IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2022-003174
First-tier Tribunal No:
EA/12745/2021

THE IMMIGRATION ACTS

Heard at Field House IAC
On the 2 November 2022

Decision & Reasons Promulgated
On the 15 February 2023

Before

UPPER TRIBUNAL JUDGE KOPIECZEK

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

XHULIO AGACI
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:
For the Appellant: Mr T Lindsay, Senior Home Office Presenting Officer
For the Respondent: Ms E Harris, Counsel, instructed by Waterstone Legal

DECISION AND REASONS

1. Although the appellant in these proceedings is the Secretary of State, for convenience I continue to refer to the parties as they were before the First-tier Tribunal.

2. On 12 April 2021 the appellant made an application for pre-settled status under the EU Settlement Scheme ("EUSS"). That application was refused in a decision dated 18 July 2021 with reference to paragraphs EU11 and 14 of the Immigration Rules ("the Rules"). The appellant appealed against that decision and his appeal came before First-tier Tribunal Abdar at a hearing on 18th January 2022 following which, in a decision promulgated on 16 March 2022, the appeal was allowed.

3. The respondent's grounds of appeal in relation to Judge Abdar's decision contend that he erred in law in finding that the appellant was a person who applied for residence in the UK before the end of the transition period, that transition period ending on 31 December 2020 which is the 'specified date' in Appendix EU. In fact the appellant's application was not submitted until 12 April 2021, four months after the transition period ended. The grounds quote Article 10(2) of the Withdrawal Agreement which requires that:

> "Persons falling under points (a) and (b) of Article 3(2) of Directive 2004/38/EC whose residence was facilitated by the host state in accordance with its national legislation before the end of the transition period in accordance with Article 3(2) of that Directive shall retain their right of residence in the host State in accordance with this Part, provided that they continue to reside in the host State thereafter."

4. The grounds contend that as the appellant was not residing within the host State prior to the end of the transition period, in accordance with the Immigration (European Economic Area) Regulations 2016, he does not come within the 'personal scope' of the Withdrawal Agreement. His residence as an extended family member was never facilitated prior to the end of the transition period, as no application had ever been made prior to 31 December 2020. Accordingly, Judge Abdar's findings at [41] – [44] of his decision are erroneous in law, his conclusion having been that it was not necessary for the appellant to present a 'relevant document' for leave to remain, and that requiring it is also contrary to Article 18(1)(n) of the Withdrawal Agreement. The appellant would be required to have a 'relevant document' in order to demonstrate his facilitated residence prior to the end of the transition period.

5. It is also contended that the conclusion that the appellant is an "other family member" is also wrong at [33] – [35] in that Judge Abdar "has created a category of residence that does not exist within Article 9 of the Withdrawal Agreement or any applicable EU directive". It is argued that Judge Abdar has incorrectly construed the definition of those family members that do not fall within Article 3(2)(b) of the Directive as applying to the appellant. As his claim to be a spouse or durable partner does fall within that definition, it is argued that Judge Abdar materially erred in law by finding that the appellant falls within Article 9(a)(ii) of the Withdrawal Agreement when he would come within Article 9(i) if the additional requirements of Article 10(2) were met.

6. Thus, the grounds argued that Judge Abdar's findings at [44] that the decision is disproportionate to the aims of the Withdrawal Agreement is based on a material misdirection of law. As he does not fall within the personal scope of the Withdrawal Agreement, his rights cannot be breached as a result.

7. It is not necessary for me to outline further the detailed decision of Judge Abdar in the light of the appellant's 'rule 24' response. There it states that the appellant is aware of the case of *Celik (EU exit; marriage; human rights)* [2022] UKUT 00220 (IAC). The rule 24 response seeks a stay of the proceedings in the Upper Tribunal on the basis that an application for permission to appeal to the Court of Appeal in the case of *Celik* has been sought, permission having been refused by the Upper Tribunal.

8. The rule 24 response states that if a stay is not granted, the appellant concedes that his appeal cannot factually be distinguished from the facts of *Celik*, and in those circumstances concedes that there is a material error of law in Judge Abdar's decision. That is notwithstanding that the arguments advanced before Judge Abdar in the original grounds of appeal and skeleton argument are maintained as to the correct approach, notwithstanding the decision in *Celik*. It is said that if the Upper Tribunal is minded to apply the guidance given in *Celik* in any re-making of the decision, the appellant would concede that he could not invoke proportionality under Article 18.1(r) of the Withdrawal Agreement or the principle of fairness more generally. The rule 24 response goes on to state that as the appellant had already conceded that he does not meet the requirements of Appendix EU and consent had not been given by the respondent for the consideration of Article 8, the appellant cannot otherwise succeed in his appeal.

9. In submissions before me, Mr Lindsay relied on, in particular, [52] – [53] of *Celik* which, he submitted, reflect the grounds of appeal to the Upper Tribunal at paragraph 1. d). The appellant was not in scope of the Withdrawal Agreement as his residence as an extended family member or family member was not facilitated and no application was made before the relevant date. Accordingly, the appropriate course was to set aside the decision of the First-tier Tribunal and re-make the decision dismissing the appeal.

10. In her submissions Ms Harris conceded that if *Celik* is to be followed the appellant could not succeed in his appeal and the decision of the First-tier Tribunal must be set aside with a re-making of the decision resulting in the appeal being dismissed.

11. However, it was submitted that the appropriate course was for a stay of the proceedings in the Upper Tribunal pending the appeal in the Court of Appeal in *Celik*. This argument is more fully set out in the rule 24 response. That refers to the decision in *R (on the application* of *AO & AM) v Secretary of State for the Home Department (stay of proceedings – principles)* [2017] UKUT 00168 (IAC) which confirms in its guidance the

power of the Upper Tribunal to grant a stay. There the Upper Tribunal referred to the principles to be applied as analysed in *AB (Sudan) v Secretary of State for the Home Office* [2013] EWCA Civ 91. I note the following from *AB (Sudan)* where it was said at [27] – [32]:

> "27. I agree with what is set out in those paragraphs, but wish to add some further comments in relation to immigration cases.
>
> …
>
> "30. Sometimes it is obviously necessary to grant such a stay, because the anticipated appellate decision will have a critical impact upon the proceedings in hand. There is also, however, a need for realism. In the world of immigration it is a fact of life that the law which the judge applies is liable to change in the future, quite possibly in the near future. This cannot usually be a reason for staying proceedings. I started dealing with immigration cases some fourteen years ago. I cannot remember any occasion during that period when important decisions on one or more aspects of immigration law were not eagerly awaited from the appellate courts."
>
> …
>
> "32. In my view the power to stay immigration cases pending a future appellate decision in other litigation is a power which must be exercised cautiously and only when, in the interests of justice, it is necessary to do so. It may be necessary to grant a stay if the impending appellate decision is likely to have a critical impact on the current litigation. If courts or tribunals exercise their power to stay cases too freely, the immigration system (which is already overloaded with work) will become even more clogged up."

12. The rule 24 response refers to [25] of *AO & AM* as follows:

> "25. Ultimately, the determination of these stay applications requires an exercise of balancing many of the ingredients enshrined in the overriding objective: the avoidance of excessive cost, the unnecessary expenditure of finite public resources, the right of every litigant to expeditious justice, the minimising of litigation delays, managing the interface and overlap between two judicial organisations, the allocation of limited judicial resources and, broadly, the convenience of all concerned. I must also weigh carefully the ages, vulnerability and plight of the two litigants. Furthermore, alertness to a broader panorama is essential since the determination of these two applications will clearly be influential in, though not automatically determinative of, the progress and case management of the five other live new cases which have been initiated in tandem with these. Fairness, reasonableness and proportionality loom large in an exercise of this kind."

13. It is argued on behalf of the appellant that the outcome of *Celik* in the Court of Appeal would have a critical impact on this appellant's case and

in which identical arguments have been made. It is said that if *Celik* does apply to this appellant's case the proceedings on his behalf before the Upper Tribunal would end. There would be no barrier to his removal from the UK once his appeal rights were exhausted and any decision in the Court of Appeal may therefore come too late for the appellant to benefit from it. Furthermore, there would be very limited additional cost associated with a stay because factual disputes are very limited in this particular case and the appeal would turn on the legal interpretation of the Withdrawal Agreement and Appendix EU. Unlike in *AO & AM*, the appellant in this case does not have any particular vulnerabilities which would increase the need to expedite his appeal.

14. In addition, in her oral submissions Ms Harris submitted that significant prejudice would be suffered by the appellant if a stay was not granted. In response to a question from me she said that although there was the possibility of an Article 8 application, that would have to be a paid application. The regime in relation to Article 8 was a stricter one and the appellant should not have to pursue that route in circumstances where his wife, the sponsor, has acknowledged rights in the UK as a Greek citizen. As to whether he would be able to pursue an appeal in relation to any adverse decision on a re-making in the Upper Tribunal, she pointed out that the appellant was privately funded.

15. In reply, Mr Lindsay resisted the application for a stay, arguing that there was nothing before the Tribunal to give any indication that *Celik* was wrongly decided, it being a decision of three judges of the Upper Tribunal including the former President. There was nothing to suggest that there was any merit in the application for permission to appeal to the Court of Appeal in *Celik*.

16. In addition, the appellant could make an Article 8 application which is clearly a claim the appellant considers has merit. It was sought to raise the Article 8 claim before the First-tier Tribunal but the Secretary of State's position is that she would not consent to Article 8 being raised in these proceedings. There is, in any event, the possibility of the appellant applying for permission to appeal to the Court of Appeal in relation to any adverse decision of the Upper Tribunal in this case.

17. Ms Harris pointed out that the arguments in the skeleton argument before the First-tier Tribunal remained those that are relevant to the merits of the appeal to the Court of Appeal in *Celik*. The arguments are the same. There was, therefore, no substance to the proposition that one does not know what the basis of the argument in *Celik* is (albeit that the decision in *Celik* post-dated the appeal before the First-tier Tribunal).

Assessment and conclusions

18. I must first deal with the application for a stay of proceedings.

19. I have already quoted from *AB (Sudan)*, a case very properly referred to in Ms Harris' rule 24 response. It is worth repeating that at [30] it was said that:

> "In the world of immigration it is a fact of life that the law which the judge applies is liable to change in the future, quite possibly in the near future. This cannot usually be a reason for stay in proceedings. I started dealing with immigration cases some fourteen years ago. I cannot remember any occasion during that period when important decisions on one or more aspects of immigration law were not eagerly awaited from the appellate courts."

20. What was said there in 2013 is true today as it was then. I do not doubt that respectable argument has been advanced in the application for permission to appeal to the Court of Appeal in *Celik*. However, I cannot see that there is any proper basis for granting a stay of the proceedings in the Upper Tribunal in this case in circumstances where there is Presidential guidance on the matters in issue which are directly relevant to this appeal.

21. I understand the concerns expressed on behalf of the appellant in terms of his situation pending the resolution of the application for permission to appeal to the Court of Appeal in *Celik* and any subsequent proceedings in the event that I decide to dismiss his appeal on any re-making. However, whilst not determinative of my decision that a stay on proceedings is not called for, it does seem to me that the appellant could, albeit at expense, make an Article 8 application. As Mr Lindsay suggested, it appears that the appellant considers that such an application has good prospects of ultimate success. That aside, if on a re-making I was to dismiss the appeal, the appellant, whether represented or not, could make an application for permission to appeal to the Court of Appeal on the basis of the same arguments as advanced in the *Celik* appeal. Both parties are inclined to agree with my suggestion that where the appellant has an appeal pending, he may not be removed from the UK (s.78 of the Nationality, Immigration and Asylum Act 2002). A pending appeal includes an appeal to the Court of Appeal (see S.104 of the 2002 Act). It does not seem to me that there is any, or any significant, prejudice to the appellant in the proceedings in the Upper Tribunal taking their normal course. Accordingly, the application for a stay of the proceedings in the Upper Tribunal is refused.

22. As to whether the First-tier Tribunal erred in law in its decision, Mr Lindsay relied in particular on [52] and [53] of *Celik* which state as follows:

> "52. There can be no doubt that the appellant's residence in the United Kingdom was not facilitated by the respondent before 11pm on 31 December 2020. It was not enough that the appellant may, by that time, have been in a durable relationship with the person whom he married in 2021. Unlike spouses of EU citizens, extended family members enjoyed no right, as such, of residence under the EU free movement legislation. The rights of extended family members arose only upon their residence being facilitated by the

> respondent, as evidenced by the issue of a residence permit, registration certificate or a residence card: regulation 7(3) and regulation 7(5) of the 2016 Regulations.
>
> 53. If the appellant had applied for facilitation of entry and residence before the end of the transition period, Article 10.3 would have brought him within the scope of that Article, provided that such residence was being facilitated by the respondent "in accordance with … national legislation thereafter". This is not, however, the position. For an application to have been validly made in this regard, it needed to have been made in accordance with regulation 21 of the 2016 Regulations. That required an application to be submitted online, using the relevant pages of www.gov.uk, by post or in person, using the relevant application form specified by the respondent; and accompanied by the applicable fee."

23. Having considered the decision in *Celik* and its analysis, I respectfully agree with it and apply it to the circumstances of this appeal.

24. In the circumstances, and in the light of the concession very properly made by Ms Harris as to the outcome should I decide to follow *Celik*, I am satisfied that Judge Abdar erred in law in allowing the appeal for the reasons he gave, for the reasons advanced in the grounds of appeal. That error of law is such as to require the decision to be set aside. In re-making the decision, in line with *Celik*, I dismiss the appeal.

Decision

25. The decision of the First-tier Tribunal involved the making of an error on a point of law. Its decision is set aside and the decision is re-made dismissing the appeal.

Signed A. M. Kopieczek 12/12/2022

Upper Tribunal Judge Kopieczek