**Upper Tribunal**
**(Immigration and Asylum Chamber)** Appeal Number: UI-2022-002528
(EA/12732/2021)

**THE IMMIGRATION ACTS**

| **Heard at Field House** | **Decision & Reasons Promulgated** |
|---|---|
| **on 06 October 2022** | **on 03 January 2023** |

**Before**

**UPPER TRIBUNAL JUDGE CANAVAN**
**DEPUTY UPPER TRIBUNAL JUDGE MONSON**

**Between**

**THE SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Appellant

**and**

**BAJRAM JAHELEZI**

Respondent

**Representation:**
For the appellant: Ms A. Ahmed, Senior Home Office Presenting Officer
For the respondent: Mr B. Lams, instructed by Arora Lodhi Heath Solicitors

**DECISION AND REASONS**

1. For continuity, we will refer to the parties as they were before the First-tier Tribunal although technically the Secretary of State is the appellant in the appeal to the Upper Tribunal.

2. The original appellant (Mr Jahelezi) appealed the respondent's (SSHD) decision dated 02 May 2021 to refuse leave to remain under the immigration rules relating to the EU Settlement Scheme. The appeal was

brought under The Immigration (Citizens' Rights Appeals) (EU Exit) Regulations 2020 ('the CRA Regulations 2020').

3. First-tier Tribunal Judge S. Dyer ('the judge) allowed the appeal in a decision sent on 11 March 2022. The Secretary of State did not send a representative to the hearing to assist the judge to navigate the complex new scheme of the immigration rules and the Withdrawal Agreement ('the WA'). The judge noted that the appellant became engaged in October 2020 and applied to the registry office to book a date for the wedding in November 2020. Due to restrictions arising from the Covid 19 pandemic the ceremony booked for 28 January 2021 was delayed. The couple married on 23 April 2021. The evidence indicated that the appellant applied for leave to remain under immigration rules relating to the EU Settlement Scheme on 14 May 2021. The judge made the following findings:

> '21. Following the UK's departure from the European Union, free movement rights for EU citizens and their family members were ended and rights of appeal against 'EEA decisions' were abolished on 31st December 2020, subject to transitional provisions which effectively extended the provisions until the 30th June 2021 in what is referred to as the '*grace period*'. Thereafter those who formerly enjoyed free movement rights were made subject to immigration control and the requirement to obtain leave to enter or remain.
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> 22. In accordance with the European Union (Withdrawal Agreement) Act 2020 ('EUWA 2020'), the EU Settlement Scheme in the form of Appendix EU and Appendix EU (Family Permit) to the Immigration Rules was introduced. The purpose of the EU Settlement Scheme is to give effect to certain provisions of the Withdrawal Agreement under Part II 'Citizen's Rights' so that those exercising free movement rights in the UK prior to the UK's departure from the EU could apply for limited or indefinite leave to enter or remain. A right of appeal to the tribunal has been provided against 'citizens' rights immigration decisions', i.e. decisions made under those Rules or otherwise restricting rights of residence that EU citizens and their family members enjoyed.
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> 23. The intention and purpose of the 'Citizens' Rights' under the Withdrawal Agreement as implemented by the EUWA 2020 is [to] ensure that those who would have benefited from the Immigration (EEA) Regulations 2016 up to exit day (and beyond through the 'grace period' which ended on 30th June 2021) are protected from the consequences of the UK exit from the European Union. Put another way, this means that if the appellant would have met the requirements for a Family Permit under the Immigration (EEA) Regulations 2016 then he should be given the benefit of the protection under the Withdrawal Agreement.
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> 24. The appellant and his wife have now been cohabiting for two years and are married. They are in a genuine relationship. There is evidence of their efforts to give effect to their intention to marry before the deadline plus evidence that in January 2021 their ceremony was suspended due to COVID-19. Whilst the appellant

could apply for a Family Permit under Appendix EU (Family Permit) he would need to leave the UK for a period of six months. I also take into account the fact that they were lawfully married within the grace period.

25. For all the reasons above, I consider it would be a disproportionate measure to require the appellant to leave the UK and apply to join his wife from outside the UK after six months when there appears to have been no circumstances that gave rise to a marriage investigation by the Home Office and no suggestion by the respondent that the appellant has entered into either a durable partnership of convenience or marriage of convenience.'

4. The Secretary of State applied for permission to appeal the First-tier Tribunal decision. The grounds outline general submissions, and are not clearly particularised, but make the following points relating to the legal framework.

(i) The appellant could not qualify as a spouse (family member) under the EU Settlement Scheme because the marriage took place after 31 December 2020.

(ii) The appellant could not qualify as a durable partner (other family member) under the EU Settlement Scheme because he had not applied for entry or residence to be facilitated or had been facilitated entry or residence by way of the issuing of a relevant document before 31 December 2020.

(iii) In the circumstances, the appellant did not engage any of the rights under Articles 10(2) or 10(3) of the WA and did not have access to the procedural protections afforded by Article 18(1)(r) (proportionality).

(iv) The judge erred in purporting to allow the appeal under the WA despite the appellant not having acquired any protected rights before 31 December 2020.

(v) The judge erred in appearing to treat the grace period as extending rights of residence under The Immigration (European Economic Area) Regulations 2016 until 31 June 2021.

5. At the hearing, Ms Ahmed argued that the decision in *Celik (EU Exit; marriage; human rights)* [2022] UKUT 220 (IAC), published after the First-tier Tribunal decision, supported the arguments outlined in the grounds of appeal.

6. Mr Lams relied on the arguments put forward in his written rule 24 response, which made points that were not argued before the First-tier Tribunal judge. He argued that the fact that the appellant was unable to marry before the deadline of 31 December 2020 because the registry offices were closed due to lockdown negated the appellant's rights under the EU Treaties. He referred to the decision of the Court of Justice of the European Union in *Metock and Others (Area of Freedom, Security and*

*Justice)* [2008] EUECJ C-127/08 (25 July 2008). It was argued that the decision to refuse leave to remain under the EU Settlement Scheme (i) failed to give effect to the objectives of the WA; (ii) breached Articles 5 and 14 of the WA; (iii) that the closure of the registry offices breached a legitimate expectation to be able to contract a marriage; and (iv) was disproportionate with reference to Article 18(1)(r) of the WA. Mr Lams accepted that these arguments could only go to the materiality of any error of law or might be relevant if the Upper Tribunal decided to set aside the decision and remake it.

## Legal Framework

7. European Union ('EU') law relating to rights of free movement made an important distinction between the rights of residence of 'family members' and those of 'other family members' (aka 'extended family members') of an EEA national who exercised rights under the EU Treaties in the United Kingdom on or before 31 December 2020.

8. A person who qualified as a family member under Article 2(2) of The Citizens' Rights Directive (2004/38/EC) ('the CRD 2004') had an automatic right of residence. A family member had a right of residence whether they were issued with a family permit or a residence card or not.

9. Any other family member who did not fall within the definition in Article 2(2) did not have an automatic right of residence. Any other family member needed to meet the requirements of Article 3(2). A person was required to apply for entry or residence to be facilitated by the host Member State in accordance with national legislation. The host Member State would undertake an extensive examination of the person's personal circumstances and had to justify any denial of entry or residence.

10. Article 10 set out the requirements to be issued with a residence card recognising a right of residence. In addition to the requirement to produce a passport and evidence of the relationship with the EEA national exercising rights of free movement, the provisions relating to other family members were:

    (i) In cases falling under Article 3(2)(a) (other family members) a Member State required a document issued by the relevant authority in the country of origin or country from which the person was arriving certifying that they were dependants or members of the household of the Union citizen, or proof of the existence of serious health grounds which strictly required the personal care of the of the family member by the Union citizen.

    (ii) In cases falling under Article 3(2)(b) a Member State required proof of the existence of a durable relationship with the Union citizen.

11. In *SSHD v Rahman & Others* [2012] EUECJ C-83/11 (05 September 2012); [2013] QB 249, the Court of Justice of the European Union ('CJEU')

reiterated that Article 3(2) of the CRD 2004 did not oblige a Member State to accord a right of residence to other family members [21]. It highlighted that Article 10(2)(e) required family members referred to in Article 3(2) of the Directive to present a document issued by the relevant authority in the country of origin or a document from the country from which they are arriving certifying that they are dependants of the Union citizen [30].

12. Rights of free movement in the United Kingdom for European citizens and their family members came to an end when the United Kingdom exited the European Union on 31 December 2020 at 23.00hrs ('Implementation Period Completion Day').

13. The United Kingdom negotiated an agreement with the European Union, which set out the arrangements for its withdrawal. The Withdrawal Agreement (2019/C 384 I/01) ('the WA') recognised that it was necessary to protect the rights of Union Citizens and United Kingdom nationals and their respective family members where they had exercised free movement rights before the agreed date. The WA was implemented in domestic law through the combination of The European Union (Withdrawal) Act 2018 ('the EUW Act 2018') and The European Union (Withdrawal Agreement) Act 2020 ('the EUWA Act 2020').

14. Article 4 of the WA made clear that the provisions of Union law applicable in the agreement shall have the same legal effects in the United Kingdom as they do within the Union and its Member States. Persons would be able to rely directly on the provisions contained in the Agreement which met the conditions for direct effect under Union law.

15. Article 5 of the WA made clear that United Kingdom shall take all appropriate measures to ensure fulfilment of the obligations arising from the Agreement and should refrain from any measures which could jeopardise the attainment of the objectives of the Agreement.

16. Article 10 of the WA sets out the persons who come within the personal scope of the Agreement. It includes Union citizens who exercised their right to reside in the United Kingdom in accordance with Union law before the end of the transition period and who continue to reside here thereafter. It also applies to their family members provided they satisfy at least one of several conditions.

17. Two systems ran parallel to one another in the run up to the United Kingdom's exit from the European Union on 31 December 2020.

**(i) EU law**

Applications could continue to be made to recognise existing rights of residence or to facilitate entry or residence under EU law. The mechanism for considering such an application under national legislation was an application made under The Immigration (European Economic Area) Regulations 2016 ('the EEA Regulations 2016').

A right of appeal against a decision to refuse to issue a family permit or a residence card arose under the EEA Regulations 2016. The available ground of appeal was that the decision appealed against breached the appellant's right under the EU Treaties in respect of entry into or residence in the United Kingdom.

**(ii) Domestic law**

The EU Settlement Scheme was designed as a mechanism to grant leave to remain under domestic law to those who could establish that they were residing in the United Kingdom under EU law at the end of the transition period when their rights of residence came to an end.

A right of appeal against a decision to refuse leave to enter or remain under the immigration rules arises under The Immigration (Citizens' Rights Appeals) (EU Exit) Regulations 2020 ('the CRA Regulations 2020'). The available grounds of appeal are:

(a) that the decision breaches any right which the appellant has by virtue of the Withdrawal Agreement ('WA'), EEA EFTA Separation Agreement or the Swiss Citizens' Rights Agreement;

(b) the decision is not in accordance with the provision of the immigration rules by virtue of which it was made, is not in accordance with the residence scheme immigration rules, is not in accordance with section 76(1) or (2) of the 2002 Act (revocation of ILR) or is not in accordance with section 3(5) or (6) of the 1971 Act (deportation).

18. The 'grace period' set out in The Citizens' Rights (Application Deadline and Temporary Protection) Regulations 2020 was an extension of the period in which those exercising rights under EU law on or before 31 December 2020 could apply for leave to remain under the EU Settlement Scheme. It was an extension of the time to make an application but not an extension of time to establish rights of residence under EU law. Rights of free movement for European citizens and their family members came to an end on 31 December 2020.

19. Appendix EU of the immigration rules and Articles 10(2) and (3) of the Withdrawal Agreement gave effect to this general principle by requiring a person who was not a family member within the meaning of Article 2(2) of the CRD 2004 to have applied for or to have been facilitated entry or residence as an other family member by way of the issuing of a relevant document before the end of the transition period.

20. In *Batool and others (other family members: EU exit)* [2022] UKUT 219 (IAC) the Upper Tribunal analysed the relevant legal framework and highlighted the distinction between the rights of family members and the need for other family members to be facilitated entry under EU law. The

Upper Tribunal also considered the terms of Appendix EU, which required other family members to have been issued with a 'residence document' (as defined) before the end of the transition period. The Upper Tribunal concluded that other family members who had not applied for facilitation of entry and residence before 23.00hrs on 31 December 2020 could not rely on the immigration rules or the WA to succeed in an appeal under the CRA Regulations 2020. Such a person did not have a right to have an application made for leave to remain under the immigration rules (domestic law) to be treated as an application for facilitation of entry or residence as an other family member (EU law).

21. In *Celik (EU Exit; marriage; human rights)* [2002] UKUT 220 (IAC) the Upper Tribunal considered the position of those who were in a durable relationship with an EEA national before 23.00hrs on 31 December 2020. Again, the Upper Tribunal concluded that those persons did not have any substantive rights under the WA if they had not applied for facilitation of entry of residence before the end of the transition period. Where a person had not established a substantive right, they could not invoke the concept of proportionality in Article 18(1)(r) WA or the principle of fairness to succeed in an appeal under the CRA Regulations 2020.

22. In *R (on the application of Lumsdon and others) v Legal Services Board* [2015] UKSC 41; [2016] AC 697 the Supreme Court considered a challenge to an aspect of The Provisions of Services Regulations 2009 (SI 2009/2999), which were made to implement Directive 2006/123/EC on services in the internal market. Whilst recognising that the Court of Justice of the European Union was the final arbiter, the Court conducted a review of the principle of proportionality as it applies in EU law. It outlined the following broad principles:

    (i) The principle generally applies to legislative and administrative measures adopted by EU institutions and national measures falling within the scope of EU law [25].

    (ii) The principle of proportionality in EU law is neither expressed nor applied in the same way as the principle of proportionality under the European Convention of Human Rights [26].

    (iii) When the validity of a national measure is challenge on the ground that it infringes the EU principle of proportionality, it is in principle for the national court to reach its own conclusion. It may refer a question of interpretation of EU law to the CJEU [29].

    (iv) Where the proportionality principle is applied by a national court it must be applied in a manner which is consistent with the jurisprudence of the CJEU, which can be complex and might be applied in different ways in different contexts. It is necessary for national judges to understand the nature and rationale of these differences and to identify the relevant body of case law [31].

(v) Proportionality as a general principle of EU law involves the consideration of two questions. First, whether the measure in question is suitable or appropriate to achieve the objective pursued. Second, whether the measure is necessary to achieve that objective or whether it could be attained by a less onerous method. There is some debate as to whether there is a third question, namely, whether the burden imposed by the measure is disproportionate to the benefits secured. In practice the court usually omits this question although it might address it if it is argued [33].

(vi) The other critical aspect of the principle of proportionality is the intensity with which it is applied. In that regard, the court has been influenced by a wide range of factors. The intensity with which the principle has been applied has varied accordingly. The jurisprudence indicates that the principle is flexible in its application [34].

(vii) Where Member States adopt measures implementing EU legislation, they are generally contributing towards the integration of the internal market, rather than seeking to limit it in their national interests. In general, proportionality functions in that context as a check of the exercise of public power akin to traditional public law principles. Where Member States rely on reservations or derogations in EU legislation to introduce measures restricting fundamental freedoms, proportionality is generally applied more strictly, subject to certain qualifications [38].

(viii) In some cases, the CJEU has emphases other general principles of EU law, by requiring that procedures under the national measure should be compatible with principles of sound administration, such as being completed within a reasonable time and without undue costs, and are also compatible with legal certainty, including the right to judicial protection [53].

## Decision and reasons

23. It is said that the appellant entered the UK illegally in 2016. The appellant and his wife say that they have been in a relationship since the end of 2018. They began living together in March 2020. Despite the appellant's illegal status, they took no steps to apply for facilitation of his entry or residence as a durable partner at an earlier stage. The appellant says that he proposed in October 2020. The couple produced evidence before the First-tier Tribunal to show that they booked an initial appointment with the registry office for 20 November 2020 to give notice of their intention to marry. That appointment was cancelled and there is evidence to show that it was rebooked for 07 December 2020. By that stage the first available date for the ceremony was 27 January 2021, after the end of the transition period. It is said that date was cancelled due to covid restrictions being imposed. The couple married on 23 April 2021.

24. The information from the registry office made clear that the standard period for notice was 28 days, but that it may take as long as 70 days if it is subject to the immigration referral scheme. There is no evidence to show why the initial notice appointment was cancelled, but even if the appellant had been able to give notice of the marriage on 20 November 2020 it was unlikely that they would have been able to contract the marriage before the end of the transition period on 31 December 2020. A 28-day notice period would have left little time to book a ceremony over the Christmas period even in pre-pandemic times. There was also a high risk that the appellant's illegal immigration status was likely to trigger a referral to the Home Office leading to a much longer notice period.

25. By the time that the couple attended the registry office to give notice on 07 December 2020 it would have been apparent that they would not be able to marry before the end of the transition period. No steps were taken to protect the appellant's position by applying to facilitate his entry under the EEA Regulations 2016 as a durable partner. As a result, the appellant failed to apply for facilitation of entry or residence or to establish any EU rights of residence before the United Kingdom left the European Union on 31 December 2020.

26. The appellant found himself in a similar situation to the appellant in *Celik*. The principles applied in that case are equally applicable in this. The judge did not have the benefit of submissions from the respondent to assist her to make a decision in relation to a new and relatively complex scheme. Nor did the judge have the benefit of the guidance given in *Celik*, which was published after the decision was promulgated.

27. Based on a proper analysis of EU law, and the residence scheme designed to transfer existing EU rights of residence into domestic law, and in light of the subsequent decision in *Celik,* we find that the First-tier Tribunal decision involved the making of an error on a point of law. The judge wrongly appeared to assume that the appellant 'would have benefited' from the EEA Regulations 2016 before exit day when no application had been made to facilitate entry or residence before the end of the transition period. The judge also wrongly appeared to assume that the 'grace period' allowed the appellant to establish a right of residence as a 'family member' following his marriage on 23 April 2021 at a time when all rights of residence under EU law had ceased.

28. Having failed to establish that any EU rights were engaged before the end of the transition period the judge erred in finding that the decision to refuse leave to remain under the EU Settlement Scheme engaged the WA and was disproportionate. The appellant did not meet the requirements of Article 10(2) or 10(3) because he had never sought to establish any EU rights before the relevant date.

29. Mr Lams made much in his argument about the principle of proportionality with reference to general principles of EU law. The decision in *Metock* does nothing more than state general principles relating to rights of free

movement, which are not relevant to the way in which the WA was implemented to transfer existing rights of residence under EU law into leave to remain under domestic law following the end of the transition period.

30. In essence Mr Lams' argument seemed to be that it was 'unfair' that the marriage was delayed beyond the end of the transition period due to covid restrictions. However, when one analyses the course of events it becomes clear that the main reason why the appellant was unable to contract a marriage in time was the very late stage at which the couple decided to marry. It would have been clear by 07 December 2020 that they would not be able to marry in time. The remedy at that late stage would have been to make an application under the EEA Regulations 2016 for facilitation of entry or residence as a durable partner before the end of the transition period. The appellant failed to make the right application under EU law at the right time. Instead, he made the wrong application under domestic law when it was far too late.

31. The WA made clear that the purpose of the Agreement was to provide protection for Union citizens and their respective family members (as defined) only where they had 'exercised free movement rights before a date set in this Agreement'. The date was 31 December 2020.

32. The WA set out a proportionate scheme to achieve the stated aim of protecting existing rights of residence at the end of the transition period. The EUSS and the WA made clear that other family members either (i) needed to have been facilitated entry or residence by the issuing of an EU residence document; or (ii) had at least applied for facilitation of entry or residence by the end of the transition period. The appellant satisfied neither of these criteria.

33. For the reasons given above, we conclude that the First-tier Tribunal decision involved the making of an error of law. We set aside the decision. Ms Ahmed submitted that we could remake the decision without a further hearing. Mr Lams indicated that he was 'agnostic'.

34. Since we had already heard the arguments that were relevant to the substantive issues, it is not necessary for a further hearing to remake the decision. For the reasons we have already explained in detail above, the decision was in accordance with the residence scheme rules and the appellant did not have any right under the WA that could be breached.

## DECISION

The First-tier Tribunal decision involved the making of an error on a point of law

The appeal is DISMISSED under the CRA Regulations 2020

Signed M. Canavan Date 05 December 2022
Upper Tribunal Judge Canavan

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**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**