Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: UI-2022-003338**
EA/15968/2021

THE IMMIGRATION ACTS

Heard at Birmingham CJC
On the 15th November 2022

Decision & Reasons Promulgated
On the 23 January 2023

Before

UPPER TRIBUNAL JUDGE MANDALIA

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

AMARJIT SINGH CHAUHAN
(NO ANONYMITY DIRECTION)

Respondent

Representation:
For the Appellant: Mr N Ahmed, instructed by Ishwar Solicitors
For the Respondent: Mr C Williams, Senior Home Office Presenting Officer

DECISION AND REASONS

Introduction

1. The appellant in the appeal before me is the Secretary of State for the Home Department ("SSHD") and the respondent to this appeal is Mr Amarjit Singh Chauhan. However, for ease of reference, in the course of this decision I adopt the parties' status as it was before the FtT. I refer

to Mr Chauhan as the appellant, and the Secretary of State as the respondent.

2. The appellant is a national of India. The appellant's immigration history is not entirely clear from the papers before me. In October 2020 he met Ms Rina Dineshchandra, and it is said they started living together on 31st December 2020. On 2nd March 2021, the appellant made an application under the EU Settlement Scheme (EUSS). The respondent refused that application with reference to Appendix EU to the Immigration Rules. The appellant was informed that from the information available, he does not meet the requirements of the scheme. The appellant's appeal under the Immigration (Citizens' Rights Appeals) (EU Exit) Regulations 2020, was allowed by First-tier Tribunal Judge Pinder for reasons set out in a decision promulgated on 15th June 2022.

3. The respondent claims the First-tier Tribunal Judge materially erred in law by failing to properly consider the provisions of the Withdrawal Agreement, when allowing the appellant's appeal. The respondent claims *inter alia* the appellant was not residing in the UK in accordance with EU law as of the specified date *(specifically 23:00 hours GMT, on 31st December 2020)*, as he had not had his residence facilitated in accordance with national legislation (The Immigration (European Economic Area) Regulations 2016). The respondent also claims the Judge erred in finding that refusal breaches the sponsor's rights as that is not a ground of appeal open to the appellant.

4. Permission to appeal was granted by First-tier Tribunal Judge Hollings-Tennant on 30th June 2022.

5. In her refusal decision, the respondent considered the appellant's claim that he is a 'durable partner' of a relevant EEA citizen, Rina Dineshchandra. The respondent said the appellant had not provided sufficient evidence to confirm this. The respondent went on to say:

> "The required evidence of family relationship for a durable partner of a relevant EEA citizen is a valid family permit or residence card issued under the EEA Regulations (or by the Bailiwick of Jersey, the Bailiwick of Guernsey or the Isle of Man) as the durable partner of that EEA citizen and, where the applicant does not have a documented right of permanent residence, evidence which satisfies the Secretary of State that the durable partnership continues to subsist.
>
> Home Office records do not show that you have been issued with a family permit or residence card under the EEA Regulations as the durable partner of the EEA national and you have not provided a relevant document issued on this basis by any of the Islands.
>
> …
>
> Until you hold such a document you cannot be granted leave under the EU Settlement Scheme as the durable partner of a relevant EEA citizen."

6. Before the First-tier Tribunal, the appellant accepted he could not qualify for settled status. Judge Pinder recorded, at [27]:

> "The Appellant accepts he did not and does not hold a 'relevant document' as a durable partner of the Sponsor. He also accepts that his subsequent and more recent marriage to the Sponsor post-dates the end of the Transition Period and that therefore, even if his marriage can be taken into consideration, the relevant definition in Appendix EU requires him to show that he was a 'durable partner' of the Sponsor prior to 11pm on 31.12.2020. Either way therefore, the Appellant's ability to meet the definition of 'durable partner' as provided for in Appendix EU of the Immigration Rules is in effect a starting point."

7. The focus of the appellant's appeal was that he has married his sponsor in September 2021. Having accepted the appellant cannot meet the requirements of Appendix EU, the judge nevertheless went on to make findings of fact in relation to the appellant's relationship with Rina Dineshchandra. Judge Pinder noted the appellant's wife and sponsor is a Portuguese national with Pre-Settled Status in the United Kingdom. The relationship began after they met in October 2020 and the appellant and the sponsor started living together in December 2020. The judge found at [34]:

> "…the Appellant and his wife were in a durable relationship before they married and prior to 11pm on 31.12.2020, within the meaning in Community law (as opposed to Appendix EU).

8. The judge referred to Article 18(r) of the Withdrawal Agreement and the issue of proportionality. The judge concluded, at paragraphs [48] to [50]:

> "48. I find that the decision to refuse the Appellant's application needs to be proportionate against, at the very least, the Sponsor's rights of residence in the UK and pursuant to my reasons set out above, I do not consider that this is the case.
>
> 49. Clearly the Withdrawal Agreement and Appendix EU are based on the requirement that marriages and civil partnerships take place before the end of the transition period. However, at the time the Withdrawal Agreement was drafted and agreed, unsurprisingly, the future impact of the pandemic was not anticipated and provided for. Nonetheless, the authorities have acted to safeguard some Treaty rights of some individuals from the harsh consequences that a strict adherence to the end of the transition period would otherwise entail.
>
> 50. Moreover, Article 18(r) draws a distinction between the legality and the facts and circumstances of a decision: "(t)he 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". I have found that the decision was legal but, in my assessment, based on this examination of the facts and circumstances, it cannot be held to be proportionate for the reasons that I have set out above. I therefore find that the Appellant has met the legal burden of proving his case on the civil standard and I shall allow his appeal."

The hearing before me

9. I began the hearing before me by discussing with the representatives the recent reported decisions of Celik (EU exit; marriage; human rights) [2022] UKUT 00220 (IAC) and Batool & Ors (other family members: EU exit) [2022] UKUT 00219 (IAC). Mr Ahmed quite properly in my judgment accepted that Celik posed the appellant significant difficulties in resisting the appeal. The facts were similar albeit not identical, but in any event, much of the reasoning in Celik was relevant to this appeal. In relation to Article 18 proportionality, at [62], the Tribunal had noted that the respondent's counsel had submitted that "*since the appellant could not bring himself within Article 18.1, sub-paragraph (r) simply had no application*". The Upper Tribunal went on to state:

> *"… 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.*
>
> *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.*
>
> *65. Against this background, the appellant's attempt to invoke the principle of proportionality in order to compel the respondent to grant him leave amounts to nothing less than the remarkable proposition that the First-tier Tribunal Judge ought to have embarked on a judicial re-writing of the Withdrawal Agreement. Judge Hyland quite rightly refused to do so."*

10. Mr Ahmed candidly accepts that the decision of the Upper Tribunal in Celik is for all intents and purposes determinative of the appeal before me, and the appellant's appeal against the respondent's decision to refuse his application for Leave to Remain under Appendix EU of the Immigration Rules. He accepted that the appellant had not sought to apply for an EEA family permit before the end of the transitional period. At [63] of Celik, the Upper Tribunal, had said that proportionality was highly unlikely to play any material role where the issue was whether an applicant fell within the scope of Article 18.1 at all, albeit it could not be entirely ruled out.

Error of Law

11. It is unnecessary to recite the full principles set out in Celik. Article 18.1(r) provides that an applicant shall have access to redress procedures against any decision refusing the grant of residence status, including an examination of the legality of the decision, as well as the facts and circumstances on which the proposed decision is based. Crucially, such redress procedures shall ensure that the decision is not disproportionate. As the Upper Tribunal in Celik had pointed out, Article 3 of Directive 2004/38/EC requires member states to facilitate entry and residence for any other family members. In Celik's case, the appellant's residence in the UK was not facilitated by the respondent before the end of the relevant transition period, nor did he apply for such facilitation [64]. It was not enough that the appellant may by that time have been in a durable relationship with the person whom he later married in 2021. The appellant here is in a similar situation.

12. It was open to the appellant to have applied for facilitation before the end of the transition period. While the FtT was conscious that whilst the appellant and his now wife were in a durable relationship, nevertheless, the appellant did not meet the requirements of the EU Settlement Scheme and therefore his appeal could not succeed.

13. Although the decision of the First-tier Tribunal here pre-dates the decision of the Upper Tribunal in Celik, the analysis of the legal framework set out in the decision of the Upper Tribunal clearly establishes the error of law in the decision of First-tier Tribunal Judge Pinder. It follows that the decision of First-tier Tribunal Judge Pinder must be set aside.

Re-making the decision

14. Mr Ahmed did not seek to make any further submission as to the remaking of the decision. That is unsurprising. Applying the reasoning in Celik, it is clear the appellant had neither applied for nor obtained a document relating to his durable relationship. He was not married to Rina Dineshchandra until September 2021, after the relevant specified date *(23:00 hours GMT, on 31st December 2020)*. The appellant cannot therefore succeed in this appeal as he has no substantive rights under the EU Withdrawal Agreement, and he cannot therefore invoke the concept of proportionality.

15. His appeal must therefore be dismissed.

16. If the appellant wishes to remain in the UK, he should therefore promptly seek expert immigration advice with a view to making an appropriate application to regularise his immigration status.

Notice of Decision

17. **The decision of First-tier Tribunal Judge Pinder is set aside.**

18. I remake the decision and dismiss the appeal.

Signed V. Mandalia Date 15th November 2022

Upper Tribunal Judge Mandalia