IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2022-005037

First-tier Tribunal No:
EA/14739/2021

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On 22nd April 2024

Before

UPPER TRIBUNAL JUDGE MANDALIA

And

DEPUTY UPPER TRIBUNAL JUDGE CHAMBERLAIN

Between

Tarzan Dega
(NO ANONYMITY DIRECTION MADE)

Appellant

and

Secretary of State for the Home Department

Respondent

REPRESENTATION

For the Appellant: No appearance by or on behalf of the appellant
For the Respondent: Ms R Arif, Senior Home Office Presenting Officer

Heard at Birmingham Civil Justice Centre on 18 April 2024

DECISION AND REASONS

INTRODUCTION

1. The appellant is a national of Albania. His appeal against the respondent's decision of 6 October 2021 to refuse his application for leave

to remain under the EU Settlement Scheme under the Immigration (Citizens' Rights Appeals) (EU Exit) Regulations 2020 was dismissed by First-tier Tribunal Judge Anthony ("the judge") for reasons set out in a decision promulgated on 24 May 2022.

2. The judge noted the appellant made an application for pre-settled status or settled status in the UK under the EU Settlement Scheme to join his partner, Ms Nicoleta Marina Chelban, a Romanian national living in the UK.

THE APPEAL TO THE UPPER TRIBUNAL

3. Permission to appeal was granted by First-tier Tribunal Judge Haria on 26 September 2022. Judge Haria said:

> "2. The grounds seeking permission make various allegations of procedural unfairness alleging the Judge approached the hearing with a degree of suspicion and prejudice denying the Appellant a fair hearing, in particular by:
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> a. placing considerable weight on and showing prejudice due to the fact that the EEA Sponsor and Appellant do not have a common language between them [30],
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> b. asking questions on a topic not raised in cross examination by the Home Office Presenting Officer [29],
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> c. making and incorrect factual finding [32],
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> d. failing to have regard to evidence as to the genuineness and durability of the relations matters which were not raised in the respondent's refusal [33],
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> e. failing to mention the case of *Boodhoo and another (EEA Regs: relevant evidence)* [2013] UKUT 00346 (IAC) relied on in the skeleton argument, and
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> f. failing to consider the citizens directive, the withdrawal agreement and the principle of proportionality.
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> 3. In relation to the allegations of bias, the Upper Tribunal in *PA (protection claim: respondent's enquiries; bias) Bangladesh* [2018] UKUT 337 (IAC) provides guidance. There is no indication in the permission application as to whether the concerns were raised with the Judge at the hearing. Furthermore, there is no witness statement or contemporaneous note in support of the allegation from Ms Malhotra of Counsel who represented the Appellant at the hearing. I grant permission as the allegation is serious and merits full consideration as in the event that it is proven, the Appellant would have been denied a fair hearing.

4. The appeal was listed for hearing before Upper Tribunal Judge Gill on 26 April 2023. At that hearing the parties agreed that the appeal be stayed pending the decision of the Court of Appeal in respect of the decision of the Upper Tribunal in *Celik (EU exit: marriage; human rights)* [2022] UKUT 0220 (IAC).

5. The appeal was reviewed by Upper Tribunal Judge Sheridan on 3 November 2023, and he issued further Directions. He noted the

judgement of the Court of appeal in *Celik v Secretary of State for the Home Department* [2023] EWCA Civ 921 was given on 31 July 2023. Upper Tribunal Judge Sheridan expressed the provisional view that the grounds of appeal asserting an error of law by the FtT cannot succeed. The parties were invited to reconsider their respective positions, and if possible, to agree a consent order.

6. There has been no further correspondence from the appellant or his representatives. In the absence of any consent order or indication as to the way in which the hearing of the appeal should proceed, the hearing of the appeal was listed before us.

THE HEARING OF THE APPEAL BEFORE US

7. The appellant did not attend the hearing of the appeal before us. There is no explanation for the appellant's absence and there has been no application for an adjournment.

8. Notice of the hearing of this appeal was sent to the appellant, by post, on 27 March 2024. A copy was also sent to the appellant and his representatives, by email on the same day. Neither the emails nor the Notice of Hearing have been returned to the Tribunal undelivered, and we are satisfied the appellant has had Notice of the Hearing in accordance with Rule 36 of The Tribunal Procedure (Upper Tribunal) Rules 2008.

9. In the absence of any response from the appellant and his representatives to the Directions issued by Upper Tribunal Judge Sheridan on 3 November 2023, and the absence of any application for an adjournment or reasons to explain the appellant's absence, we are satisfied that it is in accordance with the over-riding objective and the interests of justice for us to determine the hearing in the absence of the appellant.

DECISION

10. As Judge Haria noted in paragraph [3] of her decision when granting permission to appeal, there is no indication in the permission application as to whether the concerns identified were raised with the Judge at the hearing. Furthermore, there is no witness statement or contemporaneous note in support of the allegation from Ms Malhotra of Counsel who represented the appellant at the hearing. Judge Haria granted permission as the allegations made are serious, and merit full consideration.

11. Neither the appellant nor his representatives have made any attempt to address the issues outlined by Judge Haria regarding the lack of evidence to support the allegations made. In the absence of the appellant or his representatives, and the absence of any evidence to support the serious allegations that are made regarding the conduct of the hearing before the FtT, we reject the claim that the decision of the FtT is vitiated by procedural unfairness as set out in the grounds of appeal.

12. As far as the substantive issue in the appeal is concerned, the Court of Appeal held in *Celik v SSHD* [2023] EWCA Civ 921 that on the proper interpretation of Article 10 of the EU Withdrawal Agreement, a Turkish national who had married an EU national after the end of the post-EU exit transition period, did not have any right to reside in the UK. The fact that their marriage had been delayed due to the COVID-19 pandemic did not alter the interpretation of the Withdrawal Agreement.

13. Lord Justice Lewis (with whom Lord Justice Moylan Lord Justice Singh agreed) said:

> “54. Family members are defined to include spouses or civil partners (but not persons in a durable relationship): see Article 9(a) of the Withdrawal Agreement. In order to be resident in accordance with EU law before the end of the transition period, such persons would have to have married (or contracted a civil partnership) before that date and be residing in the United Kingdom on the basis that they were the spouse or civil partner. The wording of Article 10(1)(e)(i) is clear. It does not include persons who married an EU national after the end of the transition period and who were not, therefore, residing in the UK as a spouse or civil partner in accordance with EU law at the end of the transition period. That reflects a rational agreement for the protection of UK and EU nationals, and their families who, in the words of the sixth recital, "have exercised free movement rights before a date set in this Agreement". The date set was the end of the transition period. On the ordinary meaning of the words in Article 10(1)(e)(i) read in context and having regard to the purpose underlying the Withdrawal Agreement, therefore, persons such as the appellant who marry after the end of the transition period do not fall within the scope of that provision.
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> 55. The fact that persons did not, or could not, exercise free movement rights, or did not or could not marry, until after that date does not alter the meaning or purpose of the Withdrawal Agreement. That does not involve any breach of Article 5 of the Withdrawal Agreement. That is an obligation to act in good faith and to take all appropriate measures to ensure "fulfilment of the obligations arising from the agreement". The relevant obligation, in this context, is to ensure that family members defined to include spouses and civil partners of EU nationals (but not unmarried partners in a durable relationship) resident in the United Kingdom at the end of the transition period can continue to enjoy rights of residence after the end of the transition period. The United Kingdom is complying with that obligation. Article 32 of the Vienna Convention does not assist. That permits recourse to supplementary means of interpreting treaties where the interpretation resulting from the application of Article 31 leads to a meaning which is ambiguous or obscure (which is not the position here) or where that leads to "manifestly absurd or unreasonable results". Again, a treaty providing that those exercising certain rights at a particular date should continue to enjoy those rights after that date is not manifestly absurd or unreasonable. It is the agreement reached between the European Union and the United Kingdom as to the appropriate extent of reciprocal protection for their nationals. The fact that unforeseen events meant that certain people were not able to exercise those rights (even if as a result of events outside their control) before the set date does not lead to manifestly absurd or unreasonable results.

> 56. Further, the principle of proportionality, whether as a matter of general principle, or as given express recognition in Article 18(1)(r) of the Withdrawal Agreement, does not assist the appellant. Article 18(1)(r) is intended to ensure that decisions refusing the "new residence status" envisaged by Article 18(1) are not disproportionate. That status must ensure that EU citizens and United Kingdom nationals, and their respective family members and other persons may apply for a new residence status "which confers the rights under this Title". The principle of proportionality, in this context, is addressed to ensuring that the arrangements adopted by the United Kingdom (or a Member State) do not prevent a person who has residence rights under the Withdrawal Agreement being able to enjoy those rights after the end of the transition period. The principle of proportionality is not intended to lead to the conferment of residence status on people who would not otherwise have any rights to reside. The appellant did not have any rights under Article 10(1)(e)(i) of the Withdrawal Agreement. The refusal to grant residence status is not therefore a disproportionate refusal of residence status which would have conferred rights already enjoyed under the Withdrawal Agreement. Rather, it is a recognition that the appellant did not have any such rights under Article 10(1)(e)(i).”

14. In *Hani (EUSS durable partners: para (aaa))* [2024] UKUT 00068 (IAC) the Upper Tribunal held that the effect of paragraph (b)(ii)(bb)(aaa) of the definition of “durable partner” in Annex 1 of Appendix EU to the Immigration Rules, as inserted by Statement of Changes HC 813 (from 31 December 2020 to 11 April 2023), is that a person who was in a durable partnership but did not have a “relevant document”, and who did not otherwise have a lawful basis of say in the United Kingdom at the “specified date” of 31 December 2020 at 11.00PM, is incapable of meeting the definition of “durable partner”.

15. The appellant and his partner attended the hearing of the appeal and gave evidence. The judge’s findings of fact and conclusions are set out at paragraphs [16] to [34] of her decision. She accepted the appellant and Ms Chelban were married on 18 June 2021. She noted that alone is insufficient to establish whether they were in a “durable” relationship prior to the specified date. At paragraphs [33] and [34] she went on to say:

> “33. I conclude that the appellant has failed to demonstrate on the balance of probabilities that his relationship with the EEA citizen sponsor was and is subsisting and furthermore, that their relationship had acquired a sense of permanency. Whilst I accept they are married, in light of my concerns regarding the oral evidence, the lack of documentary evidence establishing cohabitation prior to the specified date and the lack of documentary evidence establishing cohabitation at the date of hearing, I am not satisfied the fact of the marriage alone is sufficient to discharge the burden of proof. I do not accept their written and oral evidence that they intend that the relationship will continue on a permanent basis. I conclude that their relationship was not “durable” prior to the specified date.
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> 34. As I have not found in favour of the appellant in respect of the Annex 1 definition of “durable partner” at part (a), I do not need to make a decision in respect of whether the appellant satisfies either (b)(i) or (b)(ii) of the remainder of the definition in Annex 1. For the reasons set out above, I find the appellant does not meet condition 1(a)(ii) of EU14.”

16. It was in our judgement undoubtedly open to the judge to dismiss the appeal for the reasons set out in her decision. The decision of the judge is not vitiated by any procedural unfairness and neither has the appellant established that the decision is infected by a material error of law.

17. It follows that the appellant's appeal must be dismissed.

NOTICE OF DECISION

18. The appeal is dismissed.

19. The decision of First-tier Tribunal Judge Anthony promulgated on 24 May 2022 stands.

V. Mandalia

Upper Tribunal Judge Mandalia

Judge of the Upper Tribunal
Immigration and Asylum Chamber

18 April 2024