IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2022-003232
First-tier Tribunal No:
EA/13247/2021

THE IMMIGRATION ACTS

Heard at Birmingham CJC
On the 15th December 2022

Decision & Reasons Promulgated
On the 21ST February 2023

Before

UPPER TRIBUNAL JUDGE MANDALIA

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

And

DEBORAH IMUETINYAN OMOREGIE
(NO ANONYMITY DIRECTION)

Respondent

Representation:
For the Appellant: Mr F Gazge, Senior Home Office Presenting Officer
For the Respondent: Ms D Papachristopoulou, Refugee and Migrant Centre

DECISION AND REASONS

Introduction

1. The appellant in the appeal before me is the Secretary of State for the Home Department ("SSHD") and the respondent to this appeal is Deborah Omoregie. However, for ease of reference, in the course of this decision I

adopt the parties' status as it was before the FtT. I refer to Ms. Omoregie as the appellant, and the Secretary of State as the respondent.

2. The appellant is a national of Nigeria. She arrived in the UK on 14th September 2019 as a visitor. She claims that soon after her arrival in the UK she met her partner, Isaac Ohene Gyimah ("Mr Gyimah"), an Italian national with pre-settled status. They formed a relationship and in January 2020, they started living together. There is a child of that relationship, who I refer to as [NKG] who was born on 26th May 2021. On 29th April 2021, the appellant submitted an application under the EU Settlement Scheme for leave to remain as an extended family member (durable partner). The respondent refused that application with reference to Appendix EU to the Immigration Rules for reasons set out in a decision dated 26th August 2021. The respondent said:

> "The required evidence of family relationship for an extended relative of a relevant EEA citizen is a valid family permit or residence card issued under the EEA Regulations (or by the Bailiwick of Jersey, the Bailiwick of Guernsey or the Isle of Man) as the extended relative of that EEA citizen and, where the applicant does not have a documented right of permanent residence, evidence which satisfies the Secretary of State that the relationship 1 of 4 continues to subsist.
>
> Home Office records do not show that you have been issued with a family permit or residence card under the EEA Regulations as the extended relative of the EEA national and you have not provided a relevant document issued on this basis by any of the Islands.
>
> In order to meet the definition of an extended relative as set out in Annex 1 of Appendix EU to the Immigration Rules, you need to demonstrate that you are a relative of your sponsor as claimed and that you hold a valid relevant document.
>
> Until you hold such a document you cannot be granted leave under the EU Settlement Scheme as the extended relative of a relevant EEA citizen…."

3. The appellant appealed and her appeal under the Immigration (Citizens' Rights Appeals) (EU Exit) Regulations 2020, was allowed by First-tier Tribunal Judge Juss for reasons set out in a decision promulgated on 5th May 2022.

4. The appellant claims Judge Juss erred in stating, at paragraph [20], that it was uncontested that the appellant and Mr Gyimah are in a relationship. It is said that no concession was made as to the relationship and that is clear from the judge's recording, at paragraph [17] of the decision, of the submission made by the Presenting Officer that the question whether the appellant and her partner are in a genuine and durable relationship remains a live issue. Furthermore, the respondent claims that Judge Juss properly noted, at paragraph [22], that the EUSS rules relating to the grant of leave to remain to durable partners impose a mandatory requirement that the 'the person holds a relevant document as the durable partner of

the relevant EEA citizen'. However, the Judge erred in his consideration of the Withdrawal Agreement and the relevance of 'proportionality'.

5. Permission to appeal to the Upper Tribunal was granted by First-tier Tribunal Judge Cox on 16th June 2022.

The decision of First-tier Tribunal Judge Juss

6. The appellant, and her partner Isaac Ohene Gyimah gave evidence before the First-tier Tribunal. At paragraphs [20] and [21], Judge Juss states:

> "20. First, I have found both witnesses before me to be credible. I find that there are the following uncontested facts: that the Appellant (i) has lived in the UK since 2019; (ii) she has been in a relationship with her partner, Isaac Ohene Gyimah, an Italian national with pre-settled status, (iii) they both now have a child together. And (iv) that they had planned to marry, during the lockdown but were unable to do so because of Covid-19 restrictions. Accordingly on this basis the Appellant has a private life and family life in the UK.
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> 21. Second, that on the basis of the above, the two of them have a genuine and durable relationship between them."

7. Judge Juss noted at paragraph [22] that the EUSS rules relating to the grant of leave to remain to durable partners impose a mandatory requirement that 'the person holds a relevant document as the durable partner of the relevant EEA citizen'. He acknowledged it is not sufficient (or even necessary) to prove that as a matter of fact the person was a durable partner. He noted the appellant's application failed because of the appellant's failure to produce such a document. However, he concluded the imposition of such a requirement in rules that purportedly give effect to the Withdrawal Agreement are in breach of the Withdrawal Agreement, and thus not a lawful requirement. He found, at [23], that in the circumstances, the respondent's decision to refuse the application made by the appellant cannot have been a proportionate one. He said, at [24], that in any event, Article 13(4) of the Withdrawal Agreement provides for discretion to be exercisable in favour of the applicant. Judge Juss then went on to consider how that discretion should be exercised and went on to allow the appeal.

The hearing before me

8. On behalf of the respondent, Mr Gazge adopted the grounds of appeal. He submits Judge Juss noted at paragraph [22] of his decision that the EUSS rules impose a mandatory requirement that 'the person holds a relevant document as the durable partner of the relevant EEA citizen'. He submits Judge Juss noted the appellant's application was refused because she failed to provide the required document. He relies upon the reported decisions of the Upper Tribunal in Celik (EU exit; marriage; human rights) [2022] UKUT 00220 (IAC) and Batool & Ors (other family members: EU

exit) [2022] UKUT 00219 (IAC). Those decisions post-date the decision of First-tier Tribunal Judge Juss and the grant of permission to appeal.

9. Ms Papachristopoulou accepted that Celik and Batool & Ors now pose the appellant's appeal significant difficulties. She applied for an adjournment of the hearing and submitted that the hearing of this appeal should be stayed. She submits the decision of the Upper Tribunal in Celik is the subject of an application for permission to appeal that is now before the Court of Appeal. She was unable to draw my attention to the grounds of appeal being advanced before the Court of Appeal and neither was she able to provide me with any further details about the application before the Court of Appeal, including whether permission to appeal has been granted. I refused the application for an adjournment and stay of this appeal. In the absence of any information regarding the application for permission to appeal before the Court of Appeal let alone confirmation that permission to appeal has been granted by the Court of Appeal, it is not in my judgment in the interests of justice or in accordance with the overriding objective for the hearing of this appeal to be unnecessarily delayed.

10. Ms Papachristopoulou went on to submit that in Celik, the Tribunal was concerned with an individual who had made an application for leave to remain on the basis that he was the spouse of a relevant EEA citizen, and in Batool, the Tribunal was dealing with an extended family member (or other family member). Ms Papachristopoulou submits the appellant is a 'durable partner' and it is unreasonable to expect her to return to Nigeria, where she would have to remain for 6 months, before she could make an application to return to the UK. She acknowledges that it would be open to the appellant to make an application relying upon the 'Exceptional circumstances' provisions set out in GEN.3.2. of Appendix FM of the Immigration Rules. The appellant has not yet made any such application.

Discussion

11. Judge Juss set out his reasons for allowing the appeal at paragraphs [20] to [37] of his decision. I accept, as is clear from what Judge Juss recorded at paragraph [17], that at the hearing of the appeal the respondent's position was that the question of whether there was a genuine and 'durable relationship' was still a live issue. However, as Judge Juss said, at [20], he found the appellant and her partner to be credible. Although I accept that it is ambiguous and could have been better put, I am satisfied the reference to "uncontested facts" in paragraph [20], is a reference to the findings made by the judge rather than facts conceded by the respondent.

12. I accept however that the reported decisions of the Upper Tribunal in Celik (EU exit; marriage; human rights) [2022] UKUT 00220 (IAC) and Batool & Ors (other family members: EU exit) [2022] UKUT 00219 (IAC), that post-date the decision of First-tier Tribunal Judge Juss, do pose significant difficulties for the appellant.

13. At paragraphs [51] to [53], the Upper Tribunal in Celik said:

> "51. Article 3(2) of Directive 2004/38/EC requires Member States to "facilitate entry and residence" for "any other family members" who are dependents or members of the household of the Union citizen; or where serious health grounds strictly require the personal care of the family member by the Union citizen. A person is also within Article 3.2 if they are a "partner with whom the Union citizen has a durable relationship, duly attested". (*my emphasis)* For such persons, the host Member State is required to "undertake an extensive examination of the personal circumstances and shall justify any denial of entry or residence to these people".
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> 52. There can be no doubt that the appellant's residence in the United Kingdom was not facilitated by the respondent before 11pm on 31 December 2020. It was not enough that the appellant may, by that time, have been in a durable relationship with the person whom he married in 2021. *(my emphasis)* Unlike spouses of EU citizens, extended family members enjoyed no right, as such, of residence under the EU free movement legislation. The rights of extended family members arose only upon their residence being facilitated by the respondent, as evidenced by the issue of a residence permit, registration certificate or a residence card: regulation 7(3) and regulation 7(5) of the 2016 Regulations.
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> 53. If the appellant had applied for facilitation of entry and residence before the end of the transition period, Article 10.3 would have brought him within the scope of that Article, provided that such residence was being facilitated by the respondent "in accordance with … national legislation thereafter". This is not, however, the position. For an application to have been validly made in this regard, it needed to have been made in accordance with regulation 21 of the 2016 Regulations. That required an application to be submitted online, using the relevant pages of www.gov.uk, by post or in person, using the relevant application form specified by the respondent; and accompanied by the applicable fee."

14. In paragraph [56] of its decision, the Upper Tribunal went on to say:

> "The above analysis is destructive of the appellant's ability to rely on the substance of Article 18.1. He has no right to call upon the respondent to provide him with a document evidencing his "new residence status" arising from the Withdrawal Agreement because that Agreement gives him no such status. He is not within the terms of Article 10 and so cannot show that he is a family member for the purposes of Article 18 or some other person residing in the United Kingdom in accordance with the conditions set out in Title II of Part 2."

15. If there were any doubt, in Batool & Ors, the Upper Tribunal confirmed:

> "(1) An extended (oka other) family member whose entry and residence was not being facilitated by the United Kingdom before 11pm GMT on 31 December 2020 and who had not applied for facilitation of entry and residence before that time, cannot rely upon the Withdrawal Agreement or the immigration rules in order to succeed in an appeal under the Immigration (Citizens' Rights Appeals) (EU Exit) Regulations 2020.

> (2) Such a person has no right to have any application they have made for settlement as a family member treated as an application for facilitation and residence as an extended/other family member."

16. It is unnecessary to recite the full principles set out in those decisions. As the Upper Tribunal in Celik had pointed out, Article 3 of Directive 2004/38/EC requires member states to facilitate entry and residence for any other family members. In Celik's case, the appellant's residence in the UK was not facilitated by the respondent before the end of the relevant transition period, nor did he apply for such facilitation (64). It was not enough that the appellant may by that time have been in a durable relationship with the person whom he later married in 2021. Unlike spouses of EEA nationals, extended family members enjoyed no such right of residence under the EU free movement legislation and their rights only arose upon their residence being facilitated by the respondent as evidenced by the issue of a residence permit (52).

17. If the appellant had applied for facilitation of entry and residence before the end of the transition period, Article 10.3 of the Withdrawal Agreement would have brought her within the scope of that Article but that was not the case in Celik, nor is it the case in this appeal. As the Tribunal said in Batool, an extended (oka other) family member whose entry and residence was not being facilitated by the United Kingdom before 11pm GMT on 31 December 2020 and who had not applied for facilitation of entry and residence before that time, cannot rely upon the Withdrawal Agreement or the immigration rules in order to succeed in an appeal. The appellant here did not apply for facilitation of entry or residence before the end of the transition period and her residence in the UK was not facilitated by the respondent prior to 11pm on 31 December 2020. Following Batool and Celik, the appellant cannot rely on the Withdrawal Agreement and her appeal was therefore bound to fail.

18. For the reasons given, I satisfied the decision of the First-tier Tribunal is vitiated by a material error of law and must be set aside.

Remaking the decision

19. Ms Papachristopoulou did not seek to persuade me to do anything other than remake the decision in the Upper Tribunal. The appellant arrived in the UK on 14th September 2019 as a visitor and remained in the UK unlawfully when her leave to enter expired. I accept there is a child of the appellant's relationship with Mr Gyimah born on 26th May 2021. The post-EU exit transition period ended at 11pm GMT on 31 December 2020.

20. Judge Juss found the appellant (i) has lived in the UK since 2019; (ii) she has been in a relationship with her partner, Isaac Ohene Gyimah, an Italian national with pre-settled status, (iii) they both now have a child together, and (iv) that they had planned to marry during the lockdown but were unable to do so because of Covid-19 restrictions. The appellant submitted an application on 29th April 2021, under the EU Settlement Scheme for

leave to remain as an extended family member (durable partner). There can however be no doubt the appellant's residence in the United Kingdom was not facilitated by the respondent before 11pm on 31 December 2020. As the Tribunal held in Celik, it was not enough that the appellant may, by that time, have been in a durable relationship. It follows the appellant is not within the scope of Article 10 of the Withdrawal Agreement.

21. As to any Article 8 claim, the circumstances here are the same as those discussed at [97] and [98] of Celik where the Tribunal ultimately said that *"if the appellant now wishes to claim that he should be permitted to remain in the United Kingdom in reliance on Article 8, he can and should make the relevant application, accompanied by the appropriate fee*".

22. For all those reasons it follows that the decision in the appellant's appeal should simply be re-made by dismissing the appeal.

Notice of Decision

23. **The making of the decision of First-tier Tribunal Judge Juss involved an error on a point of law and his decision is set aside.**

24. **The decision is remade and the appellant's appeal is dismissed.**

Signed V. Mandalia Date 16th December 2022

Upper Tribunal Judge Mandalia