IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2022-003205
First-tier Tribunal No:
EA/14492/2021

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On the 10 March 2023

Before

UPPER TRIBUNAL JUDGE SMITH
DEPUTY UPPER TRIBUNAL JUDGE CHAPMAN

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

YLVI SHEHU

Respondent

Representation:
For the Appellant: Mr D Clarke, Senior Home Office Presenting Officer
For the Respondent: Mr T Wilding, Counsel instructed by A J Jones solicitors

Heard at Field House on 9 January 2023

DECISION AND REASONS

1. This is an appeal by the Secretary of State. For ease of reference, we refer to the parties as they were before the First-tier Tribunal. The Respondent appeals against the decision of First-tier Tribunal Judge J M McKinney promulgated on 5 May 2022 ("the Decision"). By the Decision, the Judge allowed the Appellant's appeal against the Respondent's decision dated 4 October 2021 refusing his application for pre-settled status under the EU Settlement Scheme ("EUSS").

2. The Appellant is a national of Albania. He seeks to remain in the UK with his spouse who is an Italian national with settled status in the UK ("the Sponsor"). Although the Appellant and Sponsor are now married, they did not marry until after the date specified in the withdrawal agreement between the UK and EU ("the Withdrawal Agreement") of 2300 GMT on 31 December 2020. They were unable to marry before that date due to the Covid-19 pandemic.

3. The Appellant did not make an application to remain as a durable partner prior to the specified date under the Immigration (European Economic Area) Regulations 2016 ("the EEA Regulations"). The Respondent refused the Appellant's EUSS application on the basis that he did not hold a relevant document as a durable partner under the EEA Regulations and could not therefore qualify as a family member under the EUSS. The only decision under appeal is a refusal under the EUSS. The only grounds of appeal available to the Appellant are that the refusal is not in accordance with the Immigration Rules relating to the EUSS ("Appendix EU") or not in accordance with the Withdrawal Agreement.

4. Although the Appellant also raised a ground of appeal that the Respondent's decision breaches the Appellant's Article 8 rights, he has never made an application in that regard nor is there any refusal of a human rights claim. The Judge concluded that she could not consider Article 8 ECHR as there had not been any section 120 notice (following the Court of Appeal's decision in Amirteymour v Secretary of State for the Home Department [2017] EWCA Civ 353). Whether reliance on Amirteymour is the correct approach following this Tribunal's decision in Celik (EU exit; marriage; human rights) [2022] UKUT 00220 (IAC) ("Celik") is not something we have to decide. As Mr Wilding fairly accepted, this would amount to a "new matter" and the Respondent's consent would be required in order for it to be considered. Consent had not been and was not sought.

5. It was accepted between the parties that the Appellant could not meet Appendix EU because he had never been recognised as a durable partner under the EEA Regulations. Mr Wilding accepted before us that the Appellant does not fall within the categories of person under Article 10 of the Withdrawal Agreement ("Article 10"). The Judge made plain at [39] of the Decision that she did not consider that the Appellant fell within the scope of that article. The Judge accepted that the Appellant was in a durable relationship with the Sponsor; indeed, that much was conceded by the Respondent ([20] of the Decision). The Judge went on to consider whether the Respondent's decision was proportionate under Article 18.1(r) of the Withdrawal Agreement ("Article 18.1(r)"). Following consideration of that issue at [28] to [37] of the Decision, she concluded that it was not. She therefore allowed the appeal on the basis that the Respondent's decision breached the Withdrawal Agreement.

6. The Respondent appealed the Decision on the basis that the Judge misdirected herself "by failing to properly consider the provisions of the

Withdrawal Agreement, when allowing the Appellant's appeal". Her case is that "the Withdrawal Agreement provides no applicable rights to a person in the Appellant's circumstances" and the Appellant is not "within the personal scope of the Withdrawal Agreement". It is asserted that, as the Appellant is not within the personal scope of the Withdrawal Agreement, "there is no entitlement to the full range of judicial redress" which includes Article 18.1(r). The Respondent therefore submits that the Judge "materially erred in law by finding that the decision to refuse leave to remain is a disproportionate decision under the Withdrawal Agreement, whilst simultaneously finding that the Appellant does not fall to be someone who is afforded the protection that the Withdrawal Agreement provides".

7. Permission to appeal was granted by First-tier Tribunal Judge Karbani on 23 May 2022 on the basis that the Decision "is arguably contradictory or he [sic] has provided inadequate reasons and therefore there is a material arguable error of law." The Appellant provided a Rule 24 Reply. Although that is dated 24 July 2022, we could find no record of it being filed. However, Mr Wilding provided us with a copy in the course of the hearing without objection from Mr Clarke and we have had regard to it when considering the appeal.

8. The matter came before us to determine whether the Decision contains an error of law. If we find that it does, we then have to decide whether to set aside the Decision in consequence. If we set aside the Decision, we must then either remit the appeal to the First-tier Tribunal for re-determination or re-make the decision in this Tribunal.

9. We had before us the core documents relevant to the challenge to the Decision, the Rule 24 Reply as referred to above and the Appellant's and Respondent's bundles before the First-tier Tribunal. As the appeal does not involve any dispute of fact, we have no need to refer to the documents in those bundles.

DISCUSSION

Error of Law

10. Both parties accepted that the Tribunal's guidance in Celik is relevant to this appeal. The Respondent's grounds, the Decision and the Rule 24 Reply all pre-date that guidance and it is therefore appropriate to begin with that guidance and what the Tribunal has to say about, in particular Article 18.1(r).

11. The headnote in Celik reads as follows:

> "(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.
>
> …"

12. Mr Wilding relied on the part of the Tribunal's decision which deals with Article 18.1(r) itself (at [61] to [66]). However, in order to understand what is said in particular at [62] on which paragraph Mr Wilding placed particular reliance, it is necessary to set this passage in the context of what precedes it at [56] to [60]. The whole of that part of the decision reads as follows:

> "56. 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.
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> 57. The appellant's attempt to rely on his 2021 marriage to an EU citizen is misconceived. EU rights of free movement ended at 11pm on 31 December 2020, so far as the United Kingdom and the present EU Member States are concerned. The Withdrawal Agreement identifies large and important classes of persons whose positions in the host State are protected, following the end of the transition period. The appellant, however, does not fall within any such class.
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> 58. It is not possible to invoke principles of EU law in interpreting the Withdrawal Agreement, save insofar as that Agreement specifically provides. This is apparent from Article 4(3). It is only the provisions of the Withdrawal Agreement which specifically refer to EU law or to concepts or provisions thereof which are to be interpreted in accordance with the methods and general principles of EU law. EU law does not apply more generally.
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> 59. We agree with Ms Smyth's submission that the clarity provided by Article 10 of the Withdrawal Agreement reflects the intention of the United Kingdom and the EU that the Agreement should ensure an orderly withdrawal of the UK; protect only those United Kingdom and EU citizens who were exercising free movement rights before a specific date (see the 6th recital); and provide legal certainty to citizens and economic operators as well as to judicial and administrative authorities (see the 7th recital).
>
> 60. Sub-paragraphs (a) to (d) of Article 18 make specific provision for late submission of an application for a new residence status. One looks

in vain in Article 18 and elsewhere in the Withdrawal Agreement for anything to the effect that a person who did not meet the relevant requirements as at 11pm on 31 December 2020 can, nevertheless, be treated as meeting those requirements by reference to events occurring after that time. If that had been the intention of the United Kingdom and the EU, the Withdrawal Agreement would have so specified. Article 31 of the Vienna Convention on the Law of Treaties (1969) requires a treaty to be 'interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose'. It would plainly be contrary to the Vienna Convention to interpret the Withdrawal Agreement in the way for which the appellant contends.

(2) The appeal to proportionality: Article 18.1(r)

61.The appellant places great reliance on Article 18.1(r) of the Withdrawal Agreement. As we have seen, this gives a right for 'the applicant' for new residence status to have access to judicial redress procedures, involving an examination of the legality of the decision as well as of the facts and circumstances on which the decision is based. These redress procedures must ensure that the decision 'is not disproportionate'.

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.

63. The nature of the duty to ensure that the decision is not disproportionate must, however, depend upon the particular facts and circumstances of the applicant. The requirement of proportionality may assume greater significance where, for example, the applicant contends that they were unsuccessful because the host State imposed unnecessary administrative burdens on them. By contrast, proportionality is highly unlikely to play any material role where, as here, the issue is whether the applicant falls within the scope of Article 18 at all.

64. In the present case, there was no dispute as to the relevant facts. The appellant's residence as a durable partner was not facilitated by the respondent before the end of the transitional period. He did not apply for such facilitation before the end of that period. As a result, and to reiterate, he could not bring himself within the substance of Article 18.1.

65. Against this background, the appellant's attempt to invoke the principle of proportionality in order to compel the respondent to grant him leave amounts to nothing less than the remarkable proposition that the First-tier Tribunal Judge ought to have embarked on a judicial

re-writing of the Withdrawal Agreement. Judge Hyland quite rightly refused to do so.

66. We also agree with Ms Smyth that the appellant's interpretation of Article 18.1(r) would also produce an anomalous (indeed, absurd) result. Article 18 gives the parties the choice of introducing 'constitutive' residence schemes: see Article 18.4. Article 18.1(r) applies only where a State has chosen to introduce such a scheme. If sub-paragraph (r) enables the judiciary to re-write the Withdrawal Agreement, this would necessarily create a divergence in the application of the Withdrawal Agreement, as between those States that have constitutive schemes and those which do not. This is a further reason for rejecting the appellant's submissions."

13. Mr Clarke understandably relied on the headnote of Celik, the facts of which are to all intents and purposes the same as in this appeal. Mr Wilding, as we have already noted, argues that the Tribunal in Celik left open the possibility that Article 18.1(r) could apply to a person in the Appellant's situation by what is said in particular at [62] of the decision. He also submitted that the Respondent must fail since her submission was that Article 18.1(r) could not apply at all and that submission did not find favour with the Tribunal in Celik as could be seen from [62] of the decision.

14. We consider that Mr Wilding's submission itself goes too far. First, we do not consider that the Respondent's grounds are limited in the way that he suggested. The Respondent's overall submission is that the Judge misdirected herself by allowing the appeal in reliance on proportionality. That is capable of being a submission that Article 18.1(r) did not provide a reason to allow the appeal even if it applied as well as a submission that it does not apply at all. Second, we consider that Mr Wilding's submission misunderstands what is said at [62] of Celik. The point there made by the Tribunal is that there must be a redress procedure in order to determine whether Article 18 (and the Withdrawal Agreement more generally) applies even where the Respondent says that it does not as well as one to consider the substance of the Withdrawal Agreement where it is accepted to apply.

15. Further, this must be what was meant by the Tribunal given what is said in particular at [58] to [60] of the decision in Celik. As Mr Clarke pointed out, Article 18.1 (r) has to be read along with the first part of that Article which reads as follows:

"*Article 18*

Issuance of residence documents

1. The host State may require Union citizens or United Kingdom nationals, their respective family members and other persons, who reside in its territory in accordance with the conditions set out in this Title, to apply for a new residence status which confers the rights under this Title and a document evidencing such status which may be in a digital form.

> Applying for such a residence status shall be subject to the following conditions:
>
> …"
>
> [our emphasis]

16. Article 18 falls under Title II of Part Two which is entitled "Citizens' Rights". The "personal scope" of this part of the Withdrawal Agreement is set out at Article 10. We do not need to set that out in full. The only possible categories under which the Appellant could fall are at Article 10.2 and 10.3 as follows:

> "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.
>
> 3. Paragraph 2 shall also apply to persons falling under points (a) and (b) of article 3(2) of Directive 2004/38/EC who have applied for facilitation of entry and residence before the end of the transition period, and whose residence is being facilitated by the host State in accordance with its national legislation thereafter."

17. As we have already noted, the Appellant accepts, and the Judge found that the Appellant could not fall within scope of Article 10. Title II of the same part of the Withdrawal Agreement has to be read in that context.

18. As the Tribunal also pointed out at [2] of the headnote in Celik, the concept of proportionality cannot be invoked to create a substantive right where none otherwise exists. We asked Mr Wilding several times how the Appellant could rely on what is self-evidently a procedural provision to found a substantive right. He was unable to provide us with any satisfactory answer. He insisted that the Respondent's decision had to be proportionate but as we pointed out, in order to make good that submission, he had to explain the context of the proportionality assessment. He submitted that the decision was disproportionate when considered against the Sponsor's rights and that the Appellant has established that he is the durable partner of the Sponsor. However, the Sponsor's rights to have her partner reside with her in the UK depends on whether he is within the category of family members or other persons in Article 10. The argument is circular. As the Tribunal pointed out at [58] of Celik, the Appellant cannot rely on general principles of EU law to interpret the Withdrawal Agreement save insofar as that agreement permits. The Withdrawal Agreement is an international Treaty made between the EU and the UK. It is not to be interpreted by reference to EU Treaties or EU law more generally. It has to be interpreted on its own terms.

19. We have carefully considered what is said in the Rule 24 Reply. It is suggested at [11] of that Reply that the Appellant "plainly falls within the category of 'other persons'" in Article 18.1 and that Article 18.1(r) therefore provides an entitlement to succeed. That submission is misconceived for the reasons set out at [50] to [55] of the decision in Celik. In short summary, the words "other persons" cannot be read in isolation. Those have to be persons who are residing in the UK "in accordance with the conditions set out in [Title II]". Similarly, the rights have to be those conferred by that title. Those are set out at Article 13 of the Withdrawal Agreement by reference to various articles of Directive 2004/38/EC. They are the rights of EU citizens and their family members and not durable partners. The only way in which the Appellant could bring himself within scope is if he were in the scope of this part of the Withdrawal Agreement under Article 10 which it is accepted that he is not. "Other persons" in Article 18.1 has to be read compatibly with Article 10. For the reasons set out at [50] to [55] of Celik, the Appellant plainly is not within that provision.

20. We accept as submitted at [12] of the Rule 24 Reply that "the enjoyment of the procedural rights in Article 18.1(r) cannot …be dependent on satisfying the conditions that the procedure is designed to examine the existence of." As we have already pointed out at [14] above, that is what is meant by the Tribunal at [62] of Celik. The Tribunal has to consider whether the Respondent is right to say that an individual does not fall within the Withdrawal Agreement and the individual is entitled to a redress procedure to determine that issue. Where we part company with the Appellant is at [13] of the Rule 24 Reply. Proportionality at least in the context of Article 18.1(r) is not a substantive right. It is a procedural right as the Tribunal made clear at [2] of the headnote and at [60] of Celik.

21. The reliance on the Sponsor's rights at [16] to [26] of the Rule 24 Reply is similarly misconceived. The difficulty with the Appellant's case in this regard is that he has never been recognised as a family member. At [25] of the Rule 24 Reply, the Appellant relies on the cases of Secretary of State for the Home Department v Rahman and others [2013] QB 249 and Khan v Secretary of State for the Home Department (AIRE centre intervening) [2017] EWCA Civ 1755. However, as those cases themselves illustrate, EU law has always drawn a distinction between family members who have their own rights of free movement under EU law and extended family members whose only right is to have their entry and residence facilitated. There is a clear distinction between the two categories (see also in that regard the discussion at [30] to [42] of Batool and others (other family members: EU exit) [2022] UKUT 00219 (IAC) and what is said at [43] to [58] of the decision in that case about the position of extended family members following the UK's withdrawal from the EU and under the Withdrawal Agreement). The reliance in that part of the Rule 24 Reply on general principles of EU law is also misplaced as we have already noted (by reference to [58] of Celik).

22. For the foregoing reasons, we are satisfied that the Judge has erred by allowing the appeal on the basis that the Respondent's decision is disproportionate and therefore in breach of the Withdrawal Agreement.

RE-MAKING

23. Mr Wilding sensibly conceded that if we were not with him in relation to his arguments concerning the error of law, then the Decision must be set aside, and the appeal falls to be dismissed. We set out briefly our reasons for agreeing with that submission but do not repeat the fuller reasons which are set out above.

24. The Appellant is not within the personal scope of the Withdrawal Agreement. Article 18.1(r) does not create any separate substantive rights. The Appellant's only right under Article 18.1(r) is to a redress procedure to examine the decision under appeal and to ensure that it is in accordance with the Withdrawal Agreement. Since the Appellant is not within scope of the Withdrawal Agreement, there is no room for a conclusion that the Respondent's decision breaches the Withdrawal Agreement.

25. It is conceded by the Appellant that the Respondent's decision does not breach Appendix EU.

26. Mr Wilding accepted that although Article 8 ECHR had been raised by the Appellant as a ground of appeal, that could not be raised except with the Respondent's consent as it amounts to a "new matter". Consent had not been sought and Mr Wilding did not ask us to consider Article 8 ECHR.

27. The Appellant is of course entitled to make an application relying on Article 8 ECHR under Appendix FM to the Immigration Rules. We note in that regard the findings of Judge McKinney that the Appellant's relationship with the Sponsor was formed in May 2018, that the relationship is both genuine and durable and that they married on 17 June 2021. The Sponsor has settled status in the UK. She is employed as a nurse. The Respondent also conceded at the hearing before Judge McKinney that the relationship is genuine and durable. We were not asked to formally preserve those findings when setting aside the Decision, but it is open to the Appellant to rely on them as they were not challenged by the Respondent in the appeal before us.

28. However, for the foregoing reasons, we dismiss the Appellant's appeal.

NOTICE OF DECISION

We are satisfied that the Decision involves the making of a material error on a point of law. We set aside the decision of First-tier Tribunal Judge McKinney promulgated on 5 May 2022.

We re-make the decision. We dismiss the Appellant's appeal.

Signed L K Smith Dated: 11 January 2023
Upper Tribunal Judge Smith