IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2022-005188
First-tier Tribunal No: EA/14163/2021

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On the 11 April 2024

Before

UPPER TRIBUNAL JUDGE BLUNDELL

Between

SECREATRY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

AZZEDDINE HAMIDI

Respondent

Representation:

For the Appellant: Mr Wain, Senior Presenting Officer
For the Respondent: No appearance or representation

Heard at Field House on 26 March 2024

DECISION AND REASONS

1. The Secretary of State appeals with the permission of First-tier Tribunal Judge L J Murray against the decision of First-tier Tribunal Judge Raymond. By his decision of 11 May 2022, Judge Raymond ("the judge") allowed Mr Hamidi's appeal against the Secretary of State's refusal of his application for leave to remain under Appendix EU of the Immigration Rules.

2. In order to avoid confusion, I will refer to the parties as they were before the FtT: Mr Hamidi as the appellant and the Secretary of State as the respondent.

3. I need say very little about the background.

4. The appellant is an Algerian national who was born on 12 May 1981. The date on which he entered the UK is unclear. He formed a relationship with a Dutch national called Linda Nagtegaal. She was granted Indefinite Leave to Remain in the UK under the Settlement Scheme. They married in the London Borough of

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Merton on 1 May 2021, after the appellant had divorced his first wife by way of proceedings in Algeria.

5. On 7 May 2021, the appellant made his application for status under Appendix EU, relying on his relationship with his spouse. The application was refused in a letter dated 27 July 2021. The respondent was not satisfied that the appellant and his wife had married before the specified date (31 December 2020) or that the appellant had a documented right of residence as the durable partner of an EEA national.

6. The appellant appealed to the First-tier Tribunal and his appeal was allowed by the judge, who found that there was 'ample evidence' that the appellant and his wife had been in a genuine relationship since early 2000 and that they had married on the earliest possible date they could obtain during lockdown. The judge found that the marriage had occurred during the grace period and that it was disproportionate under Article 18 of the Withdrawal Agreement to refuse the application for leave to remain.

7. The Secretary of State appealed, contending that the judge had misdirected himself in law. Judge Murray summarised the grounds in her decision granting permission to appeal:

> The appellant did not have a relevant document and was not lawfully in the UK. It is arguable that as residence was not facilitated under national legislation, he was not residing in the UK in accordance with EU law prior to the UK's exit from the EU. It is further arguable that the judge both erred in his construction of the 'grace period' and erred in concluding that the appellant came within the personal scope of the Withdrawal Agreement.

8. The appeal to the Upper Tribunal was stayed to await the decision of the Court of Appeal in Celik v SSHD [2023] EWCA Civ 921 [2023] Imm AR 5. That decision was handed down on 31 July 2023.

9. In relation to those who married after the end of the transition period, Lewis LJ (with whom Moylan and Singh LJJ agreed) held that Article 10(1)(e)(i) of the Withdrawal Agreement clearly did 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. The fact that unforeseen events meant that certain people were not able to exercise rights of residence (even if as a result of events outside their control) before the set date did not lead to manifestly absurd, arbitrary or unreasonable results. The principle of proportionality, whether as a matter of general principle, or under article 18(1)(r), was not intended to lead to the conferment of residence status on people who would not otherwise have any rights to reside.

10. In relation to those who submitted that they had been 'durable partners' before the end of the transition period, the Court of Appeal held that Article 10(2) and (3) of the Withdrawal Agreement dealt with situations where the residence of a person was 'facilitated' by the host state in accordance with legislation. The reference to residence being 'facilitated' meant that a decision had been taken in relation to a particular individual under the relevant national legislation *granting* that individual a right to enter or reside in the relevant state.

11. Directions were issued by Upper Tribunal Judge Kebede on 14 November 2023, inviting the parties to consider their respective positions in light of Celik v SSHD. It was her provisional view that the Secretary of State's appeal was bound to succeed in light of that decision. She invited the parties to consider whether the matter could be settled by consent, failing which it would be listed for a hearing.

12. There was no response to those directions from either the Secretary of State, the appellant or his representatives, who remain on the record. Notice of today's hearing was duly sent to the parties on 7 March 2024.

13. The appellant sent an email to the Upper Tribunal on 20 March 2024. He stated that he was surprised to have received the notice of hearing because he had left the UK on 25 June 2023 and had made an application for entry clearance on 13 August 2023.

14. I stated at the outset of the hearing that I was satisfied that the appellant and his representatives had received notice of the hearing and that it was in the interests of justice, and in compliance with the over-riding objective, to proceed with the hearing in the absence of the appellant and his representatives.

15. I did not invite Mr Wain to make submissions.

16. As I stated at the hearing, the position in law is abundantly clear. The appellant married after the end of the transition period. The fact that he was prevented from marrying earlier as a result of the pandemic is legally irrelevant. He made no application for facilitation of residence as a durable partner before the end of the transitional period, nor was he granted a residence card in that capacity. He did not therefore fall within the personal scope of the Withdrawal Agreement and the principle of proportionality was of no application.

17. The appellant could not succeed on either of the grounds which were available to him under the Immigration (Citizens' Rights Appeals) (EU Exit) Regulations 2020. The judge erred in concluding otherwise. In the circumstances, the only course open to me is to allow the respondent's appeal to the Upper Tribunal and to remake the decision on the appeal by dismissing it.

18. As I have stated above, I understand that the appellant has made an application for entry clearance. I do not know whether that has been decided or not. The appellant will no doubt wish to draw Judge Raymond's finding about his relationship to the attention of the entry clearance officer. I make it clear that nothing in this decision casts any doubt on the safety of that finding. As the law presently stands, however, the appellant cannot succeed in this appeal for the reasons I have given above.

Notice of Decision

The decision of the First-tier Tribunal involved the making of an error on a point of law. That decision is set aside. I remake the decision on the appeal by dismissing it.

Mark Blundell

Judge of the Upper Tribunal
Immigration and Asylum Chamber

26 March 2024