IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2022-002938
First-tier Tribunal No:
EA/12291/2021

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

XHINO VERA
(ANONYMITY ORDER NOT MADE)

Respondent

Representation:
For the Appellant: Ms A Ahmed, Senior Home Office Presenting Officer
For the Respondent: Mr B Hawkin, of Counsel, instructed by Nova Legal Services

DECISION AND REASONS

Introduction

1. The claimant is a citizen of Albania born on 10th October 1999. He arrived in the UK on 25th January 2018 illegally. He formed a

relationship with Ms Roumpati, a citizen of Greece, in 2017 and entered the UK in September 2020 to be with her. She applied for pre-settled status and was granted this by the Secretary of State. The couple married on 2nd May 2021, and the claimant made an application under the Immigration Rules for pre-settled status on 17th May 2021. This application was refused on 10th August 2021. His appeal against the decision was allowed by First-tier Tribunal Judge Shanahan in a determination promulgated on the 10th April 2022.

2. Permission to appeal was granted by Judge of the First-tier Tribunal Cartin on 18th May 2022 on the basis that it was arguable that the First-tier judge had erred in law because it was arguable that the claimant was not a beneficiary of the Withdrawal Agreement and thus could not succeed in his appeal.

3. The matter came before me to determine whether the First-tier Tribunal had erred in law, and if so whether that error was material and the decision should be set aside. I heard submissions with respect to whether the First-tier Tribunal erred in law and reserved my determination on this issue. It was clear that the remaking of the appeal under the Withdrawal Act would follow any decision I made on error of law: so if there was no material error the decision would obviously be to uphold the First-tier Tribunal in allowing the appeal and if I found an error of law then the appeal would be remade dismissing it.

4. I permitted Mr Hawkin to amend his grounds of appeal and argue, if an error were found, that the appeal should be remade under the Immigration Rules with reference to the definition of durable partner to be found at (b)(ii)(bb)(aaa) of Annex 1 of Appendix EU. Ms Ahmed requested that any such remaking hearing be adjourned as she said she was not ready to address this provision as it was not raised in the Rule 24 notice or previously. It was agreed therefore that the submissions on this issue, and any other remaking arguments, would be set out in writing and should be emailed for my urgent attention and that of the other party. I directed that the claimant would have 14 days (until 25th October 2022) to do this and the Secretary of State having a further 7 days (until 31st October 2022). I would then set out my decision on error of law and remaking in writing after the 1st November 2022. This time frame was extended by application of the Secretary of State so that her submissions had to be made by 9th November 2022.

Submissions – Error of Law & Remaking

5. In the grounds of appeal and in oral submissions from Ms Ahmed for the Secretary of State it is argued, in short summary as follows. Beneficiaries of the Withdrawal Agreement at Article 10(1)(e) are limited to those who were residing in accordance with EU law on the specified date, namely on 31st December 2020. As the claimant did not have his residence as an extended family

member/beneficiary/durable partner facilitated or apply for his residence to be facilitated by making an application for a residence permit prior to 31st December 2020 he was not residing in the UK in accordance with EU law at the specified date and therefore has no rights under the Withdrawal Agreement. As such the claimant did not have the right to be treated proportionally in accordance with Article 18(1)(r) as he had no right under the Withdrawal Act for this proportionality/fairness to attach to. The First-tier Tribunal misdirected itself on the law on this issue, and as a result wrongly concluded that the claimant could succeed in his appeal because it was not proportionate to refuse him when he was unable to get married prior to the specified date in the context of the Covid-19 pandemic.

6. I permitted Ms Ahmed to amend the Secretary of State's grounds, in so far as this was necessary, to place reliance on the decision in Celik (EU exit; marriage; human rights) [2022] UKUT 00220, particularly at paragraphs 62 to 66, as to the proper approach to the issue of proportionality under Article 18(1)(r) of the Withdrawal Agreement. Ms Ahmed submitted that a material error of law should be found and the decision of the First-tier Tribunal should be set aside; and that the appeal should be remade dismissing it under the Withdrawal Agreement.

7. In summary Ms Ahmed's written submissions on remaking under the Immigration Rules with reference to paragraph (b)(ii)(bb)(aaa) of Annex 1 of Appendix EU are as follows. The claimant cannot simply meet this provision by making an application after the specified date on 17th May 2021 and by not having a relevant document. The provision at (b)(ii) is one by which a "joining family member of a relevant sponsor" can qualify, whereas (b)(i) is one which applies to "family member of a relevant EEA citizen". Ms Ahmed argues that the claimant is not a joining family member because he cannot meet this definition as it requires either the claimant to be married before the specified date or to be the durable partner of the sponsor before the specified date, which it is argued that he is not. It is argued further that the provision after "unless" at (aaa) does not assist the claimant avoid the problem of b(ii) of the definition of durable partner primarily providing a route for those who were not resident in the UK as a durable partner before the specified date. The wording after "unless" provides a way in for those persons who were lawfully resident in the UK and therefore did not hold a relevant document because, for instance they were present as students, and does not provide a way in for those who were illegally in the UK without a relevant document. It is strongly argued that it does not provide an alternative for an claimant who is illegally in the UK without a relevant document as this would not make sense as it would give preferential treatment to those illegally present, and would not respect the basic tenant of EU law that extended family members only have rights in law once they have been facilitated by the member state through issuing of a residence card following an examination of their personal circumstances, as per Macastena v SSHD [2018] EWCA Civ 339. Further it is argued that the

Secretary of State's guidance in relation to unmarried durable partners without relevant documents applies, as is clear from the heading in bold, to those who are partners of such a person in Northern Ireland only.

8. It is argued that the claimant cannot succeed in his appeal by reference to Article 18 of the Withdrawal Agreement. The claimant has not acquired any EU rights as he has not been recognised as an extended family member, and without this facilitation by the Secretary of State resulting in a relevant document he is not within the substance of Article 18, as is set out at paragraphs 63-64 of Celik. This position is supported by what is said in Batool and others (other family members: EU exit) [2022] UKUT 00219. Nothing in the various policies (including those relating to restrictions on marriages due to Covid-19) changes this: it was open to the claimant to have made an application for facilitation as a durable partner prior to 31st December 2020, he failed to do this and so he has no EU rights. The fact that he may struggle to meet the requirements of the domestic Immigration Rules as a person without leave to remain is of no relevance. The appeal should therefore be dismissed.

9. Mr Hawkin made submissions for the claimant. He relied upon his Rule 24 notice and oral submissions. In short summary his position was as follows. He argued that in the grounds as initially drafted it was contended that the First-tier Tribunal had erred in law as there was no entitlement to proportionality in the claimant's circumstances at all. It is argued that this ground clearly could not be made out as at paragraph 62 of the decision the Upper Tribunal had found in Celik that such a submission went too far as an applicant was found to include someone who applied but did not come within the scope of Article 18, and, as is said at paragraph 63 of Celik, the nature of the duty to ensure proportionality depended on the particular facts and circumstances of a claimant. However, I had permitted Ms Ahmed to amend her grounds so she could place reliance upon Celik and the interpretation given by the Presidential Panel as to the proper role of proportionality. I made plain to Mr Hawkin that I would find that the Secretary of State appeal could not fail on the basis that the grounds of appeal overstated the Secretary of State's case as to the limited role of proportionality under Article 18 of the Withdrawal Agreement.

10. Mr Hawkin also submitted that the position I find myself in this appeal is significantly different from the position in Celik because in Celik the appellant had failed before the First-tier Tribunal but in this appeal the claimant was successful before the First-tier Tribunal, and I should therefore be weary of interfering with the factual findings of a First-tier Tribunal Judge who had had the opportunity to hear evidence and evaluate the evidence and facts in full, and who had set these findings out at paragraphs 10 to 18 of the decision in an unarguably rational fashion. He argued that given that Celik found that proportionality did apply, even to cases where substantive rights under the Withdrawal Act were not argued it was open on the facts (even if this was

generous) to find that the decision was disproportionate, that there was no material error of law in the decision of the First-tier Tribunal, and it should be upheld. In his written submissions Mr Hawkin provided further reasoning with respect to the proportionality argument. He argued that shutting registry offices in Covid was an unnecessary administrative burden; that it would not have been realistic to have made a durable partner application before 31st December 2020 as the claimant had only be cohabiting with his partner for three months at that point; that guidance did permit, through a concession scheme, those who became stuck outside the UK to re-enter; that the impact on the claimant was severe as the alternative was that he would have to apply for leave to remain under the far more onerous and expensive domestic scheme at Appendix FM of the Immigration Rules, and so the impact was unfair.

11. Mr Hawkin's written submissions on remaking, if a material error of law was found and the decision of the First-tier Tribunal set aside, with respect to paragraph (b)(ii)(bb)(aaa) of Annex 1 of Appendix EU are in summary as follows. The claimant meets (b)(ii) of Annex 1 because he applied after the specified date on 17th May 2021 and so meets (aa); and because he meets (aaa) because he was not resident in the UK as a durable partner on a basis that met the definition of family member of a relevant EEA citizen. He does not elucidate further what he argues is meant by this wording which appears after the word "unless". He argues however that he is supported in arguing that the claimant (who was illegally present in the UK without a residence card) qualifies by what is set out in the EU Settlement Scheme Guidance which makes clear that other evidence beyond that of a residence card may be relevant.

Conclusions – Error of Law & Remaking

12. The First-tier Tribunal concluded at paragraph 10 of the decision that the claimant could not meet the requirements of the Immigration Rules Appendix EU because he married after the specified date and so was not a family member at that time, and because his residence had not been facilitated as an extended family member/durable partner at the specified date either. The finding that the claimant's marriage is genuine and subsisting is not challenged by the Secretary of State, and I do not set it aside, but it is not what this appeal turns upon.

13. I find that the First-tier Tribunal errs in law when finding that the provision for proportionality at Article 18(1)(r) of the Withdrawal Agreement permitted the claimant to succeed in his appeal because it was not proportionate to refuse him pre-settled status because (in summary) he had been in a long-standing relationship with his 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.

14. 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 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, who had no ability to bring him or herself under the substantive provisions. However, it noted at paragraph 63 of Celik that proportionality was highly unlikely to play any material role where the applicant did 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 substantive provisions of the Withdrawal Act. At paragraphs 65 and 66 of Celik it is commented that to invoke proportionality on facts falling outside the substantive of the Withdrawal Act would amount to a First-tier Tribunal rewriting the Withdrawal Agreement, which would be a remarkable proposition which would produce absurd results.

15. I find that the claimant, as an applicant as defined under Article 18 of the Withdrawal Agreement, was entitled to access judicial redress procedures to check that the decision assessing his application for rights under the Withdrawal Act was legal and the facts properly found. I find that he received fairness by way of having a proper appeal to an independent Tribunal Judge who considered the facts of his case and the law. However, in accordance with Celik, his right to be treated fairly and proportionately did not go beyond this, and the First-tier Tribunal erred in law in using the protection of proportionality to create substantive rights which were not provided for under the Withdrawal Act. Issues of various other immigration concession schemes relating to Covid, the inconvenience caused by Covid to marriage plans and the more onerous and expensive domestic Immigration Rules at Appendix FM have no relevance.

16. I also do not find that it is relevant that the First-tier Tribunal allowed this appeal whereas the First-tier Tribunal Judge dismissed the appeal in Celik. I am not setting aside any findings of fact by the First-tier Tribunal, and there is no challenge to these facts. I am finding that the First-tier Tribunal misdirected itself in law after finding these facts and in allowing the appeal.

17. In these circumstances I find that the First-tier Tribunal erred in law and that the error was material to the determination of the appeal. I now turn to my conclusions on remaking. The only way the appeal can succeed is if the claimant can bring himself within the Immigration Rules at Appendix EU.

18. I have considered the argument that the claimant can in fact succeed in this appeal by reference to the definition of durable partner at

paragraph b(ii)(bb)(aaa) of Annex 1 of Appendix EU, but conclude that he cannot do so for the following reasons.

19. It is clear that the definition of durable partner at b(i) does not apply to the claimant as he did not hold a relevant document before the specified date. The alternative definition of a durable partner at b(ii) applies to those who do not have a relevant document but are entering as "joining family members of a relevant sponsor". The claimant is not a joining family member because the definition of "required date" at Annex 1(bb)(ii) requires, I find, 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 2019, 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 his inability to meet the joining family member required date definition then he cannot benefit from the definition of durable partner at b(ii).

20. Further it is clear that the provision at (aaa) primarily is aimed at qualifying those who were not resident as a durable partner at any time prior to the specified date. The drafting after the word "unless" is extremely hard to follow. Ms Ahmed argues that the aim was not to exclude those who were resident lawfully in the UK in another capacity such as a student prior to the specified date. I do not need to decide whether the drafting succeeds in this aim for the purposes of this appeal, but the alternative conclusion, that it includes those who were illegally present and failed to apply for facilitation as durable partners, would be inconsistent with (1) of the headnote in Celik where it is held by the President Panel that: "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 31st December 2020 or P had applied for such facilitation before that time." The Secretary of State's guidance referred to by Mr Hawkin, EU Settlement Scheme: Evidence of Relationship regarding documents for unmarried (durable) partners also 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 him to be such a person. I therefore find that what is said at (aaa) does not assist the claimant in showing that he is a durable partner, as defined an Annex 1(b)(ii), and thus does not assist him in succeeding in this appeal.

21. If the claimant wishes to remain in the UK he should now take specialist legal advice on other ways to regularise his stay on the basis of his marriage using domestic law immigration provisions.

Decision:

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

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

3. I re-make the decision in the appeal by dismissing it under the Immigration Rules and Withdrawal Agreement.

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