Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: UI-2022-001930
[EA/11773/2021]

THE IMMIGRATION ACTS

Heard at Field House, London	**Decision & Reasons Promulgated**
On Friday 2 September 2022	**On Tuesday 1 November 2022**

Before

UPPER TRIBUNAL JUDGE SMITH
DEPUTY UPPER TRIBUNAL JUDGE MONSON

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MR BLEDAR PETKU

Respondent

Representation:
For the Appellant: Ms Lecointe, Senior Home Office Presenting Officer
For the Respondent: Mr B Hawkin, Counsel instructed by Nova Legal Services

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 Peter-John White promulgated on 7 March 2022 ("the Decision").

2. By the Decision, the Judge allowed the Appellant's appeal against the Respondent's decision dated 14 July 2021 refusing him pre-settled status under the EU Settlement Scheme ("EUSS"). The Respondent refused the

Appellant's application on the basis that as at the "specified date" (2300 hours GMT on 31 December 2020), he could not succeed under Appendix EU (EU Settlement Scheme) to the Immigration Rules ("Appendix EUSS") and was not within scope of the Withdrawal Agreement between the UK and the European Union ("the Withdrawal Agreement").

3. The facts so far as relevant at this stage and as accepted by Judge White are that the Appellant is now married to an EEA national, Ms Videnova. He married her however only on 13 April 2021. He was in a durable relationship prior to that date with Ms Videnova, having entered into a relationship with her in April 2020. It is though common ground that the Appellant had not made any application to have his residence as an extended family member facilitated under the Immigration (European Economic Area) Regulations 2016 ("the EEA Regulations"). The Appellant and Ms Videnova had arranged to marry on 11 November 2020 and on 12 January 2021 but both ceremonies were cancelled by the local authority due to the Covid-19 pandemic in accordance with restrictions put in place by central government.

4. The Judge found that the Appellant could not succeed under Appendix EUSS. That finding is not challenged by the Appellant. The Judge found however that the Respondent's decision was in breach of the Withdrawal Agreement as being disproportionate and contrary to article 18.1(r) of that agreement ("Article 18.1(r)") for reasons set out at [20] of the Decision to which we come below.

5. The Respondent appeals the Decision on the basis that the Appellant was not in scope of the Withdrawal Agreement by the specified date and accordingly could not rely on Article 18.1(r). It was therefore a material error for the Judge to have considered proportionality.

6. Permission to appeal was granted by First-tier Tribunal Judge Athwal on 25 April 2022 in the following terms so far as relevant:

> "… 2. The grounds assert that the Judge erred in that he misapplied the Withdrawal Agreement to someone who does not come within the scope of Part 2. The Appellant had never resided in accordance with any conditions in the Title set out in Article 13. For these reasons the Judge was not in the position to consider proportionality. Even if he were able to consider proportionality, the Judge failed to consider all matters that were relevant to proportionality.
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> 3. It is arguable that the Judge has erred in this manner."

7. The matter comes before us to determine whether the Decision contains an error of law and, if we so conclude, to consider whether to set it aside. If the Decision is set aside, it is then necessary for the decision to be re-made either in this Tribunal or on remittal to the First-tier Tribunal.

8. We had before us a core bundle of documents relating to the appeal as well as the Appellant's bundle and the Respondent's bundle as before the

First-tier Tribunal. We also had a supplementary bundle of further evidence dealing with the relationship between the Appellant and Ms Videnova which was said to be relevant in the event that the Tribunal were to set aside the Decision and re-make the decision on appeal. We do not need to set out what those documents show for reasons which follow.

9. Following the grant of permission and therefore not referred to in the Respondent's grounds, the Upper Tribunal has issued guidance in appeals such as this in Celik (EU exit; marriage; human rights) [2022] UKUT 00220 (IAC) ("Celik"). We set out the detail of that guidance below.

10. Mr Hawkin was Counsel who appeared for Mr Celik before the Upper Tribunal and was therefore familiar with the decision. No doubt for that reason, he filed a Rule 24 Reply on 1 September 2022 seeking to rely on part of the decision and to distinguish other parts.

11. In light of the issuing of the guidance in Celik which considered the main ground raised in the Respondent's appeal and the arguments made in Mr Hawkin's Rule 24 Reply, we invited Mr Hawkin to make his submissions first notwithstanding that this is the Respondent's appeal. We accept that the guidance in Celik is not binding on us but it is persuasive (particularly as a reported decision of a Presidential panel).

12. Having heard from Mr Hawkin and following discussions with him in relation to his submissions, we indicated that we did not need to hear from Ms Lecointe unless she wished to say anything. She did not wish to do so.

13. We then indicated that we found there to be an error of law in the Decision for the reasons set out in the Respondent's main ground and taking into account the guidance in Celik. We therefore set aside the Decision. Having heard further submissions from Mr Hawkin and following discussions with him in that regard, we determined the appeal by dismissing it.

14. We indicated that we would provide our reasons in writing both as to error of law and re-making which we now turn to do.

ERROR OF LAW

15. We begin with the Decision. In essence, Mr Hawkin argued that the Judge had carried out an analysis and reached findings which were open to him and that there was therefore no error of law. He directed our attention to [10] and [20] of the Decision in particular. We set those paragraphs out in context:

> "10. In relation to the wedding ceremony, I have an email from Waltham Forest dated 29th September 2020 confirming the booking for 11th November. It says that cancellation or amendment is possible up to 1 week before the day. It also

says that only 50% of the fee will be refunded, up to 4 weeks ahead, after which there will be no refund. I then have an email dated 10th November, from a 'no-reply' email address, reminding the appellant of the wedding booking for the following day. His evidence was that he was telephoned to be told of the cancellation, he was not sure exactly when, and in that call he was told that he would get a reminder email through the automated service even though it was being cancelled. I then have a third email, dated 2nd December, telling him that the ceremony has been re-booked for 12th January 2021. Ms Ogbajie is right to say that there is no email to say that the ceremony has been cancelled. It is clear that the appellant and Ms Videnova did have two bookings for their wedding before they were finally able to marry in April 2021. That suggests they wished to marry, and the respondent has not sought at any stage to cast any doubt on the genuineness of their relationship. I do not know why they should have cancelled their wedding, presumably twice, against that background. On the other hand, it is a matter of historical fact that England entered a second lockdown on 5th November 2020, which ended in early December, and then had a third lockdown beginning on 6th January. Both the abortive wedding bookings were thus on dates on which, when reached, the country was in lockdown. In the circumstances I am satisfied and find that the booking on 11th November (and that in January 2021, though that is less important) was cancelled by Waltham Forest Borough Council, in consequence of the government's imposition of a lockdown. That produces what might be regarded as an unhappy situation, where the appellant was deprived of the chance to marry Ms Videnova before 31st December 2020 as a result of the actions of the Government in imposing a lockdown, for reasons which had nothing to do with him personally, and was subsequently refused pre-settled status as a spouse by the respondent, a leading member of that same Government, because he had failed to marry until after 31st December 2020.

…

17. The remaining aspects of the submissions focussed on whether the decision was disproportionate. Article 18(r) [sic] clearly requires that redress procedures should ensure that it is not. In part, this submission relied on considerations under Article 8 and the potential interference with family life, but I am not persuaded that this is something I can consider. The 2020 Regulations do not provide for a general right of appeal on human rights grounds, nor does the withdrawal agreement provide, as it easily could have done, that redress procedures must ensure no breach of human rights. In any event, I am not persuaded that the decision is in breach of human rights. It does not require the appellant to leave the United Kingdom, nor inhibit him from any other application he may wish to make for leave to remain. It provides only that he is not

entitled to leave to remain under EUSS, the rules for which he does not meet.

18. The other aspect of this argument is that the couple would have met the requirements of the EUSS had their marriage gone ahead in 2020, as they planned. That it did not was due to matters beyond their control, and indeed to decisions taken by the State. In those circumstances there can be no public interest in refusing the application and thus the decision is disproportionate.

19. Proportionality is an established principle in European law, set out in Article 5 TEU. The Withdrawal Agreement is concerned with protection of rights under European law and it is reasonable to suppose from the context that the term is being used in the sense in which it is understood in that law. It is concerned primarily with the assessment of measures taken and involves consideration whether they are suitable to the objective being pursued and whether they are necessary to achieve that objective, or whether it could be obtained by a less onerous measure. As the Supreme Court made clear in R (Lumsdon and others) v Legal Services Board [2015] UKSC 41, this is a different exercise from the consideration of proportionality in human rights law, where the focus is on balancing the public interest against the rights of the individual affected. Mr Hawkin's submission about the absence of a public interest in refusing leave to this appellant might be thought to blur the distinction. On the other hand, Article 18(r) [sic] refers to the proportionality not of the scheme but of the individual decision and enjoins the tribunal providing the judicial or administrative redress to examine the facts and circumstances on which the proposed decision is based. That clearly focusses on the specific decision and individual, and seems to me to leave a rather wide margin of discretion as to 'proportionality'.

20. I remind myself that the objective of the Withdrawal Agreement is to ensure that Brexit does not adversely affect those entitled to rights under European law, and that it incorporates a transition period during which those rights could still be acquired, while achieving in due course a cut-off after which applicants could only acquire rights under purely domestic law. Within that framework it seeks to ensure that applicants will receive a proportionate decision on their applications. In the ordinary course of events the EUSS may be thought generally to be a proportionate means to achieve the objective, but if the focus is on the particular decision that is a different matter. I have found that the Appellant would have married Ms Videnova on 11th November 2020, and thus have been entitled to leave under the EUSS, but for the closure of the Register Office as a result of a specific Government measure. Against that background I do not consider that the subsequent refusal of this application, on the ground of not having married during the transition period, while in strict accordance with the terms of the EUSS, is a necessary decision to achieve the objectives of the scheme

> and the Withdrawal Agreement. Nor do I consider, insofar as this is a permissible factor, that there is any clear public interest in refusing this appellant leave in those circumstances. Had there been some other reason why the appellant did not marry in time my view would potentially be different; any change in the law and transitional provisions entails that some people will lose out who might previously have succeeded. But here the reason the appellant did not marry is the action of the State, and it is the State which then relies on the failure to do what it had made impossible in order to refuse him. In those very specific circumstances It [sic] seems to me that the decision is to be classed as disproportionate. If so, it is in breach of a right the appellant has under Article 18 of the Withdrawal Agreement and that is a proper ground of appeal. On that ground I conclude that the appeal is entitled to succeed."

16. We next set out the relevant parts of Celik beginning with the headnote which reads as follows:

> "(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.
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> (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.
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> (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."

17. Mr Hawkin did not rely on the headnote but on [61] to [63] of the decision dealing with Article 18.1(r). We set those paragraphs out in context:

> "***(2) The appeal to proportionality: Article 18.1(r)***
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> 61. The appellant places great reliance on Article 18.1(r) of the Withdrawal Agreement. As we have seen, this gives a right for 'the applicant' for new residence status to have access to judicial redress procedures, involving an examination of the legality of the decision as well as of the facts and circumstances on which the decision is based. These redress procedures must ensure that the decision 'is not disproportionate'.
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> 62. Ms Smyth submitted at the hearing that, since the appellant could not bring himself within Article 18, sub-paragraph (r) simply

had no application. Whilst we see the logic of that submission, we nevertheless consider that it goes too far. The parties to the Withdrawal Agreement must have intended that an applicant, for the purposes of sub-paragraph (r), must include someone who, upon analysis, is found not to come within the scope of Article 18 at all; as well as those who are capable of doing so but who fail to meet one or more of the requirements set out in the preceding conditions.

63. 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.

64. In the present case, there was no dispute as to the relevant facts. The appellant's residence as a durable partner was not facilitated by the respondent before the end of the transitional period. He did not apply for such facilitation before the end of that period. As a result, and to reiterate, he could not bring himself within the substance of Article 18.1.

65. Against this background, the appellant's attempt to invoke the principle of proportionality in order to compel the respondent to grant him leave amounts to nothing less than the remarkable proposition that the First-tier Tribunal Judge ought to have embarked on a judicial re-writing of the Withdrawal Agreement. Judge Hyland quite rightly refused to do so.

66. We also agree with Ms Smyth that the appellant's interpretation of Article 18(1)(r) would also produce an anomalous (indeed, absurd) result. Article 18 gives the parties the choice of introducing 'constitutive' residence schemes: see Article 18.4. Article 18.1(r) applies only where a State has chosen to introduce such a scheme. If sub-paragraph (r) enables the judiciary to re-write the Withdrawal Agreement, this would necessarily create a divergence in the application of the Withdrawal Agreement, as between those States that have constitutive schemes and those which do not. This is a further reason for rejecting the appellant's submissions."

18. Finally for completeness, we set out Article 18.1(r):

> "(r) 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."

19. Mr Hawkin submits that [61] to [63] of the decision in Celik entitled the Judge in this case to have regard to the proportionality of the

Respondent's decision under appeal. That is a misinterpretation of what is there said when read in context. The point being made at [61] to [63] is merely that, to exclude consideration of Article 18.1(r) altogether (as is the Respondent's case) puts the cart before the horse. A Judge must first determine whether an individual is entitled to benefit from that part of the Withdrawal Agreement. However, if an individual is not "in scope" of the Withdrawal Agreement then Article 18.1(r) is not relevant unless it can be said that the reason the individual is not in scope is because of an "unnecessary administrative burden" being placed on him or her.

20. For the reasons set out at [44] to [60] of Celik, the Appellant in this case was, as Mr Celik, not in scope of the Withdrawal Agreement. As an extended family member, his only right prior to the specified date of 31 December 2020, was to have his residence facilitated. He could have made an application for that to happen under the EEA Regulations before 31 December 2020 but did not do so.

21. As the Tribunal explained at [56] of Celik, the Appellant "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".

22. Mr Hawkin's interpretation of [61] to [63] of Celik is inconsistent not only with the clear indication at [56] but also [64] to [66] and [2] of the headnote for which Celik is reported. We accept of course that Celik is not binding on us. It is however persuasive. Moreover, we consider it to be correctly decided.

23. Mr Hawkin sought to distinguish Celik for two reasons. First, he argued that Celik was different from this case because, there, the appellant's appeal had been dismissed as the Judge failed to consider proportionality whereas, here, the Judge had considered proportionality and had been entitled to conclude that the decision was disproportionate. We have some difficulty following this submission. As we pointed out, in Celik, Mr Hawkin argued that the First-tier Tribunal Judge should have considered Article 18.1(r) and that the error was his failure to do so. This Tribunal roundly rejected that submission for the reasons given at [61] to [66]. The fact that the Judge in this appeal did consider proportionality and found in the Appellant's favour must be an error of law for the opposite reason. The Judge applied Article 18.1(r) to a case which was not within scope of that provision. He was wrong to do so.

24. Second, when his attention was drawn specifically to the limitations of the application of Article 18.1(r) in a case such as this as set out at [63] of Celik, Mr Hawkin sought to argue that the Respondent's decision involved placing an "unnecessary administrative burden" on the Appellant. This was not an argument made before the First-tier Tribunal

but in any event we reject it. If it is suggested that the requirement to be married by the specified date in order to fall within the scope of the Withdrawal Agreement is the "unnecessary administrative burden" it is neither "unnecessary" nor "administrative". It is a requirement which goes to the heart of the substantive EU law right of freedom of movement as the family member of an EEA national. If and insofar as Mr Hawkin intended to suggest that the requirement to apply for facilitation under the EEA Regulations is the "unnecessary administrative burden", it fails for similar reasons. The only right which the Appellant had prior to the specified date in EU law as an extended family member was to have his right of residence facilitated if he made an application for that purpose. He did not make that application. He could have done so. Whether it would be likely to fail (as is suggested by Judge White at [11] of the Decision) is nothing to the point. Further and in any event, Mr Hawkins' argument in this regard is effectively rejected by what Judge White says at [13] to [16] of the Decision.

25. Finally, and since we are at this stage focussed on the error of law stage, we should also explain why we consider that Judge White erred in law. He could not of course have had regard to the guidance in Celik as it was not promulgated or reported at that time. However, what is said at [17] to [20] of the Decision contains an error of law irrespective of that guidance. That is because Judge White has assumed that the Appellant has EU law rights under the Withdrawal Agreement that he simply did not have. As Judge White points out at [19] of the Decision, the objective of the Withdrawal Agreement was to protect existing EU law rights. However, the only right which the Appellant had was to have his residence facilitated if he applied by the specified date. He would have had EU law rights as an EEA family member had he married but he did not do so before the specified date. As is pointed out at [65] of Celik, to find that an individual has a right which he did not have for whatever reason, is to re-write the Withdrawal Agreement. That is not something which a Judge is entitled to do.

26. For the foregoing reasons, we consider that the Decision contains an error of law and we set it aside.

RE-MAKING

27. We sought Mr Hawkin's views whether, if we were with the Respondent as to the error of law, we should go on immediately to dispose of the appeal. It seemed to us that the Appellant could not succeed on any view of his case unless he were correct as to the Article 18.1(r) argument.

28. Mr Hawkin submitted that we should in any event hear from the Appellant and Ms Videnova before re-making the decision. They have produced more evidence as to the nature and extent of their relationship. Having considered this submission, we determined that no purpose would be served in hearing further evidence. Judge White made positive findings about the genuineness of the relationship and that it was a

durable relationship even before the specified date. However, as indicated above, the Appellant could have but did not make an application under the EEA Regulations to have his residence facilitated before the specified date. His only right in EU law prior to the specified date was for facilitation of residence. He had no other EU law right. He was not in scope of the Withdrawal Agreement unless he made the application under the EEA Regulations in time. He failed to do so.

29. There was no challenge to Judge White's finding that the Appellant could not meet Appendix EUSS. Having determined that Judge White was wrong to find that the Respondent's decision was disproportionate based on Article 18.1(r) because the Appellant was not in scope of the Withdrawal Agreement, the only possible outcome in this case is a dismissal of the appeal.

CONCLUSION

30. We have found there to be an error of law in the decision of First-tier Tribunal Judge Peter-John White promulgated on 7 March 2022. We set that decision aside in consequence. Having concluded that the Appellant cannot place reliance on the Withdrawal Agreement (specifically Article 18.1(r)), the only possible outcome in this appeal is a dismissal of it. We therefore dismiss the appeal.

DECISION

We are satisfied that the Decision involves the making of a material error on a point of law. The Decision of First-tier Tribunal Judge Peter-John White promulgated on 7 March 2022 is set aside.

We re-make the decision. We dismiss the appeal on all grounds.

Signed L K Smith Dated: 21 September 2022
Upper Tribunal Judge Smith