Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: UI-2022-003589
EA/12001/2021

THE IMMIGRATION ACTS

Heard at Bradford	**Decision & Reasons Promulgated**
On 28 October 2022	**On 18 December 2022**

Before

UPPER TRIBUNAL JUDGE HANSON

Between

AYAT MOAZAMIGOODARZI
(Anonymity direction not made)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: No appearance.
For the Respondent: Ms Young, a Senior Home Office Presenting Officer.

DECISION AND REASONS

1. The appellant appeals with permission a decision of First-tier Tribunal Judge Fisher ('the Judge') promulgated on 27 May 2022 in which the Judge dismissed the appellant's appeal against the refusal of an application made under the EU Settlement Scheme for pre-settled status.

2. The Judge summarises the appellant's case at [6] of the decision under challenge before setting out findings from [8].

3. The relationship between the appellant and his wife, his sponsor, who he married on 15 April 2021 was not challenged. At [12] the Judge finds:

> 12. The skeleton argument argues that the Appellant could only succeed on the ground that the decision is contrary to the Withdrawal Agreement and somewhat curiously, seeks an "order" to that effect as well as a grant of pre-settled status. However, it fails to particularise why the decision is inconsistent, save for the somewhat vague assertion that it is not consistent with the purposive approach thereof. Having had regard to Part 2 of the Withdrawal Agreement, I am not persuaded that any of the provisions thereof are applicable. It is for the Appellant to particularise his appeal and he has failed to do so. I do not accept the assertion in the skeleton argument that the Sponsor will be forced to leave the UK in the event that the appeal were unsuccessful.

4. The grounds seeking permission to appeal refers to the guidance provided by the Secretary of State which deals with reasonable grounds in delay in making an application. The appellant argued the delay in getting married was due to Covid-19 and that his application was therefore refused incorrectly. The appellant claims he made a pre-settled status application before 31 December 2020 which is refused as the respondent did not accept the relationship and that the third refusal, which this appeal is based on, was refused for the same reason. The appellant also claims that he had requested an adjournment and that the matter had been extremely stressful.

5. Permission to appeal was granted by another judge of the First-tier Tribunal, the operative part of which is in the following terms:

> 3. However, it is at least arguable that the Judge failed to properly address the question as to whether the Respondent's decision breaches the terms of the Withdrawal Agreement. Whilst the issue was not properly articulated in the grounds, I am conscious the Appellant is no longer legally represented. The grounds refer to an application for a residence permit as a durable partner under the Immigration (European Economic Area) Regulations 2016 which was lodged prior to the 'specified date' and the refusal decision in respect of that application was contained in the appeal bundle. As such, it is arguable that the Appellant comes within the personal scope of Article 10 as he applied for facilitation of residence before the 'specified date' and as the basis for refusing that application, namely that he failed to establish he was a durable partner, is no longer challenged by the Respondent. It is not entirely clear from his decision whether the Judge considered the fact that a previous application had been made under the EEA Regulations 2016 before concluding that the provisions of the Withdrawal Agreement do not apply to the Appellant.
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> 4. As such, I consider that the grounds have, by virtue of reference to the previous application made under the EEA Regulations 2016, identified an arguable error of law. Permission to appeal is granted.

Error of law

6. At [2] of the decision the Judge records that despite proper notices having been served the appellant failed to attend the hearing. Enquiries revealed that the appellant was aware of the hearing but that he had sent an email containing submissions indicating he had requested an adjournment for what were described as "personal circumstances" but that he had not received any response and asking

that if the appeal did proceed his submissions be considered on the papers. The Judge properly considered whether to grant an adjournment but for the reasons given at [3 – 4] decided not to do so for which, in light of the limited evidence available, the Judge cannot be criticised.

7. In relation to the hearing before the Upper Tribunal; having been served notice of hearing the appellant again contacted the Administration asking that the appeal be converted to a paper hearing as he was not attending. An explanation was provided, and various documents attached to the request. The matter had been listed for an oral hearing, there was no consent by the Secretary of State to the appeal being changed to a paper determination, and the appellant was advised accordingly. He did not turn up on the day but the submissions and document he provided have been taken into account.

8. Those documents include, inter alia, a copy of the Judges determination, the notice of hearing dated 6 October 2022 advising him of the hearing before the Upper Tribunal at Bradford specifying the starting time of 10 AM, a copy of his acknowledgement of his first application under the EU Settlement Scheme sent on 19 November 2020 requesting further documents, a copy email to a named individual concerning registration of their marriage and the request to get married in September 2020 sent by the appellant's now wife, the birth certificate of their child confirming the birth on 9 September 2022, the communication sent to the First-tier Tribunal confirming that the appellant would not be attending the hearing before the Judge as noted above, and various other procedural documents including a copy of the appellant's Decree Absolute of divorce granted on 20 July 2020. All those documents have been taken into account with the required degree of anxious scrutiny in addition to the other documents available to the Tribunal.

9. The decision which is the subject of the appeal is that dated 22 July 2021. In that the appellant's application was rejected as he claimed to be the spouse of a relevant EEA citizen but had not provided sufficient evidence to confirm that. What the appellant needs to be aware of is this is not a claim he was not married to his wife who is an EU citizen, but a finding that he had not satisfied the test required under the relevant legal provisions.

10. The appellant had not made an application for his entry to the United Kingdom to be facilitated prior to 31 December 2020 ('the specified date'). He did not have a documented right of permanent residence, a valid family permit or residence card issued under the EEA Regulations, which was not disputed before the Judge. The marriage certificate is dated 15 April 2021 after the specified date. The finding that the appellant had not provided sufficient evidence to confirm he was a family member prior to the specified date as defined in Annex 1 Appendix EU has not been shown to be finding contrary to the law or the evidence available to the decision-maker.

11. The decision-maker did go on to consider whether the appellant was able to satisfy the requirements of the EU Settlement Scheme as a

durable partner, but he had not been issued with a family permit or residence card in relation to the EEA national, his current wife, with whom he wished to settle in the UK. I accept it may have been the case that the appellant was permitted to remain in the United Kingdom as a result of his earlier marriage, but that marriage was dissolved, as evidenced by the Decree Absolute, meaning any right under EU law that he had to remain on the basis of that marriage ended on 20 July 2020.

12. Since the appellant's application the Tribunal has handed down its decision in the case of Celik [2022] UKUT 00220 the headnote of which reads:

> (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.

13. The appellant having made no application before the specified date, his challenge that the decision is contrary to the Withdrawal Agreement must fail.

14. Although the appellant's registration of his marriage may been affected by the Covid pandemic such a claim was considered in Celik, specifically when considering public law arguments from [75]. On the facts of this appeal the appellant fails to make out that there was anything irrational or unreasonable about the impugned decision and it was not made out that there is any flexibility in the specified date, such that the fact the marriage had taken place after that date should, on the facts, somehow confer a right to the appellant which was protected by the Withdrawal Agreement. It is not made out that there was any concession for weddings likely to have taken place before the specified date but for the pandemic that creates an enforceable right.

15. The argument in the amended grounds seeking permission to appeal to the Upper Tribunal that the decision was not consistent with the purposive approach of the Withdrawal Agreement is based on a misconception that agreement is "the mechanism by which an EU citizen can continue to live and work in the UK" as if that was the only purpose of the Treaty agreed between the UK and some of the Member States. The purpose of the Withdrawal Agreement was to preserve rights that existed at the specified date. Appendix EU of the Immigration Rules provides a limited situation where an individual can

enjoy the benefit of a right not contained within the Withdrawal Agreement that does not apply on the facts of this appeal.

16. Even though it was conceded before the Judge that the appellant and his EU citizen wife are in a durable relationship akin to marriage, the law that existed prior to the specified date, under the 2016 Regulations, made it clear that the existence of the relationship was not sufficient per se. Domestic law required an applicant in a durable relationship to have their entry to the UK facilitated. The Secretary of State had a discretion whether to grant such leave even if a person was in a durable relationship.

17. The appellant accepted he is not in a durable relationship for the purposes of the EU Settlement Scheme regulations which is factually correct.

18. There is no unfairness in the decision as asserted at [5] of the amended grounds. The claim that unfairness has been brought to the Secretary of State's attention by ILPA, but to date no extra statutory concession had been made, is correct because in response to the letter from ILPA it was stated that no unfairness arises, and no concession was warranted. This is a matter that was specifically commented upon within Celik.

19. Having reviewed matters carefully I find that there is no arguable legal error material to the decision of the Judge to dismiss the appeal on the basis the appellant was unable to satisfy the Withdrawal Agreement or any aspect of the EU Settlement Scheme.

20. It may be open to the appellant to make an application for leave to remain under domestic law pursuit Appendix FM of the Immigration Rules, if relevant, on the basis that he is in a relationship with his wife and that they have a child, or pursuant to Article 8 ECHR; but these are not matters upon which the Upper Tribunal is able to rule at this stage.

Decision

21. There is no material error of law in the Immigration Judge's decision. The determination shall stand.

Anonymity.

22. The First-tier Tribunal made no order pursuant to rule 45(4)(i) of the Asylum and Immigration Tribunal (Procedure) Rules 2005.

I make no such order pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008.

Signed…….
Upper Tribunal Judge Hanson

Dated 9 November 2022