Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: UI-2021-001722
EA/11076/2021

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 19th August 2022	**On 13th October 2022**

Before

UPPER TRIBUNAL JUDGE KEITH

Between

EDISON LOGJA
(NO ANONYMITY DIRECTION)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

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

DECISION AND REASONS

Introduction

1. This is an appeal by the appellant against the decision of First-tier Tribunal Judge Mill, (the "FtT"), promulgated on 16th December 2021, by which he dismissed the appellant's appeal of the respondent's refusal on 8th July 2021 for an application under the EU Settlement Scheme (EUSS), with reference to Appendix EU to the Immigration Rules, on the basis that he was a "family member of a relevant EEA citizen". The appeal was under the Immigration (Citizens' Rights Appeals) (EU Exit) Regulations 2020.

2. In her refusal decision, the respondent referred to the appellant's marriage certificate dated 19th April 2021 as evidence that he was the spouse of his EEA partner. However, he had not provided sufficient evidence to confirm that he was her family member prior to the relevant specified date under Annex 1 of Appendix EU, specifically 23:00 hours GMT, on 31st December 2020. The respondent considered whether there was evidence of a family relationship for a durable partner under the Immigration (EEA) Regulations 2016 where the dependent relative did not have a documented right of permanent residence, which was a valid family permit or a residence card issued under the 2016 Regulations. The appellant had not been issued with a family permit or residence card and until he held such documentation, he could not be granted leave under the EUSS as a durable partner.

3. The appellant appealed, including by reference to Article 8 ECHR, although Mr Collins, who appeared below, confirmed that this was not pursued before the First-tier Tribunal. The substance of the appellant's appeal was that he had made every attempt to marry his spouse in 2020, but was frustrated in his ability to do so because of COVID.

The FtT's decision

4. The FtT noted that the appellant is a citizen of Albania. From the outset, Mr Collins accepted that the appellant did not have a relevant family permit. There was an adjournment application before the FtT, which it is unnecessary to set out in detail as there is no appeal against the FtT's refusal of that adjournment application.

5. At §12, the FtT found the appellant and his wife to be credible and reliable witnesses and their evidence was not the subject of material challenge. The appellant's wife, a Greek national, had been exercising Treaty rights in the UK and this was accepted by the respondent. They had met in September 2019 and began dating shortly thereafter, moving in together on 18th January 2020. They then decided that they wished to marry and made enquiries with various registry offices and booked a wedding ceremony on 25th November 2020, but this was cancelled due to COVID restrictions as were further wedding dates in January 2021. They eventually married on 19th April 2021.

6. At §18, the FtT noted that the respondent relied upon the absence of a family permit or residence card and that the appellant's marriage was after the relevant specified date of 31st December 2020. In the alternative, the respondent had considered whether the appellant qualified as a durable partner. The FtT concluded that the appellant was in a durable relationship with his wife from January 2020, that their relationship continues and that they have subsequently married. At §22, the FtT noted that Mr Collins "*sought to persuade me that applying general principles of proportionality, the respondent's decision was unfair*". Mr Collins accepted that there was no Section 120 notice, and no removal decision had been made, so Article 8 ECHR was of no relevance to the decision-making. On

the basis that the appellant did not meet the requirements of the EUSS, his appeal could not succeed. The FtT therefore dismissed his appeal.

The grounds of appeal and grant of permission

7. The appellant lodged a grounds of appeal which referred to the FtT's positive findings about the couple's reliable evidence. Whilst the FtT had referred correctly to the basis of the appeal under the Immigration (Citizens' Rights Appeals) (EU Exit) Regulations 2020, in particular, by reference to the Withdrawal Agreement, the decision was disproportionate. Given the clear wording of Article 18.1(r) of the Withdrawal Agreement, which imported a requirement of proportionality, the FtT had failed to address the proportionality argument in any reasoned way. The respondent's decision and the FtT's judgment also infringed the appellant's rights under Article 7 of the Charter of Fundamental Rights of the European Union. Whilst the appellant did not have a family permit or a residence card, the appellant was in a durable relationship with his partner and as a residence card or permit merely confirms rather than confers durable partner status, the appeal should have been allowed on that basis. Judge Austin granted permission on 8th February 2022. The grant of permission was not limited in its scope.

The hearing before me

8. I began the hearing 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 Collins accepted that Celik posed the appellant's appeal significant difficulties as although the facts were not identical, much of the reasoning in Celik was relevant to this appeal. There was one important aspect of Celik which provided the appellant with a basis on which to continue his 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.*
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> *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."

9. Mr Collins sought to distinguish the facts of this case on the basis that the appellant had sought to marry his wife before the end of the transitional period. He accepted that the appellant had not sought to apply for an EEA family permit before the end of the transitional period, but the Upper Tribunal at §62 of Celik had made clear that a submission that Article 18.1(r) simply had no application went too far and that instead, to benefit from the Withdrawal Agreement, a recipient 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. As a consequence, whilst at §63, 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, it could not be entirely ruled out. The FtT in this case had concluded at §22 that after the Withdrawal Agreement there was no real requirement for judges to incorporate into their assessments the principle of proportionality.

The respondent's submissions

10. Mr Whitwell relied upon Celik and Batool. As the FtT had recorded at §11, the appellant was in a similar set of circumstances as an undocumented extended family member, in circumstances where he had done nothing to seek facilitation of residence by applying for a residence card as an extended family member before the end of the transition period. The Upper Tribunal in Celik had not ruled out the role of proportionality, but the stark facts of this case were that the appellant had not sought facilitation before the end of the transition period.

Discussion and conclusions

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. Unlike spouses of EEA nationals, extended family members enjoyed no such right of residence under the EU free movement legislation and their rights only arose upon their residence being facilitated by the respondent as evidenced by the issue of a residence permit (§52). If the appellant had applied for facilitation of entry and residence before the end of the transition period, Article 10.3 of the Withdrawal Agreement would have brought him within the scope of that Article but that was not the case in Celik, nor is it the case in this appeal. Just as the analysis in Celik was destructive of the appellant's ability to rely on the substance of Article 18.1 (§56) as he was not within the terms of Article 10 and so could not show that he was a family member for the purpose of Article 18, and his attempt to rely on his 2021 marriage was misconceived, so the same analysis applied here.

12. Whilst at §62 of Celik, the Upper Tribunal found that the right of redress applied to those who fell outside Article 18 as well those who partially failed, just as in Celik, the appellant's residence as a durable partner was not facilitated by the respondent as he had not applied for such facilitation before the end of the period. The cancellation of the booked marriage itself was not a frustrated attempt for facilitation. 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. That was an analysis, which on the basis of Celik, was unarguably open to the FtT to reach.

13. For the above reasons, the FtT's decision did not contain an error of law such that it is unsafe and cannot stand.

Notice of Decision

The decision of the FtT did not contain an error of law such that it is not safe and cannot stand. The appellant's appeal is accordingly dismissed.

No anonymity directions apply.

Signed J Keith Date 9th September 2022

Upper Tribunal Judge Keith