Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: UI-2022-002467
EA/14896/2021

THE IMMIGRATION ACTS

On the papers.
On 10 October 2022

Decision & Reasons Promulgated
On 22 November 2022

Before

UPPER TRIBUNAL JUDGE HANSON

Between

BLEDAR REXHEPAJ
(Anonymity direction not made)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

DECISION AND REASONS

1. In a determination promulgated on 14 March 2022 First-tier Tribunal Judge Isaacs (the Judge) allowed Mr Rexhepaj's appeal against the refusal dated 26 October 2021 of an application made on 28 June 2021 for pre-settled status under the EU Settlement Scheme.

2. The Secretary of State sought permission to appeal which was granted by another judge of the First-tier Tribunal.

3. When considering appropriate case management directions on 5 September 2022 the Upper Tribunal felt it appropriate to issue a further direction to the parties in the following terms:

DIRECTIONS

1. In a determination promulgated on 14 March 2022 First-tier Tribunal Judge Isaacs allowed the appellant's appeal on the basis it was found that the evidence supported the existence of a durable relationship between the appellant and sponsor which the Judge found existed on 31 December 2020 and continued beyond.

2. Permission to appeal was granted to the Secretary of State on 27 April 2022 on the basis the applicant did not appear to qualify as a durable partner without the relevant document, of which there was no evidence the same existed before the Judge, which the judge granting permission considered was a matter on which guidance from the Upper Tribunal was required.

3. Since the grant of permission the Upper Tribunal has handed down two decisions of relevance, being Celik [2022] UKUT 00220 and Batool & Oths [2022] UKUT 00219.

4. The parties are directed, no later than 14 days from the date of the sending of these directions, to set out their arguments in support of:

   a. The question of whether in light of the authorities Judge Isaacs erred in law in allowing the appeal on the basis he did, and

   b. Whether in light of the authorities the Upper Tribunal can remake the appeal without a hearing and, if so, their submissions as to the outcome.

4. Whilst in their further submissions Mr Rexhepaj's representative maintains the challenge to the grounds relied on by the Secretary of State, for reasons which are discussed below, neither submission contains any objection to the Upper Tribunal determining the appeal without a hearing, focusing upon their views as to the outcome of such consideration.

5. Rule 34 of the Tribunal Procedure (Upper Tribunal) Rules 2008 reads:

> **34.** - (1) Subject to paragraphs (2) and (3), the Upper Tribunal may make any decision without a hearing.
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> (2) The Upper Tribunal must have regard to any view expressed by a party when deciding whether to hold a hearing to consider any matter, and the form of any such hearing.
>
> (3) In immigration judicial review proceedings, the Upper Tribunal must hold a hearing before making a decision which disposes of proceedings.
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> (4) Paragraph (3) does not affect the power of the Upper Tribunal to—
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> (a) strike out a party's case, pursuant to rule 8(1)(b) or 8(2);
>
> (b) consent to withdrawal, pursuant to rule 17;
>
> (c) determine an application for permission to bring judicial review proceedings, pursuant to rule 30; or
>
> (d) make a consent order disposing of proceedings, pursuant to rule 39,
>
> without a hearing.

6. In light of there being no objection to the Upper Tribunal proceeding to determine the matter without a hearing, and no issue arising on the specific facts of the appeal or in law as to why it was inappropriate to proceed in such a manner, the Upper Tribunal has decided in this appeal to exercise its discretionary case management powers to make a decision in relation to the question of whether an error of law is

made and, if made out, whether to allow or dismiss the appeal on the papers.

Error of law

7. The findings of the Judge are set out between [21 – 27] of the decision under challenge in the following terms:

> 21. The appellant and sponsor married after the specified date of 11 pm 31st December 2020. On all the EUSS application form, the government guidance for applicants states that an individual in the appellant's situation of having married after the specified date, will have to provide evidence in accordance with the guidance for unmarried (durable) partners. The guidance goes on to state that if the applicant does not have a family permit or residence card then they will have to show the following; evidence of their relationship to their partner, that their relationship existed by 31st December 2020 and that the relationship continues to exist on the date of application. The guidance then goes on to give some examples of evidence all of which refers to a couple having lived together for at least two years by 31st December 2020.
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> 22. Further elucidation is found in the Home Office publication "EU Settlement Scheme: EU, other EEA and Swiss citizens and their family members Version 15.0" which states
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> 23. 'The reference to the couple having lived together in a relationship akin to a marriage or civil partnership for at least 2 years is a rule of thumb, not a requirement. You must consider in each case whether there is significant evidence of a durable relationship, based on all the information and evidence provided by the applicant.'
>
> 24. I have considered the appellant's case carefully. I found that the appellant and his sponsor were credible witnesses. This is because they gave detailed and consistent accounts of the history of their relationship and this was corroborated by the documentary evidence in each of those details. For example, the oral accounts of them living together from July 2020 were corroborated by the council tax statement of August 2020.
>
> 25. I therefore find the following facts on the evidence. The appellant and the sponsor moved in together and lived as partners from July 2020. They have continued to live together since that date. They have since married. They have attempted to start a family which sadly has been cut short by the sponsor suffering a miscarriage. Furthermore, they got engaged before the specified date and their oral evidence on this was corroborated by the documents showing the attempts to give notice of an intention to marry. I conclude that at the specified date the appellant and the sponsor were not merely dating or in an embryonic relationship but were in a durable partnership.
>
> 26. Taking all this into account I find that the appellant has provided significant evidence of his durable relationship as a partner with the sponsor. I therefore conclude that their relationship as durable partners existed at 31st December 2020, and that it has continued to exist at and beyond the date of application.
>
> 27. I allow the appeal.

8. The Secretary of State's grounds seeking permission to appeal assert one error in that the Judge has made a material misdirection of law on a material matter the following reasons:

a) It is respectfully submitted that the First Tier Tribunal Judge (FTTJ) has materially erred in law by failing to properly consider the provisions of the Appendix EU contained within the Immigration Rules.

b) The Appellant's application for status under the EU Settlement Scheme was as the family member of a relevant EEA national. It Is submitted that the Appellant could not succeed as a spouse, as the marriage took place after the specified date (31 December 2020), and so the application was considered under the durable partner route where it was also bound to fail. The rule requires a "relevant document" as evidence that residence had been facilitated under the EEA regulations which had transposed Article 3.2(b) of the 2004 Directive. No such document was held as no application for facilitation had ever been made by the Appellant. His application for facilitation as a 'durable partner' was not made until 28 June 2021, which is after the specified date.

c) It is submitted that the question of whether and how the relationship was in fact "durable" at any relevant date, as is found by the FTTJ at [25] and [26] of the determination, is of no consequence. The scheme rules could simply not be met by a durable partner whose residence had not been facilitated. This is reflected in Article 10(2) of the Withdrawal Agreement permitting the continued residence of a former documented Extended Family Member, with an additional transitional provision in Article 10(3) for those who had applied for such facilitation before 31 December 2020. This appellant had not made any such application and therefore could not satisfy the requirements of Appendix EU.

d) It is therefore submitted that the FTTJ's findings at that the Appellant satisfies the requirements of the Appendix EU, on the basis of being a 'durable partner, are erroneous.

9. In a decision dated 27 April 2022 another judge of the First-Tier Tribunal granted permission to appeal, the operative part of the grant being in the following terms:

2. The grounds assert that the judge erred in law by failing to properly consider the provisions of Appendix EU contained within the Immigration Rules. When considering the Appellant's case under the partner route under the EUSS, the judge failed to note that the Appellant was not in possession of a relevant document. The Appellant could not therefore constitute a "durable partner" under the rules.

3. Having considered the grounds and the judgment in full, I note that both parties were represented at the hearing. In the judgment, the judge has set out that the sole issue to be determined was whether the Appellant was in a durable relationship with the Sponsor on the specified date. It is not entirely clear that the point now raised by the Respondent was raised in front of the judge. However, I do find that there is an arguable material error of law in this instance, as on the face of it, the Appellant does not appear to qualify as a durable partner without the relevant document. This is a matter upon which guidance from the Upper Tribunal would be helpful.

4. Having considered the grounds of appeal and the judgment in full, I consider there to be an arguable material error of law. It is arguable that the Appellant does not fall within the scope of the definition of family member under the EUSS.

10. The Secretary of State's response to the direction dated the 22 September 2022 is that:

It is not in dispute that the appellant (Mr Rexhepaj) as he was before the First-tier Tribunal has never been issued a Residence Card or Family Permit by the SSHD. Therefore he could not fall within the category of persons whose entry/residence had been facilitated prior to the specified date (11pm GMT on 31st December 2020). His application to the SSHD was made on 28th June 2021, and refused on 26th October 2021 for want of a relevant document that established the above criteria.

This formed the basis of the SSHD's successful application for permission to appeal, granted by Judge Galloway.

It is submitted (as noted in the Directions Order) that the authorities of Batool and others (other family members: EU exit) [2022] UKUT 00219 (IAC) and Celik (EU exit; marriage; human rights) [2022] UKUT 00220 (IAC) make clear as per the headnotes that:

> *(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.*

11. The submissions made on Mr Rexhepaj's behalf are more detailed and are in the following terms:

1. This skeleton argument is submitted at the direction of Upper Tribunal Judge Hanson 5 September 2022. The direction requires the Respondent (Appellant at 1st instance) to set out his position in relation to the Appellant's appeal against the determination of First Tier tribunal Judge Isaacs, promulgated 14 March 2022, in the light of the Upper Tribunal Decisions in Celik [2002] UKUT 00220 and Batool [2022] UKUT 00219.
2. The Tribunal is directed to the determination of FTJ Isaacs at paragraphs 1-5 for background and issues. A skeleton argument was submitted in support of the appeal at first instance though many of these submissions now fall away in the light of Celik and Batool.
3. A number of appeals relating to the EU Settlement Scheme have been allowed in circumstances where the appellants were without a 'relevant document' prescribed under the rules. Some of these have been appealed by the Home Office. Some have not. In the case of those which have not been appealed by the Home Office, it can be assumed that the Secretary of State has exercised a discretion in relation to these appellants.
4. In the case of the instant Respondent, the Tribunal is directed to the Secretary of State's letter of refusal dated 26 October 2021. This appears at page 66 of the Appellant's bundle submitted for the appeal at first instance. The relevant passage appears at page 67. The Secretary of State has written in the following terms:

   > *The required evidence of family relationship for a durable partner of a relevant EEA citizen is a valid family permit or residence card issued under the EEA Regulations … as the durable partner of an EEA citizen* ***and, where the applicant does not have a documented right of residence, evidence which satisfies the Secretary of State that the durable partnership continues to subsist.*** (emboldening added).

5. The Secretary of State has clearly reserved to herself a discretion to waive the requirement of a 'relevant document' in cases where appellants are able to satisfy her that they are in a durable relationship.
6. The Tribunal is further directed to the Home Office Guidance: **EU Settlement Scheme evidence of relationship**, which appears at page 100 et seq of the Appellant's Bundle referred to above. It appears that the publication has

changed since that which was before the Tribunal at the material time. The Tribunal is directed to page 104 of the Appellant's Bundle:

> ***If you're their unmarried (durable) partner***
>
> *You must hold a relevant document issued to you under the EEA Regulations on the basis that you're the durable partner of an EEA or Swiss citizen or person of Northern Ireland.*
>
> *A relevant document here includes:*
>
> - *a residence card*
> - *a family permit*
>
> *If you're the unmarried (durable) partner of a person of Northern Ireland, you're unlikely to have a relevant document.*
>
> *If you do not have a relevant document you'll need to show evidence:*
>
> - *of your relationship to your unmarried (durable) partner*
> - *that your relationship existed by 31 December 2020*
> - *That you relationship continues to exist on the date that you apply ….*

7. It is submitted that, on proper construction of the wording of the guidance, the Secretary of State has therein, reserved to herself a discretion to waive the requirement of a 'relevant document'. It is submitted that the wording is such that the reference to Northern Ireland does not preclude a discretion being exercised in the case of other applicants.
8. The Respondent in the instant appeal was able to satisfy the Tribunal at first instance that he was in a durable relationship with a relevant EEA citizen. This aspect of the learned judge's findings it's not subject the appeal.
9. In the premises of that submitted above in relation to the clear provision of a discretion, and of the learned judge's findings at first instance, it is submitted that the learned judge at first instance was entitled to apply the discretion to the then, Appellant.
10. For all the above reasons the Respondent continues to oppose the appeal of the Secretary of State.

Discussion

12. It is right for the author of Mr Rexhepaj's skeleton argument to concede that many of the submissions made before the Judge fall away in light of the decisions of Presidential panels of the Upper Tribunal in the cases of Celik and Batool. The submission of a number of appeals relating to the EU Settlement scheme have been allowed in circumstances where an appellant was without a 'relevant document' may be so, as the Withdrawal Agreement permits the same in limited circumstances and the Secretary of State always retains a discretion whether to grant an individual leave or not. It is not made out that such events confer any legitimate expectation that an individual without a relevant document will be granted leave or that the requirements of the Withdrawal Agreement, upon which any guidance and Appendix EU of the Immigration Rules relating to the EU Settlement Scheme are based, would not be properly applied.

13. Mr Rexhepaj refers to the refusal letter of 26 October 2021 the relevant text of which reads:

> We have considered whether you meet the requirements for settlement status (also known as indefinite leave to enter or remain) or pre-settled status (also known as limited leave to enter or remain) under the EU Settlement Scheme. Unfortunately, based on the information and evidence available and for the reasons set out in this letter, you do not meet the requirements.
>
> To qualify under the scheme, you need to meet the requirements set out in Appendix EU of the Immigration Rules. You can find out more about the requirements here www.gov.uk/settle – status – EU – citizens – families/eligibility.
>
> Careful consideration has been given as to whether you meet the eligibility requirements for settled status under the EU Settlement Scheme. The relevant requirements are set out in rule EU 11 of Appendix EU of the Immigration Rules.
>
> You state that you are a spouse of a relevant EEA citizen PAULINE MACDALENA KORCZ. However, you have not provided sufficient evidence to confirm this. The reasons for this are explained below.
>
> The required evidence of family relationship for a spouse of any relevant EEA citizen, where the spouse does not have a documented right permanent residence, is a valid family permit or residence card issued under the EEA Regulations (or by the Bailiwick of Jersey, the Bailiwick of Guernsey or the Isle of Man) as the spouse of that EEA citizen.
>
> You have provided a marriage certificate dated 12 June 2021 as evidence that you are the spouse of an EEA citizen.
>
> However, you have not provided sufficient evidence to confirm that you were a family member of a relevant EEA citizen prior to the specified date, as defined in Annex 1 of Appendix EU (i.e. 2300 GMT on 31 December 2020). Your marriage certificate shows your marriage took place on 12 June 2021.
>
> Therefore, consideration has also been given as to whether you meet the eligibility requirements for settled status under the EU Settlement Scheme as a durable partner.
>
> However, you have not provided sufficient evidence to confirm this. The reasons for this are explained below.
>
> The required evidence of family relationship for a durable partner of a relevant EEA citizen is a valid family permit or residence card issued under the EEA Regulations (or by the Bailiwick of Jersey, the Bailiwick of Guernsey or the Isle of Man) as the durable partner of that EEA citizen and, where the applicant does not have a documented right of permanent residence, evidence which satisfies the Secretary of State that the durable partnership continues to subsist.
>
> Home Office records do not show that you have been issued with a family permit or residence card under the EEA Regulations as the durable partner of the EEA national and you have not provided a relevant document issued on this basis by any of the Islands.
>
> Therefore, you do not meet the requirements for settled status under the EU Settlement Scheme.
>
> Careful consideration has been given as to whether you meet the eligibility requirements for pre-settled status under the EU Settlement Scheme. The relevant requirements are set out in rule EU 14 of Appendix EU to the Immigration Rules.
>
> However, for the reasons already explained above, you have not provided sufficient evidence to confirm that you are a family member of a relevant EEA citizen as defined in Annex 1 of Appendix EU.

It is therefore considered that the information available does not show that you meet the eligibility requirements for settled status set out in rule EU 11 or for pre-settled status set out in rule EU 14 of Appendix EU to the Immigration Rules. This is for the reasons explained above.

Therefore, your application has been refused on the role EU 6.

14. The sole reason the Judge allowed the appeal is set out at [25], that the relationship between Mr Rexhepaj and the sponsor commenced in July 2020, had continued since that date, they have since married and attempted to start a family, become engaged before the specified date, and were in a durable partnership.

15. I found the Secretary of State has established material legal error in the decision of the Judge as the Judge fails to give adequate reasons establishing a proper basis in law for why the appeal was allowed solely because Mr Rexhepaj had continued with his relationship with his EU national sponsor, without more.

16. Mr Rexhepaj is in a similar position to the appellant in Celik [2022] UKUT 00220 where that relationship continued and Mr Celik had subsequently married, claiming he had only been unable to do so earlier as a result of the Covid-19 pandemic and related restrictions.

17. In Celik the Upper Tribunal found that a person in a durable relationship in the United Kingdom with an EEA citizen has no substantive rights under the EU Withdrawal Agreement, unless the person's entry and residence were being facilitated prior to the end of the 'transition period' following the UK's withdrawal from the European Union. By 'facilitated', the Tribunal meant that the relevant partner – in this case Mr Celik – had obtained a residence document in the UK on the basis of his or her durable relationship with an EEA national.

18. Prior to Brexit, couples who were unmarried had to apply for a residence document in order to regulate their status in the UK as the extended family member of an EEA citizen as per the terms of the Immigration (EEA) Regulations 2016.

19. What the Upper Tribunal has now confirmed is that if a person who was in a relationship with an EEA national living in the UK before Brexit did not have the relevant residence document, they cannot now benefit from the rights bestowed on spouses or civil partners by the Withdrawal Agreement.

20. Whilst Mr Rexhepaj's response refers to concessions by the Secretary of State, as noted above, and although other concessions have been made under the EU Settlement Scheme to allow those with Pre-Settled or Settled Status to maintain their rights in the UK despite longer-than-permitted absences during the pandemic, with the Home Office's guidance having been updated to describe the circumstances in which concessions can be made to applicants who were affected by the Covid-19 pandemic, these concessions are of no assistance to those in Mr Celik or Mr Rexhepaj's position. Concessions made to protect those already falling under the EU Settlement Scheme do exist, but it is not made out there is any concession to bring a person within the scope of the EU Settlement Scheme on a discretionary basis.

21. The fact Mr Rexhepaj is in the relationship is found by the Judge is not disputed, but it must be remembered that there has been a fundamental change in the relevant legal provisions. Prior to Brexit the foundation of assessing whether a person has a right to enter or remain in the United Kingdom under the free movement provisions of the EU was set out in Directive 2004/38/EC incorporated into the UK domestic legislation by the Immigration (European Economic Area) Regulations 2016 (as amended). The Directive was common to all member states of the EU and, subject to any margin of appreciation granted to a Member State, was intended to ensure a continuity of approach between Member States providing a degree of certainty to EU nationals and their family members exercising free movement rights.

22. By contrast the Withdrawal Agreement is a binational international treaty made between the remaining Member States of the EU and the UK. As an international treaty its terms must be interpreted strictly as recognised in Celik.

23. The UK left the EU on 31 January 2020 and EU law no longer applies in the UK. There was a transitional period during which EU law continue to apply which came to an end at 11 PM on 31 December 2020. As of that date EU free movement rights were lost both in relation to their direct effect and enforceability in the UK and the 2016 Regulations were revoked by the Immigration and Social Security Coordination (EU Withdrawal) Act 2020. Accordingly the provisions of the Regulations along with relevant rights deriving from the provisions of the Treaties to the extent that they were not implemented in domestic law from continuing to have effect as retained EU law pursuant to sections 2 and 4 of the European Union (Withdrawal) Act 2018 ceased to have effect.

24. Article 10 in Title I of Part Two (General Provisions), sets out who is within the scope of the Withdrawal Agreement and makes specific and discreet provisions for persons residing in the UK at the end of the transition period and those outside it on the other. Subject to special rules for extended family members who had made an application before the end of the transition period, persons residing in the UK must have been complying with EU law at the date of the transition period.

25. Those able to benefit from Article 10 provisions are:

26. EU citizens who exercise their right to reside in the UK in accordance with EU law before the end of the transition period and who continue to reside here thereafter - Article 10(1)(a).

27. Family members of such persons, provided that they resided in the host state in accordance with EU law before the end of the transition period and continue to reside there thereafter - Article 10 (1)(e)(i). “Family members” a defined term in Article 9(a). It includes persons who are “direct family members” for the purposes of Article 9(2) of Directive 2004/38/EC (“the Directive”).

28. Persons within Article 3(2)(a) and (b) of the Directive, *“whose residence was facilitated by the host state in accordance with its*

national legislation before the end of the transition period in accordance with Article 3(2) of that Directive", retain their right of residence in the host state, provided that they continue to reside in the host state: Article 10(2). This also applies to those who applied before the end of the transition period, and whose residence is facilitated thereafter: Article 10(3). The reference in the Withdrawal Agreement to "national legislation" reflects the fact that the arrangements for extended family members are primarily regulated by domestic law.

29. A person who was residing outside the host state before the end of the transition period and who was directly related to an EU citizen within the scope of Article 10(1)(a) need only show that they fulfil the condition of Article 2(2) of the Directive at the time they seek to join their family member. Article 10(4) makes provision in respect of durable relationships where the partner lived outside the UK at the end of the transition period.

30. In this appeal the appellant did not live outside the UK.

31. It is not disputed that under the EU Settlement Scheme that an EU citizen resident in the UK before the end of the transition period who obtains status under the Settlement Scheme enjoys a lifetime right be joined by their existing close family members resident outside the UK at 31 December 2020 where the relationship continued to exist at the date of joining. In so far as spouses are concerned, I accept that applies irrespective of the date of marriage if the couple are in a durable partnership within the scope of Article 10 at the end of the transition period. The requirement is upon an applicant who relies on being in a durable relationship with a relevant EEA citizen to show that the couple have lived together in a relationship akin to marriage or civil partnership for at least two years, or there is other significant evidence of the durable relationship. If such exists the Secretary of State will consider each case whether there is evidence of a durable relationship at the end of the transitional period based on all the information and evidence provided by the applicant. This is clearly what the decision-maker did as evidenced by the refusal letter in this case.

32. The Judge finds that the appellant and his partner entered into their relationship in July 2020 meaning there was only five months cohabitation akin to the evidence of a durable relationship by the end of the transition period. Consistent with Article 3(2)(b) of the Directive the EU Settlement Scheme required an applicant who relies on being in a durable relationship with the relevant EEA citizen to show that the couple have lived together in a relationship akin to a marriage or civil partnership for at least two years.

33. On the facts of this appeal, Article 10(1) cannot apply as Mr Rexhepaj did not reside in the UK in accordance with EU law before the end of the transition period. In particular, he was not a family member of an EU citizen.

34. Article 10(2) does not apply as Mr Rexhepaj's residence has not been facilitated by the UK before the end of the transition period.

35. Article 10(3) does not apply because regardless of whether Mr Rexhepaj could have applied or met the requirements of Article 3(2) of the Directive he had not applied for facilitation of entry and residence in accordance with the 2016 Regulations before the end of the transition period.

36. Article 10(4) does not apply as whether Mr Rexhepaj could or could not prove that he was in a durable relationship with an EU citizen resident in the UK before the end of the transition period did not reside outside the UK at the relevant point in time.

37. It must be remembered from the recitals to the Withdrawal Agreement that the purpose of this Treaty was to ensure an orderly withdrawal of the UK, protect only UK and EU citizens who were exercising free movement rights before a specific date, and provide legal certainty to citizens and economic operators as well as judicial and administrative authorities. The Judges approach to allowing the appeal on the basis on which this appeal was allowed arguably completely undermine such imperatives.

38. The available grounds of appeal against the Secretary of State's refusal are restricted by regulation 8 of the 2020 regulations which provide:

> (1) An appeal under these Regulations must be brought on one or both of the following two grounds.
>
> (2) The first ground of appeal is that the decision breaches any right which the appellant has by virtue of –
>
> (a) Chapter 1, or Article 24 (2) or 25 (2) of Chapter 2, of Title II Part 2 of the withdrawal agreement….
>
> (3) The second ground of appeal is that –
>
> (a) Where the decision is mentioned in regulation 3(1) (a) or (b) or 5, it is not in accordance with the provision of the immigration rules by virtue of which it was made;

39. Article 18, which was also discussed in Celik, of the Withdrawal Agreement is directed to the question of whether a person enjoys residence rights under Title II of Part 2 and save for Article 18(4) applies only to States which have chosen to introduce "constitutive" residence schemes. Article 18(1)(r) applies only to appeals in that specific context in which is made, as more general provisions about procedural safeguards are set out in Article 21.

40. The finding of the Judge appears to be on the basis that the Judge finds the Secretary of State's decision disproportionate in light of the factual basis even though that factual basis does not entitle Mr Rexhepaj to succeed under the provisions of the Withdrawal Agreement or the EU Settlement Scheme in the context of which he made his application.

41. The text of Article 18(1)(r) is important: "*(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." The question is proportionate to what? There is no authority for permitting a free-standing factual analysis to justify a finding that even though a person cannot meet the formally agreed requirements in an application that has been properly considered, they can otherwise succeed resulting in an appeal being allowed. The reference appears to be to the process by which the decision is arrived at where mistakes/error can occur. The finding in Celik at [63] recognised this possibility. In my view ,in reality, such cases are going to be very few and far between, are fact specific, must recognise the reality of the current situation as per the Withdrawal Agreement, and must be adequately reasoned. If 'disproportionality' is found it is arguable the correct outcome to be allow an appeal as not in accordance with the Withdrawal Agreement and to return the matter to the Secretary of State for a fresh decision to be made.

42. There was nothing before the Judge to show the decision-maker misinterpreted or misapplied the law or failed to take into account the factual matrix relied upon by Mr Rexhepaj. The Judge makes no properly reasoned findings showing that the decision under challenge was unlawful by reference to the Withdrawal Agreement applying the facts and circumstances as found. There was nothing before the Judge or upon which relevant findings were made to show that the decision refusing to grant residence status to Mr Rexhepaj was disproportionate.

43. Mr Rexhepaj had not obtained or made an application for leave to have a right to reside in the UK and there are now strict rules as to when relevant applications must be made which Mr Rexhepaj had not satisfied.

44. The reason for the refusal of his application was that Mr Rexhepaj had not established he had been granted a residence document as an extended family member on the basis of an application made before the end of the transition period. That is a key requirement of the EU Settlement Scheme which the Judge appears to accept has not been met.

45. It was not made out before the Judge that there was any breach of Mr Rexhepaj's rights under the Withdrawal Agreement as Article 10(3) required at the very least an application to be made under the relevant national legislation for extended family members before the end of the transitional period which Mr Rexhepaj did not do.

46. There is no legal error made out in the definition of the required evidence of a family relationship preferred to in the impugned decision. Article 12 of the Withdrawal Agreement only applies to those within the scope of the agreement which Mr Rexhepaj is not, the only permissible ground of appeal is that the decision breaches any rights of Mr Rexhepaj, not those any other person has.

47. There is no evidence an application pursuant to article 8 ECHR was made. The Upper Tribunal found in Celik that the same could be made

albeit that it will be a new matter which required the Secretary of State's consent.

48. Returning to Mr Rexhepaj's skeleton argument set out above, any guidance produced by the Secretary of State is not law in the sense the Withdrawal Agreement is. Even if the Secretary of State had reserved to herself discretion to waive the requirements to produce the relevant documents such discretion was not exercised in Mr Rexhepaj's case as having considered the evidence the application was refused. The scope of any concession is referred to above.

49. The fact Mr Rexhepaj was able to satisfy the Judge he was in durable relationship with a relevant EEA citizen is not enough in relation to the Settlement Scheme, although it may be relevant to an application pursuant to article 8 ECHR or Appendix FM of the Immigration Rules. There is no reason to disturb this finding which is not challenged by the Secretary of State.

50. I do not accept the argument that the Secretary of State having declined to exercise discretion in Mr Rexhepaj's favour and to have refused the application in the decision under challenge enabled the Judge to apply discretion for herself and to override the requirements of the Withdrawal Agreement. That is, as recognised in Celik, tantamount to rewriting the Withdrawal Agreement contrary to the whole purpose of that document.

51. Having considered the matter afresh, I conclude that Mr Rexhepaj has failed to discharge the burden upon him to the required standard to show that the decision under challenge was in any way unlawful, irrational, or contrary to the Withdrawal Agreement or provisions made thereunder. I find Mr Rexhepaj has failed to establish an entitlement for leave to remain in the capacity he seeks sufficient to warrant this appeal being allowed.

Decision

52. The Judge materially erred in law. I set the decision aside.

53. I substitute a decision to dismiss the appeal.

Anonymity.

54. 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 10 October 2022