IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2022-003792
First-tier Tribunal No: EA/15931/2021

THE IMMIGRATION ACTS

Decision & Reasons Promulgated
On 27 February 2023

Before

UPPER TRIBUNAL JUDGE KOPIECZEK
DEPUTY UPPER TRIBUNAL JUDGE JUSS

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

And

KEVIN JOEL RIVERA ANDRADE
(ANONYMITY ORDER NOT MADE)

Respondent

Representation:
For the Appellant: Mr Clarke (Senior Home Office Presenting Officer)
For the Respondent: Mr G Dingley (Counsel)

Heard at Field House on 1 December 2022

DECISION AND REASONS

1. This is an appeal against the determination of First Tier Tribunal Judge Wilding, promulgated on 30th June 2022, following a hearing at Taylor House on 1st June 2022. In the determination the judge allowed the appeal of the Appellant. The Respondent was subsequently granted permission to appeal to the Upper Tribunal, and thus the matter comes before us today.

2. In this determination, we have referred to the Secretary of State as the Respondent, as she was before the judge, and to Mr Andrade as the Appellant, as he was before the judge.

The Appellant

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3. The Appellant is a male, a citizen of Honduras who was born on 9th February 1989 and who appealed against the refusal by the Respondent to grant him pre-settled status under Appendix EU of the Immigration Rules ("the Rules"). The reason that the Respondent gave was that the Appellant did not have a document confirming residency as a durable partner before 31st December 2020.

The Appellant's Claim

4. The Appellant's claim is that he has been in a relationship with a *Ms Leidy Viviana Castello Toro,* a Spanish citizen, after the couple had met on 28th March 2020, whilst living in shared accommodation in London as flatmates. After that their relationship developed. That is when they started living together in a shared a room from 7th June 2020 onwards.

The Judge's Findings

5. The judge found that the relationship between the Appellant and Ms Toro became serious and durable around March or April 2020, which was well before the specified date of 31st December 2020 under the Rules. However, he also found that the parties could not marry because the Appellant's partner had not yet divorced her previous husband. Although she had earlier been separated from him, this she only did on 20th January 2022. The judge also had regard to the submission by Mr Dingley on behalf of the Appellant that he was prepared to concede that the provisions of Appendix EU could not be met by the Appellant, "albeit Mr Dingley was not explicit in why he said the rule could not be met", the judge added (see, paragraph 9). The judge held that "Mr Dingley's concession is plainly right insofar as it is a fact that the appellant did not have a residence card on or before the 31 December 2020 if the immigration rules do in fact require a residence card …" (paragraph 11).

6. However, given that Mr Dingley submitted that "the decision is disproportionate for the purposes of the Withdrawal Agreement" because "balancing everything in the balance as required under Article 18(1)(r), the decision is disproportionate" (paragraph 15), the judge also held that Respondent had not addressed the issue of proportionality in the decision. Indeed, nor was it the case that there was:

> "any consideration of the fact that there is a gov.uk webpage which instructs applicants that *even if you do not have a residence card then provided you can show that the relationship existed* before the specified date and then at the date of the application one's application can succeed" (emphases added, at paragraph 17),

the appeal stood to be allowed according to the judge. This is because, "not having a residence card is mitigated by the respondent expressly saying in published words that a residence card is not required" (paragraph 18). For all these reasons, the judge allowed the appeal.

Grounds of Application

7. The grounds of application by the Respondent Secretary of State are that the judge had erred in law. This is because Article 10(1)(e) of the Withdrawal Agreement is explicit in stating that the beneficiaries of the Withdrawal Agreement are those who were residing in accordance with EU Law as of 31st December 2020 (the specified date), so the Appellant could not have succeeded. The Appellant had not had his residence as a durable partner facilitated in

accordance with national legislation, it was said. Therefore, he was not residing in the UK in accordance with EU Law at the specified date. In fact, he had never applied for, or been granted, facilitated residence in the UK prior to the specified date. As a consequence, he was not lawfully resident in the UK under EU Law at any point prior to the UK's exit from the EU, it was argued. Moreover, given that Article 10(2) of the Withdrawal Agreement only permits the continued residence of a former documented extended family member, with an additional transitional provision in Article 10(3) for those who had applied for such facilitation before 31st December 2020, the Appellant did not fall under Article 10(2) and could not succeed on proportionality grounds. He simply did not come within the personal scope of the Withdrawal Agreement. He had no entitlement to the full range of judicial redress including Article 18(1)(r) which stipulated that the decision had to be proportionate. Quite simply, no such right was conveyed to the Appellant by the relevant parts of the Withdrawal Agreement so he could not succeed and the judge fell into error, the Respondent argued.

8. Permission to appeal was granted by IJ Boyes of the First-tier Tribunal on 10th August 2022 on the basis that the grounds were clearly arguable in that "There are a large number of these matters which fall for determination by the UT" so that "The point in issue is a valid and arguable point which requires determination".

Relevant Legal Framework

9. First, there is Directive 2004/38/EC (also known as 'the Citizens Directive'). This lays down 'the conditions governing the exercise of the right of free movement and residence within the territory of the Member States by Union citizens and their family member' and what it states in Article 3(2) is as follows:

> (2) Without prejudice to any right to free movement and residence the persons concerned may have in their own right, the host Member State shall, in accordance with its national legislation, facilitate entry and residence for the following persons:
>
> > (a) any other family members, irrespective of their nationality, not falling under the definition in point 2 of Article 2 who, in the country from which they have come, are dependants or members of the household of the Union citizen having the primary right of residence, or where serious health grounds strictly require the personal care of the family member by the Union citizen;
> >
> > (b) the partner with whom the Union citizen has a durable relationship, ….

10. Second, there is the Withdrawal Agreement (2019/C 384 I01). Article 10 of this deals with 'Personal Scope' with Article 10(1)(a) making it clear that it shall apply to '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.' Article 10(1)(e) then adds that it shall also apply to:

> (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.'

11. Article 18(1) of the Withdrawal Agreement (2019/C 384 I01) then deals with the 'Issuance of residence documents.' What it states is that:

> 'The host State may require Union citizens or United Kingdom nationals, their respective family members and other persons, who reside in its territory in accordance with the conditions set out in this Title, to apply for a new residence status which confers the rights under this Title and a document evidencing such status which may be in a digital form.'

12. It then goes onto say in Article 18 (1)(r) that:

> 'the applicant *shall have access to judicial and, where appropriate, administrative redress procedures* in the host State against any decision refusing to grant the residence status. The redress procedures 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. *Such redress procedures shall ensure that the decision is not disproportionate*'(emphases added).

13. These provisions were relied upon by the Appellants in this appeal.

Submissions

14. At the hearing before us on 1st December 2022, the Appellant continued to be represented by Mr G Dingley of Counsel, and the Respondent was represented by Mr D Clarke, a Senior Home Office Presenting Officer. Mr Clarke, for the Respondent, began by emphasising the Grounds of Appeal, and pointing out that the Appellant could not succeed under the Withdrawal Agreement. Judge Wilding, while noting the concession by Mr Dingley that the Rules could not be met, "was not explicit in why he said the rule could not be met" (paragraph 9) had nevertheless failed to demonstrate why the appeal stood to be allowed under the Withdrawal Agreement. In fact, the judge had gone on to say that "Mr Dingley's concession is plainly right insofar as it is a fact that the appellant did not have a residence card on or before 31st December 2020" (at paragraph 11), and if that was the case, the appeal could not have been allowed. Insofar as it was the case that Mr Dingley had submitted that "the decision is disproportionate for the purposes of the Withdrawal Agreement", (paragraph 15), this also could not be correct because proportionality only applied if the appeal fell under the Withdrawal Agreement because as the judge pointed out, the reference here was to "balancing everything in the balance as required under Article 18(1)(r)", but which had no application outside the Withdrawal Agreement (paragraph 15).

15. For his part, Mr Dingley submitted that although there was the well-known decision in Celik (EU exit; marriage; human rights) [2022] UKUT 220 (IAC) it was not applicable in this appeal because he had only argued "proportionality" outside the Withdrawal Agreement. The judge's reference to the website guidance (at paragraph 17) which draws attention to the gov.uk webpage was not a matter that Mr Dingley himself had raised and the judge's determination provides no indication of that being the case (see paragraph 17). What Mr Dingley had argued was that the Appellant was in a durable relationship with Ms Toro as a question of fact and his skeleton argument (see paragraph 2 of 29) referred to the minister's statement (in the second main paragraph) where Mr Dingley had referred to the fact that the Appellant has a, "lifetime right to be joined by their existing close family members resident outside the UK on 31st

December 2020, when the relationship continues to exist when the family member seeks to join them there". He submitted that if one looks at paragraph 63 of his skeleton argument, there is a reference made to how, "the nature of the proportionality balance must depend on the particular facts and circumstances of the applicant" and that if "the host state impose unnecessary administrative burdens on them" then this could not be justified as it was disproportionate. Mr Dingley submitted that these arguments were not considered in Celik.

16. In return, Mr Clarke responded by saying that paragraph 29 of Celik sees the minister talking about the provisions of the Rules, and it was quite clear that these here cannot be met. Celik referred to letters of 7th January 2022 dealing with unmarried partners of EEA nationals who are in a durable relationship by 31st December 2020, and were residing in the United Kingdom without immigration permission, but who had failed to comply with the requirement to make an application for a document under the EEA Regulations 2016 by 31st December 2020. These were people who "intended to get married or enter into civil partnership prior to 2021 but their marriages/civil partnership were delayed until after the end of the transition period due to COVID-19" (see paragraph 27 of Celik). The letter states that such persons were unable to produce a residence card issued under the EEA Regulations [2016] because of the COVID-19 delays caused to marriages so that the Respondent was urged to "provide a concession for those whose marriages had been scheduled prior to 1st January 2021 but were postponed due to the COVID-19 pandemic" (paragraph 28).

17. The minister's reply to these letters (at paragraph 29) was as follows:

> "Where the spouse or civil partner of an EEA citizen resident in the UK before the end of the transition period is concerned, they will be eligible for the EUSS where they are themselves an EEA citizen and can rely on their own residence in the UK by 31 December 2020, or where the marriage or civil partnership was formed after this date and, in line with the requirements of the Free Movement Directive and the Citizens' Rights Agreements, the couple were durable partners by this date."
>
> ….
>
> "Notwithstanding the date on which the marriage or civil partnership was formed, an EEA citizen resident in the UK before the end of the transition period, who obtains status under the EUSS, has a lifetime right to be joined by their existing close family members resident outside the UK at 31 December 2020, where the relationship continues to exist when the family members seeks to join them here. In addition, the EUSS permits 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 and had no other lawful basis of stay in the UK, still to bring themselves within the scope of the scheme as a joining family member.
>
> As you note, the person will need to break the continuity of their residence here by leaving the UK for more than six months. They will then be able to apply to the EUSS from overseas ….".

18. Mr Clarke submitted that what the minister is here doing is referring to situations where the Rules cannot be met. However, if one then has a look at the "Discussion" section of Celik where consideration is given to "The Withdrawal Agreement" what the Tribunal here states is that,

> "Part 2 of the Withdrawal Agreement makes provision in relation to citizens' rights. Article 10 sets out who is within scope of Part 2. That Part includes Article 18, upon which the appellant seeks to rely. Article 18.1 refers to 'Union citizens... their respective family members and other persons, who reside in' the territory of the host State 'in accordance with the conditions set out in this Title'" (at paragraph 46).

19. Celik then goes on to say also that:

> "Family members 'are defined in Article 9 in such a way that it is, for example, insufficient for a person merely to meet sub-paragraph (1) of the definition by reason of being the spouse of a Union citizen (Article 2(2)(a)) of Directive 2004/38/EC). The opening words of the definition of 'family members' also require the person concerned to 'fall within the personal scope provided for in Article 10' of the Withdrawal Agreement" (paragraph 47).

20. In the same way:

> "The appellant is not a family member to whom Part 2 of the Withdrawal Agreement applies. He was not a person who, in the words of Article 10.1(e)(i), resided in the United Kingdom in accordance with Union law before 11pm on 31 December 2020 and who continues to reside here afterwards. Nor does he fall within the scope of Article 10.1(e)(ii) or (iii)" (paragraph 48).

21. Mr Clarke proceeded to say that it was not enough for the Appellant to maintain that he had a partner before the stipulated date because Article 3(2) of Directive 2004/38/EC makes it quite clear that:

> "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'" (paragraph 51).

22. Mr Clarke submitted that the plain fact was that the Appellant's relationship was not "duly attested". Celik made it clear, submitted Mr Clarke that such an analysis is:

> "destructive of the appellant's ability to rely on the substance of Article 18.1. He has no right to call upon the respondent to provide him with a document evidencing his 'new residence status' arising from the Withdrawal Agreement because that Agreement gives him no such status. He is not within the terms of Article 10 and so cannot show that he is a family member for the purposes of Article 18 or some other person residing in the United Kingdom in accordance with the conditions set out in Title II of Part 2" (paragraph 56).

So, when the Tribunal in Celik turns to the question of proportionality, submitted Mr Clarke, what it states is that:

> "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"(paragraph 63).

In the instant case, submitted Mr Clarke, the Appellant had failed to come within the scope of Article 18 at all. That being so, it was highly unlikely that proportionality would play any material role at all. Indeed, Article 18 could not possibly be brought in even on the basis of Article 10.

23. We reserved our decision.

Error of Law

24. We find that the judge erred in that he did not properly consider the provisions of the Withdrawal Agreement. That agreement did not provide any applicable rights to a person in the Appellant's situation. The beneficiaries of the Withdrawal Agreement, as Article 10(1)(e) makes clear, are those persons who reside in accordance with EU Law as of 31st December 2020. The Appellant was not in that situation. His residence had not been facilitated in accordance with national legislation. Indeed, as Mr Dingley was the first to recognise, the Appellant did not have the "relevant document" as required by Appendix EU. Therefore, the Appellant did not come within the personal scope of the Withdrawal Agreement. The full range of judicial redress was not something he was entitled to. The Article 18(1)(r) requirement that the decision be proportionate was not applicable to him.

25. Second, all of this has now been made clear by the Upper Tribunal in the decisions of Celik [2022] UKUT (IAC**)** and Batool [2022] UKUT 2019 (IAC). It is not appropriate to allow the appeal on a basis of law which was not applicable, and the only applicable basis in law was whether the couple were family members for the purposes of the Withdrawal Agreement. Celik makes it clear (see headnote 1) that there exist no substantive rights under the EU Withdrawal Agreement to a person who is in a durable relationship in the United Kingdom with an EU citizen. What the Appellant is here arguing is recourse to his EU rights but such substantive rights only materialise if a person's entry and residence were being facilitated before 11pm GMT on 31st December 2020. In the alternative, they applied if such a person had applied for facilitation before that time. Neither of these are circumstances that appertain to the Appellant in this appeal. Mr Dingley has submitted that the Appellant can bring himself under Article 18. However, Mr Clarke is right in saying that that is not a possibility that is open to him unless he first comes under Article 10(2) of the Withdrawal Agreement. He cannot do that because he is not a person whose residence was facilitated by the United Kingdom before the end of the transition period.

26. Third, Mr Dingley has relied on the residual argument at paragraphs 62 to 63, namely, that in the event of a person not being able to bring themselves within Article 18(r), they may be able to avail themselves of relief if there is an imposition of unnecessary administrative burdens (see paragraph 63 of Celik). However, the reference by the Tribunal to this residual basis for relief is in cases

of an extreme situation. That situation does not appertain here. Indeed, the Tribunal in Celik was clear that proportionality is highly unlikely to play any material role where the issue was whether the Appellant fell within the scope of Article 18 at all (see paragraph 63). In Celik, as in this case, the Appellant's residence as a durable partner had not been facilitated by the Respondent before the end of the transitional period. There, as here also, the Appellant did not apply for such facilitation before the end of that period. For this reason, the Appellant could not bring himself within the substance of Article 18(1). It was therefore not open to the judge to allow this appeal on the basis that the decision was disproportionate. He did so on the basis that there is a gov.uk webpage which instructs applicants, who do not have a residence card, to still proceed on the basis that the relationship existed before the specified date, so that their application could succeed (see paragraph 17 of the determination). The judge held that for the Respondent to expressly say in published words that a residence card is not required, but then to make it a necessary condition, was disproportionate (paragraph 18). We do not find that this amounts to an imposition of unnecessary administrative burdens on the Appellant. We do not find that this is a kind of extreme situation that was envisaged in Celik at paragraph 63). This a not a case where the EU citizen had obtained a status under the EUSS, and who now has a lifetime right to be joined by their existing close family members resident outside the UK at 31 December 2020. No right exists to call upon the respondent to issue a document that evidences a 'new residence status' which arises from the Withdrawal Agreement because the Withdrawal Agreement creates no such status. The terms of Article 10 do not apply as one cannot show that one is a family member for the purposes of Article 18.

27. For all these reasons, the judge's decision in allowing the appeal on the basis that the decision was disproportionate was wrong in law. The Appellant's grounds do not raise a challenge that is sustainable. It was not open to the judge to address the issue in the context of proportionality because the Withdrawal Agreement provided no applicable rights to a person in the Appellant's circumstances.

28. In short, the judge erred materially as a matter of law in concluding as he did. Accordingly, we set aside Judge Wilding's decision.

29. Whilst Judge Wilding did not have the benefit of the guidance given in Celik when he made his decision, it nevertheless states the law as it was at the time of the hearing before him. We respectfully agree with the reasoning and analysis in Celik which provides a complete answer to the appellant's appeal in that on the facts of his case there was no alternative but for the appeal to be dismissed.

30. In the circumstances, we re-make the decision by dismissing the appeal.

31. The Secretary of State's appeal against the decision of the First-tier Tribunal is accordingly allowed.

Decision

32. 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.

Satvinder S. Juss

Deputy Judge of the Upper Tribunal
Immigration and Asylum Chamber

24th February 2023