Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: UI-2022-002554**
EA/13357/2021

THE IMMIGRATION ACTS

Heard at Field House
On the 14 October 2022

Decision & Reasons Promulgated
On the 23 January 2023

Before

UPPER TRIBUNAL JUDGE RIMINGTON

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

DAVID MIRAKA
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:
For the Appellant: Mr C Avery, Senior Home Office Presenting Officer
For the Respondent: Mr M McGarvey instructed by Justice & Rights Law Firm Ltd

DECISION AND REASONS

1. The application for permission to appeal was made by the Secretary of State but nonetheless I shall refer to the parties as they were described in the First-tier Tribunal, that is Mr David Miraka the appellant, and the Secretary of State the respondent.

2. The Secretary of State appeals against the decision of First-tier Tribunal Judge Beg who allowed the appellant's appeal under paragraph EU14 of Appendix EU of the Immigration Rules on 1st February 2022. The appellant, a citizen of Albania born in November 1992, appealed against the decision of the Secretary of State dated 15th September 2021 refusing him settled or pre-settled status under the EU Settlement Scheme as the spouse of an EEA citizen. The appellant made the application on 20th June 2021 under the EU Settlement Scheme ("EUSS").

3. The grounds for permission of appeal submitted that the judge had made a material misdirection of law on a material matter. The judge had failed to correctly consider whether the appellant satisfied the requirements of Appendix EU at the correct date. The specified date was 31st December 2020 as defined in Annex 1 of Appendix EU.

4. At [19] of the determination the judge stated the following:

> *"The couple married on 16 June 2021, within the grace period. I accept Mr McGarvey's submissions that the couple's intention to marry is in itself 'other significant evidence' of a durable relationship. It is common ground that the sponsor was lawfully present in the United Kingdom at the end of the transition period".*

5. It is asserted that the judge had incorrectly treated the grace period which ended on 31st June 2021 as extending the time in which the appellant is able to become lawfully resident under the Immigration (European Economic Area) Regulations 2016.

6. The Secretary of State submitted that all the grace period did was to extend the period in which those who satisfied the requirements of the EEA Regulations as at the specified date, 31st December 2020, would have their applications accepted. Page 34 of the EU Settlement Scheme: EU, other EEA and Swiss citizens and their family members, version 15 published for Home Office staff on 9th December 2021 states the following (emphasis added):

> *"30 June 2021 was the end of the grace period, during which an EEA citizen lawfully resident in the UK by virtue of the EEA Regulations at the end of the transition period at 11pm on 31 December 2020 (or with the right of permanent residence by virtue of them) and their family members could continue to rely on those EU law rights pending the final outcome of an application (and of any appeal) to the EU Settlement Scheme made by them by 30 June 2021. For the time being, you will give applicants the benefit of the doubt in considering whether, in light of information provided with the application, there are reasonable grounds for their failure to meet the deadline applicable to them under the EU Settlement Scheme, unless this would not be reasonable in light of the particular circumstances of the*

case. Any change in approach will be reflected in a revision of this guidance".

7. The grounds noted that the judge found at [19] of the determination that *"... there is no credible evidence before me that the couple were in a durable relationship prior to the specified date"*. In any event, the appellant was never provided with a residence card that accepted him as satisfying the requirements of Regulations 8(5) or 17(6) of the Immigration (European Economic Area) Regulations 2016 prior to the specified date. Therefore, as the appellant married on 15th June 2021, it was submitted that the appellant was not a family member of an EU national on 31st December 2020 and did not have any rights that are to be protected under the EUSS Scheme.

8. As a result, it was submitted that the judge should have dismissed the appeal due to the appellant not being a family member of an EEA national as at 31st December 2020 and therefore was unable to satisfy the requirements of paragraph EU14 of Appendix EU of the Immigration Rules.

9. Permission to appeal was granted on 3rd May 2020, noting that the judge may have wrongly treated the grace period as extending the time period in which the appellant was able to be lawfully resident (see [19]). The grant also observed that the judge did not explain why she considered that the intention to marry meant that at 31st December 2020 the appellant was the family member of an EEA citizen.

10. A Rule 24 response was submitted by the appellant which pointed to [11] of the determination stating as follows:

> *"Article 4 of the preamble of the withdrawal agreement notes that the United Kingdom shall ensure compliance with paragraph 1 including as regards the required powers of its judicial and administrative authorities to address inconsistent or incompatible domestic provisions through domestic primary legislation. The provisions of the agreement are to be interpreted in conformity with the relevant case law of the court of justice of the European Union handed down before the end of the transition period".*

11. It was submitted that the judge's finding related to the respondent's decision in terms of proportionality and that the decision to refuse the appellant under the residence scheme Immigration Rules was disproportionate under EU law in terms of the case of **R (Lumsdon)** [2015] UKSC 41**.**

12. It was also noted that **R (Lumsdon)** stated that "the way in which the principle of proportionality is applied in EU law depends to a significant extent upon the context". The Rule 24 notice explored the principles of proportionality under EU law contrasting with the European Convention on Human Rights. It was submitted that issues of proportionality had arisen most often in relation to national measures taken in reliance upon

provisions in the treaties or other EU legislation recognising permissible limitations to the fundamental freedoms.

13. Article 13(4) of the Withdrawal Agreement provided for a discretion to be exercised in favour of the appellant and the respondent's decision did not acknowledge that there was a discretion which should be considered taking into account all material matters. The failure to exercise discretion rendered the decision proportionate under the withdrawal agreement and that Article 18(r) of the withdrawal agreement drew a distinction between the legality and the facts and circumstances of the decision.

14. It was submitted by the appellant's representative that the determination of Judge Beg disclosed no material error of law.

The Hearing

15. Mr Avery submitted that Judge Beg allowed the decision by misinterpreting the grace period allowing the applicant to make an application. He submitted this case was on all fours with **Celik** and the appellant could only benefit from the grace period if, before the specified date, he had a specified status and the findings of the judge precluded that. The application was made in June 2021 after the specified date and the judge made a specific finding that there was no durable relationship. After the specified date, EU law had for these purposes been repealed. The only possible way the appellant could take himself into any consideration was if he could establish, he had some status and he could not. Mr Avery stated that the Rule 24 response did not assist if the appellant had no avenue in relation to free movement.

16. Mr McGarvey added that the respondent's decision did not acknowledge that there was a discretion which could and should have been considered taking into account all material matters. The failure to exercise a discretion rendered the decision disproportionate under the withdrawal agreement.

17. At the hearing I made clear that I found that there was a material error of law and invited submissions on remaking.

Analysis

18. The judge set out the relevant facts at [12] stating that the appellant and sponsor married on 15th June 2021. The judge identified that was after the specified date, which is 31st December 2020. The judge also noted at [19] that:

> *"There is no credible evidence before me the couple were in a durable relationship prior to the specified date. There is no credible evidence that the couple lived together in a relationship akin to marriage for two years. I do not find it credible that they were living together from January 2020 having only met at the*

end of December 2019. The sponsor said that she was aware that the appellant had entered the United Kingdom illegally".

19. At [20] it was found that the couple had decided to marry before 31st December 2020 but that they did not.

20. The judge at [2] reflected the respondent's refusal that the marriage certificate was dated 15th June 2021 but this, as stated in the refusal letter, confirmed that the appellant had not provided sufficient evidence to confirm he was a family member of the EEA citizen prior to the specified date as defined in Annex 1 of Appendix EU (23.00 hours GMT on 31st December 2020). Clearly as the marriage certificate was dated after 31st December 2020 the appellant did not meet the requirements of being a spouse of an EEA citizen by the specified date.

21. On the judge's reasoning which was not challenged by the appellant in the Rule 24 response, it is clear that the appellant was not living in the UK in accordance with the EEA Regulations as a durable partner as at the specified date. Intention to marry does not support the contention that the appellant was living in a durable relationship at the relevant time particularly as the judge found no credible evidence that they were in a durable relationship before the specified time.

22. With reference to EU14 under the definition of 'family member of a relevant EEA citizen' it is identified that the applicant must be

'(a) The spouse of civil partner of a relevant EEA citizen, and:

(i) The marriage was contracted or the civil partnership was formed **before the specified date** *[31st December 2020]*; or

(ii) The applicant was the durable partner of the relevant EEA citizen before the specified date'

23. The deadline given by the respondent for people already in the United Kingdom to apply under the EU Settlement Scheme was 30th June 2021, also known as the grace period, but this applies to those who were living in accordance with the EEA Regulations *as at that date*. The appellant was doing neither. By the specified date he was neither married nor on the findings of the judge in a durable relationship. The marriage between the sponsor and the appellant did not take place until after the specified date.

24. The Upper Tribunal issued guidance on the application of the EU withdrawal agreement in **Celik (EU exit, marriage, human rights) [2022] UKUT 00220**:

"(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".

25. Notwithstanding the appellant's apparent intended desire to marry before the specified date, he does not fall within Article 10 of the withdrawal agreement and therefore cannot be assisted by Article 18.1(r). At [52] to [57] of **Celik** the panel rejected the argument that Article 10(3) applied to someone who was not married prior to the 31st December 2020 or who was not in a durable relationship that was duly attested before the same period, or had made an application on that basis; consequently the panel found the principle of proportionality at 18(r) and more importantly 18.1 generally cannot be relied upon in these circumstances.

26. At the hearing Mr McGarvey drew my attention to [62] of **Celik**,

"62. Ms Smyth submitted at the hearing that, since the appellant could not bring himself within Article 18, sub-paragraph (r) simply had no application. Whilst we see the logic of that submission, we nevertheless consider that it goes too far. The parties to the Withdrawal Agreement must have intended that an applicant, for the purposes of sub-paragraph (r), must include someone who, upon analysis, is found not to come within the scope of Article 18 at all; as well as those who are capable of doing so but who fail to meet one or more of the requirements set out in the preceding conditions".

27. Not only did the appellant not fall within the definition of Article 9, to whom Article 10 applies but in this instance the appellant was not even recognised as being in a durable relationship, with or without a document, and thus could not fall within the definition of Article 3(2) of the Directive *prior* to 31st December 2020. He did not have a residence card attesting to such a relationship and had not applied. On the findings of the judge he was not indeed in a durable relationship as at the specified date. The post

decision evidence of marriage does not assist in these circumstances. As such, there is no route available to the appellant to benefit from any form of 'discretion' by the Secretary of State and proportionality in relation to the Withdrawal Agreement and proportionality in relation to EU law, (as referenced in **R (Lumsdon)**) does not avail the appellant.

28. For the reasons given I find that the judge erred materially, not least in giving contradictory findings, by stating in a repeat paragraph 19:

> *"The couple married on 16 June 2021, within the grace period. I accept Mr McGarvey's submissions that the couple's intention to marry is in itself 'other significant evidence' of a durable relationship. It is common ground that the sponsor was lawfully present in the UK at the end of the transition period".*

29. On the judge's own findings at the earlier [19], by the relevant date, which is key, the appellant was not in a durable relationship. Intention to marry may be evidence of a durable relationship but is not definitive of it and in this context does not render the relationship a 'durable relationship'.

30. On the basis of the above I set aside the conclusions of the First-tier Tribunal decision where the judge states that the appellant meets the requirements of EU14 at the relevant date and re-make the decision by dismissing the appeal. The appellant had no rights protected under the EU Settlement Scheme or Withdrawal Agreement as he could not fulfil the relevant criteria.

31. The Judge erred materially for the reasons identified. I set aside the decision pursuant to Section 12(2)(a) of the Tribunals Courts and Enforcement Act 2007 (TCE 2007), preserving the first paragraph 19 of that decision and remake the decision under section 12(2) (b) (ii) of the TCE 2007.

32. The appeal of Mr Miraka is dismissed.

No anonymity direction is made.

Signed Helen Rimington Date 15th November 2022

Upper Tribunal Judge Rimington

TO THE RESPONDENT
FEE AWARD

I have dismissed the appeal and therefore there can be no fee award.

Signed Helen Rimington Date 15th November 2022

Upper Tribunal Judge Rimington