IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2022-004247
First-tier Tribunal No:
EA/16491/2021

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On the 24 March 2023

Before

UPPER TRIBUNAL JUDGE RINTOUL
UPPER TRIBUNAL JUDGE STEPHEN SMITH

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

ROBERT BALA
(NO ANONYMITY ORDER MADE)

Respondent

Representation:
For the Appellant: Mr T Lindsay, Senior Home Office Presenting Officer
For the Respondent: No appearance

Heard at Field House on 14 December 2022

DECISION AND REASONS

1. The Secretary of State appeals with permission against a decision of First-tier Tribunal Judge Atreya promulgated on 28 July 2022. In that decision the judge allowed the appeal of Mr Robert Bala, a citizen of Albania, who was in a relationship with and is the partner of a Spanish citizen with indefinite leave to remain under the EU Settlement Scheme.

2. The core of the case was as put by the appellant (and we refer to Mr Bala as the appellant as he was before in the First-tier Tribunal for ease of reference) is that he was in a durable partnership with his now wife("the sponsor") as at 31 December 2020 and although they had intended to marry before then, they were unable to owing to Covid restrictions. They did not marry until 6 September 2021 well after the specified date, that is 31 December 2020.

3. The Secretary of State's case is that the appellant is not entitled to leave under the EU Settlement Scheme as even if he was a durable partner, he did not have

the relevant document to prove that – a requirement of the EU Settlement scheme – and that although married, that marriage is not relevant as it postdates 31 December 2020.

4. The judge heard evidence from the appellant and the sponsor and in a decision which is set out over a significant number of paragraphs, she found that appellant and the sponsor were truthful and reliable witnesses and she notes "it is accepted by the parties and I find that if the appellant had married his sponsor before the end of the transition period before 31 December 2020 he would have qualified for leave to remain under paragraph EU 14 of Appendix EU". The judge further found on the balance of probabilities [41] that the appellant and sponsor were in a durable relationship before the specified date and that that relationship continued. She found [42] that the appellant is a family member of the relevant EU citizen and was so before the specified date and accordingly meets paragraph EU14 and the eligibility requirements. She also concluded at paragraph 44 that the appellant fell within Article 18(1)(r) of the withdrawal agreement and that it was disproportionate to refuse him leave.

5. The Secretary of State sought permission to appeal on a number of grounds which we summarise as follows:

   i. Appendix EU does not provide for durable partners of relevant EU citizens to apply under the Settlement Scheme unless they held a relevant document which in this case was not held, that being a requirement of the definition of durable partner;

   ii. the judge had made a finding that the decision breached rights under the withdrawal agreement where no such rights in fact existed as the appellant did not fall within Article 10(2) of the Withdrawal Agreement as he had not applied for facilitation before 31 December 2020, thus did not come within the personal scope of the Withdrawal agreement and accordingly the application under Article 18(1) was not permissible.

6. Permission to appeal was granted on all grounds.

7. When the matter came before the panel we were aware that the appellant had written to the Tribunal the previous day indicating that he was no longer represented and wanted the matter to be dealt with in accordance with what had been said by his previous solicitors who were no longer acting. The Tribunal's lawyers wrote to the appellant asking for confirmation of that, indicating it was not possible to withdraw an appeal because it was the Secretary of State's appeal and indicating that if he wished to appear before the First-tier Tribunal he was entitled to do so. We are not aware of any response to that letter, nor is there any indication from the appellant that he wished to attend today and has been prevented from doing so either as a result of the weather or of transport strikes or for any other reason. Accordingly, and bearing in mind the issues in the case, we are satisfied that it would be in the interests of justice bearing in mind the overriding objective to proceed with the appeal in the appellant's absence[1].

8. Mr Lindsay drew our attention to the decision of the Upper Tribunal in Celik (EU exit; marriage; human rights) [2022] UKUT 220 submitting that this case was on

[1] There has been no further correspondence from the appellant between the hearing and the approval of this transcript.

all fours with that. For the reasons we now proceed to give we agree with that proposition.

9. We note that the headnote in Celik provides at paragraphs (1) to (3):

> *(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.*
>
> *(3) Regulation 9(4) of the 2020 Regulations confers a power on the First-tier Tribunal to consider a human rights ground of appeal, subject to the prohibition imposed by regulation 9(5) upon the Tribunal considering a new matter without the consent of the Secretary of State.*

10. We find that the judge erred in finding that the appellant's durable relationship in this case was a durable relationship for the purposes of the EUSS Scheme given that he did not have the relevant document (a residence card in that capacity). His entry and residence were not being facilitated by an application prior to 31 December 2020, nor had he applied for that. Accordingly, the judge erred in considering the concept of proportionality in Article 18(1)(r) as the appellant had no substantive rights under the EU withdrawal agreement as his entry and residence was not being facilitated prior to 11 p.m. on 31 December 2020.

11. Accordingly and for these reasons in light of the decision in Celik which we find is on all fours with this case, we find that the decision of the First-tier Tribunal involved the making of an error of law and we set it aside for that reason.

12. In terms of re-making in the absence of any submissions from the appellant that he otherwise meets the requirements of the Immigration Rules under the EUSS or otherwise or has rights under the withdrawal agreement, in light of the decision in Celik we re-make the decision by dismissing the appeal on the basis that he could not meet the requirements of the Rules as he did not have the relevant document, nor could he invoke the withdrawal agreement as he has no rights under that. We therefore dismiss the appeal on all grounds.

Notice of Decision

(1) The decision of the First-tier Tribunal involved the making of an error of law and we set it aside.

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

Case No: UI-2022-004247
First-tier Tribunal No: EA/16491/2021

Jeremy K H Rintoul

Judge of the Upper Tribunal
Immigration and Asylum Chamber

18 January 2023