Appeal Number: UI-2022-003120

IN THE UPPER TRIBUNAL
(IMMIGRATION AND ASYLUM CHAMBER)
ON APPEAL FROM THE FIRST-TIER TRIBUNAL
(IAC), JUDGE FORD (EA/12811/2021)

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 26 October 2022	**On 3 December 2022**

Before

UPPER TRIBUNAL JUDGE BLUNDELL

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

QAZIM KUKA
(ANONYMITY NOT ORDERED)

Respondent

Representation:
For the Appellant: Ms S Cunha, Senior Presenting Officer
For the Respondent: Ms J Bond, instructed by Oaks Solicitors

DECISION AND REASONS

1. The Secretary of State for the Home Department appeals, with permission granted by the First-tier Tribunal, against the decision of Judge Ford ("the judge") dated 30 March 2022. By that decision, the judge allowed Mr Kuka's appeal against the Secretary of State's decision to refuse his application for leave to remain under Appendix EU of the Immigration Rules.

2. To avoid confusion, I shall refer to the parties as they were before the First-tier Tribunal: Mr Kuka as the appellant and the Secretary of State as the respondent.

3. The appellant is an Albanian national who was born on 7 August 1994. He entered the UK unlawfully in 2019 and remained unlawfully until 10 June 2021, when he made an application for leave to remain under Appendix EU of the Immigration Rules as the spouse of a qualifying EU national. That application was refused and the appellant appealed to the First-tier Tribunal.

The Decision of the First-tier Tribunal

4. The judge noted that it was common ground between the parties that the appellant and his wife, a Greek national named Majlinda Bushati, had married on 28 May 2021. They had been unable to marry before the end of the transition period (on 31 December 2020), despite attempts to do so, because of the national lockdowns due to the Coronavirus pandemic. They had been in a durable relationship prior to their marriage. Whilst they had not cohabited for two years, there was ample evidence to show that it was a settled relationship akin to marriage. The appellant had then applied for leave to remain under the EU settlement scheme on 10 June 2021.

5. The judge noted that the respondent had refused the application because she was not satisfied that the appellant qualified under Appendix EU. He had not been issued with a family permit or residence card and the marriage had not taken place prior to the specified date.

6. The judge allowed the appeal because she found that the respondent's decision was not in accordance with the UK's obligations under the Withdrawal Agreement. She considered that the failure to make any allowance for the 'truly exceptional' reason that the appellant and his wife had been unable to marry was disproportionate. They had been unable to marry before the specified date but they had done so before 30 June 2021, the cut-off date for family members to apply for leave to remain under the EU Settlement Scheme. The respondent had suggested that the appellant should leave the UK in order to make an entry clearance application but that went beyond what was necessary in order to achieve the objective of regularising the status of EU nationals resident in the UK at the date of withdrawal and their qualifying family members. The judge found that the appellant and his wife had established family life together in accordance with "the Immigration (EU) Regulations 2016" as at the specified date, regardless of whether the appellant held a relevant document as at 31.12.20. At [19], the judge said this:

> The Respondent argues that those who have entered the UK illegally cannot be given an immigration advantage not given to those who comply with the law and enter lawfully. I can see the superficial attractiveness of this approach as it would appear to ensure that all applicants are treated equally, but it fails to recognise the special position of EU nationals and their families present and exercising Treaty rights in the UK

> as at 31.12.2020. It also fails to recognise that under the Immigration (EEA) Regulations 2016 there was no requirement that a spouse of a qualifying EEA national be lawfully resident in the UK before they could be treated as a qualifying family member and issued with a Residence card.

7. The judge therefore concluded that the decision breached the proportionality principle recognised by 'the withdrawal treaty'.

The Appeal to the Upper Tribunal

8. The respondent's grounds of appeal to the Upper Tribunal submit that the judge misdirected herself in law in two respects. Firstly, it is submitted that the judge erred in concluding that the appellant had any redress under the Withdrawal Agreement because his residence was not being facilitated on 31 December 2020. The respondent submitted, secondly, that the judge had erred in treating the 'grace period', which ended on 31 June 021, as extending the time period within which the appellant could become lawfully resident under the Immigration (EEA) Regulations 2016.

9. First-tier Tribunal Judge Murray granted permission to appeal. She noted that the appellant did not have a relevant document and that his marriage post-dated the specified date, in which circumstances it was arguable that he was not residing in the UK in accordance with EU Law prior to the UK's exit from the EU.

10. After permission was granted, Presidential panels of the Upper Tribunal issued the decisions in Celik (EU exit; marriage; human rights) [2022] UKUT 00220 (IAC) and Batool & Ors (other family members: EU exit) [2022] UKUT 00219 (IAC).

11. Counsel who appeared for the appellant before the First-tier Tribunal (Barnabas Lams) settled a response to the grounds of appeal on 14 October 2022. The response was filed and served with a helpful bundle of authorities.

12. Mr Lams was unable to attend the hearing and an application to adjourn the appeal so that he could represent the appellant was refused by an Upper Tribunal Lawyer. That application was not renewed before a judge and Ms Bond of counsel was instructed to represent the appellant.

Preliminary Matters

13. At the outset of the hearing, it was unfortunately necessary to give Ms Cunha, who represented the Secretary of State before me, additional time. She had attended court late and had only learned that there was a detailed response to the grounds of appeal at the start of the hearing. The bundle had evidently been served on the respondent but had not, for whatever reason, been brought to Ms Cunha's attention. I gave her time in which to consider the rule 24 response and the bundle of authorities.

14. On my return to court, Ms Cunha did not state that the arguments in the rule 24 response necessarily caused her any difficulty. She did seek an adjournment, however, in order to introduce material from Hansard. She was unable to give me the date of the relevant debate or the name of the minister who had made the statement in question. Nor, it transpired, was she able to state that there had even been a debate during which anything relevant had been said. What she hoped, however, was that something had been said during a debate on an amendment to the Immigration (EEA) Regulations 2016 which might assist her in the submissions she wished to make about the fundamental difference between the position of direct family members and extended family members in EU Law.

15. I refused that application for several reasons. Firstly, an adjournment granted on that basis would not necessarily have yielded any material from Hansard. Ms Cunha was not able to state whether any such material existed. Secondly, it is not immediately apparent to me why there would have been a debate in Parliament about a statutory instrument such as the 2016 Regulations. Thirdly, even if there had been a debate (for whatever reason), I could not see how the requirements in Pepper v Hart [1993] AC 593 were conceivably met. The respondent does not say that there is any ambiguity in the wording of any of the relevant provisions. I was not told by Ms Cunha that there was an Act to which this application related and it is not clear, in those circumstances, that there was a relevant Bill in connection with which there was a relevant statement made by the Promoter of the Bill.

16. Fourthly, leaving all that to one side, the key instrument in these proceedings is not a piece of domestic legislation but an international treaty, in the form of the Withdrawal Agreement. I cannot immediately conceive of a way in which Parliamentary debate could properly shed light on the meaning of a treaty, to which the principles of the Vienna Convention apply. Were it otherwise, there is every risk that each individual signatory to the treaty would adopt a different construction of it, based upon words said domestically. If recourse to any external aids to construction is permissible, it would surely be only the travaux preparatoires, rather than purely domestic material.

17. I refused Ms Cunha's application to adjourn on this basis. There was no further application to adjourn.

18. Ms Bond then indicated that she wished to rely on a point which did not feature in the decision of the FtT or in the submissions made by Mr Lams in either the FtT or the Upper Tribunal. The point was that Article 10(4) of the Withdrawal Agreement might apply to the appellant. Ms Bond noted that it was said in the statements made by the appellant and his wife that their relationship had started when the sponsor was on holiday in Albania in August 2019. Ms Bond recognised, however, that there had been no reference to Article 10(4) in the hearing before the FtT and that no findings of fact had been made on this point. She accepted that she was unable, on the findings reached by the judge, to submit that the appellant should have prevailed before the FtT on this basis. She did not seek to pursue the point in the circumstances.

19. I then heard brief submissions on the merits of the respondent's appeal.

Submissions

20. Ms Cunha maintained that the grounds of appeal established an error on the part of the judge and that the correctness of the grounds was underlined by the decision in Celik. The appellant's residence had never been facilitated by the respondent and Article 10(2) did not apply; the mere existence of a durable relationship was clearly insufficient.

21. Ms Bond wished simply to rely on the rule 24 response. She encouraged me to focus not on the existence of the durable relationship but on the fact that the appellant and his wife had intended to marry and to become direct family members before the end of the transition period. I asked her to address me on how such a right could be defined but she did not wish to respond beyond referring me to the rule 24 response.

22. Ms Cunha did not wish to reply.

23. I reserved my decision.

Analysis

24. As I have already observed, matters have moved on significantly since the judge gave her decision in March 2022. Four months later, on 18 and 19 July 2022, the Presidential guidance in Celik and Batool was issued. Mr Lams accepts in his rule 24 response that the Upper Tribunal's focus is likely to be on those decisions and he quite properly takes no point on the fact that the respondent has not made a formal application to amend her grounds to rely on those decisions. I should perhaps record that I would not have been favourably disposed to any such objection; the grounds of appeal essentially raise the very points on which the Secretary of State prevailed in those decisions and it would be wholly artificial not to permit argument on those matters in the absence of an application to vary the grounds of appeal.

25. The judicial headnote to Celik is as follows:

> (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.

26. The judicial headnote to Batool states:

> (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.

27. The first two paragraphs of the headnote to Celik and the first paragraph of the headnote to Batool are directly relevant to the appellant's appeal. Subject to the arguments now advanced in the rule 24 response, those paragraphs suffice to establish that the judge erred in law in concluding that this appellant could succeed in his appeal on the basis that the Withdrawal Agreement applied to him. He was in a durable relationship with an EEA national who was exercising her Treaty Rights in the UK on 31 December 2020 but his residence was not facilitated on that date and he had made no application for facilitation before that date.

28. At [4]-[5] of the response, Mr Lams submits that the judge's focus was on the inability of the appellant and the sponsor to marry before 31 December 2020 and that she did not err in concluding that the respondent had unlawfully failed to make any allowance for what he described in his FtT skeleton as the *force majeure* cause of that inability. As Ms Bond noted in her brief oral submissions, Mr Lams does not submit in his response that the appellant somehow had a right to remain in the UK as a durable partner. The submission, made in various different ways to which I will shortly turn, is instead that the appellant's situation as a putative spouse of an EEA national should have brought him within the scope and protection of the Withdrawal Agreement.

29. As a preliminary observation, I very much doubt that it is possible to define the category of person to whom this argument might apply, and the type of protection which should be afforded to them. They are not family members, and would never have had any automatic rights under the Directive until they married. They are not extended family members whose residence was being facilitated at the relevant point in

time. And they had not made an application for facilitation at that time. They belong to a category of individual who – at the relevant time – had no rights under the Directive. If an intention to protect that category of person is to be read into the Withdrawal Agreement, I cannot understand how that category would be defined and for how long the protection in question would last. The same point was made by the Presidential panel in Celik:

> [60] Sub-paragraphs (a) to (d) of Article 18 make specific provision for late submission of an application for a new residence status. One looks in vain in Article 18 and elsewhere in the Withdrawal Agreement for anything to the effect that a person who did not meet the relevant requirements as at 11pm on 31 December 2020 can, nevertheless, be treated as meeting those requirements by reference to events occurring after that time. If that had been the intention of the United Kingdom and the EU, the Withdrawal Agreement would have so specified. Article 31 of the Vienna Convention on the Law of Treaties (1969) requires a treaty to be "interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose". It would plainly be contrary to the Vienna Convention to interpret the Withdrawal Agreement in the way for which the appellant contends.

30. To afford some sort of open-ended protection to this ill-defined group of individuals would, in my judgment, be wholly contrary to the intention of the Withdrawal Agreement, which was clearly to ensure an orderly withdrawal from the EU and to provide legal certainty to citizens and economic operators as well as to judicial and administrative authorities: [59] of Celik refers.

31. With those introductory observations in mind, I turn to the specific arguments advanced by Mr Lams in the response. The first is that legal certainty and the imperative of free movement for EU nationals provides a strong justification for affording protection to the putative spouse of an EU national who was exercising free movement rights prior to the UK's withdrawal from the Union.

32. As I have sought to explain above, however, legal certainty favours the Secretary of State's approach to this category of case. Whilst it is undoubtedly capable (particularly in combination with the pandemic) of creating results which might be seen as unfair by those affected, the bright lines created by the Withdrawal Agreement furthered the fundamental aim of legal certainty. Those who were able to marry before 31 December 2020 were protected. Those whose residence was being facilitated were protected. And those who made an application for facilitation *under EU law* before the specified date were also afforded protection under Article 10(3).

33. Those, like the appellant, who had taken no such steps (for whatever reason) fell outside the scope of the available protections. That cannot properly be said to inhibit the sponsor's right to freedom of movement, as the appellant would have been able at any time prior to the

specified date to make an application under the Immigration (EEA) Regulations 2016 as an extended family member. If an individual was unable to marry before the end of the transition period, they were always able to make an application for facilitation as a durable partner before that date. The fact that a couple had not lived together for two years or more could not automatically disentitle the applicant from qualifying as a durable partner and from being considered for facilitation of residence. Any difficulty encountered by him after that date cannot be said to compromise the right to freedom of movement within the EU because the sponsor was no longer exercising any such right post-withdrawal.

34. Mr Lams submits that the 'lockdowns' which prevented the appellant from marrying his spouse were measures which jeopardised the attainment of the objectives of the Agreement or imposed limitations on obtaining the residence rights recognised within it, contrary to Article 5 and 14 of the Withdrawal Agreement. I do not accept that argument. The lockdowns were not measures which were put in place with any such objective. The objective of those measures was the protection of public health. The provisions to which Mr Lams refers were put in place to ensure that all signatory states acted in good faith; those provisions do not serve to protect an individual from any 'limitation', regardless of the basis upon which it was imposed.

35. At [20]-[22] of his response Mr Lams submits that the respondent's stance frustrates the appellant's legitimate expectation. The legitimate expectation is defined in the following way:

> EU nationals residing in the UK in accordance with EU rules must have had a legitimate expectation that they would be allowed to settle here [sic] establish or continue family life here as part of the orderly transition contemplated by the WA.

36. In reality, however, the only legitimate expectation which the appellant or the sponsor could have had was that the UK would abide by its obligations under the Directive and the Withdrawal Agreement. A person who failed to attempt to bring themselves within those protections before the specified date could not hope to secure lasting protection thereafter.

37. In the concluding paragraphs of his response, Mr Lams draws on what was said at [62] of Celik, about the possibility of Article 18(1)(r) of the Withdrawal Agreement potentially providing protection to a person 'who, upon analysis, is found not to come within the scope of Article 18 at all'. He makes no reference to [64], however, which makes it clear that a person in the appellant's position cannot bring himself within the substance of Article 18.1. What he does submit, however, is that it was not argued in Celik that the Withdrawal Agreement had an objective of seeking to 'preserve the rights of EU citizens including the right to marry and to live with a spouse in the host country'.

38. I reject that argument by reiterating the conclusions I have previously expressed. It is not possible to discern any such objective in the Withdrawal Agreement and to do so would be to blur beyond

recognition the clear lines which it creates. To do so would also be to depart from the plain wording of the agreement and to afford protection to an ill-defined group of individuals for an unspecified period. That was obviously not the intention of the signatory states.

39. It follows that the appellant cannot bring himself within the scope of the Withdrawal Agreement, whether for the reasons given by the judge or those now advanced in the response to the Secretary of State's grounds of appeal. I therefore hold that the judge in the FtT erred in law in allowing the appeal and that the error was material to the outcome. I will substitute a decision to dismiss the appellant's appeal.

40. I note, however, that no consideration has been given to any rights which the appellant might have under the ECHR. He has never made an application on that basis and he did not attempt to raise that ground as a new matter within this appeal. Whether he makes an application on that basis or not, it is only proper to observe that there has been no challenge to the judge's findings of fact and, in particular, to her finding that the appellant's relationship with the sponsor is a genuine one and that they were prevented from marrying before the end of the transition period by circumstances beyond their control.

Notice of Decision

The FtT erred in law in allowing the appellant's appeal. I set aside that decision and substitute a decision to dismiss his appeal.

No anonymity order is made.

M.J.Blundell

Judge of the Upper Tribunal
Immigration and Asylum Chamber

28 October 2022