Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: UI-2022-003312**
EA/15313/2021

THE IMMIGRATION ACTS

Heard at Field House
On the 02 November 2022

Decision & Reasons Promulgated
On the 05 January 2023

Before

UPPER TRIBUNAL JUDGE ALLEN

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT
Appellant

and

LLOKMAN XHIKA
(ANONYMITY DIRECTION NOT MADE)
Respondent

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

DECISION AND REASONS

1. The Secretary of State appeals with permission to the Upper Tribunal against the decision of a Judge of the First-tier Tribunal who allowed the appeal of Mr Xhika against the Secretary of State's decision of 2 November 2021, refusing an application under the EU Settlement Scheme (EUSS).

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2. I shall refer hereafter to the Secretary of State as the respondent, as she was before the judge, and to Mr Xhika as the appellant, as he was before the judge.

3. The judge summarised the Secretary of State's concerns in paragraph 2 of his decision. He noted that the appellant's marriage certificate postdated the specified date and in respect of whether the couple were in a durable relationship prior to that date, it was considered that the appellant did not satisfy the scheme because he had not been issued with a valid residence card.

4. The judge considered all the evidence, in particular the appellant's bundle which contained witness statements from the appellant and his wife, a marriage certificate, proof of cohabitation and submissions. He found the appellant and his partner's evidence to be broadly credible. At paragraph 7 he made findings. The couple had met in the United Kingdom, began a relationship and moved in together in August 2020 and had been living together at the same property ever since. They had been engaged since October 2020 and sought to marry as soon as possible but due to COVID restrictions were unable to do so until 10 June 2021.

5. The judge found that the couple were in a genuine, subsisting and durable relationship best evidenced by the fact that they had been living together at the same property since August 2020, had been engaged since October 2020 and had subsequently married. The Secretary of State had not sought to challenge the relationship but had noted that the appellant did not have a residence card as a durable partner of his EEA sponsor. The judge noted that in respect of the Withdrawal Agreement, he also needed to consider the proportionality of the respondent's decision.

6. In that regard he found the decision to be disproportionate. He found that the couple were in a durable relationship prior to the end of the transition period and were now married. If they had applied prior to the end of the transition period, on the basis of the durable relationship, the judge would have allowed the appeal under the EEA Regulations. He reminded himself that that route was no longer open to them, but it would be disproportionate in his judgment to deny the appellant leave under the Withdrawal Agreement because the couple waited until they were married before applying under the scheme.

7. In her grounds the Secretary of State argued that the judge had erred in failing to consider properly the provisions of the Withdrawal Agreement and that that agreement provided no applicable rights to a person in the appellant's circumstances. Article 10(1)(e) of the agreement confirmed that beneficiaries of the agreement were those who were residing in accordance with EU Law as of 31 December 2020, and that was not the case of the appellant as he had not had his residence facilitated in accordance with national legislation. He therefore did not have the "relevant document" as required by Appendix EU. It was submitted that the appellant did not come within the personal scope of the Withdrawal

Agreement and therefore had no entitlement to the full range of judicial redress which included the Article 18(1)(r) requirement that the decision be proportionate.

8. In his submissions Mr Whitwell relied on the grounds and also on the decisions of the Upper Tribunal in Celik [2022] UKUT 00220 (IAC) and Batool [2022] UKUT 00219 (IAC). The points in the grounds were entirely relevant. The judge had only considered the matter under the Withdrawal Agreement. The findings were only relevant if the Withdrawal Agreement bit in this case and it did not. There was no indication that the couple were family members for the purpose of the Withdrawal Agreement and the appeal had therefore been allowed on the basis of law which was not applicable.

9. In his submissions, Mr Collins made the point that neither of the two decisions cited by Mr Whitwell had been pleaded. There had been no application to amend the grounds. Neither decision was declaratory and the grounds were very general in nature. There was no attack on the proportionality findings per se. It was important to note what was said at paragraph 61 onwards in Celik and in particular at paragraph 62 where the submission made on behalf of the Secretary of State that since the appellant could not bring himself within Article 18, subparagraph (r) simply had no application was not accepted. Proportionality was thus in play. The qualification in Celik set out at paragraph 63 was unnecessary. It was for the First-tier Judge to engage in an holistic assessment if it was in play. The judge’s reasoning was brief, but he had set out his findings at paragraph 9, and his conclusions on proportionality at paragraph 10. That was not challenged. There was no materiality to any error. There was an expectation to follow reported cases as had been held in Berdica [2022] UKUT 276 (IAC). In light of what Mr Collins had argued as to the proper interpretation of Celik it was open to the judge to allow the appeal and the challenge was a very limited one.

10. By way of reply Mr Whitwell relied on paragraphs 44 onwards, in particular 59 and 60 in Celik. This was time referenced. On the specified date the parties were not within the provisions. Though there was the finding referred to at paragraph 62, it was relevant also to read paragraphs 63 to 66. There was nothing in that case nor this to bring it within Article 18.1. The judge had made the mistake in his findings at paragraph 10 that was identified at paragraph 65 in Celik. In effect he had found there was a durable relationship so the appeal should succeed, but it was not within scope so was not disproportionate.

11. I reserved my decision.

12. It is clear from what was held in Celik that, as headnote (1) states, a person in a durable relationship in the United Kingdom with an EU citizen has as such no substantive rights under the EU Withdrawal Agreement unless his entry and residence were being facilitated before 11pm GMT on 31st December 2020 or he had applied for such facilitation before that

time. In the instant case it does not appear that any application had been made prior to the end of the post EU exit transition period on 11pm GMT on 31 December 2020. The fact that neither Celik nor Batool was before the judge is in my view entirely by the way. I agree entirely with the reasoning in those cases and find that the judge erred in law in his approach to the assessment of the issues in this case. The appellant cannot bring himself within Article 18 as he does not fall within Article 10.2 of the Withdrawal Agreement as he is not a person whose residence was facilitated by the United Kingdom before the end of the transition period.

13. Though it is the case that at paragraph 62 in Celik the Tribunal did not accept the extensive submission put to it, since the appellant in that case could not bring himself within Article 18(r) it had no application, the example it gave at paragraph 63, the imposition of unnecessary administrative burdens is an extreme situation and certainly not one that was applicable in this case. As the Tribunal went on to say later in paragraph 63, proportionality is highly unlikely to play any material role where, as in that case, the issue was whether the applicant fell within the scope of Article 18 at all. As in that case, so in this, the appellant’s residence as a durable partner was not facilitated by the respondent before the end of the transitional period and he did not a apply for such facilitation before the end of that period. As a consequence he could not bring himself within the substance of Article 18.1.

14. As a consequence, the judge’s decision allowing this appeal on the basis that the decision was disproportionate is clearly wrong in law and I do not accept the argument that the grounds do not raise a challenge on that basis. The absence of any challenge to the factual findings on proportionality is by the way. It is clear from the grounds that the Secretary of State challenged the decision because it was not open to the judge to address the matter in the context of proportionality because the Withdrawal Agreement provided no applicable rights to a person in the appellant’s circumstances.

15. Accordingly I find that the judge erred materially as a matter of law in concluding as he did. The matter will need a full rehearing on the basis of the correct legal principles, and that can most properly be done in the First-tier Tribunal.

Notice of Decision

16. The Secretary of State’s appeal, is, as a consequence, allowed.

No anonymity direction is made.

David Allen

Upper Tribunal Judge Allen

7th December 2022