Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: EA/12179/2021
UI-2022-000243

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 27 April 2022	**On 8 July 2022**

Before

UPPER TRIBUNAL JUDGE ALLEN

Between

AMRITPREET SINGH JOSAN
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr G Symes, instructed by West London Solicitors
For the Respondent: Mr D Clarke, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellant appeals to the Upper Tribunal with permission against a decision of a Judge of the First-tier Tribunal promulgated on 14 December 2021 in which he dismissed his appeal against the respondent's decision of 25 July 2021 to refuse to issue him with a family permit.

2. In brief, the appellant's history where relevant is as follows. He is married to Ms Nikola Noemi Zbylut, a Polish national, they having first met in March 2019 in Poland. They moved in together about a year later. Later in 2020 they decided to get married but their plans were delayed by the COVID-19

pandemic. In the event, they were not able to marry until 13 March 2021. The appellant applied to join Ms Zbylut in the United Kingdom where she had moved to, on 22 April 2021 and this application was refused, leading to the appeal before the judge.

3. In the refusal decision it was pointed out, with reference to the relevant provisions of Appendix EU (FP) that since the marriage had not been contracted by the specified date, which was 2300 GMT on 31 December 2020, the requirements of the Rules were not satisfied. It was also not accepted that the couple were "durable partners" since they had not provided sufficient evidence to show that they were in a relationship akin to marriage for the two years preceding 31 December 2020.

4. It was confirmed before the judge that the issue of the couple being in a durable partnership was not pursued. It was also accepted by the appellant that he could not meet the Rules insofar as they related to spouses, in other words, he could not meet the definition of "family member" in Appendix EU (FP).

5. Reliance was placed on Article 18(1)(r) of the "Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community" ("the Withdrawal Agreement").

6. This states:

> "The applicant shall have access to judicial and, where appropriate, administrative redress procedures in the host State against any decision refusing to grant the residence status. The redress procedures shall allow for an examination of the legality of the decision, as well as of the facts and circumstances on which the proposed decision is based. Such redress procedures shall ensure that the decision is not disproportionate."

7. On the appellant's behalf it was argued by Mr Symes, who also appeared below, that the couple had been prevented from marrying before 31 December 2020 by the pandemic and had they been able to marry earlier, the appellant would have fallen within the definition of "family member" in Appendix EU (FP) and his application for a family permit would have succeeded. As a consequence, it was argued that the respondent's decision was disproportionate and therefore open to challenge on the basis of what was said at Article 18(1)(r).

8. The judge noted the terms of Article 4(3) of the Withdrawal Agreement, which states:

> "The provisions of this Agreement referring to Union law or to concepts or provisions thereof shall be interpreted and applied in accordance with the methods and general principles of Union law."

9. Noting that the concept of proportionality is a concept of EU law, the judge considered that he was required to apply an EU law approach to his application of it in the present context. He noted also what was said at Article 5(4) of the Treaty on European Union, which states:

> "Under the principle of proportionality, the content and form of Union action shall not exceed what is necessary to achieve the objectives of the Treaties."

10. The judge quoted from what was said by Lord Reed and Lord Toulson in Lumsdon [2015] UKSC 41 at paragraph 33 in respect of the principle of proportionality as involving a consideration of two questions, first, whether the measure in question is suitable or appropriate to achieve the objective pursued and secondly, whether the measure is necessary to achieve that objective or whether it could be attained by a less onerous method.

11. The judge considered the argument on behalf of the appellant that the decision to apply the 31 December 2020 cut-off without considering the surrounding circumstances leading to the delay in the appellant's wedding was disproportionate. He stated that at the heart of the concept of proportionality in EU law lies the question of whether the measure complained of achieves the purposes set out in the EU treaties. He considered that in this case, the respondent's approach was in perfect accordance with the terms of the Withdrawal Agreement, in particular Article 10 1 e. Indeed, he stated, the decision complained of simply gave effect to the provisions of the Withdrawal Agreement and in that context could not be said to exceed what was necessary to achieve the objectives of the treaties.

12. As a consequence, expressing every sympathy though he did for the appellant and his wife, he concluded that the appeal had to be dismissed.

13. The appellant sought and was granted permission to appeal on the basis that the judge had failed to assess, in accordance with what was said in Lumsdon, whether the measure could have been achieved in a less onerous manner. It was argued that the purpose of the restrictions in Appendix EU (FP) is to limit the number of people eligible for a permit to those who are in a genuine and subsisting relationship at the time of withdrawal from the EU. A strict cut-off date by which parties were required be married was overly onerous, especially in light of the pandemic, and was therefore not proportionate in EU terms.

14. It was also argued that the judge had not taken into account the requirement that a measure must be proportionate "stricto sensu", i.e. that the disadvantages caused by the measure are not disproportionate to the aims pursued. Reliance was placed on the decision in Man (Sugar), Case 181/84: [1985] ECR 2889. The judge had therefore, it was argued, erred in law in failing to grapple with the second limb of Lumsdon, failed to grapple with the assessment of proportionality on the 'stricto sensu' basis and the fact that the requirement to marry was a secondary obligation and yet infringement thereof carried the same penalty as infringement of the

primary obligation of being in a genuine relationship, and the fact that it was impossible for the appellant to comply with the requirements of Appendix EU (FP).

15. In his submissions, Mr Symes adopted and developed the points made in the grounds. It was argued that the judge had erred in failing to consider whether less onerous methods had been available in this case. He had cited Lumsdon but only seemed to deal with the first limb of that. Man (Sugar) was also relevant in that the primary obligation was the requirement to be in a genuine relationship at a certain level and likewise, in that case there was a requirement to have a certain status and have a piece of paper, in Man (Sugar) an exporter's licence, and the primary obligation was the status rather than a piece of paper. If the Tribunal agreed, then it was disproportionate on the basis of failure to satisfy the secondary obligation to be married by a certain date. That was a disproportionate requirement. The judge had not referred to the physical and legal impossibility to marry by the specified date.

16. In his submissions, Mr Clarke relied on the Rule 24 response which had been put in and placed reliance in particular on the point made there in respect of Article 10 of the Withdrawal Agreement. There were regular references there to matters being required to be done before the end of the Transitional Agreement. In every term with regard to the scope of those coming within the agreement it was very specific. It was impossible to see how Article 18 could be involved, particularly bearing in mind the opening words of Article 18, referring to people residing in the host State's territory in accordance with the conditions set out in the Title.

17. By way of reply, Mr Symes placed reliance on what was said in Article 18. The appellant was a family member: whether at the time of exit day was a question for the judge's decision but under the Withdrawal Agreement he was a family member of the Union citizen. Article 18(1)(r) extended to family members making applications, so what was said by Mr Clarke was misguided. As regards the argument that it was necessary to look at Article 10, as Article 18 concerned extended family members, that had to be seen as the key point. It should be contrasted with the position of a family member in the Immigration Rules, Appendix EU (FP), requiring marriage before a certain date. The two were distinct.

18. Mr Clarke then argued as a final point that the wording of Article 9 was relevant where it was said that "family members" had to fall within the personal scope provided for in Article 10.

19. On this point, Mr Symes argued that "family members" in Article 10 raised the question of being directly related, which was not defined in Article 10, and on a plain reading, that must extend to spouses but equally, Article 18 included other persons residing in the territory in accordance with the Article. As the spouse of an EU national, the appellant was a family member.

20. I reserved my decision.

21. I have set out above the relevant provisions of Article 18 upon which reliance is placed by the appellant. I have also summarised what is said at Article 9(a) on the definition of "family members" within Part 2 of the Withdrawal Agreement, meaning categories of people who, irrespective of their nationality, fall within the personal scope provided for in Article 10.

Article 10 states as follows:

"*Article 10*

Personal scope

1 Without prejudice to Title III, this Part shall apply to the following persons:

a Union citizens who exercised their right to reside in the United Kingdom in accordance with Union law before the end of the transition period and continue to reside there thereafter;

b United Kingdom nationals who exercised their right to reside in a Member State in accordance with Union law before the end of the transition period and continue to reside there thereafter;

c Union citizens who exercised their right as frontier workers in the United Kingdom in accordance with Union law before the end of the transition period and continue to do so thereafter;

d United Kingdom nationals who exercised their right as frontier workers in one or more Member States in accordance with Union law before the end of the transition period and continue to do so thereafter;

e family members of the persons referred to in points (a) to (d), provided that they fulfil one of the following conditions:

(i) they resided in the host State in accordance with Union law before the end of the transition period and continue to reside there thereafter;

(ii) they were directly related to a person referred to in points (a) to (d) and resided outside the host State before the end of the transition period, provided that they fulfil the conditions set out in point (2) of Article 2 of Directive 2004/38/EC at the time they seek residence under this Part in order to join the person referred to in points (a) to (d) of this paragraph;

(iii) they were born to, or legally adopted by, persons referred to in points (a) to (d) after the end of the transition period, whether inside or outside the host State, and fulfil the conditions set out in point (2)(c) of Article 2 of Directive 2004/38/EC at the time they seek residence under this Part in order to join the person referred to in points (a) to (d) of this paragraph and fulfil one of the following conditions:

- both parents are persons referred to in points (a) to (d);

- one parent is a person referred to in points (a) to (d) and the other is a national of the host State; or

- one parent is a person referred to in points (a) to (d) and has sole or joint rights of custody of the child, in accordance with the applicable rules of family law of a Member State or of the United Kingdom, including applicable rules of private international law under which rights of custody established under the law of a third State are recognised in the Member State or in the United Kingdom, in particular as regards the best interests of the child, and without prejudice to the normal operation of such applicable rules of private international law[(7)];

f family members who resided in the host State in accordance with Articles 12 and 13, Article 16(2) and Articles 17 and 18 of Directive 2004/38/EC before the end of the transition period and continue to reside there thereafter.

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.

4 Without prejudice to any right to residence which the persons concerned may have in their own right, the host State shall, in accordance with its national legislation and in accordance with

point (b) of Article 3(2) of Directive 2004/38/EC, facilitate entry and residence for the partner with whom the person referred to in points (a) to (d) of paragraph 1 of this Article has a durable relationship, duly attested, where that partner resided outside the host State before the end of the transition period, provided that the relationship was durable before the end of the transition period and continues at the time the partner seeks residence under this Part.

5 In the cases referred to in paragraphs 3 and 4, the host State shall undertake an extensive examination of the personal circumstances of the persons concerned and shall justify any denial of entry or residence to such persons."

22. It is clear from the first line of Article 10 1 that without prejudice to Title III, the "Citizens Rights" Part applies to the categories of people set out in Article 10. The appellant in this case cannot fall within Article 10 1 a, b, c or d as members of those categories have to be United Kingdom nationals or Union citizens, and he is neither. Nor is he a person who comes under 10 1 f as he has not resided in the United Kingdom, which is the host state. As regards paragraph 2 of Article 10, he is not a person 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 the Directive. At no time has he resided in the United Kingdom. Nor does he fall under paragraph 3. Although he is the spouse of a Union citizen he did not apply for facilitation of entry and residence before the end of the transition period.

23. Paragraph 4 is concerned with people in durable relationships and that is not a factor in this case.

24. If the appellant is therefore to come within Article 10 it can only be, as it seems to me, under paragraph 1 e, which refers to family members of, in this case a Union citizen, who has to fulfil one of the conditions set out under paragraph e. He does not come under e (i) as he has not resided in the host state. Nor does he come under e (iii) as he was not born to, or legally adopted by, a person referred to in points a to d.

25. He can therefore only potentially come within the personal scope provisions if he satisfies the requirements of paragraph 1 e(ii). There are two apparent difficulties with this. The first is the question of whether he was "directly related" to the Union citizen. Mr Symes argued that the couple are directly related. There is, as he noted, no definition of "directly related" within the Withdrawal Agreement and it must therefore be left to be a matter for interpretation in the individual case. I am far from sure that a married couple can be said to be directly related, but even if I am wrong about that, it does not appear that the appellant can satisfy the requirements of paragraph 1 e (ii) as the requirement is to be directly related to such a person and residing outside the host state before the end of the transition period. The correct reading of that, as it seems to me, is

that the couple would have to have been directly related, accepting that this could be done through marriage, before the end of the transition period. But that period elapsed at the end of December 2020 and they were not married until March 2021. Accordingly, the appellant cannot be said to fall within the personal scope provisions as set out in Article 10.

26. That, as it seems to me, is fatal to this appeal. The first paragraph of Article 18 sets out the range of people to whom that Article applies, and those are Union citizens, United Kingdom nationals, their respective family members and other persons residing in the territory in accordance with the conditions set out in this Title of the agreement. As noted above, the appellant does not fulfil any of the conditions set out in Article 10 1 e and as a consequence does not in any event come within Article 18.

27. As a consequence, I consider that the judge did not err in referring as he did to Article 10 1 e as being determinative. It is common ground that the appellant cannot satisfy the requirements of Appendix EU (FP), hence the reliance on his part on the Withdrawal Agreement. But it is clear from the above analysis that the appellant does not come within the personal scope provisions of Article 10 and is therefore not a person who can benefit from the provisions of the Withdrawal Agreement concerned, for example as Article 18 is, with issuance of residence documents. Article 18 cannot be taken into account without bearing in mind the personal scope requirements set out in Article 10. One cannot, as Mr Symes argued, simply jump to Article 18 and seek to evaluate the proportionality of the decision. This is not a decision which is open to effective challenge, on the basis that the appellant does not meet the requirements of the personal scope provisions set out in Article 10 of the Withdrawal Agreement.

28. As a consequence, I consider that the judge did not err in his decision,which included the correct conclusion that Article 10 (1) (e) was determinative and, though I entirely share his sympathy with the appellant and his wife for the unfortunate position into which due to no fault of their own they have fallen , it is not a case where rights under the Withdrawal Agreement are engaged, and as a consequence, the judge’s decision dismissing the appeal is maintained.

Notice of Decision

The appeal is dismissed

No anonymity direction is made.

Signed Date 19 May 2022

Upper Tribunal Judge Allen