Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Numbers: UI-2022-003727**
EA/01038/2022

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On the 26 March 2023

Before

UPPER TRIBUNAL JUDGE PITT

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

EDMIR TUSHA
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:
For the Appellant: Mr E Tufan, Senior Home Office Presenting Officer
For the Respondent: Mr B Hawkin, instructed on Direct Access

Heard at Field House on 24 November 2022

DECISION AND REASONS

1. This is an appeal against the decision issued on 15 July 2022 of First-tier Tribunal Judge Sweet which allowed the appellant's appeal against a decision of the respondent dated 31 December 2021 which refused leave under the European Union Settlement Scheme (EUSS) as set out in Appendix EU of the Immigration Rules.

2. For the purposes of this decision I refer to the Secretary of State for the Home Department as the respondent and to Mr Tusha as the appellant, reflecting their positions before the First-tier Tribunal.

3. The appellant is a national of Albania, born on 2 March 2001.

4. The appellant began cohabiting with Ms Elena Hura, a Romanian national, in August 2019. During the latter part of 2020 the couple tried to get married but were unable to find an appointment prior to 31 December 2020.

5. On 21 December 2020 the appellant made an application for a residence card as a durable partner of an EEA national exercising Treaty rights as provided in Regulation 8 of the Immigration (European Economic Area) Regulations 2016 (the EEA Regulations).

6. The respondent refused that application in a decision dated 10 February 2021. The respondent did not accept that the appellant had provided sufficient evidence to show that he was in a durable relationship with Ms Hura. The appellant did not appeal against that decision.

7. On 10 April 2021 the appellant and Ms Hura married. On 29 April 2021 the appellant made an application for leave under the EUSS as the spouse of an EU national.

8. The respondent refused that application on 31 December 2021. The Secretary of State said this:

> "You state that you are a spouse of a relevant EEA citizen. However, you have not provided sufficient evidence to confirm this. The reasons for this are explained below.
>
> As you married the relevant EEA citizen after 23:00 GMT on 31 December 2020 and you are not the specified spouse or civil partner of a Swiss citizen, you must have been the durable partner of the relevant EEA citizen by that date and time.
>
> Consideration has been given as a durable partner of a relevant EEA citizen. However, you have not provided sufficient evidence to confirm this. The reasons for this are explained below.
>
> The required evidence of family relationship for a durable partner of a relevant EEA citizen is a valid registration certificate, family permit (or a letter from the Secretary of State, issued after 30 June 2021, confirming your qualification for one) or residence card issued under the EEA Regulations (or an equivalent document or other evidence issued by the Bailiwick of Jersey, the Bailiwick of Guernsey or the Isle of Man), a valid EU Settlement Scheme biometric residence card, or an EU Settlement Scheme Family Permit ('a relevant document') as the durable partner of that EEA citizen and, where the applicant does not have a documented right of permanent residence, evidence which satisfies the Secretary of State that the durable partnership continues to subsist.

> Home Office records do not show that you have been issued with a registration certificate, family permit (or a letter from the Secretary of State, issued after 30 June 2021, confirming their qualification for one) or residence card under the EEA Regulations as the durable partner of the relevant EEA citizen and you have not provided an equivalent document or other evidence issued on this basis by any of the Islands. Our records also do not show that you have been granted an EU Settlement Scheme biometric residence card, or an EU Settlement Scheme Family Permit, as the durable partner of the relevant EEA citizen.
>
> In order to meet the definition of a durable partner as set out in Annex 1 of Appendix EU to the Immigration Rules, you need to demonstrate that you are joining a family member of your sponsor as claimed and that you hold a valid relevant document.
>
> Unless you hold such a document you cannot be granted leave under the EU Settlement Scheme as the durable partner of a relevant EEA citizen.
>
> Therefore, you do not meet the requirements for settled status as a family member of a relevant EEA citizen".

9. The appellant appealed this decision to the First-tier Tribunal. First-tier Tribunal Judge Sweet allowed the appeal in a decision issued on 15 July 2022. In paragraphs 8 to 10 of the decision, Judge Sweet found that there was strong evidence that the appellant was in a genuine relationship with Ms Hura and that their evidence as to the history of the relationship and their attempts to marry was credible. He found that the appellant had been in a durable relationship with Ms Hura since August 2019 and had made every effort to marry before that date. In paragraph 10 Judge Sweet found that the inability to marry before the end of the transition period (31 December 2020) was due to the Covid-19 restrictions and temporary closure of the registry office where they had tried to get married.

10. In paragraph 11 the judge said this:

> "Apart from the considerable evidence regarding the durability of their relationship, which commenced in January 2019, I also take into account Article 18(1)(r) of the Withdrawal Agreement, that the redress procedure shall allow for an examination of the legality of the decision, as well as of the facts and circumstances on which the proposed decision is based, and such redress procedure shall ensure that the decision is not disproportionate. I am satisfied that the decision by the respondent on 31 December 2021 is disproportionate and this appeal should be allowed. I also take into account the policy guidance *EUSS* dated 13 April 2022, which acknowledged the problems caused by Covid 19 and referring to other compelling practical or compassionate reasons such that the appellant may not be able to obtain evidence of ID and nationality or residence required to make an application.
>
> For all of these reasons, I am satisfied that the appellant was in a durable relationship at the relevant time and this appeal should be allowed".

11. The respondent appealed against the decision of First-tier Tribunal Judge Sweet and permission was granted by the First-tier Tribunal on 2 August 2022. The respondent maintained that the appellant's residence was not being facilitated under the EEA Regulations as of 31 December 2020 so could not benefit from the transitional provisions set out in Article 10(3) of the Withdrawal Agreement. The appellant had not shown that he was a durable partner for the purposes of the EUSS. He was therefore not entitled to any of the protection of the Withdrawal Agreement, including the proportionality provisions in Article 18, as a result. The respondent therefore submitted that the First-tier Tribunal had erred in allowing the appeal.

12. Article 10(3) of the Withdrawal Agreement provides:

> "Paragraph 2 shall also apply to persons falling under points (a) and (b) of Article 3(2) of Directive 2004/38/EC who have applied for facilitation of entry and residence before the end of the transition period, and whose residence is being facilitated by the host State in accordance with its national legislation thereafter".

13. By the time of the hearing before me, a Presidential panel of the Upper Tribunal had issued the decision in Celik (EU exit; marriage; human rights) [2022] UKUT 00220 (IAC). Celik provides that an individual who "had applied for facilitation of entry and residence before the end of the transition period" (31 December 2020) and "was being facilitated by the respondent "in accordance with … national legislation thereafter" may be able to make out a case that they come within Article 10(3) of the Withdrawal Agreement and are entitled to the benefit of the proportionality provisions of Article 18 of the Withdrawal Agreement; see paragraph 53 of Celik.

14. Mr Hawkin submitted that the appellant came within that part of the ratio of Celik. He had an outstanding application as of 31 December 2020 for the respondent to recognise his rights as a durable partner under the EEA Regulations. That was the situation referred to in paragraph 53 of Celik as being capable of bringing the appellant within the provisions of the Withdrawal Agreement. Mr Hawkin maintained that was so even where the application under the EEA Regulations was refused on 10 February 2021 and the appellant thereafter had no outstanding application or appeal under the EEA Regulations or any other provisions until he made the application under the EUSS on 29 April 2021.

15. I did not find that the appellant came within the provisions of Article 10(3). The appellant had an outstanding application under the EEA Regulations as of 31 December 2020 and at that time was being facilitated as required under Article 10(3). However, once the application under the EEA Regulations was refused on 10 February 2021 and the appellant did not appeal that decision, his residence was no longer being facilitated in accordance with domestic legislation. The requirement in Article 10(3) for his residence to be facilitated under domestic legislation not only prior to

the end of the transition period but "thereafter" was not met on the facts here. He could not be found to be a durable partner for the purposes of the EUSS where that was so and the First-tier Tribunal erred in finding otherwise. There was therefore no basis on which the First-tier Tribunal could have found that the appellant did come within the provisions of the Withdrawal Agreement and no basis on which the appeal could have been allowed.

16. It is also clear from paragraphs 63 to 66 of Celik that the appellant cannot benefit from the principles of proportionality within the Withdrawal Agreement on any alternative basis.

17. Mr Hawkin sought to cite an unreported decision dated 22 September 2022 of the Upper Tribunal concerning two linked appeals (UI-2022-002263 and UI-2022-002250). The decision was sent by email after the hearing on 24 November 2022. No reference was made at the hearing to any intention to serve any further materials after the hearing. The unreported decision was unsolicited. No serious explanation was given for the unreported decision not having been referred to at the hearing on 24 November 2022 (or before) even though it was issued some two months earlier. Mr Hawkin's email dated 24 November 2022 attaching the unreported decision stated only that it had just come to his attention. None of the formal provisions required for seeking permission to cite an unreported decision of the Upper Tribunal were addressed. Where that was so, it was my view that permission to admit and cite an unreported decision, assuming that was what Mr Hawking was seeking, should be refused. It was evident on a cursory view of the decision that the facts were materially different, in any event, where there was no question in the facts of the unreported decision of a lapse in facilitation of residence, as here.

18. For all of these reasons, I found that the decision of the First-tier Tribunal disclosed an error on a point of law and set it aside to be remade. The same reasoning indicates that there was no basis on which the appeal could be allowed and I therefore re-make the appeal as refused.

Notice of Decision

19. The decision of the First-tier Tribunal discloses an error on a point of law and is set aside to be re-made.

20. The appeal is re-made as refused.

Signed: S Pitt Date: 9 January 2023
Upper Tribunal Judge Pitt