence facilitated, he submitted. The purpose of para. (aaa) was to prevent those without any lawful basis to reside in the UK from enjoying any rights under the WA, he submitted. Para. (aaa) recognises that there would be some durable partner applicants who enjoyed leave to remain, or a right to reside, on another basis at the relevant time, and so could not have been expected to apply for their residence to be facilitated.

16. For the appellant, Mr Collins emphasised that there has been an application for permission to appeal to the Court of Appeal in *Celik*, which remains pending, but expressly did not invite us to adjourn the proceedings. He disputed the assertion in the Secretary of State's grounds of appeal that a person such as this appellant is outside the scope of the WA. He added that the tribunal in *Celik* recognised that there would be some cases where a person otherwise outside the personal scope of the agreement nevertheless enjoys a proportionality-based basis to be brought within its scope, and that the assessment of proportionality was a matter for the judge. To the extent *Celik* militated in favour of a contrary conclusion, we should not follow it.

The law

17. Article 10 of the WA provides, where relevant:

> "1. Without prejudice to Title III, this Part shall apply to the following persons:
>
> […]
>
> (e) family members of the persons referred to in points (a) to (d), provided that they fulfil one of the following conditions: (i) they resided in the host State in accordance with Union law before the end of the transition period and continue to reside there thereafter…
>
> 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.
>
> 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."

18. Directive 2004/38/EC makes provision for EU citizens and their family members to move and reside freely within the territory of the Member States. Pursuant to the WA, it continued to apply to the UK until the conclusion of the IP. Article 3(2) imposes (or in the case of the UK, imposed) a duty on host Member States to "facilitate" the residence of certain other family members and "durable partners"

in accordance with national legislation. The 2016 Regulations transposed the directive into domestic law.

19. The definition of "durable partner" in Appendix EU is also relevant; we have already set out the central provision, para. (aaa), above, and to the extent further citation is required, we will set out the relevant extracts in the course of our discussion.

Discussion

Paragraph (aaa)

20. It was common ground at the hearing before us that the judge had erred in relation to para. (aaa).

21. Since the provision has caused a considerable degree of confusion before the First-tier Tribunal we will set out our reasoning for endorsing the common ground.

22. The drafting of paragraph (b)(ii)(bb)(aaa) is complex. Particular confusion has arisen due to the "unless" clause towards the end of the paragraph. On some constructions, the "unless" serves to benefit a person unlawfully present in the UK, as though it renders an applicant's otherwise unlawful presence in the UK a positive attribute, and part of the criteria to be recognised as a durable partner.

23. Such a construction would lead to an absurdity. It would enable putative durable partners who would otherwise not enjoy any lawful immigration status to be able to rely on their unlawful presence as a means to regularise their stay. In our judgment, it is unlikely that the Secretary of State sought to introduce such a far-reaching amnesty through the drafting of paragraph (aaa). Properly understood, we find that it cannot have that effect.

24. It is important to recall that, by definition, paragraph (b)(ii)(bb)(aaa) only applies to applicants who are or were in a durable relationship with a relevant EEA citizen: see paragraph (a) of the definition of "durable partner". The analysis that follows therefore takes place on the footing that the existence of a durable relationship with an EEA sponsor is not in issue (as found by the judge in these proceedings). Merely being in a durable partnership with an EEA national does not render an applicant a "durable partner" for the purposes of Appendix EU, of course; that is the question the definition of "durable partner" goes onto address, and which we consider below.

25. Paragraph (b)(ii)(bb)(aaa) is in two halves, separated by the "unless". The requirement imposed by the "first half" is as follows:

> "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…"

26. The "first half criteria", as we shall call them, are relatively self-explanatory. The term "not resident… as" introduces a qualitative requirement for the applicant's residence not to have been in a capacity which met the definition of a "family member of a relevant EEA citizen." The "not" means that an applicant's

residence must not have been in that capacity in order to meet that criterion. It is hardly surprising that such residence must "not" have been on that basis, since paragraph (b)(i) addresses cases where such residence was in that capacity.

27. Most applicants falling within the *Celik* paradigm (that is, a third country applicant with no pre-IP lawful status who marries an EEA sponsor after the conclusion of the IP: "a *Celik* applicant") will meet the "first half criteria" with ease: by definition, they will not have been resident as the durable partner of a relevant EEA citizen or qualifying EEA citizen during the relevant period. On a straightforward reading an application of the "first half" of paragraph (aaa), therefore, most *Celik* applicants would succeed.

28. The first half criteria, taken in isolation, therefore cast the net very broadly: the criteria encompass unlawfully resident *Celik* applicants, on the one hand, and migrants with a lawful immigration status, on the other. For example, a student with leave to remain in the UK on that basis who is in a durable relationship with an EEA national without a relevant document would not have been:

> "resident in the UK and Islands as the durable partner of a relevant EEA citizen… on a basis which met the definition of 'family member of a relevant EEA citizen…'"

29. It follows that the "first half criteria" are strikingly broad. But for an exception to their scope, most unlawfully resident *Celik* applicants would succeed as durable partners, even though they were unlawfully resident at the relevant times, had not applied for their claimed durable partnership to be facilitated prior to the conclusion of the implementation period, and did not marry an EEA national until after the UK's withdrawal from the EU was complete. That cannot have been the intention of the rules. It would lead to the absurdity identified above.

30. It is at this stage in the analysis that the "unless" enters the equation. It is a conjunction; it introduces an exception to the previous criteria, namely the otherwise very broad "first half criteria" in paragraph (aaa).

31. The scope of the first half criteria is narrowed in the following way by the "unless". If the "unless" exception is engaged, the "first half" criteria in paragraph (aaa) are incapable of being satisfied, and this route to qualify as a durable partner falls away. Put another way, if the "unless" applies, an applicant will not be able to avail themselves of the route to recognition as a durable partner provided by the first half criteria in paragraph (aaa).

32. We therefore turn to the "unless" criteria in the "second half" of paragraph (aaa). Understood against the above background, the "second half" criteria assume a significance and clarity which is not otherwise readily apparent.

33. The "second half" of paragraph (aaa) provides:

> "…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"

34. Application of the "unless" requirement involves an examination of the reasons why an applicant ostensibly meets the first half criteria. It involves consideration of two factors, both of which must be present in order to disqualify an applicant from enjoying the otherwise broad benefit of the first half criteria in paragraph (aaa). The two "unless" requirements are as follows:

    a. First, "the reason why… they were not so resident is that they did not hold a relevant document as the durable partner of a relevant EEA citizen…"

    b. Secondly, " and they did not otherwise have a lawful basis of stay in the UK and Islands for that period…"

35. As to "*did not hold a relevant document*", this criterion means that the applicant had not been issued with a relevant document, namely a residence card (or an EEA Family Permit) as a durable partner under the 2016 Regulations. The inclusion of this criterion underlines the centrality of holding a relevant document to an individual's recognition as a durable partner under the regime under Article 3(2)(b) of Directive 2004/38/EC. The requirement to have held a relevant document reflects the nature of the facilitation duty to which the UK was subject under Article 3(2)(b) of Directive 2004/38/EC (both in its application to the UK as a Member State, and pursuant to the Withdrawal Agreement). The need to hold a relevant document as a durable partner flows from the fact that residence rights enjoyed by durable partners were those that were conferred by the host Member State following an extensive examination of the personal circumstances of an applicant, rather than existing as a matter of law, pursuant to the EU Treaties or Directive 2004/38/EC. To enjoy a right to reside as a durable partner required a positive step on the part of the UK as the host Member State in the form of issuing a relevant document; the WA refers to holding a relevant document as residence being "facilitated". See Art 10(2) WA.

36. Again, the class of persons who would not have been resident as a durable partner because they did not hold a document in that capacity would, in principle, be very broad. It would encompass unlawfully resident *Celik* applicants, on the one hand, and a potentially limitless cadre of those holding leave to remain (or another form of right to reside), on the other.

37. The operative wording of the "unless" exception is therefore found in the final clause: "*and they did not otherwise have a lawful basis of stay in the UK and Islands for that period…*" This is the crucial wording that gives effect to the "unless" and avoids the otherwise absurd consequences that would result, but for the engagement of the exception. It requires an examination of the immigration status of the applicant at the relevant time. It is the means by which paragraph (aaa) distinguishes between unlawfully resident *Celik* applicants, on the one hand, and persons lawfully resident on some other basis, on the other.

38. A person with no lawful basis of stay at the relevant times is incapable of satisfying paragraph (aaa). By contrast, an applicant who held leave in some other capacity, for example as a student, would otherwise have had a lawful basis of stay in the UK.

39. We take the example of the student we refer to above. A student with limited leave to remain would "otherwise have a lawful basis of stay in the UK…"; the "*unless*" exception would not be engaged, and the applicant would, in principle, be capable of meeting the definition of durable partner at the relevant time.

40. There is a logic to this construction, which must reflect the intention of the EUSS and the WA. Those who enjoyed leave to remain in their own capacity will not be penalised for having failed to obtain a document they didn't need. By contrast, those who did not hold a relevant document (nor applied for the facilitation of their relationship prior to the conclusion of the implementation period) yet were present unlawfully prior to the end of the implementation period and remain so unlawfully resident in the UK cannot regularise their status through the EUSS. That is entirely consistent with the WA, and the Immigration Rules drafted to give it effect.

41. For these reasons, paragraph (aaa) does not achieve the absurd consequences the FTT found that it did. The judge erred by allowing the appeal on the basis that the fact that the appellant did not hold a relevant document, and resided unlawfully, amounted to the positive fulfilment of the relevant eligibility criteria.

Prior facilitation and the Withdrawal Agreement

42. Mr Collins very fairly accepted that the grounds of appeal were correct to contend, at para. 1(d), that that only those residing in accordance with the WA were within its express scope and that, in practical terms, that required an applicant to hold a residence card or EEA family permit under the 2016 Regulations in order to fall within its scope (but for his submissions, which we consider below, concerning the import of *Celik*).

43. Under Article 10(2) WA, to be within scope of the agreement as a durable partner required an applicant's residence to have been "facilitated" by the host State under Article 3(2)(a) and (b) of Directive 2004/38/EC. The means to achieve the "facilitation" of the residence of durable partners and extended family members under Directive 2004/38/EC was a matter of national law, left to the discretion of Member States: see *Sohrab and Others (continued household membership) Pakistan* [2022] UKUT 157 (IAC) at [18].

44. The judge was therefore wrong to state that the WA did not require an applicant to hold a family permit or residence card. In one sense, that is correct; the WA did not use the terminology of "residence card" or "family permit". However, that is nothing to the point. "Residence card" and "family permit" were the terms adopted by the United Kingdom in its implementation of the facilitation duties imposed by Article 3(2) of Directive 2004/38/EC through the 2016 Regulations; the WA looks to whether the residence of an applicant had been "facilitated" as a durable partner by the host state, not to the terminology adopted by the host state when doing so. The issue is not whether the WA adopts the same terminology as that adopted by the UK in its domestic implementation of Directive 2004/38/EC, and later the WA, but whether the WA permits the UK to examine whether an applicant seeking to bring themselves within Article 10(2) WA had had their residence facilitated under 2004/38/EC.

45. Article 10(2) WA plainly permits the UK to examine whether an applicant as a durable partner had their residence facilitated in that capacity under the 2016 Regulations by means of being issued with a residence card or an EEA family permit. It was an error of law for the judge to conclude otherwise.

46. That being so, it was also an error for the judge to conclude that to require a residence card (or a family permit) from a durable partner applicant was an "unreasonable burden". It is not; it is simply a permitted assessment of whether

an applicant's pre-IP residence had been facilitated under Directive 2004/38/EC, pursuant to Article 10(2) WA.

47. The judge was therefore wrong to conclude that it was an unreasonable burden and contrary to the WA to require the appellant to produce a residence card or family permit.

The import of Celik

48. We now turn to Mr Collins' submissions that pursuant to *Celik*, the judge was entitled to conclude that the decision to refuse the application was disproportionate, and that this appellate tribunal should respect a first instance judge's exercise of discretion.

49. The difficulty with this submission is that the judge did not purport to apply a proportionality-based assessment. As we have set out above, she concluded that the prior facilitation requirement was inconsistent with the WA and an unnecessary burden; she did *not* expressly conclude that the refusal decision was disproportionate.

50. However, the principle of proportionality, if applicable, could (on Mr Collins' submission) be relevant to the materiality of the errors of law in the judge's decision we have found above, or alternatively to our own task in remaking the decision, if we set it aside the judge's decision. We will therefore consider these submissions in any event.

51. Mr Collins' submissions on *Celik* are founded on Article 18(1)(r) WA and paragraphs 62 and 63 of the panel's decision. Article 18(1)(r) provides:

> "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.
>
> Applying for such a residence status shall be subject to the following conditions:
>
> > […]
> >
> > (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**." (emphasis added)

52. Paragraphs 62 and 63 of *Celik* state:

> "62. Ms Smyth [counsel for the Secretary of State] 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." (Emphasis added)

53. Mr Collins submitted that *Celik*'s rejection of the Secretary of State's submissions concerning proportionality means that the panel endorsed the proposition that proportionality could, in principle, perform a role in an assessment concerning whether an EUSS applicant is within scope of the WA. He submitted that the Headnote to *Celik* was inconsistent with its reasoning, for it glossed over the nuance of the panel's decision concerning proportionality. He invited us not to follow *Celik* to the extent it militated against an application of the principle of proportionality. Refusing the appellant's application was disproportionate since the only reason he had not been able to get married before the conclusion of the IP was the pandemic.

54. In our judgment, whatever potential the panel in *Celik* considered there would be for the principle of proportionality to perform a role in an assessment of whether an applicant is within the WA's scope, it is clear that there would be no scope for such an assessment in relation to an individual who is in the same position as this appellant. See *Celik* at para. 64:

> "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."

55. This appellant's residence and facilitation status are, therefore, on all fours with those of Mr Celik. It is clear that the panel in *Celik* expressly considered and rejected the possibility that a person in the circumstances of Mr Celik, and therefore this appellant, would benefit from the principle of proportionality.

56. We see no reason not to follow the ratio of *Celik* as reported in the headnote. It is difficult to see how a person in the position of this appellant (as with Mr Celik) could benefit from the principle of proportionality. An EU law assessment of proportionality addresses two questions: first, whether the measure is suitable or appropriate to achieve the objective pursued; secondly, whether the measure is necessary to attain that objective or whether it could be achieved by a less onerous method (see *R (oao Lumdson and others) v Legal Services Board* [2015] UKSC 41 at para. 33). Neither question lends itself to the binary issue of whether

an unfacilitated putative durable partner is within the scope of EU law (or, by analogy, the WA: see Art. 4(3) WA, which incorporates EU law principles to concepts of EU law referred to within the WA). That is in contrast to other decisions that a host State could take under the WA where the principle of proportionality may well lie at the heart of such decisions, such as determining whether an applicant has reasonable grounds for missing a deadline (Article 18(1)(d)) or restrictions on the rights of residence and entry (Article 20). We therefore reject Mr Collins' submissions that this appellant is able to benefit from the principle of proportionality in the circumstances of his case.

Setting aside the decision

57. In light of the above analysis, we find that the decision of the judge involved the making of an error of law. The appellant could not succeed under para. (aaa), and nor was it a breach of the EUSS to require his residence to have been facilitated as a durable partner. Those errors were material because there is no scope for a proportionality of assessment of the sort for which Mr Collins contended could 'save' the judge's decision. We therefore set the decision aside.

58. There have been no challenges to any of the judge's findings of fact, which we preserve. In light of the preserved findings of fact, it is appropriate for the decision to be remade in this tribunal, which we now proceed to do, acting under section 12(2)(b)(ii) of the Tribunals, Courts and Enforcement Act 2007.

Remaking the decision

59. The appellant's marriage to the sponsor took place after the conclusion of the IP. He had not applied for his residence to be facilitated as a durable partner before then, and nor had he been issued with a relevant document as a durable partner. As a person who otherwise did not have a lawful basis of stay in the UK, he is unable to benefit from para. (aaa), or the principle of proportionality, for the reasons given above.

60. We therefore remake the decision by dismissing the appeal.

Notice of decision

The decision of Judge Anthony involved the making of an error of law and is set aside.

We remake the decision by dismissing the appeal.

Stephen H Smith

Judge of the Upper Tribunal
Immigration and Asylum Chamber

1 February 2023