Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: UI-2022-003088
(EA/15197/2021)

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated on:**
On 17 November 2022	**On 29 January 2023**

Before

UPPER TRIBUNAL JUDGE BLUNDELL
DEPUTY UPPER TRIBUNAL JUDGE HUTCHINSON

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

EDISON NURKA
[NO ANONYMITY ORDER]

Respondent

Representation:
For the appellant: Ms A Nolan, Senior Home Office Presenting Officer (by video-link)
For the respondent: In person

DECISION AND REASONS

1. For the purposes of this decision, the appellant is referred to as the Secretary of State, and the respondent is referred to as the claimant. In a decision promulgated on 26 April 2022, First-tier Tribunal Judge G Clarke (the judge) allowed the claimant's appeal against the Secretary of State's decision, dated 21 October 2021, to refuse the claimant's application for

leave to remain under the EU Settlement Scheme (EUSS) as the spouse of a relevant EEA citizen (the sponsor). The claimant appeals with permission granted by the Upper Tribunal.

Background

2. There was no dispute, either before us or before the First-tier Tribunal, as to the facts. The claimant is a citizen of Albania, born on 9 May 1994. He met the sponsor a citizen of Romania and now his wife, in February 2020 in the UK and they began cohabiting on 4 August 2020. The sponsor's divorce from her previous marriage was issued (in Romania) on 3 December 2020. The couple married on 24 June 2021, the claimant indicating that the Covid-19 pandemic and consequent 'lockdowns' had prevented them from marrying in October 2020.

3. Although the judge in the First tier Tribunal noted, at paragraph 23 of his decision, the claimant's oral evidence that his application under the EUSS had been his only attempt to regularise his status in the UK, the claimant informed the Upper Tribunal at the hearing before us, that he had in fact made a claim for asylum in May 2020. Ms Nolan confirmed, on reviewing the Secretary of State's electronic records, that this was indeed the case and further confirmed that the asylum application remained undecided. As we indicated at the hearing, that is a matter separate to this appeal.

4. The claimant applied on 25 June 2021 for leave to remain under the EUSS on the basis of his relationship with his wife, the sponsor. The Secretary of State accepted that the claimant had provided a marriage certificate as evidence that he was the spouse of an EEA citizen, but the Secretary of State decided that the claimant had not provided sufficient evidence to confirm that he was a family member of a relevant EEA citizen, prior to the specified date, as defined in Annex 1 of Appendix EU, 11pm on 31 December 2020. The Secretary of State relied on the fact that the claimant had not been issued with a family permit or residence card under the Immigration (European Economic Area) Regulations 2016 (the EEA Regulations). In addition the Secretary of State relied on the definition of durable partner set out in Annex 1 to Appendix EU of the Immigration Rules and maintained that the claimant also did not qualify as the durable partner of the sponsor as he had not been issued with a family permit or residence card under the EEA Regulations. Therefore the Secretary of State was satisfied that the claimant did not meet the eligibility requirements for either settled or pre-settled status under either rule EU11 or rule EU14 of Appendix EU of the Immigration Rules.

First-tier Tribunal Appeal

5. The judge found as fact that the claimant and the sponsor were in a durable relationship since August 2020. The judge considered Appendix EU of the Immigration Rules and made findings that the claimant could not succeed under the eligibility requirements, such not being argued by the claimant's representative. Rather the claimant's representative submitted

that the appeal should be allowed on the basis that it breached the claimant's rights under the Withdrawal Agreement, specifically that the refusal was disproportionate.

6. The judge considered the Withdrawal Agreement, in particular Article 18 and found that the Secretary of State's refusal was disproportionate under Article 18(1)(r) recognising, inter alia, the impact of the pandemic._

Upper Tribunal Appeal

7. The Secretary of State sought permission to appeal on the grounds that the Withdrawal Agreement provides no applicable rights to a person in the claimant's circumstances, Article 10(1)(e) confirming that beneficiaries of the Withdrawal Agreement are those who were residing in accordance with EU law as of 31 December 2020, the specified date. The claimant was not residing in accordance with EU law at the specified date as he had not had his residence facilitated in accordance with national legislation. The judge's finding that the claimant was in durable relationship was of no consequence as the claimant's residence as an Extended Family Member had never been facilitated in accordance with national legislation. Neither had the claimant applied for facilitation before 31 December 2020. Therefore the claimant could not rely on Article 18(1)(r) of the Withdrawal Agreement, in respect of proportionality. As the claimant had no such rights under the Withdrawal Agreement there could be no breach of those claimed rights.

8. The claimant appeared unrepresented before us, confirming that whilst he retained the services of his solicitors, due to cost implications he had elected to attend the Upper Tribunal hearing without his legal representatives. He made no application to adjourn the hearing and wished to proceed. He had seen the Secretary of State's grounds of appeal. We were satisfied that we were able to proceed with the appeal and that it was fair to do so.

9. At our request and for the benefit of the claimant, Ms Nolan set out the Secretary of State's case. She confirmed that there was no challenge to the judge's findings of fact in respect of the claimant's relationship with the sponsor and cohabitation. However, relying on Celik (EU exit; marriage; human rights) [2022] UKUT 220 (IAC) Ms Nolan recited the key relevant findings of the Upper Tribunal: specifically that a person in a durable relationship with an EU citizen has no substantive rights under the Withdrawal Agreement unless their entry was being facilitated before 31 December 2020 or they had made an application before that time. Although it transpired that the claimant had made an asylum application, we accept that he had not made an application for his residence to be facilitated in accordance with national legislation prior to 11pm on 31 December 2020 (the claimant not making any application in relying on his relationship with the sponsor until 25 June 2021). Ms Nolan submitted therefore, that the judge had been incorrect to rely on the Withdrawal

Agreement and incorrect to find the respondent's decision to be disproportionate under Article 18(1)(r) of the Withdrawal Agreement**.**

10. At the end of the hearing we reserved our decision.

Analysis

11. We agree with Ms Nolan that the Upper Tribunal decision in Celik is determinative of the issues in this appeal.

12. The claimant had neither applied to the respondent nor been accepted by the respondent to be a durable partner before the end of the transition period. Like the claimant in Celik therefore the respondent had no facilitation duty.

13. The judge erred in law by concluding that the Withdrawal Agreement assisted the claimant's case to the extent that it justified allowing the appeal on the grounds that the Secretary of State's decision was disproportionate under Article 18(1)(r).

14. Celik clarified that those in the claimant's situation could not gain any material assistance from the Withdrawal Agreement, whether in respect of proportionality or otherwise.

15. Paragraphs 61-66 of Celik provide as follows:

> *61. "The appellant places great reliance on Article 18.1(r) of the Withdrawal Agreement. As we have seen, this gives a right for "the applicant" for new residence status to have access to judicial redress procedures, involving an examination of the legality of the decision as well as of the facts and circumstances on which the decision is based. These redress procedures must ensure that the decision "is not disproportionate".*
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> *62. Ms Smyth submitted at the hearing that, since the appellant could not bring himself within Article 18, sub-paragraph (r) simply had no application. Whilst we see the logic of that submission, we nevertheless consider that it goes too far. The parties to the Withdrawal Agreement must have intended that an applicant, for the purposes of sub-paragraph (r), must include someone who, upon analysis, is found not to come within the scope of Article 18 at all; as well as those who are capable of doing so but who fail to meet one or more of the requirements set out in the preceding conditions.*
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> *63. The nature of the duty to ensure that the decision is not disproportionate must, however, depend upon the particular facts and circumstances of the applicant. The requirement of*

proportionality may assume greater significance where, for example, the applicant contends that they were unsuccessful because the host State imposed unnecessary administrative burdens on them. By contrast, proportionality is highly unlikely to play any material role where, as here, the issue is whether the applicant falls within the scope of Article 18 at all.

64. In the present case, there was no dispute as to the relevant facts. The appellant's residence as a durable partner was not facilitated by the respondent before the end of the transitional period. He did not apply for such facilitation before the end of that period. As a result, and to reiterate, he could not bring himself within the substance of Article 18.1.

65. Against this background, the appellant's attempt to invoke the principle of proportionality in order to compel the respondent to grant him leave amounts to nothing less than the remarkable proposition that the First-tier Tribunal Judge ought to have embarked on a judicial re-writing of the Withdrawal Agreement. Judge Hyland quite rightly refused to do so.

66. We also agree with Ms Smyth that the appellant's interpretation of Article 18(1)(r) would also produce an anomalous (indeed, absurd) result. Article 18 gives the parties the choice of introducing "constitutive" residence schemes: see Article 18.4. Article 18.1(r) applies only where a State has chosen to introduce such a scheme. If sub-paragraph (r) enables the judiciary to re-write the Withdrawal Agreement, this would necessarily create a divergence in the application of the Withdrawal Agreement, as between those States that have constitutive schemes and those which do not. This is a further reason for rejecting the appellant's submissions."

16. We further rely on what was said in Celik in respect of that appellant, who like the claimant relied before the First-tribunal on his claim that his marriage would probably have taken place before 31 December 2020 but which did not do so, wholly or in part because of Covid-19 pandemic:

67. "In particular, any such public law challenge is rendered hopeless by the fact that (as the present case illustrates) those who marry are highly likely to regard themselves as being in a durable relationship. Accordingly, a person in the position of the appellant could and should have applied to the respondent for facilitation (and, thus, recognition) of their position as an extended family member. The fact that marriage makes the non-EU citizen the possessor of an underlying right, whereas being in a durable relationship with such a person does not automatically do so, is insufficient to demonstrate that the respondent committed a public law error in not providing some form of concession for those whose weddings were likely to have taken place before 31 December 2020, but for Covid-19."

17. The claimant's marriage post-dated the UK's exit from the European Union and there was no evidence to show that the claimant applied for or was facilitated residence as a durable partner before 31 December 2020. In light of the above, the judge's decision must be set aside.

Remaking the decision

18. There is no reason to doubt the genuineness of the relationship between the claimant and the sponsor. As the judge did, we accept that they have been in such a relationship since August 2020 and are now married. However, in light of Celik, the application made to the Respondent under the EUSS was bound to fail. The claimant cannot, in the circumstances of his case, rely on the issue of proportionality under the Withdrawal Agreement.

19. No human rights issues were raised in this case and we need not consider that issue.

20. We therefore re-make the decision in this appeal by dismissing it.

Notice of Decision

The making of the decision of the First-tier Tribunal did involve the making of an error on a point of law.

We set aside the decision of the First-tier Tribunal.

We re-make the decision by dismissing the appeal on all grounds.

M M Hutchinson

Deputy Upper Tribunal Judge Hutchinson
Date: 21 November 2022

To the Secretary of State
Fee Award

As we have dismissed the appeal, there can be no fee award.

M M Hutchinson

Deputy Upper Tribunal Judge Hutchinson
Date: 21 November 2022