Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: UI-2022-003671
EA/14350/2021

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 25 November 2022	**On 8 January 2023**

Before

UPPER TRIBUNAL JUDGE RINTOUL
DEPUTY UPPER TRIBUNAL JUDGE CHANA

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

NIK CANI
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:
For the Appellant: Ms S Cunha, Senior Home Office Presenting Officer
For the Respondent: Mr Jafar instructed by Norton Folgate Solicitors

DECISION AND REASONS

1. The Secretary of State appeals with permission against the decision of First-tier Tribunal Judge Head, promulgated on 10 May 2022, allowing the respondent's appeal against a decision by the Secretary of State made on 27 September 2021 to refuse to his application for status under the EU Settlement Scheme ("EUSS").

Background

2. The respondent's now wife ("the sponsor") arrived in the United Kingdom on 15 September 2016, the sponsor arrived in the UK. The respondent arrived on 2 July 2019. They met in July 2020. The couple started dating and moved in together in October 2020. The couple intended to marry; however, they were unable to apply for notice of marriage until April 2021, due to Covid-19 restrictions. The couple were eventually able to marry on 16 June 2021. The respondent made his application under the EU Settlement Scheme (EUSS) the following day. The application was refused on 27 September 2021.

3. The Secretary of State refused the application for the reasons set out in the refusal letter dated 27 September 2021. She refused the application for both settled and pre settled status on the basis that the respondent did not satisfy the requirements of Rule EU 11 of Appendix EU as he was not married to the sponsor prior to the 'specified date' of the 31 December 2020 and therefore, as he was not the spouse of an EEA national, he was not a qualifying family member of an EEA national at the relevant time. The Secretary of State concluded that the respondent had failed to provide a residence card/ family permit to indicate that he was the durable partner of his sponsor at the relevant time.

4. The Secretary of State was not represented at the hearing before the First-tier Tribunal. The judge found [9] that the respondent and sponsor are a genuine couple and were in a durable relationship at the relevant date, their subsequent marriage being indicative of this. She found both to be credible witnesses [15] and accepted their evidence. Having directed herself as to the relevant part of the EUSS [17], the judge noted [21] that it was accepted that the respondent was not a spouse at the specified date (31 December 2020) and found [23] that they would have marred before that date but for the Covid 19 pandemic. She found also [25] that the respondent was the durable partner of an EEA citizen on and before 31 December 2020.

5. The judge found [28], however, that the respondent did not meet the definition of "durable partner" within Appendix EU as he did not have the relevant residence document.

6. The judge then turned to the Withdrawal Agreement; and, after setting out the relevant provisions found [35] that the sponsor came within Article 10 (1)(e), finding [38] that in all the circumstances, given that the Withdrawal Agreement was in part designed to protect the rights of EEA nationals and their families, that the decision to refuse the respondent's application was disproportionate [38].

Grounds of appeal

7. The Secretary of State sought permission to appeal on the grounds that the judge had erred in law as:

(i) The Withdrawal Agreement did not provide the respondent with applicable rights; he did not come within article 10 (1)(e) as he was not residing in accordance with EU law as at 31 December 2020, as his residence had not been facilitated under the relevant national legislation nor had he a pending application for that as at that date.

(ii) As the respondent did not come within the personal scope of the Withdrawal Agreement, there was no entitlement to the full range of judicial redress set out in article 18 (1)(r), including the requirement that the decision is proportionate.

Submissions

8. Ms Cunha relied on the grounds submitting that this case fell to be decided in line with Celik (EU exit: marriage, human rights) [2022] UKUT 220. She submitted further that all the respondent had been entitled to under Directive 2004/38 ("the Citizenship Directive") was to have her residence facilitated under the relevant national legislation, pursuant to article 3.2 of the Directive. She submitted the judge had erred in concluding that the respondent benefited from the Withdrawal Agreement.

9. Mr Jafar relied on his skeleton argument, submitting that this appeal can be distinguished from Celik on two grounds: first, as the respondent's wife is a beneficiary of the Withdrawal Agreement; and, there was now evidence that the Covid Pandemic lockdown had prevented the couple from marrying. He submitted further that Secretary of State had, contrary to articles 18(1) (e) and (f) of the Withdrawal Agreement, not made transparent the process through which those in durable relationships could secure their rights, in that she had not explained that they could make an application for a relevant document, pending marriage. Thus, having breached the Withdrawal Agreement, the respondent was entitled to rely on proportionality.

The Law

10. The legal framework relating to cases such as this is set out in Celik at paragraph 20. There is no purpose served in setting that out in full here. We do however consider that, given the submissions made, that it is appropriate to consider the provisions set out below.

11. The Immigration (Citizens Rights Appeals) (EU Exit) Regulations 2020 (SI 2020/61) grant a right of appeal to those refused status under EUSS. The permissible grounds of appeal are set out in reg. 8 and provide, so far as is relevant:

> **Reg. 8 - Grounds of appeal**
>
> (1) An appeal under these Regulations must be brought on one or both of the following two grounds.

(2) The first ground of appeal is that the decision breaches any right which the appellant has by virtue of-"

(a) [Chapter 1, or Article 24(2), 24(3), 25(2) or 25(3) of Chapter 2] , of Title II [, or Article 32(1)(b) of Title III,] of Part 2 of the withdrawal Agreement,

(3) The second ground of appeal is that-"

(a) where the decision is mentioned in regulation 3(1)(a) or (b) or 5, it is not in accordance with the provision of the immigration rules by virtue of which it was made;

(b) where the decision is mentioned in regulation 3(1)(c) or (d), it is not in accordance with residence scheme immigration rules;

(c) where the decision is mentioned in regulation 4, it is not in accordance with section 76(1) or (2) of the 2002 Act (as the case may be);

(d) where the decision is mentioned in regulation 6, it is not in accordance with section 3(5) or (6) of the 1971 Act (as the case may be) [;]

The host Member State shall undertake an extensive examination of the personal circumstances and shall justify any denial of entry or residence to these people.

…

Discussion

12. The respondent seeks to distinguish Celik from the facts of this case. For the reasons set out below nothing in Mr Jafar's submissions has persuaded us that we ought in any way to depart from the Upper Tribunal's analysis of the law as set out in Celik at paragraphs [44] to [60].

13. Stepping back from the particular facts of this appeal, we observe that the effect of the Withdrawal Agreement was, to take a snapshot of the rights of those concerned, be that EEA nationals or their dependents as they were at 23.00 on 31 December 2020 and to preserve them; who is covered is set out in article 10 of the Withdrawal Agreement, and the means by which those preserved rights are to be documented and preserved are set out in the subsequent articles.

14. In that context, we note that as a matter of law, and following (see SSHD v Aibangbee [2019] EWCA Civ 339 and Rahman [2012] EUECJ C-83/11 the respondent had no rights under the EEA Regulations or EU law as at 22.59 on 31 December 2020, save for the right to have his residence facilitated and only then after an extensive examination of the circumstances. He had not made such an application. Despite that, is argued on his behalf, that he is covered by the Withdrawal Agreement as that applies to his now wife.

15. We accept that the respondent's wife is, as a citizen of an EEA state, within the scope of article 10 of the Withdrawal Agreement. That is not in doubt.

But it does not follow, as Mr Jafar submitted, that her rights under that agreement encompass a right to be joined by a durable partner who is not also an EEA national. That is not what the Withdrawal Agreement provides. Article 10 defines the persons to whom Part Two of the agreement applies and what the respondent cannot point to is any provision conferring the right of a person who falls within article 10 to be joined by a beneficiary as defined in article 3.2 of the Citizenship Directive. If that was what was intended, then it would be in the Agreement; articles 10.1 (g), 10.2 and 10.3 would redundant and article 10 would not be structured in the way it is.

16. The respondent's position is no different from the appellant in Celik about which the Upper Tribunal held:

> 46. Part 2 of the Withdrawal Agreement makes provision in relation to citizens' rights. Article 10 sets out who is within scope of Part 2. That Part includes Article 18, upon which the appellant seeks to rely. Article 18.1 refers to "Union citizens... their respective family members and other persons, who reside in" the territory of the host State "in accordance with the conditions set out in this Title".
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> 47. "Family members "are defined in Article 9 in such a way that it is, for example, insufficient for a person merely to meet sub-paragraph (1) of the definition by reason of being the spouse of a Union citizen (Article 2(2)(a)) of Directive 2004/38/EC). The opening words of the definition of "family members" also require the person concerned to "fall within the personal scope provided for in Article 10" of the Withdrawal Agreement.
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> 48. The appellant is not a family member to whom Part 2 of the Withdrawal Agreement applies. He was not a person who, in the words of Article 10.1(e)(i), resided in the United Kingdom in accordance with Union law before 11pm on 31 December 2020 and who continues to reside here afterwards. Nor does he fall within the scope of Article 10.1(e)(ii) or (iii).
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> 49. By the same token, the appellant is not a person who falls within Article 10.1(f), as he was not someone who resided in the United Kingdom in accordance with Articles 12, 13, 16(2), 17 and 18 of Directive 2004/38/EC before the end of the transition period. Broadly speaking, those provisions relate to retained rights of residence and rights of permanent residence, none of which are relevant in the appellant's case.
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> 50. Accordingly, the only way the appellant can bring himself within the scope of Part 2 and, thus, Article 18, is if he can fall within Article 10.2. To reiterate, this provides as follows:
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> > "2. Persons falling under points (a) and (b) of Article 3(2) of Directive 2004/38/EC whose residence was facilitated by the host State in accordance with its national legislation before the end of the transition period in accordance with Article 3(2) of that Directive shall retain their right of residence in the host State in accordance with this Part, provided that they continue to reside in the host State thereafter."

17. Further, although there is a finding in this case that the marriage did not take place owing to the pandemic, that does not assist the respondent. As was held in Celik at [67] and [68], the principle of fairness cannot assist the respondent as it did not give a judge power to disregard the Withdrawal Agreement.

18. There is no merit in the submission that article 18 (1) (e) or (f) of the Withdrawal Agreement assist the respondent. Those provisions apply to applications under the EUSS; it cannot be argued that, even were article 18 applicable to the respondent, they apply to the process by which those in durable relationships should be simple because those applications are made under an entirely different piece of legislation not covered by the Withdrawal Agreement which is concerned with the processing of providing documentation or status to those who had rights under EU law as at 31 December 2020, not with applications pursuant to the Immigration (European Economic Area) Regulations 2016.

19. Turning finally to proportionality, we see no reason to depart from the observation in Celik at [65] that the principle cannot be used to rewrite the clear terms of the agreement.

20. In any event, and even were it not for the reasoning in Celik, we bear in mind that, here, we are dealing with proportionality in its EU law sense. As noted in R (Lumsdon & ors) v Legal Services Board [2015] UKSC 41 at [25], the principle applies only to measures interfering with protected interests which includes the fundamental freedoms guaranteed by the EU treaties. Here, however, the respondent had no rights under the Treaties, save to have his right to reside facilitated, on application, and under national legislation. He chose not to make that application.

21. For these reasons, we find no reason to depart from the reasoning in Celik which we adopt and endorse. We find therefore that the decision to allow the appeal on the basis that the decision was disproportionate was wrong in law and we set it aside on that basis. In the light of our findings as to the law, we remake the appeal by dismissing it as the respondent did not meet the requirements of the relevant immigration rules, nor did it breach any of his rights under the Withdrawal Agreement.

Notice of Decision

1. The decision of the First-tier Tribunal involved the making of an error of law and we set it aside.

2. We remake the decision by dismissing it on all grounds.

Signed Date: 29 December 2022

Jeremy K H Rintoul

Upper Tribunal Judge Rintoul