



**Upper Tribunal
(Immigration and Asylum Chamber)**

Appeal Number: UI-2022-003466
EA/12065/2021

THE IMMIGRATION ACTS

**Heard at Field House
On 20 September 2022**

**Decision & Reasons Promulgated
On 21 November 2022**

Before

**UPPER TRIBUNAL JUDGE GLEESON
DEPUTY UPPER TRIBUNAL JUDGE CHAMBERLAIN**

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

**MARIGLEN HASA
(ANONYMITY DIRECTION NOT MADE)**

Respondent

Representation:

For the Appellant: Mr. Peter Deller, a Senior Home Office Presenting Officer
For the Respondent: Mr. Michael McGarvey, Counsel instructed by Justice &
Rights Law Firm Ltd.

DECISION AND REASONS

1. The Secretary of State appealed against a decision of First-tier Tribunal Judge Pinder, promulgated on 24 May 2022, in which she allowed the claimant's appeal against the Secretary of State's decision to refuse the claimant's application for settled or pre-settled status under the EU Settlement Scheme (EUSS).

2. The Secretary of State was asked before the hearing in the First-tier Tribunal to consider Article 8 ECHR as a new matter. However, she did not consent to this. As set out at [20] of the Judge's decision, the parties were in agreement that Article 8 could not be considered as part of the claimant's appeal and we are not seised of any freestanding Article 8 issue in these proceedings.

Permission to appeal

3. Permission to appeal was granted by First-tier Tribunal Judge Aldridge on 1 July 2022 as follows:

“The in-time application for permission has been made stating that the judge has provided a determination with material errors of law. In particular, the judge has failed to properly consider the provisions of the Withdrawal Agreement by allowing the appellant to fall within the scope of the agreement when the appellant was not residing in accordance EU law as of 31 December 2020 in accordance with Article 10(1)(e) of the Withdrawal Agreement.”

Rule 24 Reply

4. The claimant's Rule 24 Reply was received at the hearing, significantly out of time, but we have admitted it. The claimant argued therein that there was no arguable error of law in the Judge's findings at paragraph [49].
5. With regard to the Secretary of State's disagreement with the Judge's findings at [50], he contended that Regulation 9(4) allowed consideration of “any matter which it thinks relevant to the substance of the decision appealed against”. It was submitted that the consideration of the sponsor's rights was a matter relevant to the substance of the decision and necessary in the proportionality assessment required under Article 18 (1)(r).

The hearing

6. The hearing was a hybrid face to face and remote hearing: Mr. Deller for the Secretary of State, and the claimant and sponsor, attended in person. For the Secretary of State, Mr. McGarvey attended remotely due to problems caused by disruption to train services. There were no technical difficulties and we are satisfied that the hearing was completed fairly, with the cooperation of both representatives.
7. Both representatives made oral submissions. The Tribunal gave Mr. McGarvey an opportunity to make further written submissions on behalf of the claimant, to be served by 12 noon on 21 September 2022, but none were received. We therefore proceed to determine the appeal on the arguments as they stood at the hearing.
8. We reserved our decision, which we now give.

Background

9. The claimant is a national of Albania. He married the sponsor, a national of Hungary, on 28 March 2021, almost three months after the end of the Transition Period at 11 p.m. on 31 December 2020. On 9 May 2021 the claimant made an application for settled or pre-settled status under the EU Settlement Scheme.
10. The claimant and sponsor's marriage post-dated the end of the Transition Period [30]. He accepted that he had not applied for, or been issued with, a family permit or resident card under the EEA Regulations when the Transition Period ended and that he therefore needed to show that he was a 'durable partner' at that date.
11. The First-tier Tribunal found that the claimant could not meet the relevant definitions in Annex 1 to Appendix EU at [32]. The claimant has not challenged this finding. The Judge found that although the claimant and sponsor could not meet the definition of 'durable partner' in Appendix EU, they were in a durable relationship as defined in *YB (EEA reg 17(4) - proper approach) Ivory Coast* [2008] UKAIT 00062 [36]. There was no challenge to this finding by the Secretary of State.
12. At [49] of the First-tier Judge's decision, she stated that proportionality was relevant in this decision because:

"With Article 18 addressed to the host state and laying conditions for residence status applications, and those conditions including the proportionality principle contained in Article 18(1)(r), I do not consider that any difficulty is raised by Article 10 - personal scope - potentially not providing for the [claimant]."
13. At [50] the Judge considered that, even if she was wrong to find that the claimant could be covered by the Withdrawal Agreement, the sponsor was "firmly in scope". She states:

"I consider that it is likely that Article 18 is not in fact connected or requiring someone to be in 'personal scope' in order to be triggered and for such a person to be able to benefit from the provisions contained in Article 18. In any event, as I have considered above, the Sponsor is firmly in scope under Article 10(1)(a) and the decision to refuse her husband's status in the UK clearly impacts on her residence rights in the UK. Thus, 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."
14. The Judge then proceeded to consider the claimant's grounds under the Withdrawal Agreement. At [53] she concluded:

"In light of all of the above, I am satisfied on balance that the [Secretary of State's] refusal of the [claimant's] application for leave to remain under the EUSS is a disproportionate interference with the [claimant's] and sponsor's rights and fundamental freedoms under EU law, as retained and safeguarded through the Withdrawal Agreement."
15. The First-tier Tribunal allowed the appeal and the Secretary of State appealed to the Upper Tribunal.

Grounds of appeal

16. The Secretary of State argued that the Judge was wrong to find that the claimant had any rights under the Withdrawal Agreement, alternatively in allowing the appeal on the basis that it breached the sponsor's rights under the Withdrawal Agreement, as the Agreement provides no applicable rights to the claimant, with reference to the Judge's reasoning at [49] (see above).
17. Secondly the grounds argue that the Judge materially erred at [50] where she focused on the sponsor's rights under the Withdrawal Agreement, and whether they were breached. The Secretary of State submits that the Judge erred in this finding with reference to regulation 8(2) of the 2020 Regulations. This provides that the ground of appeal is that the decision breaches "any right which the appellant has...".

Permission to appeal

18. Permission to appeal was granted by First-tier Judge Aldridge on the basis that:

"... In particular, the Judge has failed properly to consider the provisions of the Withdrawal Agreement, by allowing the [claimant] to fall within the scope of the Agreement, when the [claimant] was not residing in accordance EU law as of 31 December 2020, in accordance with Article 10(1)(e) of the Withdrawal Agreement."

Rule 24 Reply

19. The claimant's Rule 24 Reply argued that it was necessary to consider the sponsor's rights, in a proportionality assessment under Article 18(1)(r), as a matter 'relevant to the substance of the decision appealed against':

"With regard to the Secretary of State's disagreement with the Judge's findings at paragraph 50 of the determination it is submitted that Regulation 9(4) states "The relevant authority may also consider any matter which it thinks relevant to the substance of the decision appealed against, including a matter arising after the date of the decision."

It is submitted that the consideration of the Sponsor's rights by the Judge was a matter relevant to the substance of the decision and consideration of the Sponsor's rights was necessary in the proportionality assessment required under Article 18 (1)(r)."

Upper Tribunal hearing

20. In oral argument, Mr. Deller for the Secretary of State submitted that the sponsor's rights under the Withdrawal Agreement were not in the scope of the appeal. She was residing in the UK in accordance with Article 10(1)(a) of the Withdrawal Agreement.
21. For the claimant, Mr. McGarvey sought to argue that the Upper Tribunal need not engage with the guidance in *Celik (EU exit; marriage; human rights)* [2022] UKUT 00220 (IAC), handed down on 19 July 2022, which post-dated the First-tier Tribunal decision.

22. Mr. McGarvey argued that *Celik* had changed the law, and that the First-tier Tribunal could not be criticised for failing to apply the law as therein set out. He asked us to uphold the decision of the First-tier Tribunal and dismiss the Secretary of State's appeal.

Celik (EU exit; marriage; human rights) [2022] UKUT 220 (IAC)

23. Mr McGarvey's argument that *Celik* changed the law is unarguably bad: the decision in *Celik* is a declaratory clarification of the effect of the Withdrawal Agreement where a person's entry and residence were not being facilitated before the end of the Transition Period on 31 December 2020.
24. It is implicit in Mr McGarvey's submissions that he accepts that *Celik*, if applicable, is fatal to the claimant's application: the claimant does not dispute that he was not a person whose residence was being facilitated at the end of the Transition Period, and therefore, the concept of proportionality or the principle of fairness cannot be invoked on his behalf.
25. We find that the 2020 Regulations make clear that the only permissible grounds of appeal relate to a breach of the claimant's rights, rather than those of his EEA sponsor. The First-tier Judge materially erred in considering the sponsor's rights and the concept of proportionality in his decision.
26. The First-tier Tribunal therefore erred in law by allowing the appeal and we set it aside and proceed to remake the decision in the light of *Celik*.

Remaking

27. The finding that the claimant could not meet the definition of "durable partner" in Annex 1 to Appendix EU was not challenged, and we find that he cannot succeed on this basis.
28. It is accepted that the claimant did not make an application before 31 December 2020, and we therefore find that his residence was not being facilitated by this date. As set out above, following *Celik*, we therefore find that the claimant has no substantive rights under the Withdrawal Agreement.
29. His appeal therefore falls to be dismissed.

Notice of Decision

1. The decision of the First-tier Tribunal involves the making of material errors of law. We set the decision aside.
2. We remake the decision dismissing the claimant's appeal.
3. No anonymity direction is made.

Signed [Judith AJC Gleeson](#)
Upper Tribunal Judge Gleeson

Date: 12 October 2022