IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Appeal No: UI-2022-002839
First-tier Tribunal No: EA/14985/2021

THE IMMIGRATION ACTS

Decision & Reasons Promulgated
On 22 February 2023

Before

UPPER TRIBUNAL JUDGE GRUBB

Between

THE SECRETRAY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MARIO HASMUCA

Respondent

Representation:
For the Appellant: Ms S Rushforth, Senior Home Office Presenting Officer
For the Respondent: Mr M Brooks instructed by Nova Legal Services

Heard at Cardiff Civil Justice Centre on 19 January 2023

DECISION AND REASONS

Introduction

1. Although this is an appeal by the Secretary of State, for convenience I will refer to the parties as they appeared before the First-tier Tribunal.

2. The Secretary of State appeals against a decision of the First-tier Tribunal (Judge Richards-Clarke) which allowed the appellant's appeal against the respondent's decision made on 28 October 2021 to refuse his application for leave (or pre-settled status) made on 7 May 2021 under the EU Settlement Scheme ("EUSS") in Appendix EU of the Immigration Rules.

Background

3. The facts, accepted by the judge, are not in dispute.

4. The appellant is a citizen of Albania who was born on 27 June 1996. He is the spouse of an EU national, Xhensia Kodra, a Greek citizen whom he married on 15 May 2021.

5. The appellant and Ms Kodra met, and began a relationship, in Albania around February 2018. In September 2018, the appellant came to the UK. In November 2019 and February 2019, Ms Kodra visited the appellant in the UK and on the second visit they became engaged. In July 2020, Ms Kodra again came to the UK and has remained here ever since, living with the appellant since August 2020. On 24 September 2020, Ms Kodra was granted pre-settled status and leave until 25 September 2025 under the EUSS. Between October 2020 and May 2021 the appellant and Ms Kodra made attempts to marry but were unable to do so because of Covid-19 restrictions. They eventually married on 15 May 2021 at the Camden Register Office.

6. On 7 May 2021, the appellant applied under the EUSS for pre-settled status and leave as the "durable partner" of Ms Kodra. On 28 October 2021, the respondent refused that application. The appellant was not the "family member of a relevant EEA citizen" as required by EU14, Condition 1 in Appendix EU. First, the appellant could not succeed as a spouse under the EUSS as his marriage had taken place after the specified date (31 December 2020), namely on 15 May 2021. Second, the appellant could not succeed as a "durable partner" because to fall within the definition in Annex 1 to Appendix EU he had to have been issued with (which he had not) a residence permit under the Immigration (EEA) Regulations 2016 (SI 2016/1052) on the basis of a 'durable relationship' with an EEA national prior to 31 December 2020.

The Appeal to the First-tier Tribunal

7. The appellant appealed to the First-tier Tribunal under reg 3 of the Immigration (Citizens' Rights Appeals) (EU Exit) Regulations 2020 (SI 2020/61) (the "Appeals Regulations 2020") relying on the two grounds in reg 8(2)(a) and reg 8(3)(b) which provide as follows:

> "8(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) or 25(2) of Chapter 2, of Title II of Part 2 of the withdrawal agreement,
>
> ....
>
> (3)The second ground of appeal is that—
>
> ....

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

8. The reference to the "residence scheme immigration rules" in reg 8(3)(b) includes the EUSS rules in Appendix EU (see EU (Withdrawal Agreement) Act 2020, s.17(1)).

9. First, Judge Richards-Clarke accepted that the appellant could not succeed under the EUSS as a 'spouse' or 'durable partner'. At [22]-[24], the judge said this:

> "22. The Appellant's marriage to his EEA national sponsor took place on 15 May 2021, after the specified date of 31 December 2020 when the United Kingdom left the European Union. The Appellant is therefore unable to satisfy the Respondent that he is the family member of a relevant EEA citizen as defined in Annex 1- Definitions which requires that the marriage be contracted before the specified date.
>
> 23. For the Appellant to be meet the requirements of Appendix EU as a durable partner then he is required to be in a durable relationship with his relevant EEA national sponsor for Appeal Number: EA/14985/2021 5 two years and hold a relevant document issued under the Immigration (EEA) Regulations 2016. It is not in dispute that the Appellant has not applied for or obtained this document.
>
> 24. In these circumstances I am satisfied that the Appellant is not able to meet the requirements of Appendix EU as the family member of a relevant EEA national."

10. The judge's findings and conclusion on this issue is not challenged. The appellant did not contend that he should succeed under the EUSS.

11. Second, the appellant relied upon the Withdrawal Agreement between the EU and UK on exiting the EU (*Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community* (2019/C 384 1/01)), in particular Art 10 and 18(1)(r) within Part 2, Chapter 1, of the Withdrawal Agreement. The appellant argued that he and Ms Kodra came within the scope of the Withdrawal Agreement under Art 10 and relied on Art 18(1)(r) providing for a right of access to administrative and judicial redress procedures and that any decision should be proportionate.

12. Judge Richards-Clarke accepted that the appellant and Ms Kodra came within Art 10 and the scope of the Withdrawal Agreement. At [25], the judge said this:

> "25. Article 10 of the Withdrawal agreement sets out the personal scope for rights to be protected. This includes Union citizens who exercised their right to reside in the United Kingdom in accordance with Union law before the end of the transition period and continue to reside thereafter and their family members who resided in the United Kingdom in accordance with Union law before the end of the transition period and continue to reside in the United Kingdom thereafter. I am satisfied that the both the Appellant and Ms Kodra are within the scope to have their rights protected under the Withdrawal Agreement".

13. Further, Judge Richards-Clarke accepted that the appellant was a 'durable partner' and, in the light of all the circumstances including their inability to marry prior to 31 December 2020 because of the Covid-19 pandemic, the decision to refuse him leave was disproportionate. At [27]-[30] the judge said this:

> "27. I am satisfied that this means that I am required to conduct a dual examination in a case such as this where the decision is lawful in accordance with the Immigration Rules Appendix EU but the particular specific facts and circumstances of this case mean that a consideration must be undertaken as to whether the decision is proportionate. Here, the Appellants marriage was delayed due to the COVID-19 pandemic. Given the facts before me if the Appellant had been able to marry in the autumn of 2020 as had been intended then his application for leave to remain as the family member of a relevant EEA national would have been successful. The evidence before me is that the only reason that the Appellant was not able to marry and the marriage be contracted before the specified date of 31 December 2020 was due to the cancellations and lack of appointments available due to restrictions in place during the COVID-19 pandemic.
>
> 28. The evidence before me is that the Appellant's relationship with his EEA national sponsor began in February 2018, they were engaged to be married in February 2020, their cohabitation began in August 2020 and from October to May 2021 were attempting to marry. The evidence before me is that since August 2020 the Appellant and his EEA national sponsor have lived together and continued to do so. This is supported by the unchallenged witness evidence before me together with the documentary evidence of their relationship which culminated in their marriage in May 2021.
>
> 29. In the decision 28 October 2021, the Respondents review and at the hearing before me the Respondent does not properly engage with the question of whether there has been a breach of rights under the withdrawal agreement. In the Appeal Note 25 March 2022 I am directed by the Appellant to other circumstances where concessions have been made by the Respondent. At this time the Respondent has not made any concessions for any such applicants that find themselves in such a position as the Appellant today. This is confirmed in paragraph 11 of the Respondent's Review 30 March 2022 that the Home Office has not amended the policy for spouses who did not marry by 31 December 2020, even if they intended to marry, but could not do so due to Covid 19.
>
> 30. In these circumstances I am satisfied that the decision to refuse the Appellant's application for leave to remain as the family member of a relevant EEA citizen is disproportionate. To find otherwise would mean that the spouse of a EEA citizen with limited leave to remain in the United Kingdom until September 2025 would be without leave in the United Kingdom and required to leave for the sole reason that they were unable to marry before the United Kingdom left the European Union because their attempts to do so were thwarted by the closure of Registry Offices due to the coronavirus pandemic. It therefore follows that I find the decision of the Respondent under appeal to be unlawful. For the reasons set out above I do find that the decision under appeal

> breaches the Appellant's rights under the Withdrawal Agreement. I am therefore satisfied that on the evidence before me it would be justified and proportionate to allow this appeal."

14. Reflecting the two relevant grounds of appeal in reg 8 of the Appeals Regulations 2020, the judge dismissed the appellant's appeal under the Immigration Rules (i.e. the EUSS in Appendix EU) (reg 8(3)(b)) but allowed the appeal on the basis that the decision breached the appellant's rights under the Withdrawal Agreement (reg 8(2)(a)).

The Appeal to the Upper Tribunal

15. The respondent challenged the judge's decision to allow the appeal on the Withdrawal Agreement ground. On 17 May 2022, the FtT (Judge Grey) granted permission to appeal.

16. The grounds contend that the judge was wrong to conclude that the appellant fell within the scope of the Withdrawal Agreement under Art 10 as he was not residing in the UK in accordance with EU law on the specified date (31 December 2020) as he was not married to his partner (see Art 10(1)(e)) and, although in a durable relationship, he had not been issued with a residence card under the Immigration (EEA) Regulations 2016 and had not applied for his residence to be facilitated (see Arts 10(2) and 10(3)). As a consequence the right in Art 18(1)(r), in effect to a proportionate decision, had no application.

17. The appeal was listed at the Cardiff CJC on 19 January 2023. The Secretary of State was represented by Ms Rushforth and the appellant by Mr Brooks. I heard submissions from both representatives. Mr Brooks also relied upon a detailed skeleton argument I received on the day of the hearing.

The Issues

18. As I indicated above, there was no challenge to the judge's decision to dismiss the appeal under the EUSS on the basis that the appellant could not establish he was a 'durable partner' as defined in Annex 1 to Appendix EU as he did not have a "relevant document" at the specified date (31 December 2020), namely a residence card issued on that basis to him as an "extended family member" under the Immigration (EEA) Regulations 2016.

19. The sole issue concerned whether the judge was right to conclude the Withdrawal Agreement applied to the appellant (and his partner) and that therefore the judge had been entitled, applying Art 18(1)(r), to find that the decision breached that provision as it was not proportionate in all the circumstances.

The Submissions

20. The focus of the submissions concerned the correctness, or applicability, of the UT's decision in Celik (EU exit; marriage; human rights) [2022] UKUT 220 (IAC) (Lane J, President and UTJs Hanson and McWilliam). In that case, the UT concluded, after extensive argument, that the Withdrawal Agreement did not apply to an individual (in circumstances markedly similar to the appellant) who relied upon a durable relationship established before, and existing at, 31 December 2020 and who made an application after that date under the EUSS but

had not been issued with, or applied for, a residence card as an 'extended family member' under the Immigration (EEA) Regulations 2016 prior to that date.

21. Mr Brooks' submissions are fully set out in his detailed skeleton argument which he relied upon and addressed in his oral submissions. He accepted that he had to overcome the UT's decision in Celik. I can summarise them as follows.

22. First, Mr Brooks submitted that the appellant did fall within the scope of the Withdrawal Agreement under Art 10(e)(i) as he was residing in the UK in accordance with EU law as he was in a durable relationship which fell within Art 3.2(b) of the Citizens' Directive (Directive 2004/38/EC). It was not necessary to have the 'relevant document' as that was inconsistent with EU law and that had to be disapplied because of the direct effect of the Withdrawal Agreement (Art 4.1) and that the Tribunal was required to "disapply inconsistent or incompatible domestic provisions" (Art 4.2). Mr Brooks prayed in aid Art 18(1)(e) of the Withdrawal Agreement which requires that "any unnecessary administrative burdens be avoided".

23. Second, Mr Brooks submitted that, in any event, the appellant's partner fell within the scope of the Withdrawal Agreement as an EU citizen. Her rights under the Withdrawal Agreement were breached, namely not to be discriminated against on grounds of her nationality (Art 12). Further, under Art 9(3) of the Citizens' Directive any sanction for failure to apply for a residence card could be disproportionate and discriminatory.

24. Ms Rushforth relied upon Celik and, having heard Mr Brooks' submissions, submitted that the decision was correct and that, in fact, the points he raised had been considered, and rejected, by the UT in Celik.

Discussion

25. The judicial headnote in Celik summarises the UT's conclusions 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."

26. On the face of it, the decision in Celik is wholly inconsistent with the position taken by Mr Brooks to support the judge's decision. Celik was, of course, not decided at the time of the FtT hearing in this appeal and the judge did not, therefore, have the benefit of the UT's reasoning and conclusions on this complex area of law. It would today be binding on the FtT (Berdica [2022] UKUT 276 (IAC) at [43]). It is not, however, binding on the UT as it is not a starred decision or a country guidance decision (see *Senior President's Practice Direction: Immigration*

and Asylum Chambers of the First-tier Tribunal and the Upper Tribunal (November 2014) at paras 12.1 and 12,2) . Nevertheless, in my view, the approach of the UT should reflect the approach of the High Court to earlier High Court decisions. Whilst such decisions are not binding, the High Court should, as a matter of comity, follow its earlier decision, unless "convinced that the decision was wrong" (see Howard de Walden Estates Ltd v Les Aggio and others [2007] EWCA Civ 499 per Arden LJ at [88]-[89]). That, in my judgement, is the approach that should be taken in the UT. For the reasons I am about to set out, not only am I not convinced the decision in Celik is wrong, I am persuaded that it is, indeed, correct. I reject Mr Brooks' carefully crafted, but ultimately unsustainable, submissions.

27. First, as regards the appellant, whether he falls within the scope of the relevant provisions relied upon in Part 2, Chapter 1 of the Withdrawal Agreement turns upon the application of Art 10 of that Agreement. It provides as follows:

> "Article 10
>
> **Personal Scope**
>
> 1. Without prejudice to Title III, this Part shall apply to the following persons:
>
> (a) Union citizens who exercised their right to reside in the United Kingdom in accordance with Union law before the end of the transition period and continue to reside there thereafter;
>
> (b) United Kingdom nationals who exercised their right to reside in a Member State in accordance with Union law before the end of the transition period and continue to reside there thereafter;
>
> (c) Union citizens who exercised their right as frontier workers in the United Kingdom in accordance with Union law before the end of the transition period and continue to do so thereafter;
>
> (d) United Kingdom nationals who exercised their right as frontier workers in one or more Member States in accordance with Union law before the end of the transition period and continue to do so thereafter;
>
> (e) family members of the persons referred to in points (a) to (d), provided that they fulfil one of the following conditions:
>
> (i) they resided in the host State in accordance with Union law before the end of the transition period and continue to reside there thereafter;
>
> (ii) they were directly related to a person referred to in points (a) to (d) and resided outside the host State before the end of the transition period, provided that they fulfil the conditions set out in point (2) of Article 2 of Directive 2004/38/EC at the time they seek residence

under this Part in order to join the person referred to in points (a) to (d) of this paragraph;

(iii) they were born to, or legally adopted by, persons referred to in points (a) to (d) after the end of the transition period, whether inside or outside the host State, and fulfil the conditions set out in point (2)(c) of Article 2 of Directive 2004/38/EC at the time they seek residence under this Part in order to join the person referred to in points (a) to (d) of this paragraph and fulfil one of the following conditions:

- both parents are persons referred to in points (a) to (d);

- one parent is a person referred to in points (a) to (d) and the other is a national of the host State; or

- one parent is a person referred to in points (a) to (d) and has sole or joint rights of custody of the child, in accordance with the applicable rules of family law of a Member State or of the United Kingdom, including applicable rules of private international law under which rights of custody established under the law of a third State are recognised in the Member State or in the United Kingdom, in particular as regards the best interests of the child, and without prejudice to the normal operation of such applicable rules of private international law;

(f) family members who resided in the host State in accordance with Articles 12 and 13, Article 16(2) and Articles 17 and 18 of Directive 2004/38/EC before the end of the transition period and continue to reside there thereafter.

2. 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.

3. 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.

4. Without prejudice to any right to residence which the persons concerned may have in their own right, the host State shall, in accordance with its national legislation and in accordance with point (b) of Article 3(2) of Directive 2004/38/EC, facilitate entry and residence for the partner with whom the person referred to in points (a) to (d) of paragraph 1 of this Article has a durable

relationship, duly attested, where that partner resided outside the host State before the end of the transition period, provided that the relationship was durable before the end of the transition period and continues at the time the partner seeks residence under this Part.

5. In the cases referred to in paragraphs 3 and 4, the host State shall undertake an extensive examination of the personal circumstances of the persons concerned and shall justify any denial of entry or residence to such persons."

28. Mr Brooks is wrong to place reliance on Art 10(e)(i) which applies to "family members" (see [46]- [49] of Celik). The relevant provisions in this appeal are Art 10(2) and (3) which apply to "other family members" (including those in durable relationships) within Art 3.2 of the Citizens' Directive. In respect of those provisions, the UT in Celik concluded that they did not apply to an individual who was, in all material respects, in the same position as the appellant. At [50]-[54} the UT said this:

"50. Accordingly, the only way the appellant can bring himself within the scope of Part 2 and, thus, Article 18, is if he can fall within Article 10.2. ....

51. Article 3(2) of Directive 2004/38/EC requires Member States to "facilitate entry and residence" for "any other family members" who are dependents or members of the household of the Union citizen; or where serious health grounds strictly require the personal care of the family member by the Union citizen. A person is also within Article 3.2 if they are a "partner with whom the Union citizen has a durable relationship, duly attested". For such persons, the host Member State is required to "undertake an extensive examination of the personal circumstances and shall justify any denial of entry or residence to these people".

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.
>
> 54. After 30 June 2021, a favourable decision of the respondent by reference to a pre-31 December 2020 application, results in a grant of leave under the EUSS, rather than a grant of residence documentation under the 2016 Regulations."

29. It led the UT to conclude that the individual concerned could not rely upon the rights in the Withdrawal Agreement, in particular in Art 18(1)(r) which is also relied upon by the appellant in this appeal and was applied by the judge.

30. I agree with the UT's reasonings and conclusion. Mr Brooks' submission is based upon a false premise, namely that the appellant had a substantive EU right to reside in the UK prior to 31 December 2020 because of his durable relationship. He did not.

31. Unlike, "family members" who could have such a right, "other family members" (including those in durable relationships) had no substantive right to reside under the Citizens' Directive but only a right to have their applications for residence facilitated following any extensive examination of their person circumstances (see Art 3.2, Citizens' Directive). The Immigration (EEA) Regulations 2016 reflected this providing in UK law for that procedural right and, if their relationship was established, that a residence card could be issued to them (see regs 18(4) and (5)). Once the residence card was issued, then they were treated as "family members" with a right to reside as long as their qualifying circumstances continued (see reg 7(3)).

32. That position in EU law and UK law was confirmed by the Court of Appeal in SSHD v Aibangbee [2019] EWCA Civ 339 (Sharp and Baker LJJ and Sir Stephen Richards) albeit in the context of the earlier, but not materially different, Immigration (EEA) Regulations 2006 (SI 2006/1003). The case raised the issue whether an individual in a durable relationship could rely upon periods of residence in the UK prior to the grant of a residence card in order to establish a permanent right of residence based upon 5-years' residence in accordance with EU law. The Court of Appeal held that he could not. At {25}, Sir Richards commented on the effect of the Citizens' Directive as follows:

> "25. The obligation on Member States in article 3(2) can also be expressed as a *right* of the extended family member for his or her application to be facilitated by the Member State; but it is a limited procedural right, distinct from the substantive rights of residence conferred by the Directive."

33. Referring to CJEU's decisions in SSHD v Rahman (Case C-83/11) {2013 QB 249 and SSHD v Banger (Case C-89/17) [2019 1 CMLR 6, Sir Stephen Richards continued at [30}:

> "30. Thus, article 31(1) of the Directive was given an expansive scope of application for the purpose of ensuring that extended family members had the benefit of *procedural safeguards* in relation to decisions concerning them under article 3(2). As part of its reasoning, the court referred to parts of articles 8 and 10 in which the expression "family members" is used to include extended family members; but

> those are narrow procedural provisions, relating to the documents to be presented for specified purposes, and there was no suggestion by the court that they undermined the fundamental distinction between family members and extended family members as found in articles 2(2) and 3(2) and confirmed in *Rahman*. Nothing in *Banger* supports Mr de Mello's contention that the substantive rights of residence conferred by the Directive on family members as defined in article 2(2) are also conferred on extended family members."

34. As regards the national law in the Immigration (EEA) Regulations 2006, Sir Stephen Richards at [38] cited with approval the UT's decision in Kunwar [2019] UKUT 00063 (IAC):

> "38. The same argument in respect of *Macastena* as that advanced by Mr de Mello was considered and rightly rejected by Upper Tribunal Judge Grubb in *Kunwar (EFM – calculating periods of residence)* [2019] UKUT 00063 (IAC). The judge concluded his discussion of the issue as follows:
>
> > "39. In my judgment, the Court of Appeal's decision in *Macastena* confirms, and applies, the scheme of the 2006 Regulations and Directive which I have set out above, drawing the distinction between the right of residence of a 'family member' and the absence of any right of residence for an 'extended family member' until a residence card is issued by the Secretary of State under reg. 17(4) of the 2006 Regulations. Only from that point in time do the 2006 Regulations confer upon the 'extended family member' a right of residence because from that point in time they are treated as a 'family member' and may, if appropriate rely upon the rights of residence recognised in reg. 13(2) and 14(2). Then and only then, does the individual begin to acquire a period of lawful residence under the 2006 Regulations which can count towards establishing a 'permanent right of residence' on the basis of residing in the UK in accordance with the 2006 Regulations for a continuous period of five years under reg. 15(1)(b)."
>
> That is a neat encapsulation of the effect of the relevant provisions, giving proper effect to the judgment in *Macastena*."

35. The distinction between "family members" and "other family members" or "extended family members" rights of residence in UK law is, in turn, reflected in the Withdrawal Agreement at Arts 10(2) and (3) brining within its scope those "other family members" who have had their residence facilitated (i.e. a residence card issued) or have applied for a residence card prior to 31 December 2020.

36. In my judgment, the UT's decision in Celik is correct. None of the provisions relied upon by Mr Brooks detract from that reasoning or give any traction to the argument that the scope of the Withdrawal Agreement, and therefore the applicability of Art 18(1)(r), is determined other than by the wording of Arts 10 (2) and (3) of the Withdrawal Agreement which the appellant does not fall within. Consequently, the right in Art 18(1)(r) was not applicable to the appellant. The judge erred in law in reaching a contrary conclusion.

37. Mr Brooks' additional argument relies upon the rights of the Appellant's partner, an EU national under the Withdrawal Agreement. Mr Brooks submitted

that the UT in Celik had not considered this argument. In fact, that is not the case as is clear from [80]-[86] where an argument based upon Art 12 and discrimination against the individual's spouse was examined and rejected. Further, because of the terms of the Appeals Regulations 2020, the scope of the relevant ground of appeal is only in respect of the breach of "any right which the *appellant* has" under the Withdrawal Agreement (my emphasis). I set out the UT's reasoning in full:

> "80. We turn to the ground which alleges discrimination, contrary to Article 12 of the Withdrawal Agreement. This concerns the position of an EEA citizen resident in the United Kingdom before the end of the transition period. We have seen that the Minister's letter of February 2022 refers to such a person as having "a lifetime right to be joined by their existing close family members resident outside the UK at 31 December 2020" and for a person who was "living in the UK before the end of the transition period as the durable partner of an EEA citizen resident here by then (and who may now be their spouse or civil partner) but who did not obtain a residence card under the EEA Regulations ... still to bring themselves within the scope of the scheme as a joining family member". These situations are provided for by Article 10.4 of the Withdrawal Agreement, as given effect by the EUSS. Where spouses are concerned, this "lifetime right" applies irrespective of the date of the marriage, provided that the couple were durable partners within the scope of Article 10 at the end of the transition period. Consistently with Article 3(2)(b) of Directive 2004/38/EC, the EUSS requires an applicant who relies on being in a durable relationship with a relevant EEA citizen to show that the couple have lived together in a relationship akin to a marriage or civil partnership for at least two years or that there is other significant evidence of the durable relationship.
>
> 81. The appellant submits that the definition of "required evidence of family relationship" in Annex 1 to Appendix EU shows that a durable partner of an EEA sponsor who married after the specified date must have the required document to satisfy the requirement to be considered to be a durable partner. In contrast, however, individuals who rely upon their sponsor being a British citizen or from Northern Ireland can submit other evidence to the respondent to prove that their relationship was formed and durable before the specified date.
>
> 82. The appellant submits that this is discriminatory, contrary to Article 12, albeit not against him. It discriminates against his wife because, while she has evidence of the durable relationship which has been submitted to the respondent, this is not evidence that the respondent will take into account. However, if the same evidence had been submitted by a British citizen sponsor or a sponsor from Northern Ireland, then the respondent would take it into account.
>
> 83. Ms Smyth rightly observes that this submission did not feature in the grounds of appeal in respect of which permission was granted. In order, however, for the Upper Tribunal to provide a decision

which is of maximum potential utility to the First-tier Tribunal in cases of this kind, we grant of permission for it to be argued.

84. There is, however, no merit in this new ground. Article 12 prohibits discrimination on the grounds of nationality within the meaning of Article 12 of the TFEU "in respect of the persons referred to in Article 10 of this Agreement". Since, for the reasons we have given, the appellant is not a person within Article 10, Article 12 cannot assist him.

85. The appellant's attempt to rely upon the position of his wife, on the basis that she was exercising her right to reside in the United Kingdom in accordance with EU law before 31 December 2020 and continues to do so, cannot enable the appellant to succeed in the appeal. Article 8(2) states in terms that the first ground of appeal is that the decision "breaches any right which the appellant has ..." not a third party. Likewise, the appellant's wife cannot be invoked in respect of the second ground of appeal in that the respondent's decision was not contrary to the immigration rules, so far as the wife was concerned.

86. In any event, the appellant's wife is, as Ms Smyth submits, in a better position than British nationals, who do not enjoy automatic rights of entry and residence for their spouses. It appears that the appellant advances his discrimination argument by reference to the discrete category of family members of British citizens who benefit under the EUSS (but not under the Withdrawal Agreement) because of the exercise of EU free movement rights in a different State. This is, as Ms Smyth says, *Surinder Singh* territory. Such persons are not covered by the Withdrawal Agreement but can apply under the EUSS. The appellant's complaint that such persons are not required to produce a document under the 2016 Regulations is incorrect. They are, in fact, required to do so where they were resident in the United Kingdom before the end of the transition period without another lawful basis of stay in the UK: see sub-paragraph (e)(i) of the definition of "required evidence of family relationship" in Annex 1. The extended family member of a British citizen would also need to have complied with the laws of the State in which their British sponsor had been exercising EU rights to reside."

38. I agree with that reasoning. It is a complete answer to Mr Brooks' submissions relying on the rights of the appellant's partner and any argument based upon discrimination. For the above reasons, the judge erred in law in allowing the appeal on the ground in reg 8(2)(a) of the Appeals Regulations 2020.

39. The appellant could not succeed under either ground relied on, namely reg 8(2)(a) and reg 8(3)(b).

Decision

40. The decision of the First-tier Tribunal to allow the appellant's appeal involved the making of an error of law. That decision cannot stand and I set is aside.

41. I re-make the decision dismissing the appeal on all grounds.

Andrew Grubb

Judge of the Upper Tribunal
Immigration and Asylum Chamber

27 January 2023