IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2022-003141
First-tier Tribunal No:
EA/14430/2021

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On the 09 March 2023

Before

UPPER TRIBUNAL JUDGE STEPHEN SMITH
DEPUTY UPPER TRIBUNAL JUDGE SAINI

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MR DILAVER SUFA
(NO ANONYMITY ORDER MADE)

Respondent

Representation:
For the Appellant: Mr E. Tufan, Senior Home Office Presenting Officer
For the Respondent: Mr B. Lams, Counsel instructed by Oaks Solicitors

Heard at Field House on 9 December 2022

DECISION AND REASONS

1. This is an appeal by the Secretary of State against a decision of First-tier Tribunal Judge Cameron ("the judge") in which he allowed an appeal against a decision of the Secretary of State dated 28 September 2021 to refuse an application for pre-settled status under the EU Settlement Scheme ("the EUSS"). The appeal before the judge was heard under the Immigration (Citizens' Rights Appeals) (EU Exit) Regulations 2020 ("the 2020 Regulations").

2. Although this is an appeal of the Secretary of State, this decision refers to the appellant before the First-tier Tribunal as "the appellant", for ease of reference.

3. This decision records the conclusion of the panel reached immediately following the hearing.

Factual background

4. This is a case where the facts are very similar to those before this tribunal in *Celik (EU exit; marriage; human rights)* [2022] UKUT 220 (IAC), which was promulgated on 19 July 2022.

5. The appellant is a citizen of Albania. He began a relationship with an EEA national, Julie-Cristina Mihai ("the sponsor"), in early 2020. In either early September 2020 or late November 2020 (the appellant's statements on this issue are inconsistent as to precisely when: at para. 15 the judge recited the "November" narrative) they got engaged and wanted to get married as soon as possible. They were unable to do so, the judge found, because of the Covid-19 restrictions in force at the time. They eventually married on 21 June 2021. Four days later, the appellant applied for pre-settled status under the EU Settlement Scheme.

6. The Secretary of State refused the application on 28 September 2021: the appellant was not a "family member" prior to the "specified date" of 11PM on 31 December 2020, which was when the "implementation period" ("the IP") under the EU-UK Withdrawal Agreement ("WA") came to an end. Nor had he been issued with a "relevant document" as the durable partner of an EEA national by the specified date.

7. The appellant appealed against that decision to the First-tier Tribunal. The judge heard the appeal on 28 February 2022 and the decision was promulgated on 17 May 2022. Mr Lams, who also appeared below, advanced proportionality-based arguments, drawing on Article 18(1)(r) WA. The judge accepted that the appellant and the sponsor were in a genuine relationship, but that "due to the Covid issues they were not able to give the necessary notice of intention to marry" (paras 27, 33). He found that the appellant was in a durable relationship with the sponsor prior to 31 December 2020 (para. 34), and concluded his operative reasoning in these terms, at para. 35, which we quote in full:

> "I therefore find that the appellant has met the requirements of the regulations."

8. The judge did not consider Article 8 ECHR for the unchallenged reasons he gave at para. 36, but allowed the appeal in any event (albeit without specifying the operative basis in the "*Notice of Decision*" part of his decision).

Grounds of appeal

9. By grounds of appeal dated 24 May 2022, the Secretary of State contends that the appellant's appeal before the First-tier Tribunal was "bound to fail" since the appellant did not hold a "relevant document", and the judge's operative reasons for allowing the appeal were not compatible with the requirements of the EU Withdrawal Agreement. The appellant was out of scope of the WA, since he could not bring himself within the "personal scope" provisions in Article 10. That being so, the appellant could not benefit from the proportionality-based protections in Article 18(1)(r) WA.

10. Permission to appeal was granted by First-tier Tribunal Judge Athwal.

Submissions

11. Mr Tufan relied on the Secretary of State's grounds of appeal, and additionally relied on *Celik,* which post-dated both the judge's decision and the grounds of appeal.

12. Resisting the appeal, Mr Lams relied on a detailed skeleton argument and rule 24 response dated 5 December 2022. He accepted that the appellant could not succeed under Appendix EU, but advanced (in broad terms) four arguments by which he sought to persuade us that *Celik* was either wrongly decided or may be distinguished. First, on the basis of the "good faith" provisions in Article 5 WA; secondly that it was open to the Secretary of State to exercise discretion in favour of the applicant under the WA; thirdly, on the basis of the appellant's "legitimate expectation"; and fourthly, on the basis of proportionality under Article 18(1)(r) WA. We will expand on the detail of the submissions in the course of our discussion, below.

THE LAW

13. The relevant legal framework is cited at length at paragraph 20 of *Celik* and it is not necessary to repeat it here; the parties are familiar with it, and this decision will refer to it in detail when necessary.

DISCUSSION

Preliminary observations

14. By way of a preliminary procedural observation, the appellant's rule 24 notice is late: pursuant to rule 24(2)(a) of the Tribunal Procedure (Upper Tribunal) Rules 2008, it should have been served no later than one month after the respondent had been sent notice that permission to appeal had been granted. Mr Tufan did not resist Mr Lams' reliance on the rule 24 notice in this way which, in any event, could properly have been categorised as a skeleton argument (about which there could have been no objection). It was not a rule 24 notice which, for example, sought to achieve a substantive or procedural impact on the proceedings, for example of the sort envisaged in *Secretary of State for the Home Department v Devani* [2020] EWCA Civ 612 at paras 30 to 40. Mr Lams' written submissions were helpful and concise, and consider that, to the extent it is necessary to do so, it is in the interests of justice and consistent with the overriding objective of this tribunal to permit Mr Lams to rely on it.

15. Mr Lams' submissions advanced detailed arguments that he did not rely upon below. There was no objection to him doing so from Mr Tufan. We permitted Mr Lams to rely on the full spectrum of his intended submissions.

Impact of Celik

16. But for Mr Lams' submissions inviting the tribunal not to follow *Celik*, that authority would be dispositive of all issues in the Secretary of State's appeal against the judge's decision. The relevant extract of the headnote provides:

> "(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."

17. It is therefore necessary to address Mr Lams' submissions which, he contends, the Presidential panel in *Celik* did not have the benefit of considering.

The objectives of the Withdrawal Agreement and legitimate expectation

18. Mr Lams submitted that the objectives of the WA, as encapsulated by the Preamble and a purposive reading of its provisions, militate in favour of an expansive view of its scope provisions, a benevolent exercise of discretion in favour of the appellant, or a broad view of the engagement of the proportionality-based protections in Article 18(1)(r). The Preamble to the WA stresses the need to "ensure an orderly withdrawal" with "protection for Union citizens", and the need to "provide legal certainty to citizens". Those aspirations draw on Recital (5) to Directive 2004/38/EC concerning the freedom and dignity which should characterise the exercise of EU free movement rights. The principles find expression in Article 5 WA, entitled "Good faith", Mr Lams submitted, which provides:

> "They [the EU and the UK] shall take all appropriate measures, whether general or particular, to ensure fulfilment of the obligations arising from this Agreement and shall refrain from any measures which could jeopardise the attainment of **the objectives of this Agreement**."

19. It is necessary to recall that, pursuant to Article 31(1) of the Vienna Convention on the Law of Treaties, a treaty shall be interpreted in good faith, in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.

20. In the tribunal's judgment, the objectives of the WA were not to enable third country and Union citizens to be able enter into marriage relationships or otherwise form relationships that would bring one party into the scope of the WA regardless of the domestic notification or other procedural requirements pertaining to the celebration of marriages. Still less were the WA's objectives to enable third country and Union citizens to get married in the UK at short notice in the midst of a global pandemic. No support is found for that proposition on the face of the WA itself, when interpreting the terms of the treaty in their context, in light of its object and purpose.

21. The context for the WA was, of course, the UK's withdrawal from the European Union. The substantive concept of, and procedural rules relating to, marriage are a reserved Member State competence: see *V.M.A. v Stolichna obshtina, rayon 'Pancharevo'* (Case C-490/20) ECLI:EU:C:2021:1008 at para. 52. It would be surprising if the notice conditions pertaining to marriage ceremonies were intended by the parties to the WA to be embedded within its wider objectives.

22. To the extent that the Preamble to the WA underlines the need for "protection for Union citizens… as well as their respective family members", it says nothing of the position of those who are *not yet family members*. The UK's orderly withdrawal from the EU did not entail the need for the authorities responsible for administering domestic law relating to marriages either to expedite the notification requirements (so as to enable a pre-IP marriage to take place in circumstances when it would not have otherwise been possible to comply with those requirements), or for the immigration authorities to rewrite the past, to treat a post-IP marriage as though it took place pre-IP. Such an approach would be anything but orderly. It could have resulted in uncertainty and disorder prior to the conclusion of the IP, whereby putative third country family members and potential beneficiaries of the IP would be entitled to secure marriage ceremonies at short notice, with little regard for the capacity of domestic marriage infrastructure or other couples already waiting to enter into formal relationships of marriage. Alternatively, the status of post-IP marriages under the WA would be characterised by uncertainty and confusion, for it would not be clear whether the non-Union parties to such marriages were caught by the personal scope of Article 10.

23. Mr Lams' reliance on pre-WA authorities, such as *Metock v Minister for Justice, Equality and Law Reform* Case C-127/08 ECLI:EU:C:2008:449, is of no assistance to the appellant. Such authorities predate the UK's notification of its intention to withdraw from the EU. They are not authority for the proposition that a non-EU citizen who is otherwise outside the scope of EU law – or the WA – enjoys any EU or WA-based entitlement to get married on an expedited basis, or to be treated as being within the scope of the WA following the conclusion of the IP, despite having not been a family member on 31 December 2020. The rights enjoyed by EU citizens and their third country family members under the WA do not confer any entitlement on non-EU citizens *to become* family members of EU citizens. There is a clear distinction between rights enjoyed by existing family members, on the one hand, and the process to become such a family member, on the other. The "good faith" requirements of the WA do not function to compel a party to the WA to wind back the clock in order to treat something that happened after the conclusion of the IP, as though it happened before its conclusion. The WA imposed a hard deadline in the form of the IP coming to an end on 31 December 2020 at 11.00PM. There will inevitably be "hard cases" that fall on the "wrong" side of that line. There is no bad faith on the part of a signatory to the WA applying that deadline in practical terms. It is simply a natural consequence of an agreement that seeks to define, and thereby limit, the class of persons entitled to its protection.

24. In any event, the WA *did* make provision to cater for the needs of persons in a durable relationship who were not married before the conclusion of the IP. Article 10(2) WA provides for those whose residence was "facilitated" as durable partners under Article 3(2)(b) of Directive 2004/38/EC to retain their right of residence. Article 10(3) WA makes provision for persons who had not had their residence facilitated before the conclusion of the IP but who had applied for a "relevant document" before its conclusion to enjoy rights of residence. That being so, it would be odd to infer that the parties to the WA intended to enable potential beneficiaries of the agreement who, like this appellant, were able to apply for pre-IP facilitation but did not, to invoke the WA's broad objectives as a means to defeat domestic marriage notification requirements or otherwise rewrite the past by treating a post-IP event as though occurred pre-IP.

25. Mr Lams submitted that it was unsatisfactory for the appellant to have to "fall back" on the lesser status of durable partner in circumstances when it was the government's fault that he was unable to marry the sponsor in the first place. There is no merit to this submission. The appellant's personal preference to be able to marry at relatively short notice is an unhelpful aid to interpreting the WA. The significance of the ability of durable partners (and "other family members" under Article 3(2)(a) of Directive 2004/38/EC) to have their residence "facilitated" under the WA is that it demonstrates that the parties to the WA made express provision to cater for those who would otherwise be outside the scope of the agreement but who nevertheless were in relationships that would have been capable of recognition under Directive 2004/38/EC prior to the conclusion of the IP. It is true that durable partners may enjoy a lesser form of status in those circumstances, but that is a natural consequence of the terms of the WA, and not a basis to infer that the agreement must have been intended to mean something else.

26. Two consequences flow from this analysis, which address Mr Lams' submissions concerning legitimate expectation and Article 14(4).

27. First, the appellant could not be said to have enjoyed a legitimate expectation that he would be able to give notice, and marry, within a relatively short timeframe, in these circumstances, or otherwise be treated as though he had done so. Applying the criteria at para. 20 of Mr Lams' skeleton argument, the appellant was not given the required precise, unconditional, and consistent assurances originating from an authorised and reliable source that he would be able to get married in the UK, at short notice, before the end of the IP. There was no evidence before the judge that either the appellant or the sponsor were operating under any form of legitimate expectation that they would be able to marry with no regard to the wider administrative, civic or public health conditions prevailing in the UK at the time, which would have been well underway when the appellant and so began to cohabit in July 2020. This is perhaps a by-product of Mr Lams seeking to advance a new point on appeal, since the factual premise of this submission rests on matters that were not expressly considered below.

28. Secondly, it follows that Mr Lams reliance on Article 13(4)[1] WA is misplaced. Article 13(4) provides:

> "4. The host State may not impose any limitations or conditions for obtaining, retaining or losing residence rights on the persons referred to in paragraphs 1, 2 and 3, other than those provided for in this Title. There shall be no discretion in applying the limitations and conditions provided for in this Title, other than in favour of the person concerned."

29. For present purposes, the "persons referred to in paragraphs 1, 2 and 3" of Article 13 are "family members", which is a term defined under Article 9(a) by reference to persons within the personal scope of Article 10 WA. Article 10(1)(e) brings the specified "family members" within the personal scope of the WA by reference to their status as such at the conclusion of the IP (or, in the terminology of the WA, the "transition period": see Article 126). Mr Lams' reliance on Article 13(4) is therefore self-defeating. Article 13(4) only protects those who were "family members" at the conclusion of the IP. Mr Lams' attempted reliance upon

[1] Mr Lams' skeleton argument and oral submissions referred to "Article 14(4)" WA. That must mean Article 13(4), since there is no Article 14(4), and the text quoted in his skeleton argument is, in fact, that which may be found at Article 13(4).

Article 13(4) as a means by which to bring the appellant within the personal scope of the WA merely underlines his status as a person outside its scope. For the reasons given above, the appellant did not enjoy a WA-based right to *become* a family member, at the last minute, before the conclusion of the IP.

30. As to the UK's ability to exercise discretion under Article 13(4), Mr Lams' submission in this respect is misconceived. The reference to more a more generous exercise of discretion under Article 13(4) is in relation to those within the scope of the WA. In any event, there is no ground of appeal under the 2020 Regulations that a discretion conferred upon the Secretary of State by the Immigration Rules or under the WA should have been exercised differently.

31. The Secretary of State enjoys an inherent discretion to grant leave to remain outside the rules; it is, of course, open to the appellant to make an application to the Secretary of State, under the Immigration Rules, and a human rights (or other) claim, in an attempt to regularise his stay.

32. The premise of Mr Lams' submissions was that actions of the government were responsible for preventing the appellant and the sponsor from getting married at a time of their choosing. However, it is by no means clear that any lockdown *restrictions* were responsible for the appellant's inability to marry before the conclusion of the IP, which is the premise of Mr Lams' submissions. The written evidence before the judge concerning the pre-IP period referred to Covid-based *problems* but did not expressly attribute the couple's inability to marry to Covid *restrictions*. See paragraph 2 of the appellant's supplemental witness statement, in which he stated that he and the sponsor "found it impossible" to give notice online in September 2020 because they struggled to access the online system; the statement did not refer to there being Covid-19-based online difficulties.

33. The appellant's supplemental statement goes on to explain that in "early October" the couple did manage to book an appointment for "early November", but that he was informed by telephone "around 10 days later" that Covid-19 based staff shortages meant that the appointment had to be cancelled. The appellant's written evidence was that he did not attempt to book a further appointment until 22 December 2020. We grant the appellant's application to admit under rule 15(2A) of the Tribunal Procedure (Upper Tribunal) Rules 2008 a table prepared by the Institute for Government ("IFG") outlining a timeline of the Covid lockdown restrictions: it states that the second national lockdown, which started on 5 November 2020 came to an end on 2 December 2020. There was thus a delay of 20 days from the conclusion of the second lockdown to the appellant's attempt to give notice on his marriage for a second time.

34. Of course, the judge had the benefit of hearing oral evidence which may have expanded upon the written evidence; but when one reads his decision, the operative reasoning on this issue draws mainly on the written evidence. Under the heading *Findings of fact and credibility*, the judge referred at para. 15 to the appellant's written evidence that Covid-19 "*problems*" were the cause of the delay, and additionally said at para. 16 that there were "*difficulties and delays*" due to the "Covid-19 *issues*", and at para. 17, that the couple could not give evidence of their intention to marry due "because of the Covid *issues*" (emphasis added). Thus, when the judge stated, at para. 28, that "Covid 19 *restrictions*" were the cause of the delay, his introduction of the terminology of *restrictions* contrasts with the reasoning and findings earlier in the decision, and the written evidence upon which those findings were expressly based.

35. The findings reached by the judge, therefore, were that Covid-based *difficulties* such as staff shortages were the cause of the delay experienced by the appellant, not the express introduction of restrictions. That is entirely consistent with the appellant's written evidence and contradicts Mr Lams' submissions that "actions such as *closing* registry offices in the run up to 31 December 2020" were "measures which could jeopardise the attainment of the objectives of [the WA]" (skeleton argument, para. 16). There was no evidence before the judge that registry offices had been *closed* at the relevant times, and the IFG graphic is silent as to the restrictions insofar as they related to registry offices and marriage notification infrastructure. Staff shortages caused by a global pandemic leading to the cancellation of some public services may be distinguished from the adoption of restrictive 'lockdown' measures of the sort relied upon by Mr Lams.

36. In conclusion, nothing in the WA required a contracting party to maintain the same level of public services when faced with unprecedented levels of staff sickness necessitated by a global pandemic.

37. Finally, even if Covid-19 restrictions *were* the reason the appellant was unable to get married in the UK before the conclusion of the IP, to the extent that he considered that any such measures were unreasonable or unlawful by reference to the WA, he could and should have challenged them at the time. He did not. These proceedings cannot be used as a backdoor challenge to those restrictions.

Proportionality

38. Mr Lams is correct to submit that that at para. 62 of *Celik*, this tribunal preserved the possibility that, in some circumstances, it may be possible for a person otherwise outside the scope of the WA to benefit from the principle of proportionality. The tribunal there held:

> "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." (Emphasis added)

39. Paragraph 62 is of no assistance to this appellant. His circumstances are on all fours with those of Mr Celik. Whatever potential there is for a putative beneficiary of the WA to rely on the principle of proportionality as a means to defeat an otherwise accurate application of the Article 10 WA scope provisions, it is of no assistance to this appellant. It is difficult to see how a procedural provision such as Article 18(1)(r), concerning redress procedures, can be used to invoke a substantive right.

Conclusion on the Secretary of State's error of law appeal

40. Drawing the above analysis together, the Secretary of State's appeal must be allowed. Mr Lams' submissions that *Celik* was wrongly decided or should otherwise not be followed were without merit; in reality, *Celik* is dispositive of the Secretary of State's appeal. It was not open to the judge to allow the appellant's

appeal under the EUSS since he was not a "family member" before the conclusion of the IP. Nor had he been recognised as, or applied for "facilitation" as, the durable partner of the sponsor before the conclusion of the IP. Accordingly, judge fell into error by allowing the appeal on the basis that the appellant was in a durable relationship with the sponsor prior to 31 December 2020.

41. The decision of the judge involved the making of an error of law and is set aside.

REMAKING THE DECISION

42. It was common ground at the hearing that if decision of the judge involved the making of an error of law, it could be remade without a further hearing, acting under section 12(2)(b)(ii) of the Tribunals, Courts and Enforcement Act 2007.

43. The tribunal's conclusions on this point may be simply stated. First, since the appellant did not marry the sponsor until after the conclusion of the IP, he is not within the scope of Article 10(1)(e)(i) WA and cannot succeed on that basis. Secondly, since the appellant had neither applied for a residence card as a durable partner, nor had his residence facilitated as a durable partner, his appeal cannot succeed on that basis. For the reasons already set out, none of the four arguments relied upon by Mr Lams (see para. 12, above) are of any assistance to the appellant.

44. In remaking the appellant's appeal under section 12(2)(b)(ii), the appeal is dismissed.

Notice of Decision

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

The tribunal has remade the decision, dismissing the appeal under the Immigration (Citizens' Rights Appeals) (EU Exit) Regulations 2020.

No anonymity direction is made.

Stephen H Smith

Judge of the Upper Tribunal
Immigration and Asylum Chamber

24 January 2023

TO THE RESPONDENT
FEE AWARD

The appeal has been dismissed so there can be no fee award.

Stephen H Smith

Judge of the Upper Tribunal

Immigration and Asylum Chamber

24 January 2023