**Upper Tribunal**
**(Immigration and Asylum Chamber)** Appeal Number: UI-2022-003306
[EA/12467/2021]

**THE IMMIGRATION ACTS**

| **Heard at Field House** | **Decision & Reasons Promulgated** |
|---|---|
| **On 7 November 2022** | **On 9 January 2023** |

**Before**

**UPPER TRIBUNAL JUDGE KOPIECZEK**

**Between**

**THE SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Appellant

**and**

**SAHAR OUAHMIDEN**
**(ANONYMITY DIRECTION NOT MADE)**

Respondent

**Representation:**
For the Appellant: Ms S Cunha, Senior Home Office Presenting Officer
For the Respondent: Mr M Moksud, Counsel instructed by Briton Solicitors

**DECISION AND REASONS**

1. Although the appellant in these proceedings is the Secretary of State, I refer to the parties as they were before the First-tier Tribunal.

2. The appellant is a citizen of Morocco. She made an application on 23 April 2021 for settlement under the EU Settlement Scheme ("EUSS") as the spouse of a relevant EEA citizen. That application was refused in a decision dated 12 August 2021.

3. The decision refusing the application was made on the following basis. Although the appellant had provided a marriage certificate dated 8 June 2021 as evidence of her relationship to his EEA citizen sponsor, that marriage occurred after the UK left the European Union on 31 December 2020. She had not, therefore, established that she met the requirements of Appendix EU of the Immigration Rules, in particular paragraph EU11. Nor had she established that she can be considered as the durable partner of a relevant EEA citizen because she had not been issued with a family permit or residence card under the Immigration (European Economic Area) Regulations 2016 ("the EEA Regulations") as a durable partner.

4. Her appeal came before First-tier Tribunal Judge Rastogi ("the FtJ") at a hearing on 4 May 2022. In a decision promulgated on 20 May 2022 the FtJ allowed the appeal on the basis that the decision was in breach of the Withdrawal Agreement (" the WA").

***The FtJ's decision***

5. The FtJ set out the basis of the appellant's appeal as follows:

> "3. The appellant and the sponsor met in August 2019 and their relationship started on 30 October 2019. They started to live together on 10 February 2020. On 6 February they had applied for a notice of marriage and booked an appointment for 9 February 2020. That was cancelled but rearranged for 26 March 2020. That appointment was also cancelled by the London Borough of Camden and rearranged for 30 September 2020. They attended and then had to wait for the formal decision that they were 'free to marry' which was received on 11 November 2020. On 5 December 2020 they were informed their wedding had been cancelled as London was back in Tier 4 lockdown. Therefore it was rescheduled for 27 April 2021, at which point there were finally able to marry."

6. The FtJ said at [4] that although they were not married by 31 December 2020 they were engaged and cohabiting and awaiting their wedding and therefore were in a durable relationship.

7. The FtJ summarised the relevant law in terms of the Immigration (Citizens' Rights) (EU Exit) Regulations 2020 and paragraphs EU11 and EU14 of the Immigration Rules, including with reference to the definitions of family member and durable partner.

8. She noted at [15] that there was unchallenged evidence that the appellant and her partner were cohabiting at the specified date, were not married but were engaged and that they had been cohabiting since February 2020. At [17], having considered the respondent's guidance on the definition of durable partner in Annex 1 to Appendix EU, she found that at the specified date the appellant and her partner were in a durable relationship.

9. She considered the WA, stating at [23] that Article 10(1)(e)(i) would give the appellant a right to reside in the UK had she been able to marry her partner prior to the specified date.

10. She concluded at [28] that the appellant had not made an application for facilitation of her residence prior to the specified date and hers was not a situation where her residence was being facilitated. She noted that durable partners of EEA citizens had no automatic right to reside pursuant to the EEA Regulations, that residence being discretionary on the part of the Secretary of State.

11. At [29] the FtJ found that the appellant does not have a relevant residence document and the decision with reference to Appendix EU was in accordance with the Immigration Rules. Similarly, the respondent's refusal to grant settlement on the basis of an absence of such a document as required by the WA, Article 18(1)(iv), was not in itself a breach of any right to reside under the WA. She concluded at [31] that the appellant does not benefit from Article 9(a)(ii) because she is a durable partner and is therefore excluded from the benefit of it. She also rejected the submission that the appellant benefits from Article 18(n) because its terms, on the facts, exclude her.

12. She rejected an argument based on Article 18(r). She concluded at [35] that the appellant does not have a right to reside under the WA for the reasons she had given.

13. At [36] she said that had the appellant been able to marry earlier, as she had found, she would have done so but for the COVID-19 delays and she would have had a right to reside. The only intervening factor was COVID-19 which was a matter entirely outside of her control. What she should have done, the FtJ said, was to have applied to the respondent for a residence card as a durable partner prior to the specified date and then she would have had the requisite document required for a grant of leave under the EUSS, although she did not do so. Finally, at [37] she said as follows:

> "37. However, when there is evidence that the reason the marriage could not proceed by the specified date was due to COVID (a fact not disputed by the respondent in this appeal) and where that marriage has now taken place and the couple continue to reside in the UK, it seems to me to be contrary to the spirit of the Withdrawal Agreement and therefore disproportionate for the respondent not to have granted the appellant leave to remain."

***The grounds of appeal and submissions***

14. The grounds contend, in summary, that the WA provides no rights to a person in the appellant's circumstances. The appellant was not residing in accordance with EU law at the specified date as required by Article 10(1)(e). Her residence was not being facilitated in accordance with national legislation at that time.

15. It is argued that if the appellant does not fall within the personal scope of the WA there is no entitlement to the full range of judicial redress, including Article 18(1)(r) in terms of proportionality. The FtJ erred in law in finding that the refusal of leave is a disproportionate breach of the "spirit" of the WA, despite the FtJ's finding that the appellant is not entitled to the protection it offers.

16. In submissions Ms Cunha relied on the grounds. She drew my attention to the decision in *Celik (EU exit; marriage; human rights)* [2022] UKUT 00220 (IAC) and the guidance given in it. She submitted that that guidance was consistent with previous case law.

17. On behalf of the appellant Mr Moksud referred to the positive findings made in favour of the appellant by the FtJ. It was submitted that she took account of all the circumstances, including the fact of the unavoidable delay in their marrying. She set out in detail the history of the case.

18. It was pointed out that the decision in *Celik* was not referred to in the grounds. The FtJ had found that the appellant was only unable to marry because of COVID. It was submitted that there was no error of law in the FtJ's decision and she was right to conclude that the decision to refuse settlement was against the spirit of the WA.

***Assessment and Conclusions***

19. *Celik* was a decision of a three person Presidential panel of the Upper Tribunal. It gave the following guidance, represented in the headnote to the decision:

> *"(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.*
>
> *(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."*

20. It is paragraphs 1 and 2 of the guidance that is pertinent in the appeal before me.

21. Similarly, in *Batool and others (other family members: EU exit)* [2022] UKUT 00219 (IAC), again a Presidential panel, it was decided that an extended family member whose entry and residence was not being facilitated by the United Kingdom before 11 pm GMT on 31 December 2020 and who had not applied for facilitation of entry and residence before that time, cannot rely upon the WA or the Immigration Rules in order to succeed in an appeal under the Immigration (Citizens' Rights Appeals) (EU Exit) Regulations 2020.

22. Having considered both those decisions and their analysis and reasoning, I am in agreement with the conclusions expressed.

23. The FtJ in this case found that the appellant's residence was not being facilitated and that none of the provisions of the WA or the Immigration Rules availed her in her appeal. In that, she was correct. However, the conclusion that the appeal should be allowed because the respondent's decision was "contrary to the spirit of the Withdrawal Agreement and therefore disproportionate" is in error. There was no basis upon which to allow the appeal in terms of the decision being in breach of the "spirit" of the WA.

24. Mr Moksud was not able to advance any answer to the contention that in the light of *Celik* the appeal ought to have been dismissed by the FtJ. That *Celik* was not referred to in the grounds of appeal is, with respect to Mr Moksud, plainly irrelevant.

25. Accordingly, I am satisfied that the decision of the FtJ is marred by error of law. I should say that the FtJ did not have the advantage, which I do, of the guidance in the two cases to which I have referred but that does not avail the appellant. The result of the error of law is inevitably that the FtJ's decision must be set aside. Likewise, the only possible outcome is for the appeal to be dismissed. I re-make the decision and dismiss the appeal accordingly.

***Decision***

26. 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

Upper Tribunal Judge Kopieczek 29/12/2022