Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: EA/12807/2021
UI-2022-003152

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 4 November 2022	**On 22 December 2022**

Before

UPPER TRIBUNAL JUDGE FRANCES

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

AHMED BOUTALEB
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:
For the Appellant: Mr T Melvin, Home Office Presenting Officer
For the Respondent: Mr J Collins , instructed by Wimbledon Solicitors

DECISION AND REASONS

1. Although this is an appeal by the Secretary of State for the Home Department, I shall refer to the parties as in the First-tier Tribunal. The appellant is a citizen of Algeria born on 1 March 1993. His appeal against the refusal of pre-settled status as a family member under the EU Settlement Scheme ('EUSS') was allowed by First-tier Tribunal Judge Loughran ('the judge') on 4 May 2022.

2. The appellant met the sponsor, a Portuguese national, on 31 December 2019 and she was granted pre-settled status under the EUSS on 16

September 2020. The appellant and sponsor were married under Islamic law on 10 November 2020 and started living together. Due to the Covid-19 pandemic they were unable have a civil marriage ceremony until 8 June 2021. The appellant applied for pre-settled status as a family member under the EUSS on 26 March 2021. The application was refused on 29 June 2021.

3. The judge found the appellant could not meet the definition of durable partner under Appendix EU because the appellant did not hold a 'relevant document' and she was not required to consider Article 8 because this was an entirely new case not within the scope of the appeal. The judge allowed the appellant's appeal under the Immigration (Citizens' Rights Appeals) (EU Exit) Regulations 2020 ('the 2020 Exit Regulations') on the grounds the respondent's decision was disproportionate and breached the Withdrawal Agreement ('WA').

4. Permission to appeal was granted by First-tier Tribunal Judge Sills on 7 June 2022 for the following reasons:

> "2. It is arguable that the Judge gave inadequate reasons for finding the relationship to be durable. The Judge states that the couple met on 31 December 2019 and that the Appellant proposed in November 2019. Both of these statements cannot be true. Hence there is arguably a material mistake of fact.
>
> 3. It is arguable that the Judge has failed to give adequate reasons for finding that the Appellant was a durable partner by the end of December 2020 given they began cohabiting in November 2020. It is arguable that the Judge failed to identify 'other significant evidence' of the durable relationship.
>
> 4. In the absence of any clear guidance from the higher courts on Article 18(r) of the Withdrawal Agreement, it is arguable that the Judge erred in her assessment of the proportionality of the decision."

Relevant law

5. In Batool and others (other family members: EU exit) [2022] UKUT 00219 (IAC), the Upper Tribunal held:

> "(1) An extended (oka other) family member whose entry and residence was not being facilitated by the United Kingdom before 11pm GMT on 31 December 2020 and who had not applied for facilitation of entry and residence before that time, cannot rely upon the Withdrawal Agreement or the immigration rules in order to succeed in an appeal under the Immigration (Citizens' Rights Appeals) (EU Exit) Regulations 2020.

(2) Such a person has no right to have any application they have made for settlement as a family member treated as an application for facilitation and residence as an extended/other family member."

6. In Celik (EU exit; marriage; human rights) [2022] UKUT 00220 (IAC), the Upper Tribunal held:

"(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."

Respondent's submissions

7. Mr Melvin relied on his skeleton argument dated 11 November 2022 and submitted following Celik and Batool, the judge erred in law in allowing the appeal under the WA. The decision should be set aside, remade and dismissed. The respondent refused consent to hear argument on Article 8. There was no rule 24 response from the appellant. Alternatively, the judge erred in law in finding the appellant's relationship was durable and in her assessment of proportionality.

Appellant's submissions

8. Mr Collins submitted that neither Celik nor Batool were pleaded in the grounds of appeal and there was no application to amend the grounds. These cases were not declaratory in nature and it was not open to the respondent to rely on them retrospectively. The mistake of fact was an obvious typographical error. There was no challenge to the evidence and the judge's reasoning was adequate. The appellant and sponsor were unable to marry because of the Covid-19 pandemic. The judge accepted the appellant's would have married but for the Covid-19 pandemic and her finding the decision was disproportionate was open to her.

9. Mr Collins submitted it was apparent from [62] of Celik that proportionality was still applicable even though the appellant did not come within Article 18 of the WA. The respondent had failed to consider this and it was open to the judge to do so. The law was not settled and Celik was the subject of an application for permission to appeal to the Court of Appeal. This was not a case of re-writing the WA and the decision maker had adopted a rational approach.

Conclusions and reasons

10. The grounds plead the appellant's residence was not facilitated and he was not residing in the UK in accordance with EU law as of 31 December 2020. The appellant did not come within the scope of the WA and there was no breach of his rights. Alternatively, the judge erred in her assessment of proportionality.

11. It was accepted the appellant applied under the EUSS as a family member and he did not satisfy the definition of durable partner in Appendix EU of the immigration rules. It is not in dispute that the appellant did not apply for facilitation of entry or residence before the end of the transition period and his residence in the UK was not facilitated by the respondent prior to 11pm on 31 December 2020. The appellant cannot not satisfy Article 10(2) or 10(3) WA.

12. I agree with the conclusions and reasons in Batool and Celik. The appellant cannot rely on the WA and the judge erred in law in allowing the appeal on that basis. I set aside the decision and remake it.

13. The appellant has no substantive right under the WA and he cannot satisfy Appendix EU. Article 8 was a new matter and the respondent had not given her consent. I dismiss the appeal under the 2020 Exit Regulations.

Notice of Decision

The respondent's appeal is allowed.

The decision of the First-tier Tribunal dated 4 May 2022 is set aside.

The appellant's appeal is dismissed under the Immigration (Citizens' Rights Appeals) (EU Exit) Regulations 2020.

J Frances

Signed Date: 8 November 2022
Upper Tribunal Judge Frances

TO THE RESPONDENT
FEE AWARD

As I have dismissed the appeal, I make no fee award.

J Frances

Signed Date: 8 November 2022
Upper Tribunal Judge Frances

NOTIFICATION OF APPEAL RIGHTS

1. A person seeking permission to appeal against this decision must make a written application to the Upper Tribunal. Any such application must be **received** by the Upper Tribunal within the **appropriate period** after this decision was **sent** to the person making the application. The appropriate period varies, as follows, according to the location of the individual and the way in which the Upper Tribunal's decision was sent:

2. Where the person who appealed to the First-tier Tribunal is **in the United Kingdom** at the time that the application for permission to appeal is made, and is not in detention under the Immigration Acts, the appropriate period is **12 working days (10 working days, if the notice of decision is sent electronically).**

3. Where the person making the application is in detention under the Immigration Acts**, the appropriate period is 7 working days (5 working days, if the notice of decision is sent electronically)**.

4. Where the person who appealed to the First-tier Tribunal is **outside the United Kingdom** at the time that the application for permission to appeal is made, the appropriate period is **38 days (10 working days, if the notice of decision is sent electronically).**

5. A "working day" means any day except a Saturday or a Sunday, Christmas Day, Good Friday or a bank holiday.

6. The date when the decision is "sent' is that appearing on the covering letter or covering email.