IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case Nos.: UI-2022-005705

First-tier Tribunal Nos:
EA/11988/2021

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On 21 June 2024

Before

UPPER TRIBUNAL JUDGE L SMITH
DEPUTY UPPER TRIBUNAL JUDGE GRIMES

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

And

ERVIN GJOKA

Respondent

Representation:
For the Appellant: Mr T Lindsay, Senior Home Office Presenting Officer
For the Respondent: Mr Gjoka did not attend and was not represented

Heard at Field House on Wednesday 12 June 2024

DECISION AND REASONS

1. This is an appeal by the Secretary of State. For ease of reference, we refer to the parties as they were before the First-tier Tribunal. The Respondent appeals against the decision of First-tier Tribunal Judge Abdar promulgated on 14 March 2022 ("the Decision") allowing the Appellant's appeal against the Respondent's decision dated 29 July 2021 refusing him status under the EU Settlement Scheme ("EUSS") as the durable partner of an EEA (Spanish) national, Ms Haizea Gaston Buisan ("the Sponsor").

2. The Respondent refused the Appellant's application on the basis that he had not applied for facilitation of his residence as a durable partner prior to 31 December 2020. He did not marry the Sponsor until 14 April 2021 and therefore also after the UK's withdrawal from the EU. Accordingly, the Appellant was not recognised as a family member or extended family member prior to the date of the UK's departure from the EU and could not benefit as such under either the rules relating to EUSS (Appendix EU) or the withdrawal agreement between the UK and the EU on the UK's departure from the EU ("the Withdrawal Agreement").

3. The Judge accepted that the relationship between the Appellant and Sponsor was genuine and that they had been in a durable relationship before 31 December 2020. He also accepted that they were prevented from marrying earlier than they did due to the Covid-19 pandemic. Although the Judge thought that the Respondent had misinterpreted EU law when formulating Appendix EU, he accepted that he was bound to apply the rules and concluded that the Appellant could not meet Appendix EU. He went on to conclude that the Appellant fell within the personal scope of the Withdrawal Agreement and therefore had a right to reside by virtue of that agreement. He also concluded that the Respondent's decision was disproportionate under Article 18(1)(r) of the Withdrawal Agreement. Having concluded that the Respondent's decision breached the Withdrawal Agreement, he allowed the appeal on that ground.

4. The Respondent appealed on the basis that the Judge had misconstrued the Withdrawal Agreement by failing to have regard to the fact that the Appellant was not exercising Treaty rights prior to 31 December 2020 as he had not made an application for facilitation under the Immigration (European Economic Area) Regulations 2016 ("the EEA Regulations") prior to that date, and had in any event not made any application prior to 31 December 2020. Further the Appellant is a person whose claim previously fell under Article 3(2)(b) of Directive 2004/38/EC (contrary to the Judge's finding) such that Article 10 of the Withdrawal Agreement could only apply if the Appellant had applied for facilitation of his residence under the EEA Regulations prior to 31 December 2020 which he had not done. Accordingly, the Appellant could not fall within the personal scope of the Withdrawal Agreement.

5. Permission to appeal was granted by First-tier Tribunal Judge SPJ Buchanan on 25 May 2022 in the following terms:

> 1. The respondent seeks permission to appeal, (in time), against a Decision of a FTTJ (Judge Abdar) who, in a Decision and Reasons promulgated on 14 March 2022, allowed the appellant's appeal.
> 2. The Grounds of Appeal [GOA] contend that the FTTJ arguably erred in law because – Ground One – there was a material misdirection of law on a material matter; and – Ground Two – there was error in concluding that the appellant was an 'other family member'
> 3. Ground One: it is arguable that the appellant requires a 'relevant document' to fall within the scope of the Immigration Rules and also within

> the scope of the Withdrawal Agreement; and arguably the FTTJ erred in deciding otherwise [see #43-#48 of Decision].
> 4. Ground Two: it is arguable that the FTTJ is improperly construed the Withdrawal Agreement to extend enforceable rights of residence to the appellant. [see #51].
> 5. It is arguable by reference to the Grounds of Appeal that there may have been error of law in the Decision as identified in the application. I grant permission to appeal."

6. The matter was listed for hearing before this Tribunal (Upper Tribunal Judge Sheridan and Deputy Upper Tribunal Judge Wilding) at an error of law hearing on 13 March 2023 but was adjourned on that occasion and stayed behind the case of Celik (EU exit; marriage; human rights) [2022] UKUT 00220 (IAC) ("Celik"). By then, the Tribunal's decision was the subject of an appeal to the Court of Appeal. The Tribunal stayed this appeal and did not determine the error of law issue.

7. The Tribunal's guidance in Celik was subsequently upheld by the Court of Appeal ([2023] EWCA Civ 921).

8. On 16 November 2023, directions were issued by Upper Tribunal Judge Pitt, inviting the parties to agree a consent order to dispose of the appeal. If that were not agreed, the appeal would be listed for hearing. There was no response from either party. Accordingly, Upper Tribunal Judge Pickup issued directions on 22 March 2024 for the appeal to be listed for hearing.

9. The appeal was therefore listed before us for hearing on Wednesday 12 June 2024.

10. There was no appearance before us by or on behalf of the Appellant. We were satisfied that the Tribunal had given notice of the hearing to the Appellant's last known address by post on 21 May 2024. That notice was also given to the Sponsor at the same address. The notices were also sent to email addresses provided to the Tribunal by the Appellant and Sponsor. We were satisfied that notice of the hearing before us had been properly given.

11. There was no application by the Appellant for adjournment of the hearing nor any explanation for his absence. We therefore decided that it was in the interests of justice to proceed with the appeal in the Appellant's absence.

12. We are satisfied that the Appellant's case is hopeless in light of the decision and Court of Appeal judgment in Celik. Although the Appellant is now married to the Sponsor, he was not married to her as of 31 December 2020. He could only fall within the personal scope of the Withdrawal Agreement if he were either married as at that date or had his residence as a durable partner facilitated by application under the EEA Regulations prior to 31 December 2020. The Appellant is therefore not within the personal scope of the Withdrawal Agreement and the Judge was wrong so

to find. Article 18(1)(r) of the Withdrawal Agreement cannot operate to provide a right to the Appellant under the Withdrawal Agreement which does not exist. Paragraphs [54] to [57] of the Court of Appeal judgment in Celik are determinative of the Appellant's case.

13. The Appellant could not meet Appendix EU or the Withdrawal Agreement (see (1) of the headnote and [68] and [71] of the judgment in Celik). The Judge was right to conclude that the Appellant could not meet Appendix EU albeit wrong to find that Appendix EU had misinterpreted the Appellant's EU law rights. He was wrong to conclude that the Appellant could meet the Withdrawal Agreement.

14. In those circumstances, we find an error of law in the Decision, we set aside the Decision and we re-make the decision by dismissing the Appellant's (Mr Gjoka's) appeal. As we indicated to Mr Lindsay at the hearing, we preserve the Judge's finding that the Appellant was, at the time of the Decision, in a genuine relationship with the Sponsor. It is open to him to make an application to remain under domestic Immigration Rules (ie Appendix FM to those rules) based on that relationship should he choose to do so. Whether that application succeeds is of course a matter for the Respondent.

NOTICE OF DECISION

The Decision of Judge Abdar promulgated on 14 March 2022 involved the making of an error of law. We therefore set aside that Decision (whilst preserving the finding that at the date of the Decision the Appellant was in a genuine relationship with the Sponsor). We re-make the decision by dismissing the Appellant's (Mr Gjoka's) appeal.

L K Smith
Judge of the Upper Tribunal
Immigration and Asylum Chamber
13 June 2024