Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Numbers: EA/15501/2021
UI-2022-002863

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 18 October 2022	**On 4 December 2022**

Before

UPPER TRIBUNAL JUDGE McWILLIAM

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

SIHAM DERKAOUI
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:
For the Appellant: Ms A Everett, Senior Home Office Presenting Officer
For the Respondent: Mr P Richardson, Counsel, instructed by Rashid & Rashid Solicitors

DECISION AND REASONS

1. I shall refer to the Respondent as the Appellant as she was before the First-tier Tribunal. Her date of birth is the 4 July 1973. She is a citizen of Morocco.

2. On the 19 May 2022 the First-tier Tribunal (Judge Singer) granted the Secretary of State (SSHD) permission to appeal against the decision of the First-tier Tribunal (Judge Rothwell) to allow the Appellant's appeal in a decision dated 12 April 2022 following a hearing on 1 April 2022 (the

decision was promulgated on 19 April 2022) to allow the Appellant's appeal against the decision of the SSHD on 26 October 2021 to refuse to grant her pre-settled status under the EU Settlement Scheme (EUSS).

3. The SSHD did not accept that the Appellant met the eligibility requirements under Appendix EU because she had not provided evidence that she was a family member of a relevant EEA citizen by 23:00 GMT on 31 December 2020.

4. The Appellant married a French national, Mr Adil Boukantar on 13 April 2021. It is accepted that the Appellant had not been issued with a family permit or residence card as a durable partner of an EEA national nor had she made an application for such before 31 December 2020.

5. The judge accepted that while the Appellant and her husband had booked their marriage for 17 October 2020, they had to change the date to comply with the Respondent's 70 day period which ended on 18 November 2020. The ceremony was rebooked for 26 November 2020. This had to be cancelled as a result of lockdown due to COVID-19. That ceremony was again cancelled and they were unable to marry until 13 April 2021.

6. The judge made findings at paragraphs [24] – [38]. She accepted the Appellant and her husband's evidence. She found them to be credible witnesses. She accepted that they were in a durable relationship before the end of the transition period. The judge at [33] found "the Appellant cannot succeed as a spouse of an EEA family member".

7. Under a heading "Proportionality" the judge considered the appeal under the Withdrawal Agreement. With reference to Article 18(1)(r) the judge found as follows:-

> "35. The decision made by the respondent was lawful, but Article 18 (1) (r) permits me to examine the facts and circumstances upon which the decision is based and to ensure the decision is not disproportionate.
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> 36. The Withdrawal Agreement is wide and allows for EEA nationals exercising their rights of free movement to have their family members with them in the host State. It is accepted jurisprudence that whether the measure in question is appropriate to achieve the objective pursued and whether the measure is necessary to achieve that objective (see R (Lumsdon [2015] UKSC 41).
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> 37. In this case, although the decision is lawful, I find on the facts of this case that the decision is disproportionate. My reasons are given below. I have accepted that the appellant and her husband were in a durable relationship from when they gave notice to marry on 09/09/2020, and they remained in a durable relationship, until the date of their marriage on 13/04/2021. I

> have found that the marriage is genuine and subsisting. I have found that the appellant's husband remains an EEA national and remains to be employed here. I have found that they could not marry before the specified date of 11pm on 31/12/2020 because of the COVID restrictions, which was no fault of their own. They married as soon as the COVID restrictions allowed them to do on so 13/04/2021.
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> 38. I allow the appeal."

The Grounds of Appeal

8. The SSHD's grounds of appeal assert that the judge erred in allowing the appeal under the Withdrawal Agreement which provides no rights to a person in the Appellant's circumstances. Article 10(1)(e) confirms that the beneficiaries of the agreement are limited to those individuals who were residing in accordance with EU Law as of 31 December 2020.

9. The Appellant was not residing in accordance with EU Law at the specified date. She had not had her residence facilitated in accordance with national legislation (the Immigration) European Economic Area (Regulations) 2016 ("the 2016 Regulations).

10. The requirement to hold a "relevant document" within Appendix EU of the Immigration Rules reflects this requirement which accords with Article 3.2(b) of the Citizens' Directive 2004/38/EC.

11. The Appellant does not come within the personal scope of the Withdrawal Agreement and therefore accordingly there was no entitlement to the full range of judicial redress including Article 18(1)(r). Moreover the judge materially erred taking into account the rights of the Appellant's husband under the Withdrawal Agreement at [36] to [37] of the determination. It is not a permissible ground of appeal under Regulation 8(2) of the (Immigration (Citizens' Rights Appeals) (EU Exit) Regulations 2020 "the Exit Regulations 2020").

The law

12. The Appellant has a right of appeal pursuant to reg 3 of the Exit Regulations 2020. Regulation 8 sets out the grounds on which an Appellant can appeal. There is no issue in this appeal that the Appellant had a right of appeal and that there is a ground of appeal under reg 8 on the basis that the decision is in breach of the Withdrawal Agreement.

13. Article 18.1 (r) of the Withdrawal Agreement reads as follows:

> "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."

14. The Upper Tribunal recently reported the case of Celik (EU exit; marriage; human rights) [2022] UKAIT 220. The headnote of Celik 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."

15. At paragraphs 61 – 67 the UT specifically considered the issues of proportionality and fairness reference to Article 18.1(r). The court said as follows:

> "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."

67. Closely linked to the appellant's submissions on proportionality is his attempt to invoke the principle of fairness. The appellant's case is that he would have secured a date for his wedding to take place before 31 December 2020, but for the Covid-19 pandemic. Although there is nothing in the exchanges with the Register Office that confirms this assertion, we shall take the appellant's case at its highest and assume that this was so.

68. Even on that assumption, however, the principle of fairness cannot assist the appellant. As is the case with proportionality, it does not give a judge power to disregard the Withdrawal Agreement."

Error of Law

16. Mr Richardson accepted that he was in some difficulty following Celik. He did not make a concession. He said that his lay client felt aggrieved. He drew my attention to the marriage having been initially postponed for 70 days following intention by the SSHD to investigate which was unfounded considering the findings of the judge in respect of the relationship. He submitted that despite the two parallel schemes and the Appellant being able to make an application under the 2016 Regulations, this route was not known to her and many lawyers were confused at the time.

17. The First-tier Tribunal did not have the benefit of the guidance in Celik which was promulgated post the hearing and promulgation of its decision. My understanding of the decision of the judge is that she correctly identified that the Appellant could not meet the requirements of the EUSS and Appendix EU and she dismissed the appeal under the Immigration Rules. There was no cross challenge to this. Following Celik, no other option was open to the First-tier Tribunal. The Appellant's residence as a durable partner was not facilitated by the SSHD before the end of the transitional period and the Appellant had not made an application for facilitation before the end of the period.

18. It is clear from a proper reading of Celik and applying the guidance given by the UT that it was not open to the First-tier Tribunal to allow the Appellant's appeal under the Withdrawal Agreement. The Appellant could not bring herself within the substance of Article 18.1 of the Withdrawal Agreement for the same reasons as the appellant in Celik could not do so. I do not need to repeat the reasoning given by the UT and set out above.

19. In my view the Appellant's case is on all fours with that of Celik. The judge materially erred. It was not open to the judge to allow the appeal. I set aside the decision to allow the Appellant's appeal. The parties did not have any further submissions in respect of re-making.

20. I dismiss the appeal.

No anonymity direction is made.

Signed *Joanna McWilliam* Date 1 November 2022

Upper Tribunal Judge McWilliam