Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: UI-2022-002484
[EA/14508/2021]

THE IMMIGRATION ACTS

Heard at Field House, London	**Decision & Reasons Promulgated**
On 6 October 2022	**On 11 December 2022**

Before

UPPER TRIBUNAL JUDGE CANAVAN
DEPUTY UPPER TRIBUNAL JUDGE MONSON

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

ETMOND KUSHI

Respondent

Representation:
For the Appellant: Ms A. Ahmed, Senior Home Office Presenting Officer.
For the Respondent: None.

DECISION AND REASONS

Introduction

1. This an appeal by the Secretary of State. However, 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 O'Malley promulgated on 26 February 2022 ("the Decision").

2. By the Decision, the Judge allowed the appellant's appeal against the decision of the respondent to refuse to grant him settled or pre-settled

status under the EU Settlement Scheme ("EUSS") in the capacity of a spouse or durable partner of a relevant EEA citizen.

Relevant Background

3. The background facts found by the Judge are that appellant is a national of Albania, who arrived in the UK illegally in July 2016 and remained without status. The appellant's spouse is Ms Evalina Varfi, a Greek national. She arrived in the UK in 2019 and remained here exercising Treaty rights. She has been given pre-settled status under the EUSS. The appellant and the sponsor were introduced to each other in November 2020 and they began to cohabit in December 2020. In May 2021 they gave notice of their intention to marry. On 25 June 2021 the appellant applied for a grant of pre-settled status under the EUSS. On 5 July 2021 the appellant and the sponsor got married.

The Reasons for Refusal

4. On 28 September 2021 the respondent gave her reasons for refusing the appellant's application.

5. In order to qualify as a family member of a relevant EEA citizen the relationship must have existed by the specified date (2300 GMT on 31 December 2020). As his marriage certificate was dated after that date, he did not meet the requirements of being a spouse.

6. The required evidence of a family relationship for a a durable partner of a relevant EEA citizen was a valid family permit or residence card issued under the EEA Regulations and, where the applicant did not have a documented right of permanent residence, evidence which satisfied the Secretary of State that a durable partnership continues to subsist. Home Office records did not show that he had been issued with a family permit or residence card under the EEA Regulations as a durable partner of his EEA national sponsor. As he did not hold a valid relevant document, he did not meet the requirements for settled or pre-settled status as a family member of a relevant EEA citizen.

7. Careful consideration had been given as to whether he met the eligibility requirement for pre-settled status under the EUSS. The relevant requirements were set out in Rule EU14 of Appendix EU to the Immigration Rules. However, for the same reason as applied in respect of his application for the grant of settled status, he had not provided sufficient evidence to confirm that he was a durable partner of a relevant EEA citizen.

The Decision of the First-tier Tribunal

8. The appeal was heard remotely at Taylor House on 24 February 2022. Both parties were represented by Counsel.

9. The Judge's findings began at [19] where she held that both the appellant and sponsor were credible witnesses, and there was no factual dispute.

10. At [20] she directed herself that the issues to determine where (a) whether the appellant was a qualifying family member under the EU Settlement Scheme ("EUSS"), and thus whether the respondent's decision was not in line with the Immigration Rules, and (b) whether the respondent's decision breached the Withdrawal Agreement.

11. At paragraphs [21]-[27] the Judge gave her reasons for finding that the appellant did not meet the definition of a durable partner under Appendix EU, despite being a durable partner of an EEA national as at 31 December 2020.

12. At paragraph [28] the Judge directed herself that the WA was designed to protect the rights of EEA nationals and their family members prior to the withdrawal of the UK from the EU, and to ensure that they continued to be protected after withdrawal. As a durable partner of an EEA national as at 31 December 2020, the appellant was entitled to rely on the rights arising from the EU Treaties.

13. At paragraph [29], the Judge cited various passages from the Withdrawal Agreement, including the following passage from Article 18.1 (r):

> *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.*

14. At [30] the Judge held that the additional requirement for a particular document, the absence of which had been used to refuse to acknowledge the status of the appellant as a durable partner, interfered with a primary aim of the Withdrawal Agreement. There was no consideration in the decision of the proportionality of that requirement.

15. At [31] the Judge accepted the couple's evidence that they would have married earlier had that been possible, and the reason it was not possible was the restrictions arising from the COVID pandemic. She was satisfied that the delay was entirely out of their control.

16. At [32] the Judge accepted the couple's evidence about the difficulties that would be caused to their relationship if the sponsor had to leave the UK and the EU to be with her spouse in Albania, and that the sponsor's free movement would be fettered if she were only to reside in Greece.

17. The Judge concluded at [33] that, in the absence of any consideration or clarity from the respondent on her reason for concluding that the decision was proportionate, and taking account her findings at [30] to [32], the decision of the respondent was disproportionate, and the appeal should be allowed.

The Grant of Permission to Appeal

18. On 28 April 2022 First-tier Tribunal Judge Lodato granted permission to appeal for the following reasons:

> "Three grounds are relied upon to challenge the lawfulness of the determination. The first ground argues that the judge misunderstood the provisions and underlying purpose of the Withdrawal Agreement in concluding that there was a tension between this and the requirements of the Immigration Rules to hold a "relevant document". I consider it is arguable that the Withdrawal Agreement was misinterpreted for the reasons outlined in the grounds. There is a degree of overlap with the second ground in that it is further argued that the Withdrawal Agreement was misunderstood by the judge in deciding that the appellant was within the personal scope of its terms. This too is arguably an error of law. The third ground argues that the judge attached too much weight to the couple's engagement in February 2021, and their subsequent marriage in July 2021, in reaching the conclusion that the refusal decision was disproportionate. The third ground is weaker than the first two given that the judge noted that the marriage could not retroactively render the relationship durable before the specified date. However, all grounds may be argued."

The Hearing in the Upper Tribunal

19. At the hearing before us to determine whether an error of law was made out, there was no appearance by the appellant, who was now a litigant in person. Having satisfied ourselves that notice of the hearing had been sent to his last known address, and that there was no explanation for his non-attendance, we decided that it was procedurally fair to proceed with the hearing in his absence.

20. Ms Ahmed relied on the grounds of appeal and on **Celik (EU exit: marriage; human rights) [2022] UKUT 00220** ("**Celik**") which was promulgated on 19 July 2022. She submitted that in the light of **Celik** the only legally sustainable outcome was for the Decision to be set aside and remade in favour of the respondent.

Discussion

21. In **Celik** a Presidential panel ruled on two issues which also arise in the appeal before us. The headnote 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.
>
> (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.

(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."

22. The Presidential panel addressed the issue of proportionality at paragraphs [61] to [63] of their decision:

"***(2)The appeal to proportionality: Article 18.1(r)***

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'.

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."

23. 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."

24. Although **Celik** is not binding on us, it is highly persuasive and the panel's analysis of the relevant parts of the Withdrawal Agreement accords with our own analysis.

25. Having rightly directed herself that the appellant did not meet the requirements of Appendix EU for a grant of status as a durable partner because he did not hold a relevant document, the Judge was wrong to find that the appellant nonetheless qualified as a durable partner under the Withdrawal Agreement.

26. The first error in the Judge's line of reasoning arose at [28] where she wrongly held that at or before the specified date (2300 GMT on 31 December 2020), which marked the end of the transition period referred to in the Withdrawal Agreement, the appellant had acquired a substantive right as a durable partner of an EEA national. The appellant did not have any substantive right under the EU treaties before the end of the transition period as a family member of an EEA national exercising Treaty rights in the UK, as he was not a family member as defined in Article 2 of Directive 2004/38/EC. He was also not an extended family member as defined in Article 3(2) of the Directive, as he had not been issued with an EEA residence card as a durable partner. In the period leading up to the specified date, the appellant only had a procedural right to apply under Article 3(2) of Directive 2004/38/EC for an EEA residence card as a durable partner, and it was a matter of discretion whether the host Member State would issue him with him a residence card, having conducted an extensive examination of the appellant's personal circumstances. However, as the appellant failed to exercise the procedural right conferred on him by Article 3(2) of Directive 2004/38/EC, the appellant could not come within the scope of Article 10.3 of the Withdrawal Agreement. He was not a person falling under points (a) and (b) of Article 3(2) of Directive 2004/38/EC who had applied for facilitation of entry and residence before the end of the transition period. The appellant also did not come within the scope of Article 10.2 as he was not a person falling under points (a) and (b) of Article 3(2) of Directive 2004/38/EC whose residence was facilitated by the host State in accordance with its national legislation before the end of the transition period.

27. The second error in the Judge's line of reasoning arose at [30] where she described the requirement to produce a relevant document as being "additional" and held that this additional requirement interfered with a primary aim of the Withdrawal Agreement.

28. Properly construed, it is apparent that the purpose of the Withdrawal Agreement is to preserve the rights of family members of EEA nationals that have crystallised by the end of the transition period.

29. Consistent with this, sub-paragraph (l) of Article 18.1 of the Withdrawal Agreement permits the host State to require, for persons referred to in Article 10.2 or 10.3, *"a document issued by the relevant authority in the host State in accordance with Article 3(2) of Directive 2004/38/EC."*

30. There is thus no mismatch between Appendix EU and the Withdrawal Agreement as the Judge implies. Appendix EU is a mirror of the Withdrawal Agreement, and the requirement for the appellant to produce a relevant document is integral to both.

31. It is entirely lawful and compatible with the Withdrawal Agreement for Appendix EU to require that sufficient evidence of a durable partnership should be made up of two elements, the first of which is that the appellant already has an EEA residence card as a durable partner, and the second element of which is proof that the relationship has remained durable since the end of the transition period. Indeed, the wording of Article 10.2 impels the first requirement (holding a relevant document such as an EEA residence card) as a matter of inexorable logic: the only way the appellant could verify that he came within the scope of Article 10.2 of the Withdrawal Agreement was to produce an EEA residence card that had been issued to him as a durable partner before the end of the transition period. The finding by the Judge that the appellant was in retrospect a durable partner of a relevant EEA citizen by the specified date is thus irrelevant, as it cannot change the fact that the appellant is not a person whose entry and residence was facilitated by the host State before the end of the transition period.

32. The refusal decision reasonably did not engage with an alternative scenario arising under Article 10.3, as it was not suggested that the appellant had applied before the end of the transition period for an EEA residence card.

33. The Judge's third error was to treat the principle of proportionality that is contained in Article 18.1(r) as enabling her to find that the respondent's refusal decision was disproportionate, and thereby in breach of the Withdrawal Agreement.

34. The principle of proportionality contained in Article 18.1(r) does not operate as a free-floating principle which hovers above any relevant decision taken under the Withdrawal Agreement, giving the judicial decision-maker free rein to disapply an evidential requirement which is

specifically mandated by other provisions within the Withdrawal Agreement. The appellant did not meet the requirements of the Rules and he did not come within the personal scope of the Withdrawal Agreement. In the light of those facts, it was not open to the Judge to deploy the principle of proportionality to re-write the Rules or the terms of the Withdrawal Agreement in order to deliver a different outcome.

35. While the principle of proportionality can potentially be invoked by any disappointed applicant seeking redress in an EUSS appeal, the case put forward by the appellant did not disclose a sustainable ground for asserting that the maintenance of the refusal decision was disproportionate.

36. For the above reasons, we find that the Decision is erroneous in law and must be set aside in its entirety.

Remaking

37. We consider that we should go on immediately to dispose of the appeal as the appellant cannot succeed in his appeal on the facts found by the Judge. While the Judge found that the relationship was genuine and that it had become a durable one before the specified date, the corollary of this is that the appellant could have made an application under the EEA Regulations 2016 to have his residence facilitated, but he did not do so. His only right under EU law prior to the specified date was to apply to have his residence facilitated. 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.

38. For the reasons given in [33]-[35] above, the decision to refuse the appellant's application was not disproportionate. The matters relied upon by the appellant to advance his case on proportionality are not capable of engaging Article 18.1(r) of the Withdrawal Agreement. The matters relied on are potentially relevant to a claim under Article 8 ECHR, but the Tribunal has no jurisdiction to entertain a human rights claim in an appeal against the refusal of a grant of status under the EUSS unless the Secretary of State has given her consent, and her consent was not sought (or given) prior to the hearing in the First-tier Tribunal.

Conclusion

39. We have found there to be an error of law in the decision of First-tier Tribunal Judge O'Malley promulgated on 26 February 2022. We set that decision aside in consequence. It is accepted by the appellant that the refusal decision was in accordance with the Immigration Rules. Having concluded that the appellant cannot place reliance on Article 18.1 (r) of the Withdrawal Agreement in order to establish that the refusal decision breaches the Withdrawal Agreement, the only possible outcome in this case is a dismissal of 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 O'Malley promulgated on 26 February 2022 is set aside. We remake the decision. We dismiss the appeal on all grounds.

Signed Andrew Monson Date: 7 November 2022
Deputy Upper Tribunal Judge Monson