IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2022-003821
First-tier Tribunal No:
EA/16181/2021

THE IMMIGRATION ACTS

Heard at Field House IAC
On the 12 December 2022

Decision & Reasons Promulgated
On the 21 February 2023

Before

UPPER TRIBUNAL JUDGE SMITH

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MR ASAD SMAJLAJ

Respondent

Representation:
For the Appellant: Mr S Whitwell, Senior Home Office Presenting Officer
For the Respondent: Mr Smajlaj appeared in person

DECISION AND REASONS

1. This is an appeal by the Secretary of State. For ease of reference, I refer to the parties as they were before the First-tier Tribunal. The Respondent appeals against the decision of First-tier Tribunal Judge Zahed promulgated on 28 June 2022 ("the Decision"). By the Decision, the

Judge allowed the Appellant's appeal against the Respondent's decision dated 22 November 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 of Albanian descent ("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 rules relating to the EUSS ("Appendix EU") or not in accordance with the Withdrawal Agreement.

4. Notwithstanding that the decision under appeal was made under the EUSS and not the EEA Regulations, Judge Zahed purported to allow the appeal by reference to the EEA Regulations on the basis that the relevant provisions (regulations 7 and 8) were continued in force by the Immigration and Social Security Co-ordination (EU Withdrawal) Act 2020 (Consequential, Saving, Transitional and Transitory Provisions) (EU Exit) Regulations 2020 ("the 2020 Regulations"), specifically schedule 3 to those regulations. He also found that "under the 'Grace Period' provided for by the Withdrawal Agreement the Tribunal needs to adopt a purposive approach to its interpretation of the rules surrounding the [EUSS]" ([15] of the Decision). Having found that the Appellant and Sponsor lived in the UK together before the specified date, that they wished to marry before that date but were prevented from doing so by the Covid-19 pandemic and that the Appellant and Sponsor were durable partners at that date, the Judge allowed the appeal on the basis that the Appellant satisfied the definition of regulation 7 of the EEA Regulations, that he was not required to hold a relevant document (notwithstanding the express requirement in Appendix EU).

5. The Respondent appeals on the basis that the Judge has misdirected himself in law. In particular, it is said that it was not open to the Judge to allow the appeal by reference to the EEA Regulations which were revoked by the time of the Appellant's application and that the Judge had failed to apply the requirements of Appendix EU. The Respondent also argued that the Judge had misunderstood the purpose of the "grace period". The Respondent submits that the effect of the grace period was not to extend time for applicants to apply under the EEA Regulations. It extended time

only for those who were EEA citizens and their family members lawfully resident under the EEA Regulations on the specified date.

6. Permission to appeal was granted by First-tier Tribunal Judge Lester on 14 August 2022 on the basis that an arguable error of law would be established if the Respondent were able to make out the analysis in her grounds.

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

8. Although the Appellant was legally represented by Counsel before Judge Zahed and had solicitors on file, he attended in person with the Sponsor. He confirmed that he was able to understand and communicate in English and did not require an interpreter. This was in any event the Respondent's appeal.

9. Mr Whitwell addressed me in relation to the errors which the Respondent said were disclosed by the grounds. He also drew my attention to the Tribunal's guidance in Celik (EU exit; marriage; human rights) [2022] UKUT 00220 (IAC) ("Celik") which he argued was on all fours with the facts of this appeal. I accepted his submissions in that regard. I explained to the Appellant in what I hope were readily accessible terms what Mr Whitwell had submitted and explained why the Respondent said that he was unable to succeed in his appeal. I allowed him to respond. I did not expect him to make any legal arguments. He submitted that he had won his appeal and that the Decision should stand. Beyond that, he was unable to make any relevant submissions.

10. I indicated at the conclusion of submissions that I found errors of law in the Decision and would set that aside. Mr Whitwell accepted that I should not set aside the findings of fact which had been made in the Appellant's favour. As Mr Whitwell submitted (and I reiterated) it remains open to the Appellant to apply to remain in the UK under the domestic provisions which apply (specifically Appendix FM to the Immigration Rules) and the factual findings made could be relied upon in that regard. However, as I explained to the Appellant, he could not succeed under the EUSS. The guidance given in Celik is fatal to his case. I indicated however as he was not legally represented that I would issue my decision in writing rather than orally at the hearing and would explain as fully as possible the reasons for my conclusion. That would enable him to take legal advice on his options. I therefore turn to provide my reasons.

DISCUSSION

Error of Law

11. I begin with the Judge's findings relating to the EEA Regulations and the extent to which they are preserved. As the Judge rightly pointed out at [7] of the Decision, under the Immigration and Social Security Co-ordination (EU Withdrawal) Act 2020 ("the 2020 Act"), specifically paragraph 2(2) of schedule 1 thereto, the EEA Regulations are revoked.

12. The Judge relied on schedule 3 of the 2020 Regulations however to find that certain provisions continued in force in a way which impacted on this appeal. He did so in reliance on paragraph 5 of that schedule which is set out at [8] of the Decision but bears repeating:

> **"Existing appeal rights and appeals**
>
> **5.**- (1) Subject to sub-paragraph (4), the provisions of the EEA Regulations 2016 specified in paragraph 6 continue to apply—
>
> (a) to any appeal which has been brought under the Immigration (European Economic Area) Regulations 2006 and has not been finally determined before commencement day,
>
> (b) to any appeal which has been brought under the EEA Regulations 2016 and has not been finally determined before commencement day,
>
> (c) in respect of an EEA decision, within the meaning of the EEA Regulations 2016, taken before commencement day, or
>
> (d) in respect of an EEA decision, within the meaning of the EEA Regulations 2016 as they continue in effect by virtue of these Regulations or the Citizens' Rights (Application Deadline and Temporary Protection) (EU Exit) Regulations 2020, which is taken on or after commencement day.
>
> (2) For the purposes of paragraph (1)—
>
> (a) an appeal is not to be treated as finally determined while a further appeal may be brought and, if such a further appeal is brought, the original appeal is not to be treated as finally determined until the further appeal is determined, withdrawn or abandoned; and
>
> (b) an appeal is not to be treated as abandoned solely because the appellant leaves the United Kingdom.
>
> (3) The revocation of the EEA Regulations 2016 does not affect the application of the Immigration (European Economic Area) Regulations 2006 to an appeal that falls within paragraph 3(1) of Schedule 4 to the EEA Regulations 2016.
>
> (4) The provisions specified in paragraph 6 do not apply to the extent that the provisions of the EEA Regulations 2016 specified in paragraph 6 continue to apply to an appeal or EEA decision by virtue of the Citizens' Rights (Application Deadline and Temporary Protection) (EU Exit) Regulations 2020."

13. That paragraph cannot be read in isolation from the rest of the 2020 Regulations and from the EEA Regulations itself. The paragraph itself makes clear that it is subject to sub-paragraph (4). The Respondent did not rely on that sub-paragraph but it could not assist the Appellant in any event since it disapplies paragraph 6 of the schedule. Leaving aside that sub-paragraph, there are four circumstances set out in paragraph 5(1) which may lead to the EEA Regulations continuing to apply.

14. The first is an appeal which is brought under the EEA Regulations. As the Judge notes at [1] of the Decision, the appeal in this case is against a decision made under the EUSS and not the EEA Regulations. Paragraph 5(1)(a) cannot therefore apply.

15. Paragraph 5(1)(b) relates to an appeal brought under the EEA Regulations which is pending as at "commencement day". Since this is not an appeal under the EEA Regulations, paragraph 5(1)(b) cannot apply either.

16. Paragraph 5(1)(c) refers to an EEA decision within the meaning of the EEA Regulations taken before commencement day. There are two reasons why that cannot apply. First, an "EEA decision" as defined by the EEA Regulations is a decision under those regulations (see regulation 2 of the EEA Regulations). I reiterate, the decision under appeal in this case is not under those regulations. Second, the 2020 Regulations provide for commencement on the date when paragraph 2(2) of schedule 1 to the 2020 Act comes into force (see regulation 1(2) of the 2020 Regulations). Since the Judge accepted at [7] of the Decision that the EEA Regulations had by the time of the Decision been revoked (they were revoked with effect from the specified date subject to the grace period), it follows that the decision under appeal would have to be made also prior to that date. It was not made until 22 November 2021.

17. Paragraph 5(1)(d) cannot apply insofar as it relies on the 2020 Regulations for the reason that this is not an EEA decision within the meaning in the EEA Regulations. In relation to The Citizens' Rights (Application Deadline and Temporary Protection) (EU Exit) Regulations 2020 ("Citizens' Rights Regulations 2020"), those cannot avail the Appellant either. Those regulations apply to certain applications made by the deadline specified in regulation 2. That refers to a date of 30 June 2021 for the making of an application. However, it relates only to certain applications. Only regulation 2(a) could apply in this case. That refers to an application made under "the first sub-paragraph of Article 18(1)(b) of the [Withdrawal Agreement]" ("Article 18"). Article 18 so far as relevant 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:
>
> …
>
> (b) the deadline for submitting the application shall not be less than 6 months from the end of the transition period, for persons residing in the host State before the end of the transition period…"

As that extract makes clear, it relates only to those who reside in the UK (or another EU State) "in accordance with" the provisions of the Withdrawal Agreement.

18. 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. I 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."

19. The Appellant had not had his residence facilitated before the end of the transition period (31 December 2020) nor had he applied for facilitation before that date. Accordingly, he 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.

20. It should also be noted that both the 2020 Regulations and the Citizens' Rights Regulations 2020 are by way of saving or transitional provisions to the general position that the EEA Regulations are revoked as at 31 December 2020. They do not of themselves create substantive rights in EU law.

21. In short, therefore, the EEA Regulations were, as the Judge found at [7] revoked prior to the making of the Appellant's application and the Respondent's decision under appeal. The Appellant did not make an application under the EEA Regulations. The Respondent's decision was

not one under the EEA Regulations. There was simply no basis by reference to the transitional arrangements to apply provisions which had no bearing on the decision under appeal and were revoked.

22. The real fallacy of the Judge's reasoning is to be found at [10] of the Decision where the Judge found that "even though the EEA Regulations have been revoked, certain provisions of the Regulations continue to apply to appeals which have been brought under the EEA Regulations and have not been finally determined before commencement day". As a statement of the law, that is not incorrect. The difficulty is that the Appellant had not brought an appeal under the EEA Regulations. His case fell squarely under the EUSS. As such, the finding at [11] of the Decision that regulations 7 and 8 of the EEA Regulations continued to apply was an error.

23. It is entirely unclear to me why the Judge found at [15] that the grace period under the Withdrawal Agreement meant that the Tribunal had to adopt a purposive approach to Appendix EU. In any event, for the reasons I have already given, the grace period under Article 18(1)(b) does not apply to the Appellant's case as he is not within the personal scope of this part of the Withdrawal Agreement. The grounds of appeal available to the Appellant were only that the Respondent's decision was not in accordance with Appendix EU or the Withdrawal Agreement. The Judge makes no reference to the requirements of Appendix EU. It was not open to him to disapply those requirements without consideration of them. He might have found that the Respondent's decision was otherwise not in accordance with the Withdrawal Agreement. However, if that was his intention, he failed there to explain how the Respondent's decision failed to comply with that agreement.

24. At [17] and [18] of the Decision, the Judge said this:

> "17. I further find that under Part 3 of the Withdrawal Agreement and the European Union (Withdrawal Agreement) Act 2020, that to benefit from the Withdrawal Agreement, United Kingdom nationals and their family members had to be lawfully residing in the host EU state in accordance EU law on free movement on 31 December 2020 when the transition period ended.
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> 18. Applying this to the appellant I find that he must have resided with his EEA sponsor in the United Kingdom before the specified date, being 30th December 2020. I find that the appellant and his EEA sponsor have lived in the UK before 30th December 2020."

25. Leaving aside that the specified date under the Withdrawal Agreement is 31 December 2020 and not 30 December, the foregoing discloses other errors of law. I assume that the Judge intended to refer to part 3 of the European Union (Withdrawal Agreement) Act 2020 and not the Withdrawal Agreement itself. That is headed "Citizens' Rights". Of course, the position of family members of United Kingdom nationals residing in other EU states is of no relevance here. The Sponsor is an EEA

national residing in the UK. I accept as I indicated above, that the provisions of the Withdrawal Agreement might have had some bearing on the situation of the Appellant if he had been residing in the UK prior to 31 December 2020 (or 30 June 2021) in accordance with EU law. However, under the EEA Regulations, as an unmarried partner of an EEA national, the Appellant could not have been a family member unless and until his residence was "facilitated" by the Respondent. He could not be a direct family member under regulation 7 of the EEA Regulations until he was married. A distinction is drawn (as is preserved by the personal scope of the Withdrawal Agreement) between those family members who have (or had) their own rights of free movement as direct family members and those other persons who have (or had) only the right to have their entry and residence facilitated (if they fall or fell within regulation 8 of the EEA Regulations). Since the Appellant had not applied under the EEA Regulations for facilitation nor had his residence been facilitated under those regulations, it follows that the Appellant was not residing in the UK in accordance with EU law as at the specified date. The Judge was therefore wrong to find as he did at [18] of the Decision. As a matter of fact, the Appellant and the Sponsor lived in the UK but that has no bearing on the Appellant's rights in law.

26. For the foregoing reasons, the Decision contains errors of law. I therefore set that aside. However, I preserve (without objection from Mr Whitwell) the findings made by Judge Zahed at [19] and [20] of the Decision as follows:

> "19. I accept the appellant's evidence, which has been corroborated by his EEA sponsor that they met in February 2020, that they moved in together and cohabiting [sic] from August 2020. I accept the appellant and his EEA sponsor decided to get married in October and tried to give notice so that they could get married during October, November and December. Unfortunately due to Covid they were unable to get through to the Registry Office. Their evidence was corroborated by the appellant's sister who also tried making contact with various Registry offices in December 2020.
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> 20. I take into account that the Home Office guidance with respect to a Durable Partner states that the appellant and his EU sponsor should be cohabiting for at least 2 years before the date of application, but also allows for the provision of 'other significant evidence of a durable relationship'. I find that the fact that the appellant married his EU sponsor amounts to 'other significant' evidence that the appellant was in a durable relationship. I find that the appellant was a Durable Partner as at the specified date and that he was married to his EA [sic] sponsor at the date of his application during the 'grace period'"

RE-MAKING

27. I turn then to the guidance given by this Tribunal in Celik. That reads as follows (so far as relevant):

> "(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.
>
> …"

28. As that guidance and the substance of the decision in Celik make clear, this Appellant's case is on all fours factually with the situation in that appeal. Mr Celik was living in the UK with his EEA national partner before the specified date. He had tried to marry her before the specified date but could not do so due to the Covid-19 pandemic. He had not made any application under the EEA Regulations for facilitation of his residence before the specified date. It was accepted that, prior to the specified date, Mr Celik was the durable partner of his EEA national spouse. By reference to both Appendix EU and the Withdrawal Agreement, the Tribunal concluded that Mr Celik could not succeed. He was not a family member on the specified date and therefore had no substantive EU law rights at that time. He had not applied for facilitation prior to the specified date. He could not rely on the Withdrawal Agreement or the transitional arrangements in the Citizens' Rights Regulations 2020 to succeed. The fact that he was unable to marry due to the Covid-19 pandemic had no impact on his legal rights.

29. Applying the guidance in Celik to this case, the Appellant's appeal must fail. I therefore dismiss the appeal. As I and Mr Whitwell made clear to the Appellant at the hearing, it is open to him and his Sponsor to make an application under the domestic rules which apply to spouses of those settled in the UK (or EEA nationals with pre-settled status) (Appendix FM to the Immigration Rules). The findings which I have preserved are likely to be relevant to the Respondent's consideration of that application.

DECISION

I am satisfied that the Decision involves the making of a material error on a point of law. I set aside the decision of First-tier Tribunal Judge Zahed promulgated on 28 June 2022. I preserve the findings made at [19] and [20] of the Decision (as set out at [26] above).

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

Signed L K Smith Dated: 19 December 2022

Upper Tribunal Judge Smith