Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: UI-2022-002922
EA/11847/2021

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 13 October 2022	**On 25 November 2022**

Before

UPPER TRIBUNAL JUDGE NORTON-TAYLOR

Between

MR GENTJAN ZIAI
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr M Moriarty, Counsel, instructed by Turpin & Miller LLP
For the Respondent: Mr E Tufan, Senior Home Office Presenting Officer

DECISION AND REASONS

Introduction

1. The Appellant appeals against the decision of First-tier Tribunal Judge Chohan ("the judge"), promulgated on 26 April 2022, by which he dismissed the Appellant's appeal against the Respondent's refusal of his application under the EUSS.

2. The Appellant is a citizen of Albania born in 1994. He arrived in the United Kingdom unlawfully in early 2018. In around late March 2020 the

Appellant began a relationship with a Romanian citizen, Mrs Odobescu ("the Sponsor"). They began cohabiting at the beginning of April of that year and got engaged in September. In early November they gave notice to get married. Permission to do so was obtained on 9 December, but the couple were unable to undertake the marriage itself, it was said, due to the consequences of the COVID-19 pandemic. A date in February 2021 was allocated, but this was then put back as a result of the national lockdown which occurred over the Christmas period of 2020. The couple finally got married on 14 April 2021.

3. It was at this stage that the Appellant made the EUSS application. The application was refused by the Respondent on 23 July 2021. This was on the basis that the marriage had taken place after 31 December 2020 and because the Appellant had not held a residence card under the Immigration (European Economic Area) Regulations 2016 ("the 2016 Regulations") prior to that date, nor had he applied for one.

The decision of the First-tier Tribunal

4. Having set out the background to which I have just referred, the judge recorded the fact that both the Appellant and Sponsor were called at the hearing but were not the subject of any cross-examination by the Respondent's representative. The judge proceeded to set out what were described as his findings between [6] and [10]. He noted that there had been no dispute that the Appellant was unable to meet the requirements of the EUSS.

5. With regard to the chronology of events referred to earlier, the judge did not accept the explanation as to the couple's inability to get married before 31 December 2020. He found that there had been no adequate explanation for the delay between the engagement in September of that year and giving notice in November. The judge found that the Appellant had had "ample time and opportunity" to obtain permission to get married at an earlier stage: [7].

6. The judge then went on to consider the Withdrawal Agreement. He noted the fact of the Appellant's unlawful entry into the United Kingdom and the chronology of events which took place thereafter. The Appellant had not made an application under the 2016 Regulations. The judge appeared to be of the view that there had been no good reason for that failure.

7. Towards the end of [9] the judge concluded that he failed to see how the Withdrawal Agreement could assist the Appellant in the appeal. That appeal was accordingly dismissed.

The grounds of appeal and grant of permission

8. Condensed down, the grounds of appeal made the following challenges: first, that the judge had failed to make a clear finding as to whether the Appellant's relationship with the Sponsor had been durable prior to and as at 31 December 2020; second, that the judge had erred in failing to undertake a proportionality exercise under Article 18.1(r) of the Withdrawal Agreement (reference is made to "19", but this must be a typographical error).

9. Permission was granted by the First-tier Tribunal on 20 May 2022.

Adjournment application

10. By a letter received by the Upper Tribunal on 22 September 2022, the Appellant applied for an adjournment of the error of law hearing on the basis that the case should be stayed pending the outcome of any appeal to the Court of Appeal in the case of Celik (EU exit; marriage; human rights) [2022] UKUT 00220 (IAC). Unfortunately, that application had not been considered by a judge prior to the hearing before me.

The hearing

11. Having established that the adjournment application remained outstanding, I considered it and reached a decision thereon. Having regard to all the circumstances, I refused the application. As I understood it, there was an application for permission to appeal in Celik, but it had either not yet been determined by the Upper Tribunal or this had only just occurred. Either way, the potential appellate process was at such an early stage and the outcome so uncertain that it would not be appropriate to stay the present appeal.

12. Mr Moriarty did not renew the application. He did, however, make eloquent submissions on the Appellant's behalf. Without intending any disrespect, I summarise them here in relatively brief terms.

13. His overarching submission was that Celik was wrongly decided. He accepted that the facts of the present case were almost on all fours with those in Celik. He submitted that paragraphs 62 and 63 of Celik "left the door open" for judges to undertake a proportionality exercise in cases such as the present and the judge had erred in failing to adopt that approach. As a prior error, as it were, Mr Moriarty submitted that the judge had in fact failed to make a clear finding on the nature of the Appellant's relationship with the Sponsor, although he recognised that from the face of the decision one could infer that the relationship was accepted as being genuine and, to all intents and purposes, "durable".

14. Mr Moriarty submitted that the barrier presented to a timely marriage presented by the COVID-19 pandemic, together with the durable relationship, was a sufficient basis to conclude that the errors committed by the judge were material to the outcome. Whilst he was not submitting that the Respondent had placed unnecessary administrative burdens before the Appellant, Mr Moriarty suggested that the relevant paragraphs in Celik, specifically 63 to 66, did not preclude success in this case (I took this to be an aspect of the overarching submission that Celik was wrongly decided on this particular point). Mr Moriarty confirmed that he was not arguing that unfairness had taken place. He submitted that if I were to set the judge's decision aside I should go on and remake the decision on the evidence currently before me.

15. Mr Tufan relied on the case of Celik and submitted that there were simply no errors in the judge's decision whatsoever.

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

Discussion and conclusions

17. At the outset I remind myself of the need to exercise appropriate restraint before interfering with a decision of the First-tier Tribunal, having regard to a number of pronouncements to that effect by the Court of Appeal: see, for example UT (Sri Lanka) [2019] EWCA Civ 1095, at paragraph 19.

18. I begin by addressing the issue of the sufficiency of the judge's findings of fact. I see some merit in the assertion that the judge should have, but did not, make an express finding as to the nature of the Appellant's relationship with the Sponsor. It appeared as though there was no real dispute as to the underlying evidence as to how the couple met and how their relationship developed over an albeit relatively short period of time. At the very most, it could be described as an error of law in the sense that there was a failure to make a finding on a relevant matter.

19. Having said that, to my mind it is readily apparent that the judge was at the very least implicitly accepting that the relationship was durable as a matter of substance, having regard to what appears to be the unchallenged matter set out in [2] of his decision and the fact that neither the Appellant nor the Sponsor were the subject of cross-examination at the hearing: [4].

20. For reasons which I set out below, this error, if it can be described as such, was clearly immaterial to the outcome. There is no indication in the judge's decision that he reached on the basis that the Appellant's relationship with the Sponsor was not genuine or not durable.

21. The real issue in this case relates to Celik and, specifically, proportionality. I do not accept that Celik was wrongly decided. In my view it dealt

correctly with matters which were, to all intents and purposes, the very same as those arising in the present case. Those matters included proportionality under Article 18.1(r) of the Withdrawal Agreement.

22. I of course acknowledge that the judge did not engage with proportionality in any meaningful sense. For the purposes of this appeal, I am prepared to accept that this might have constituted an error. Yet, once again, the error was clearly immaterial.

23. On the face of paragraph 62 of Celik, the Presidential panel stated that proportionality under Article 18.1(r) of the Withdrawal Agreement could in principle apply to a person who did not fall within the scope of Article 18 at all, as well as those who were capable of doing so but failed to meet one or more of the requirements set out in the preceding conditions. Even accepting that this "leaves the door open", as Mr Moriarty put it, to those in the Appellant's position relying on proportionality, the following passages in Celik make it plain, in my judgment, that the Appellant could not have succeeded in his appeal before the judge. Paragraphs 63-66 read as follows:

> "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.
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> 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.
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> 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.
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> 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."

24. Applying the above to the Appellant's case, there was nothing within the factual matrix which could conceivably have resulted in a favourable outcome. The Appellant was essentially in precisely the same set of circumstances as Mr Celik. It is common ground that the Appellant never held a residence card prior to 31 December 2020, nor had he applied for one prior to that date. It has never been suggested that the Respondent had imposed unnecessary administrative burdens on the Appellant. Further, the finding by the judge at [6] and [7] to the effect that the Appellant had failed to explain why he could not have attempted to get married sooner than he did undermines any reliance on proportionality. Thus, on the facts of the case, any reliance on the effects of the COVID-19 pandemic could not have carried any material weight.

25. Indeed, it is plain to me that for the judge to have concluded that the decision under appeal was disproportionate would have amounted to an impermissible embarkation on a "judicial re-writing of the Withdrawal Agreement", to adopt the phrase used in Celik.

26. It follows from the above that whilst the judge's decision had shortcomings, there are no errors of law such that his decision should be set aside in the exercise of my discretion under section 12(2)(a) of the Tribunals, Courts and Enforcement Act 2007.

27. For the sake of completeness, I note that no Article 8 issue was ever raised or addressed by the judge.

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 shall stand.

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

No anonymity direction is made.

Signed H Norton -Taylor Date: 18 October 2022

Upper Tribunal Judge Norton-Taylor