Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Numbers: UI-2022-003634
EA/13312/2021

THE IMMIGRATION ACTS

Heard at Field House
On 4 October 2022

Decision & Reasons Promulgated
On 21 November 2022

Before

UPPER TRIBUNAL JUDGE McWILLIAM

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

And

MRS KLEMENTINA MOLLAJ
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:
For the Appellant: Ms A Everett, Home Office Presenting Officer
For the Respondent: unrepresented

DECISION AND REASONS

1. I shall refer to the Respondent as the Appellant as she was before the First-tier Tribunal.

2. The Appellant is a citizen of Albania. Her date of birth is 9 May 1990. She made an application for leave to remain 28 December 2020 under the EU Settlement Scheme (EUSS). The application was refused by the SSHD on 10 May 2021 because the Appellant had not provided sufficient evidence to confirm that she was a family member of a relevant EEA citizen prior to 2300 GMT on 31 December 2020 as defined in Annex 1 of Appendix EU.

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3. The Appellant had not been issued with a family permit or residence card under the Immigration (European Economic Area) Regulations 2016 ("2016 Regulations") as the durable partner of an EEA national and had not provided a relevant document issued on this basis. The SSHD decided that she did not meet the requirements for settled status under the EUSS.

4. The Appellant appealed against the decision of the SSHD on 10 May 2021. Her appeal was allowed by the First-tier Tribunal (Judge Juss) in a decision that was promulgated on 1 July 2022 following a hearing in Birmingham on 12 May 2022.

5. The First-tier Tribunal (Judge Cartin) granted the SSHD permission to appeal against the decision of the First-tier Tribunal on 20 July 2022.

The Decision of the First-tier Tribunal

6. At the hearing before the First-tier Tribunal the SSHD was not represented. The Appellant was represented by Counsel, Mr M Aziz. The judge heard evidence from the Appellant and her husband, a citizen of Romania exercising Treaty rights in the UK. The Appellant provided a marriage certificate indicating that she and her husband married on 31 March 2021.

7. The judge allowed the appeal, having found the Appellant and her husband to be credible. He accepted that they were in a genuine and durable relationship evidenced by a marriage certificate. He accepted that they intended to marry before the end of 2020, however, were unable to do so because of Covid-19 regulations. The wedding was postponed as a result of Covid-19. The Appellant relied on a UK Government statement published on the Home Office website which stated: "The Home Office has responded quickly in unprecedented circumstances to ensure that no-one is unfairly penalised for events outside of their control."

8. The judge found as follows:

> "21. … I find that Home Office published guidance around late applications assists the Appellant in this case. It requires there to be 'reasonable grounds' with a wide range of examples given, and in any event it requires that the applicants are to be given the 'benefit of the doubt'. The guidance in fact is couches [sic] in liberal language and this is consistent with the ethos of the EU Settlement Scheme1. Thus it requires caseworkers (i) to look to grant status rather than find reasons to refuse and requires them to adopt a '*flexible and pragmatic approach*'; and (ii) to give applicants the '*benefit of the doubt*' when considering reasonable grounds. Of course, the greater the delay, the harder it will generally be to show 'reasonable grounds' but in the instant case one can see from the facts above why the Appellant does have 'reasonable grounds' and why a '*flexible and pragmatic approach*' should be adopted. In fact, the guidance also refers to the existence of the mitigating factor for applicants of being '*hampered in accessing the support available to help them apply by restrictions associated with the Covid-19 pandemic*'. The

meaning of being 'hampered' is an ordinary English language construction and the threshold is not inordinately high.

22. Third, the EUSS Rules relating to the grant of leave to remain to durable partners impose a mandatory requirement that 'the person holds a relevant document as the durable partner of the relevant EEA citizen'. This means that it is not sufficient (or even necessary) to prove that as a matter of fact the person was a durable partner. The plain fact is that the Appellant's failure to produce such a document is the reason why his application for leave to remain was refused. However, the imposition of such a requirement in Rules that purportedly give effect to the withdrawal agreement is in breach of the withdrawal agreement and thus not a lawful requirement. The reason for this is quite simply because under Article 18(1)(l)(iv) of the withdrawal agreement the state can require an applicant to produce 'a document issued by the relevant authority in the host State in accordance with Article 3(2) of Directive 2004/38/EC.' What is important here to recognise is that the imposition of such a requirement is only permitted on 'family members'. The Appellant is <u>not</u> a family member. This is because 'family members' is defined for the purposes of Part Two of the withdrawal agreement in Article 9(a) and it is clear from this that 'durable partners' are not within the meaning of Article 3(2) of the Directive as falling within that definition. In fact, Article 9(a)(ii) expressly excludes them from the definition of 'family members'. If this is right, then it must follow that durable partners within the meaning of Article 3(2) of the Citizens' Directive do not fall within the class of persons to whom Article 18(1)(l)(iv) applies.

23. Fourth, the decision to refuse in these circumstances cannot have been a proportionate one. This is because the reason for the refusal of the Appellant's application was her failure to satisfy a requirement that was unwarranted by the withdrawal agreement to which the Rules have purported to give effect. It also takes no account of Appendix E which states that '*other significant evidence*' within that time period can be taken into account.

24. Fifth, and in any event, the withdrawal agreement provides for discretion to be exercisable in favour of the applicant. This is clear from Article 13(4) which states that 'The host State may not impose any limitations or conditions for obtaining, retaining or losing residence on the persons referred to in paragraphs 1, 2 and 3, other than those provided for in this Title.' It is made clear that 'There shall be no discretion in applying the limitations and conditions provided for in this Title, other than in favour of the person concerned.' It is plainly unlawful not to consider the possibility of exercising a discretion where that discretion is exercisable, but to instead rely on an Appellant's sole failure to satisfy the various mandatory requirements embodied in the (domestic) Rules.

25. Sixth, how then should the discretion have been exercised? If, for argument's sake, the Secretary of State was entitled to rely on the Appellant's failure to produce a relevant document, the Secretary of State still had a discretion to exercise and in doing so should

> have taken into account the fact that (i) the Appellant and her husband were partners in a durable relationship, even if it had been the case that they were unable to provide the requisite documentation, and (ii) the extraordinary circumstances of a global pandemic leading to a two year lockdown which prevented them marrying prior to the end of the transition period, because marriage registrars have not been working during the Covid-19 lockdown."

The Grounds of Appeal

9. The grounds assert that the judge erred in law. The Withdrawal Agreement provides no applicable rights to a person in the Appellant's circumstances. The Appellant was not residing in accordance with EU law as of the specified date (31 December 2020). She had not had her residence as a durable partner facilitated in accordance with the Immigration (European Economic Area) Regulations 2016. The Appellant has never applied for or been granted facilitated residence in the UK prior to the specified date. She was not lawfully resident in the UK under EU law at any point prior to the UK's exit from the EU.

10. The Appellant does not come within the personal scope of the Withdrawal Agreement. There is no entitlement to the full range of judicial redress, including the Article 18(1)(r) requirement that the decision was proportionate.

The Law

11. Since the hearing before the First-tier Tribunal appeal the Upper Tribunal has clarified the position in the case of Celik (EU exit, marriage, human rights) [2022[UKUT 00220. The headnote reads 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."*

Error of law

12. Ms Mollaj attended the hearing as a litigant in person. She explained to me that she was in a genuine relationship and had been prevented by Covid-19 regulations from marrying her partner before the relevant date. I explained to her that there was no issue concerning her credibility. I brought to her attention the recent reported decisions of the UT which were binding on me.

13. The judge did not identify the grounds of appeal with reference to Reg. 8 of the Immigration (Citizens' Rights Appeals) (EU Exit) Regulations 2020 (the "Exit regs").[1] It does not appear to have been argued that the decision was not in accordance with Appendix EU. In any event this Appellant cannot meet the requirements of the Rules because she was not married or documented before the relevant date. Her residence had not been facilitated before 31 December 2020. In so far as the judge purported to allow the appeal under the Withdrawal Agreement with reference to proportionality, this was not open to him (see Celik).

14. The judge also purported to allow the appeal on the basis of discretion which should be exercised in favour of the Appellant. He had no jurisdiction to allow the appeal on this basis.

15. The decision of the judge was not open to him on the evidence properly applying the guidance given by the UT in Celik.

16. I set aside the decision of the First-tier Tribunal to allow the appeal.

Re-making

17. I invited further submissions from the parties for the purpose of remaking. Neither had anything further to add. I dismissed the appeal.

The appeal is dismissed

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[1] **Reg. 8 - Grounds of appeal**

(1) An appeal under these Regulations must be brought on one or both of the following two grounds.

(2) The first ground of appeal is that the decision breaches any right which the appellant has by virtue of—

(a) Chapter 1, or Article 24(2), 24(3), 25(2) or 25(3) of Chapter 2 , of Title II , or Article 32(1)(b) of Title III, of Part 2 of the withdrawal Agreement,

(b) Chapter 1, or Article 23(2), 23(3), 24(2) or 24(3)], of Title II, or Article 31(1)(b) of Title III, of Part 2 of the EEA EFTA separation Agreement, or

(c) Part 2, or Article 26a(1)(b), of the Swiss citizens' rights agreement.

(3) The second ground of appeal is that—

(a) where the decision is mentioned in regulation 3(1)(a) or (b) or 5, it is not in accordance with the provision of the immigration rules by virtue of which it was made;

(b) where the decision is mentioned in regulation 3(1)(c) or (d), it is not in accordance with residence scheme immigration rules;

(c) where the decision is mentioned in regulation 4, it is not in accordance with section 76(1) or (2) of the 2002 Act (as the case may be);

(d) where the decision is mentioned in regulation 6, it is not in accordance with section 3(5) or (6) of the 1971 Act (as the case may be);

Signed Joanna McWilliam Date 12 October 2022

Upper Tribunal Judge McWilliam