IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2022-002977
First-tier Tribunal No:
EA/11846/2021

THE IMMIGRATION ACTS

Heard at Field House IAC
On the 11th October 2022

Decision & Reasons Promulgated
On the 03rd February 2023

Before

UPPER TRIBUNAL JUDGE LINDSLEY

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

ESMERALDA GJINI

Respondent

Representation:
For the Appellant: Ms A Ahmed, Senior Home Office Presenting Officer
For the Respondent: Mr T Wilding, of Counsel, instructed by AJ Jones Solicitors

DECISION AND REASONS

Introduction

1. The claimant is a citizen of Albania born on 9th December 1992. She came to the UK illegally on 15th December 2018. She formed a relationship with a Greek citizen, Mr Keldis Lalmi. The couple meet in the UK in March 2019, and cohabited as a couple from July 2020. The

couple married on 3rd April 2021, and the claimant applied for pre-settled status under the Immigration Rules on 26th April 2021. This application was refused on 21st July 2021 by the Secretary of State. Her appeal against the decision was allowed by First-tier Tribunal Judge Freer in a determination promulgated on the 16th March 2022.

2. Permission to appeal was granted by Judge of the First-tier Tribunal SPJ Buchanan on 25th May 2022 on the basis that it was arguable that the First-tier judge had erred in law in misconstruing the requirements of the Immigration Rules at Appendix EU and in misconstruing the Withdrawal Agreement; and in failing to give sufficient reasons why the claimant was not required to have a relevant document.

3. The matter came before me to determine whether the First-tier Tribunal had erred in law, and if so to determine whether any error of law was material and whether the decision of the First-tier Tribunal should be set aside. At the end of the hearing I reserved my decision.

Submissions – Error of Law & Remaking

4. In the grounds of appeal for the Secretary of State it is argued, in short summary, as follows. The First-tier Tribunal erred in law in making a material misdirection of law that the claimant could fulfil the Immigration Rules at Appendix EU Annex 1 as a durable partner. The claimant did not have a relevant document showing his stay had been facilitated, and had not applied for such a document by the specified date, namely the 31st December 2020. It was of no relevance that the First-tier Tribunal found that the relationship was a durable one at this date as the document requirement was not met. Further proportionality had no bearing on the appeal as this is only engaged if the claimant has a right to remain under the Withdrawal Agreement, and as her stay had not been facilitated by the Secretary of State at the specified date this was not the case. In addition, the decision errs in law for insufficient reasoning as to how the appeal succeeds under the Immigration Rules and Withdrawal Agreement.

5. Ms Ahmed made submissions for the Secretary of State to articulate why the claimant cannot benefit from the definition of durable partner at Annex 1 b(ii)(bb)(aaa), which is the provision which the claimant argues was put to the First-tier Tribunal and relied upon in allowing the appeal on the basis of the claimant having been a durable partner and now being a spouse.

6. Ms Ahmed argued that the claimant could not qualify as she was not “a joining family member of a relevant sponsor” but she struggled to articulate why the claimant failed to be able to meet this definition. At this point I note that the provision is extremely hard to understand, and I do not criticise Ms Ahmed. Ms Ahmed indicated that there was a definition of joining family member which she found to be important. She also referred me to EU 11A which is a section of Appendix EU dealing with Eligibility for indefinite leave to enter or remain, and to

EU14A which is the equivalent provision for those seeking limited leave to enter or remain. Ultimately, I understand Ms Ahmed's position was that the claimant could not benefit from b(ii) firstly because she was in the UK, when this provision relates, at least primarily, to people who are abroad, and secondly because she had been in the UK unlawfully. She submitted that what is set out after "unless" in b(ii)(bb)(aaa) is a clarification of what does not suffice to meet the paragraph -i.e. just being without a document and unlawfully present do not qualify as reasons why the applicant can say they were not resident as a a durable partner. She submitted that the claimant could not meet the requirements of the Immigration Rules as she could not meet the definition as she had no required document as necessitated by b(i) and did not fulfil the conditions of b(ii) either. As such a material error of law should be found in the decision of the First-tier Tribunal and the appeal remade and dismissed under the Immigration Rules.

7. Ms Ahmed argued, in relation to any remaking that the concept of proportionality and Article 18(1)(r) of the Withdrawal Agreement was of no relevance because of what was said in Celik (EU exit; marriage; human rights) [2022] UKUT 00220 at paragraphs 62 to 66, and also at paragraph 71. In essence she submitted that without a right preserved under the Withdrawal Agreement to attach itself to the claimant had no substantive right to be treated proportionally or fairly, and so the appeal, should be remade and dismissed on this basis too.

8. Mr Wilding took me to his skeleton argument which had been before the First-tier Tribunal in which he referred to the relevant provisions of the Immigration Rules citing the Court of Appeal as describing them as "elaborate to the point of impenetrability"; and in which he adds his own comment that the relevant Rules are "fiendish". I have great sympathy with these sentiments.

9. In his skeleton and oral submissions Mr Wilding outlined that the claimant had applied as a family member of a relevant EEA citizen under EU14 of Appendix EU because at Annex 1 definitions a(ii) this includes the spouse of an EEA citizen who was the durable partner of the EEA citizen before the specified date. The skeleton argument then turns to the definition in Annex 1 of durable partner. It is common ground, I understand, that (a) is a factual question as to whether the claimant and her spouse were in a durable relationship which was answered by the First-tier Tribunal in the affirmative. (b) (i) is accepted by the claimant as not being a provision she can meet as she did not hold a relevant document. The question is then whether the requirements of b (ii) can be met by this claimant.

10. With respect to b(ii) of Annex 1 definition of a durable partner Mr Wilding argues that it is plainly the case that the claimant is applying as a spouse of a relevant sponsor and does not hold a relevant document, and that she fulfils (aa) because the application is after the specified date. He accepts that the claimant cannot fulfil the first part

of b(ii)(bb)(aaa) as it requires that she was not resident as a durable partner at any time before the specified date, and on the facts of this case the claimant says she was a durable partner of her (now) husband from July 2020. Mr Wilding says that this is not fatal to the claimant fulfilling this provision of the Rules however because of what is said after "unless", which he says creates an alternative to being not resident as a durable partner at any time before the specified date. He says that this section means that those who held no relevant document and who were unlawfully present qualify.

11. Mr Wilding says that this makes sense because of what is said in the un-number paragraph after options (bbb) and (ccc), which are not relied upon by either party to this appeal, as the Secretary of State has to be satisfied that the relationship was durable before the specified date which is an additional requirement to those under (b)(i). Mr Wilding says that his interpretation is also supported by what is said in the Secretary of State's guidance document: EU Settlement Scheme: evidence of relationship – GOV.UK, which gives details of what a relevant document is under the heading "If you're their unmarried (durable) partner", but then goes on to outline relevant documents to show evidence of a relationship existing on 31st December 2020 and continuing to exist at the date of application if you do not have a relevant document.

12. Mr Wilding submitted, in the alternative if it were found that the First-tier Tribunal had erred in law and the appeal was not to be allowed under the Immigration Rules, as he has argued it should be for the reasons above, that it should be allowed under the Withdrawal Agreement Article 18(1)(r) not withstanding what was said in Celik. He argued for a wider concept of proportionality based on the Supreme Court case of Lumsdon & Ors, R (on the application of) v Legal Services Board [2015] UKSC 41 and Tsakouridis (European citizenship) [2010] EUECJ, and the wording of the Withdrawal Agreement itself, going beyond that which was found applicable in Celik. Mr Wilding also argued that in any case Celik did not find the concept of proportionality was entirely irrelevant in cases where the Immigration Rules are not met, as is said at paragraph 62 of the decision, and there are also factors which differentiate this case from that of Celik, and make it stronger. In Celik the GOV.UK guidance was not before the Upper Tribunal, which if the Immigration Rules are not found to cover the claimant's situation is seemingly more generous than the Rules, and further in this case there is proper evidence regarding the problems the couple experienced in getting married prior to 31st December 2020 due to Covid-19 restrictions. It is argued therefore that the appeal should also be allowed on the basis of the Withdrawal Agreement as the decision to refuse the application is, in all the circumstances, not proportionate or fair.

Conclusions – Error of Law & Remaking

13. The First-tier Tribunal finds, in an unchallenged finding, that the claimant is in a genuine relationship with her husband at paragraph 42 of the decision, and was in a durable relationship before her marriage and on the specified date, namely 31st December 2020, at paragraph 43 of the decision.

14. At paragraph 44 of the decision the First-tier Tribunal decided that the claimant can succeed by fulfilling the definition of a durable partner applying the definition at Appendix EU Annex 1 (b)(ii)(bb)(aaa). The provision at (b)(ii) is an alternative to the provision at (b)(i), (b)(i) requires that a claimant has a relevant document facilitating his/her stay as a durable partner at the relevant date or has applied for such a document, which the claimant accepts she does not have and has not applied for. It is said by the First-tier Tribunal, by reference to the claimant's argument at paragraphs 28 to 31 of the decision, that b(ii) means that the claimant can succeed by being in a durable relationship and not having a residence card. The First-tier Tribunal does not articulate any adequate reasoning for coming to this conclusion and so errs in law. The question is whether this error is material.

15. I am not assisted by Celik in the specific meaning of (b)(ii) as the starting point for the Upper Tribunal in that case was, as set out at paragraph 17, that it was conceded by the appellant that he could not succeed by reference to the Immigration Rules. However I note that any interpretation of this paragraph that concluded that the claimant could succeed in this appeal without having facilitated her residence in the UK as a durable partner, or having applied to do so, by 31st December 2020 would be contrary to the first point of the guidance provided by this decision of the Presidential Panel as it is stated: " 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."

16. I set out the durable partner definition section of the Immigration Rules below with my own high-lighting to attempt to aid navigation of this densely drafted provision.

Appendix EU: Annex 1: Definitions

durable partner

17. **(a)** person is, or (as the case may be) for the relevant period was, in a durable relationship with a relevant EEA citizen (or, as the case may be, with a qualifying British citizen or with a relevant sponsor), with the couple having lived together in a relationship akin to a marriage or civil partnership for at least two years (unless there is other significant evidence of the durable relationship); **and**

(b)(i) the person **holds a relevant document as the durable partner** of the relevant EEA citizen (or, as the case may be, of the qualifying British citizen or of the relevant sponsor) for the period of residence relied upon; **for the purposes of this provision, where the person applies for a relevant document** (as described in sub-paragraph (a)(i)(aa) or (a)(ii) of that entry in this table) **as the durable partner of the relevant EEA citizen or, as the case may be, of the qualifying British citizen before the specified date and their relevant document is issued on that basis after the specified date, they are deemed to have held the relevant document since immediately before the specified date**; **or**

(ii) where the person is applying as the durable partner of a relevant sponsor (or, as the case may be, of a qualifying British citizen), **or as the spouse** or civil partner **of a relevant sponsor** (as described in sub-paragraph (a)(i)(bb) of the entry for **'joining family member of a relevant sponsor'** in this table), **and does not hold a document of the type to which sub-paragraph (b)(i) above applies**, and where:

(aa) the date of application is after the specified date; and

(bb) the person:

(aaa) was not resident in the UK and Islands as the durable partner of a relevant EEA citizen (where that relevant EEA citizen is their relevant sponsor) on a basis which met the definition of 'family member of a relevant EEA citizen' in this table, or, as the case may be, as the durable partner of the qualifying British citizen, **at** (in either case) **any time before the specified date, unless the reason why, in the former case, they were not so resident is that they did not hold a relevant document as the durable partner of a relevant EEA citizen for that period (where their relevant sponsor is that relevant EEA citizen) and they did not otherwise have a lawful basis of stay in the UK and Islands for that period**; or

(bbb) was resident in the UK and Islands before the specified date, and one of the events referred to in sub-paragraph (b)(i) or (b)(ii) in the definition of 'continuous qualifying period' in this table has occurred and after that event occurred they were not resident in the UK and Islands again before the specified date; or

(ccc) was resident in the UK and Islands before the specified date, and the event referred to in sub-paragraph (a) in the definition of 'supervening event' in this table has occurred and after that event occurred they were not resident in the UK and Islands again before the specified date,

the Secretary of State is satisfied by evidence provided by the person that the partnership was formed and was durable

before (in the case of a family member of a qualifying British citizen as described in sub-paragraph (a)(i)(bb) or (a)(iii) of that entry in this table) **the date and time of withdrawal and otherwise before the specified date**; and

(c) it is, or (as the case may be) for the relevant period was, not a durable partnership of convenience; and

(d) neither party has, or (as the case may be) for the relevant period had, another durable partner, a spouse or a civil partner with (in any of those circumstances) immigration status in the UK or the Islands based on that person's relationship with that party

18. I now attempt to navigate (b)(ii) of this provision with reference to the claimant's facts. The claimant is the spouse of a relevant sponsor and does not hold a relevant document so appears to meet the initial requirements. This application was made after the specified date, on 26th April 2021, so the claimant meets the provision at (b)(ii)(aa).

19. The first potential obstacles is whether the claimant is the "**joining family member of a relevant sponsor".** The difficulty with this is that when the definition of "joining family member of a relevant sponsor" is looked up in Annex 1 it is circular because it requires (if there was no marriage prior to the specified date) the applicant to be a durable partner of the relevant sponsor, meeting the definition of durable partner in the table before the date specified date, before the date of application and that he/she remains in a durable partnership. Ms Ahmed suggests that "joining family member" can only be someone applying from abroad but that is not compatible with what is said in EU2A and EU3A of Appendix EU which clearly contemplate that indefinite leave to remain and limited leave to remain, as well as indefinite leave to enter and indefinite leave to enter, can be granted to a joining family member of a relevant sponsor. I find therefore that a joining family member of a relevant sponsor can therefore potentially be an applicant/appellant/claimant who is applying in the UK.

20. However I conclude that the claimant cannot meet the definition of "joining family member" because of the definition of "required date" at Annex 1(bb)(ii) which requires that that a "joining family member" arrives in the UK after the 1st April 2021. This claimant arrived in the UK well before this date, in December 2018, and so cannot fulfil this condition, and applications made under Appendix EU must all be made by the required date. As the claimant is not therefore able to able to meet the definition of "joining family member" (due to her inability to meet the joining family member required date definition) then she cannot benefit from the definition of durable partner at b(ii). Given this conclusion it is not necessary to proceed with further consideration of the definition of durable partner, but in case I am wrong, I find it prudent to do so.

21. The question arises then as to the meaning of (b)(ii)(bb)(aaa). The initial clause is clear: the claimant should not have been resident in the UK as a durable partner of a relevant EEA citizen at any time before the specified date. So, at this point, it would appear that the claimant cannot benefit from this provision as she claims that she was resident in the UK as the durable partner of her husband prior to 31st December 2020. The question that then arises is whether this is altered by that is said in subparagraph (aaa) from the word "**unless**" onwards . From here onwards I will refer to this as the "unless clause".

22. The "unless clause" refers first to this applying to the category of "the former case". This means, I find, durable partners of relevant EEA citizens rather than durable partner of a British citizen. This claimant was a durable partner of an EEA citizen. I find that what the drafting means at this point, although it is extremely poorly expressed, is that an applicant cannot say that they were not resident in the UK at any time before the specified date as a durable partner simply because they were in the UK illegally without a residence card as a durable partner. I find therefore that it does not assist the claimant as this was exactly her position. So for this reason too the claimant does not meet the definition of durable partner at (b)(ii) of Annex 1 of Appendix EU.

23. Mr Wilding has also referred to the Secretary of State's guidance with respect to the documentation that should be provided when a claimant does not have a relevant document, however I find that the "EU Settlement Scheme: Evidence of Relationship regarding documents for unmarried (durable) partners" guidance does not support the claimant in arguing that the definition of durable partner at b(ii) generally includes those without documentation as the reference to documents other than "relevant" documents is only for "persons of Northern Ireland", and the claimant makes no claim to be such a person and there are no facts in this case which would support her being seen as such a person

24. I also do not find that the appeal can succeed by reference to Article 18(1)(r) of the Withdrawal Agreement based on an argument it was not proportionate to refuse her pre-settled status because (in summary) she is in a genuine relationship with her partner, and had not been able to marry prior to the specified date due to Covid-19 Pandemic lockdown restrictions on marriages. I come to this conclusion for the following reasons.

25. Article 18(1)(r) of the Withdrawal Act gives a right for an applicant for new residence status to have access to judicial redress procedures, and prescribes that these involve an examination of the legality of the decision as well as the facts and circumstances on which the decision is based, and must ensure that the decision is not disproportionate. The Presidential Panel in Celik found at paragraph 62 of the decision that an applicant for the purposes of Article 18 of the Withdrawal Act could be someone who, like this claimant, has no ability to bring him or herself under the substantive provisions. However, it noted at

paragraph 63 of Celik that proportionality is highly unlikely to play any material role where the applicant does not fall within the substantive scope of Article 18; and at paragraph 64 of Celik it is made clear that applicants such as the appellant in that case and the claimant in this case (whose factual case is in all material respects the same as the appellant in Celik) do not come within the substance of Article 18(1). At paragraphs 65 and 66 of Celik it is commented that to invoke proportionality on facts falling outside of Article 18(1) would amount to a First-tier Tribunal rewriting the Withdrawal Agreement, which would be a remarkable proposition which would produce absurd results.

26. I find that the claimant, has been an applicant under Article 18, and was thus entitled to access judicial redress procedures to check that the decision assessing her application for rights under the Withdrawal Act was legal and the facts properly found, and indeed received fairness by way of having a proper appeal to an independent Tribunal who considered the facts of her case and the law. However, in accordance with Celik, her right to be treated fairly and proportionately does not go beyond this.

Decision:

1. The making of the decision of the First-tier Tribunal involved the making of a material error on a point of law.

2. I set aside the decision of the First-tier Tribunal.

3. I remake the decision by dismissing the appeal under the Immigration Rules and the Withdrawal Agreement.

Signed: Fiona Lindsley Date: 28th November 2022
Upper Tribunal Judge Lindsley