IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2022-002933
First-tier Tribunal No: EA/15163/2021

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On the 24 March 2023

Before

UPPER TRIBUNAL JUDGE RIMINGTON

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

BLEDAR METALIA
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:
For the Appellant: Mr S Whitwell, Senior Home Office Presenting Officer
For the Respondent: Ms M Vidal instructed by Haris Ali Solicitors

Heard at Field House on 19 January 2023

DECISION AND REASONS

1. The application for permission to appeal was made by the Secretary of State but nonetheless I shall refer hereinafter to the parties as they were described in the First-tier Tribunal ("the FtT").

2. The Secretary of State appealed, with permission, against the decision of First-tier Tribunal Judge Gibbs ("the judge") who allowed the appellant's appeal under the Immigration Citizens' Rights Appeals (EU Exit) Regulations 2020 on the basis of Article 18 of the Withdrawal Agreement.

3. The appellant, a citizen of Albania born on 20th October 1993 appealed against the decision of the Secretary of State dated 26th October 2021 refusing him pre-settled status under the EU Settlement Scheme as the family member (durable

partner) of an EEA citizen under Appendix EU 11 and 14. The refusal stated that the appellant did not have the relevant evidence. The appellant had made the application on 30th June 2021 under the EU Settlement Scheme ("EUSS").

4. The grounds for permission to appeal to the Upper Tribunal asserted that

> (a) the judge materially erred by failing to consider properly the terms of the Withdrawal Agreement which provided no applicable rights to a person in the appellant's circumstances. Article 10 (1) (e) confirmed that the beneficiaries of the Withdrawal Agreement were limited to individuals residing in accordance with EU law as of 31st December 2020 ("the specified date"). The appellant was not as he had not had his residence facilitated in accordance with national legislation. There was therefore no entitlement to the full range of judicial redress including Article 18(1)(r).

The Hearing

5. At the hearing before me Mr Whitwell acknowledged that the decision was made on 30th March 2022 and prior to the guidance on the application of the EU withdrawal agreement in **Celik (EU exit, marriage, human rights) [2022] UKUT 00220** which was promulgated in July 2022. He nevertheless relied on **Celik** which explained the law.

6. Ms Vidal submitted that the appellant had been in a durable relationship for over two years and the judge had found that the relationship did form the basis of a durable relationship albeit, as the judge found, the appellant could not comply with the documentary and other requirements of Appendix EU. The appellant had not been residing in the UK lawfully prior to the specified date and clearly had not made an application for facilitation of his 'durable partnership' prior to 31st December 2020.

Analysis

7. The Upper Tribunal issued guidance on the application of the EU withdrawal agreement in **Celik (EU exit, marriage, human rights) [2022] UKUT 00220** 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".

8. On the basis of the above, the appellant cannot succeed. The appellant made his application under the EU Settlement Scheme not under the Immigration (European Economic Area) Regulations 2016 and not before the specified date. The judge found at [13] that the 'couple had lived together in a relationship akin to marriage since 1 September 2018' and that was 'not challenged'. However, the judge also found the appellant could not fulfil the immigration rules under Appendix EU in relation to 'durable partner' by the specified date. At [18] the judge found the decision of the Secretary of State breached the appellant's rights under the Withdrawal Agreement. As set out in Celik, however,_ the appellant had no such substantive rights.

9. **Celik** is good law and there is no indication of any grant of appeal on **Celik** to undermine that authority which was determined by a Presidential panel. In that case, and on similar facts, the Presidential panel specifically stated proportionality did not apply because the appellant did not fall within the personal scope of article 10 of the Withdrawal Agreement. That is the case here. As stated in paragraph 63 of **Celik** the Upper Tribunal stated, '*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'*.

10. The judge properly dealt with the issues before her in terms of the relationship and the requirements under Appendix EU but materially erred in her approach to Article 18(1) of the Withdrawal Agreement as set out in Celik by simply overlooking Article 10. He does not fall within the scope of the Withdrawal Agreement and cannot avail himself of the benefit of the Withdrawal Agreement. In effect the appellant cannot succeed on any basis.

11. I find a material error in the decision of the First-tier Tribunal and the Secretary of State's appeal to the Upper Tribunal is allowed. The judge's decision is set aside. Having canvassed the matter with the parties, and in the face of no objection, I remake the decision and in the light of the facts as set out above the appellant's appeal is dismissed.

Notice of decision

The Judge erred materially for the reasons identified. I set aside the decision pursuant to Section 12(2)(a) of the Tribunals Courts and Enforcement Act 2007 (TCE 2007) and remake the decision under section 12(2) (b) (ii) of the TCE 2007. Mr Metalia's appeal is dismissed.

No anonymity direction is made.

Signed Helen Rimington Date 19th January 2023

Upper Tribunal Judge Rimington