Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: EA/00743/2022**
UI-2022-003852

THE IMMIGRATION ACTS

Heard at Field House IAC
On the 28 November 2022

Decision & Reasons Promulgated
On the 07 February 2023

Before

UPPER TRIBUNAL JUDGE FRANCES

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT
Appellant

and

MANDEEP SINGH
(ANONYMITY DIRECTION NOT MADE)
Respondent

Representation:
For the Appellant: Ms A Nolan, Home Office Presenting Officer
For the Respondent: Ms S Pinder, instructed by Whitefields Solicitors

DECISION AND REASONS

1. Although this is an appeal by the Secretary of State for the Home Department, I shall refer to the parties as in the First-tier Tribunal. The appellant is a citizen of India born on 8 August 1990. His appeal against the refusal of pre-settled status as a family member under the EU Settlement Scheme ('EUSS') was allowed by First-tier Tribunal Judge Head ('the judge') on 29 June 2022.

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2. The appellant came to the UK as a student in 2011 and overstayed. The sponsor, a Romanian national, was granted pre-settled status under the EUSS on 14 November 2019. The appellant and sponsor met in June 2020 and began living together in October 2020. They were married on 8 December 2020 in a Sikh Temple. Due to the Covid-19 pandemic they were unable have a civil marriage ceremony until 12 July 2021. The appellant applied for pre-settled status as a family member under the EUSS on 30 June 2021. The application was refused on 22 November 2021.

3. The judge found the appellant could not meet the definition of durable partner under Appendix EU of the immigration rules because the appellant did not apply for a family permit prior to the specified date and he did not hold a 'relevant document'. The judge found the appellant did not fall within the scope of the Withdrawal Agreement ('WA'), but the sponsor did and, since the application was made on the basis of the relationship between the appellant and the sponsor and adversely affected the sponsor's rights, the judge considered proportionality under Article 18(1)(r). The judge allowed the appellant's appeal on the grounds the respondent's decision was disproportionate and breached the WA.

4. Permission to appeal was granted by First-tier Tribunal Judge J M Dixon on 21 August 2022 on the grounds that it was arguable the appellant, who had not applied for residence under the Immigration (EEA) Regulation 2016 ('the 2016 EEA Regulations') did not come within the ambit of the WA following Celik (EU exit; marriage; human rights) [2022] UKUT 00220 (IAC).

Relevant law

5. In Batool and others (other family members: EU exit) [2022] UKUT 00219 (IAC), the Upper Tribunal held:

> "(1) An extended (oka other) family member whose entry and residence was not being facilitated by the United Kingdom before 11pm GMT on 31 December 2020 and who had not applied for facilitation of entry and residence before that time, cannot rely upon the Withdrawal Agreement or the immigration rules in order to succeed in an appeal under the Immigration (Citizens' Rights Appeals) (EU Exit) Regulations 2020.
>
> (2) Such a person has no right to have any application they have made for settlement as a family member treated as an application for facilitation and residence as an extended/other family member."

6. In Celik, the Upper Tribunal held:

> "(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.

(3) Regulation 9(4) of the 2020 Regulations confers a power on the First-tier Tribunal to consider a human rights ground of appeal, subject to the prohibition imposed by regulation 9(5) upon the Tribunal considering a new matter without the consent of the Secretary of State."

Respondent's submissions

7. Ms Nolan relied on the grounds and submitted the appellant had not applied for a family permit and he did not have a residence card. He had no substantive rights under the WA because his entry and residence had not been facilitated before the end of the transition period. The appellant could not rely on Article 18(1)(r) and the judge erred in law in allowing the appeal. The appeal should be remade and dismissed.

Appellant's submissions

8. Ms Pinder relied on her rule 24 response dated 24 November 2022 and the skeleton argument before the First-tier Tribunal. She submitted this case could be distinguished from Celik because the appellant did not rely on Article 8 and had specifically argued the decision was disproportionate under EU law. Alternatively, this case was one of the rare occasions referred to at [62] of Celik in which the appellant could rely on Article 18(1)(r) of the WA given the pandemic and the impact on the sponsor, notwithstanding he could not satisfy the legal requirements in the immigration rules. The EU proportionality principle applied even though the appellant did not personally come within the scope of the WA.

Conclusions and reasons

9. The grounds plead the appellant's residence was not facilitated and he was not residing in the UK in accordance with the 2016 EEA Regulations as of 31 December 2020. The appellant did not come within the scope of the WA and there was no breach of his rights. The judge erred in law by finding

at [49] that the respondent's decision was in breach of the WA on the basis the refusal breached the sponsor's rights. This was not a permissible ground under the Immigration (Citizens' Rights Appeals) (EU Exit) Regulations 2020 ('the 2020 Exit Regulations').

10. There was no challenge to the judge's finding that the appellant did not satisfy the definition of 'durable partner' in Appendix EU of the immigration rules. It is not in dispute that the appellant did not apply for facilitation of entry or residence before the end of the transition period and his residence in the UK was not facilitated by the respondent prior to 11pm on 31 December 2020. The appellant cannot not satisfy Article 10(2) or 10(3) WA.

11. I agree with the conclusions and reasons in Batool and Celik. The appellant cannot rely on the WA and the judge erred in law in allowing the appeal on that basis.

12. The appellant cannot invoke Article 18(1)(r) by relying on the sponsor's rights under the WA. Regulation 8(2) of the 2020 Exit Regulations states: "The first ground of appeal is that the decision breaches **any right which the appellant has** by virtue of …[the WA]" (my emphasis).

13. I find the judge erred in law at [49]. I set aside the decision and remake it. The appellant has no substantive right under the WA and he cannot satisfy Appendix EU of the immigration rules. I dismiss the appeal under the 2020 Exit Regulations.

Notice of Decision

The respondent's appeal is allowed.

The decision of the First-tier Tribunal dated 29 June 2022 is set aside.

The appellant's appeal is dismissed under the Immigration (Citizens' Rights Appeals) (EU Exit) Regulations 2020.

J Frances

Signed
Upper Tribunal Judge Frances

Date: 30 November 2022

TO THE RESPONDENT
FEE AWARD

As I have dismissed the appeal, I make no fee award.

J Frances

Signed
Upper Tribunal Judge Frances

Date: 30 November 2022

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.