



**Upper Tribunal
(Immigration and Asylum Chamber)**

**Appeal Number: UI-2022-002570
EA/11818/2021**

THE IMMIGRATION ACTS

**Heard at Field House
On 26 September 2022**

**Decision & Reasons Promulgated
On 20 November 2022**

Before

UPPER TRIBUNAL JUDGE NORTON-TAYLOR

Between

**MR XHYHER TYRBETARI
(ANONYMITY DIRECTION NOT MADE)**

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: No attendance

For the Respondent: Ms N Willocks-Briscoe, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The Appellant is a citizen of Albania who appeals against the decision of First-tier Tribunal Judge Monson (“the judge”), promulgated on 3 February 2022. By that decision the judge dismissed the Appellant’s appeal against the Respondent’s refusal of his application under the EU Settlement Scheme (“EUSS”).
2. The Appellant arrived in the United Kingdom in January 2016. He met his current wife (an EEA national, hereafter “the Sponsor”) in February 2020.

They began cohabiting in May of that year. The couple became engaged in September 2020 and they took steps to get married. They experienced difficulties in obtaining dates due in part to backlogs caused by the COVID-19 pandemic. They eventually got married on 8 April 2021.

The decision of the First-tier Tribunal

3. The judge set out the relevant background in some detail. It was common ground that the Appellant had neither applied for nor had been issued with a residence card under the Immigration (European Economic Area) Regulations 2016 prior to 31 December 2020. The judge correctly noted that the Appellant's appeal had been brought under the Immigration (Citizens' Rights Appeals)(EU Exit) Regulations 2020 ("the 2020 Regulations") and this restricted him to two grounds of appeal, namely that the Respondent's decision to refuse the EUSS application breached rights under the Withdrawal Agreement and/or that the decision was not in accordance with the relevant Immigration Rules (namely those set out in Appendix EU). At [25] the judge noted that the Appellant's case on appeal rested on the first of these grounds of appeal.
4. The judge then went on to consider the evidence relating to the claimed relationship. At [26] he regarded the evidence as credible, in effect accepting that the relationship had been genuine and that there had been a true intention to marry. In subsequent paragraphs the judge went through the chronology of events relating to the attempts at undertaking the marriage. He did not accept that the principal reason for the couple not marrying prior to 31 December 2020 had been the effects of the COVID-19 pandemic: see [33]-[35].
5. At [36]-[40] the judge concluded that the Appellant could not benefit from the provisions of the Withdrawal Agreement. Although he accepted that the Appellant might have been the "durable partner" of the Sponsor prior to the end of the transition period, there had been no issuance of, or application for, a residence card before 31 December 2020. This, combined with the fact that the marriage itself had not occurred until April 2021, was determinative of the Appellant's appeal, such that it relied on the first ground of appeal under regulation 8 of the 2020 Regulations. Having so found, the judge went on to confirm that no reliance had been placed on Article 8 ECHR.

The grounds of appeal

6. The grounds of appeal were drafted by Counsel who had not appeared before the judge. The first point raised was that the judge should have allowed the appeal under the Immigration Rules, namely Appendix EU. In essence, the argument was that once the judge had effectively found that

there was a durable relationship he should have gone on to allow the appeal on that basis alone.

7. The second contention was that the judge had been wrong to conclude that the Withdrawal Agreement played no part. It was said that the Respondent had failed to conduct the extensive examination of the personal circumstances of the Appellant and that the judge was wrong to have found that the failure to have made a residence card application prior to 31 December 2020 precluded the Appellant from relying on the Withdrawal Agreement.
8. Permission was granted on all grounds.

Procedural issue: proceeding in the Appellant's absence

9. The appeal to the Upper Tribunal was listed for an oral hearing. By email dated 21 September 2022, the Appellant's legal representatives confirmed that, having taken instructions, they were requesting that the appeal be determined "on the papers". This email was brought to my attention and on 22 September 2022 I directed the Upper Tribunal's administrative staff to respond by confirming that the hearing would remain listed (given the late notice of the request), but that neither the Appellant nor his legal representatives were required to attend.
10. At the outset of the hearing itself I considered afresh whether it was fair to proceed in the Appellant's absence. There was nothing in the email correspondence or elsewhere in the papers to suggest that the Appellant's decision was made on anything other than a properly informed basis. The Respondent was represented at the hearing and wished to proceed. No new issues were raised which would have required further input from the Appellant's side.
11. In all the circumstances, I concluded that it was indeed fair and in the interests of justice to proceed in the Appellant's absence, pursuant to rule 38 of the Tribunal Procedure (Upper Tribunal) Rules 2008.

The Respondent's submissions

12. Ms Willocks-Briscoe confirmed that there had been no challenge to the genuineness of the Appellant's relationship with the Sponsor. It was clear that the Appellant could not have met the Immigration Rules and the judge was correct to have reached that conclusion. In terms of the Withdrawal Agreement, reliance was placed on the recent decision of Celik (EU exit; marriage; human rights) [2022] UKUT 00220 (IAC) The judge had been entitled to conclude that the Withdrawal Agreement did not benefit the Appellant because the Appellant could not bring himself within the scope

of Article 10 or Article 18. There was no basis upon which the Appellant could have succeeded in respect of proportionality or fairness.

13. At the end of the hearing I reserved my decision.

Conclusions on error of law

14. I acknowledge the need for restraint before interfering with the decision of the First-tier Tribunal.

15. In the present case it is plain that the judge did not commit any errors of law. It was unarguably the case that the Appellant could not satisfy the Immigration Rules, as set out in Appendix EU. The Appellant may as a matter of fact have been in a durable relationship with the Sponsor prior to 31 December 2020, but he clearly did not hold any “relevant document”. The grounds offer no alternative argument as to how the Appellant could have met the relevant definition with reference to Annex 1 to Appendix EU. The reference in the grounds to the Respondent’s policy on the EUSS takes the Appellant’s case no further and ignores the fact that there was no such argument put to the judge: see [21] of the judge’s decision.

16. In terms of the Withdrawal Agreement, the decision in Celik is, I conclude, correct in law and I apply its conclusions. It is clear that the Appellant could not fall within the scope of either Article 10 or Article 18. There was never any suggestion of there being “unnecessary administrative burdens” imposed by the Respondent. The essential facts were that the Appellant had not been issued with, or applied for, a residence card under the Immigration (European Economic Area) Regulations 2016 prior to 31 December 2020 and had only married the Sponsor after the end of the transition period. The judge was entirely correct to reject the argument based on the Withdrawal Agreement.

17. For all these reasons, the decision of the judge shall stand and the Appellant’s appeal to the Upper Tribunal must be dismissed.

Anonymity

18. There has never been any suggestion that an anonymity direction would be appropriate in this case and I make no such direction.

Notice of Decision

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

The Appellant's appeal to the Upper Tribunal is accordingly dismissed.

Signed H Norton-Taylor

Date: 12 October 2022

Upper Tribunal Judge Norton-Taylor