IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2022-001768

[First-tier Tribunal No: EA/11601/2021]

THE IMMIGRATION ACTS

Decision & Reasons Promulgated
On 12 March 2023

Before

UPPER TRIBUNAL JUDGE KOPIECZEK

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

NEIDIS LOKA
(NO ANONYMITY ORDER MADE)

Respondent

Representation:
For the Appellant: Mr C Avery, Senior Home Office Presenting Officer
For the Respondent: Mr K Pullinger, Counsel, instructed by SMA Solicitors

Heard at Field House on 22 December 2022

DECISION AND REASONS

1. Although the appellant in these proceedings is the Secretary of State, it is convenient to refer to the parties as they were before the First-tier Tribunal ("FtT").

2. The appellant is a citizen of Albania. He made an application on 4 May 2021 for settlement under the EU Settlement Scheme ("EUSS") as the spouse of an EEA citizen. That application was refused in a decision dated 7 July 2021.

3. The appellant appealed that decision and his appeal came before First-tier Tribunal Judge Gillan ("the FtJ") at a hearing on 14 December 2021. In a decision

promulgated on 14 February 2022 the appeal was allowed. Permission to appeal having been granted by a judge of the FtT, the appeal came before me.

The grounds and submissions

4. The grounds of appeal contend that the FtJ erred in allowing the appeal on the basis of the FtJ's assessment of the application of Appendix EU of the Immigration Rules ("the Rules"). The appellant's application for status under the EUSS was as the family member of an EEA national. The appellant could not succeed as a spouse as the marriage took place after the specified date of 31 December 2020. As a durable partner the appellant required a "relevant document" as evidence of facilitation of residence but he did not have such a document. It is argued that the FtJ's findings at [33]–[35], namely that the appellant was lawfully resident at the end of the transition period, are erroneous in terms of the Withdrawal Agreement ("WA").

5. The grounds further argue that the FtJ was wrong to treat the 'grace period', which ended on 31 June 2021, as extending the time period in which the appellant was able to become lawfully resident under the Immigration (European Economic Area) Regulations 2016 ("the EEA Regulations").

6. In his submissions Mr Avery relied on the grounds of appeal. It was submitted that what the FtJ had said at [33] was contrary to the decision in *Celik (EU exit; marriage; human rights)* [2022] UKUT 00220 (IAC).

7. Mr Pullinger in submissions acknowledged that there were difficulties for the appellant in his appeal in the light of *Celik*. However, he submitted that [62]–[63] of *Celik* does allow for proportionality to be considered in some circumstances, although what those circumstances are is not specified in *Celik* he said.

8. It was further submitted that although *Celik* set out the various definitions of durable partner under the Immigration Rules, it did not set out all the categories of durable partner as contained in Appendix EU of the Rules. It was submitted, therefore, that although the Rules are confusing and seemingly contradictory, they do show that without a relevant document an individual can meet the definition of durable partner; a matter not grappled with in *Celik*.

9. Mr Pullinger accepted that the logic of his submission was that it would need to be found that *Celik* was wrongly decided.

10. It was further accepted that although the FtJ did say that the appellant did not meet the Rules, there is a definition of partner which means that he does. Therefore, any error of law on the part of the FtJ was not material.

11. In reply, Mr Avery referred to [33] of the FtJ's decision whereby he said that he could look beyond the Rules to the WA. It can be assumed that the FtJ was relying on Article 18 of the WA but it was not clear. If so, the FtJ's decision in this respect is also contrary to *Celik*.

Assessment and conclusions

12. It was accepted before the FtJ that the appellant did not have the necessary "relevant document" as evidence that he was a durable partner before the specified date, and the FtJ so found. He concluded that the appellant could not

satisfy the requirements of Appendix EU in terms of the definition of durable partner.

13. Mr Pullinger submitted before me that there were different ways in which the appellant could satisfy the requirement under the Rules of being a durable partner, even where there was no relevant document in existence. The logic of his submission in relation to *Celik*, as he accepted, was that *Celik* was wrongly decided because of its only partial analysis of the basis upon which a person could satisfy the definition of durable partner.

14. Although Mr Pullinger sought to refer me to aspects of Annex 1 of Appendix EU in terms of the ways in which an individual could be categorised as a durable partner, I do not see that there is any aspect of the Rules which undermines the fundamental requirement for the appellant's residence in this case to have been facilitated, as was decided in *Celik*.

15. Mr Pullinger was correct to submit that [62]–[63] of *Celik* allows for a proportionality assessment in some circumstances, and I infer from his submission that that includes circumstances in which an individual does not come within the scope of Article 18(r) of the WA, which provides for redress procedures available to an applicant which are to ensure that the decision is not disproportionate. It is instructive, however, to quote [64]–[65] of *Celik* as follows:

> "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.
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> 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".

16. The same circumstances apply in the appeal before me. The appellant's residence as a durable partner was not facilitated by the respondent before the end of the transitional period and he is unable, therefore, to bring himself within the substance of Article 18.1 of the WA. In concluding otherwise, I am satisfied that the FtJ erred in law, requiring the decision of the FtJ to be set aside.

17. The FtJ did not have the advantage, as I do, of the Upper Tribunal's guidance in *Celik* in relation to the application and interpretation of the relevant Rules and the WA. That, however, does not change the inevitable outcome of this appeal.

18. Having set aside the FtJ's decision, I re-make the decision, dismissing the appeal.

Decision

19. The decision of the First-tier Tribunal involved the making of an error on a point of law. Its decision is set aside and the decision is re-made, dismissing the appeal.

A. M. Kopieczek

Judge of the Upper Tribunal
Immigration and Asylum Chamber

6/03/2023