Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: EA/11764/2021
UI-2022-001339

THE IMMIGRATION ACTS

Heard at Field House
On: 10 August 2022

Decision & Reasons Promulgated
On: 27 September 2022

Before

UPPER TRIBUNAL JUDGE KAMARA

Between

MADRIT SHUSHARI
(ANONYMITY DIRECTION NOT MADE)

Appellant

And

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr S Mustafa, counsel, instructed by Briton Solicitors
For the Respondent: Ms A Ahmed, Senior Home Office Presenting Officer

DECISION AND REASONS

Introduction

1. This is an appeal against the decision of First-tier Tribunal Judge T Lawrence promulgated on 17 January 2022. Permission to appeal was granted by Upper Tribunal Judge L K Smith on 22 June 2022.

Anonymity

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2. No anonymity direction has been made previously, and there was no application nor apparent reason for one now.

Background

3. The appellant is a national of Albania, born on 11 January 1988. On 19 May 2021, he made an application for leave to remain under the EU Settlement Scheme (EUSS) as the spouse of a relevant EEA citizen. By virtue of a decision dated 19 July 2021, the Secretary of State refused that application and declined to grant the appellant either settled or pre-settled status under the EUSS because the requirements of Appendix EU, Rules 11 and 14, had not been met. The precise reason given was that the appellant had not been issued with a valid relevant document, in the form of either a family permit or residence card issued under the EEA regulations.

The decision of the First-tier Tribunal

4. At the hearing before the First-tier Tribunal, the judge heard and rejected submissions on the appellant's behalf to the effect that the scope of the appeal could include consideration of the appellant's right to a private and family life under Article 8 ECHR. The judge accepted that the appellant enjoyed a durable relationship with his EEA sponsor and that they intended to marry prior to 31 December 2020 but were prevented from doing so owing to the public health crisis. Nonetheless, the appeal was dismissed because the appellant was never granted a right of entry or residence in the United Kingdom as required by the Withdrawal Agreement and the respondent's decision was found to be in accordance with the Immigration Rules.

The grounds of appeal

5. There were two grounds of appeal. Firstly, it was argued that the judge erred in his application of Appendix EU to the Rules as he had failed to engage with a particular definition of durable partner and secondly, that the judge's decision was incompatible with Article 10.3 of the Withdrawal Agreement, because the appeal ought to have been considered with a view to the appellant's facilitation, entry to and residence in the United Kingdom. Within the second ground, it was contended that the judge had failed to consider proportionality as set out in Article 18.1(r) of the Withdrawal Agreement. A third ground which was advanced in the application to the First-tier Tribunal (regarding Article 8 ECHR) was not repeated.

6. Permission to appeal was granted on the basis that there was arguable merit in the first ground, albeit permission was not limited.

7. The respondent filed a Rule 24 response on 5 July 2022, in which the appeal was opposed. In short, the respondent noted that the appellant was an undocumented extended family member of an EEA citizen prior

to the expiry of the transition period on 31 December 2020 and the delay to his wedding owing to the pandemic did not negate this fact.

The hearing

8. In advance of the hearing, Ms Ahmed had sought to rely on an unreported case, (*Halil Celik* /EA/11062/2021). I permitted her to do so because not only did Mr Mustafa have no objection, *Celik*, was heard by a Presidential panel of the Upper Tribunal and it is clear from the content of the decision and reasons that the facts of that case are on all fours with that of the appellant in the instant proceedings and that broadly similar arguments have been raised.

9. Thereafter I heard submissions from Mr Mustafa which did not expand greatly on the grounds of appeal. He confirmed that he was not pursuing the Article 8 ground and readily admitted that none of the arguments or interpretations raised in the grounds had been put to the First-tier Tribunal judge by Mr Lee who previously represented the appellant. Mr Mustafa argued that the appellant's case could be distinguished from *Celik* because permission to appeal had only been granted on the proportionality point raised in Article 18.1(r) of the Withdrawal Agreement.

10. Ms Ahmed responded to Mr Mustafa's submissions by relying on the respondent's Rule 24 response as well as drawing my attention to several passages from the case of *Celik*.

11. At the end of the hearing, I informed the representatives that I had detected no error of law in the decision of the First-tier Tribunal judge. I give my reasons below.

Decision on error of law

12. I will firstly address Mr Mustafa's contention that this appeal can be distinguished from that of *Celik* on the basis that permission was granted only on the Article 18.1(r) point. It is apparent from [19] of *Celik* that permission was granted for more than one reason, evidenced by the use of the term '*in particular*' when referring to the reasons why permission was granted in that case. Elsewhere, in the decision and reasons in *Celik* are references to the panel considering frequently put arguments, with the aim of providing guidance to IAC judges. Furthermore, the appellant in *Celik* was in a durable relationship but like the appellant he did not make an application for a relevant document before the specified date.

13. It is notable that none of the matters raised in the renewed grounds were argued on behalf of the appellant before the First-tier Tribunal. Accordingly, it cannot be said that the judge failed to consider them. This should suffice to dispose of this appeal.

14. Previous counsel representing the appellant sought three findings from the First-tier Tribunal. These are set out at paragraphs 18 and 21 of the skeleton argument. Firstly, that the appellant was in a durable relationship prior to 31 December 2020; secondly that but for delays caused by Covid, the appellant would have been able to marry his partner and thirdly, that the appellant would qualify for status under the EUSS as a joining family member were he to break his continuous period of residence by an absence abroad of more than six months. The judge accepted the first two propositions but made no mention of the third. The grounds do not assert that the judge erred in declining to speculate as to whether the appellant would qualify under the EUSS were he to leave the UK for the required period.

15. While the fact that the arguments raised in the grounds were never put to the judge, I could leave matters there. However, I can briefly comment on Mr Mustafa’s grounds/submissions. He attempted to introduce a new definition of durable partner, supported only by incomplete extracts from Appendix EU and opaque reasoning.

16. The judge made no error in finding that the appellant did not fall within the terms of Appendix EU. In Annex 1 of Appendix EU the definition of a durable partner includes, at (b)(i), the requirement that the applicant holds a ‘relevant document as the durable partner of the relevant EEA citizen for the period of residence relied upon.’

17. Annex 1 of Appendix EU defines a relevant document as follows.

relevant document	(a)(i)(aa) a family permit (or a letter from the Secretary of State, issued after 30 June 2021, confirming their qualification for one), registration certificate, residence card, document certifying permanent residence, permanent residence card or derivative residence card issued by the UK under the EEA Regulations on the basis of an application made under the EEA Regulations before (in the case, where the applicant is not a dependent relative, of a family permit) 1 July 2021 and otherwise before the specified date;

18. Both EU 14 and 11 of Appendix EU state that the eligibility requirements for leave to enter or remain, whether limited or indefinite, are met where the Secretary of State is satisfied as to the required evidence of family relationship. In Annex A, the term ‘required evidence of family relationship’ is defined at (e) as a ‘relevant document as the durable partner of the relevant EEA citizen.’

19. Given the definitions in Appendix EU, there is no support for Mr Mustafa’s contention that there is an alternative definition of durable partner that can assist the appellant in his circumstances. That disposes of the first ground.

20. In the second ground, it is asserted that the judge failed to consider that the appellant's appeal should have included consideration of facilitating his application under Article 10.3 of the Withdrawal Agreement. Mr Mustafa's contention fails to address the fact that the appellant did not fall within the scope of the Withdrawal Agreement because he had not been issued with a relevant document before the end of the transition period. I reject his suggestion that the appellant giving notice of his intention to marry prior to 31 December 2020, could amount to an application under the Regulations. The judge properly considered the Withdrawal Agreement at [20] onwards of his decision, including Article 10 and rightly found that the appellant could not benefit from its terms. Indeed, in *Celik*, Article 10.3 was considered in detail, with the panel concluding that the appellant in that case would have come within its scope '*if (he) had applied for facilitation of entry and residence before the end of the transition period*.' Halil Celik made no such application under the Immigration (European Economic Area) Regulations 2016 and neither did the appellant.

21. At [56] of *Celik*, the panel found that the appellant's failure to make an application under the Regulations was 'destructive' of his ability to rely on the substance of Article 18.1. That conclusion disposes of the last point Mr Mustafa raised in his submissions.

Conclusions

The making of the decision of the First-tier Tribunal did not involve the making of an error on a point of law.

The decision of the First-tier Tribunal is upheld.

No anonymity direction is made.

Signed: T Kamara Date 11 August 2022

Upper Tribunal Judge Kamara

NOTIFICATION OF APPEAL RIGHTS

1. A person seeking permission to appeal against this decision must make a written application to the Upper Tribunal. Any such application must be **received** by the Upper Tribunal within the **appropriate period** after this decision was **sent** to the person making the application. The appropriate period varies, as follows, according to the location of the individual and the way in which the Upper Tribunal's decision was sent:

2. Where the person who appealed to the First-tier Tribunal is **in the United Kingdom** at the time that the application for permission to appeal is made, and is not in detention under the

Immigration Acts, the appropriate period is **12 working days (10 working days, if the notice of decision is sent electronically).**

3. Where the person making the application is in detention under the Immigration Acts**, the appropriate period is 7 working days (5 working days, if the notice of decision is sent electronically)**.

4. Where the person who appealed to the First-tier Tribunal is **outside the United Kingdom** at the time that the application for permission to appeal is made, the appropriate period is **38 days (10 working days, if the notice of decision is sent electronically).**

5. A “working day” means any day except a Saturday or a Sunday, Christmas Day, Good Friday or a bank holiday.

6. The date when the decision is “sent’ is that appearing on the covering letter or covering email