Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: UI-2022-002992
(EA/11709/2021)

THE IMMIGRATION ACTS

Heard at: Birmingham Civil Justice Centre
On : 8 December 2022

Decision & Reasons Promulgated
On: 28 February 2023

Before

UPPER TRIBUNAL JUDGE KEBEDE

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

RAMAZAN LITA

Respondent

Representation:
For the Appellant: Mr Gazge, Senior Home Office Presenting Officer
For the Respondent: Mr M West, instructed by Kings Court Law

DECISION AND REASONS

1. This is an appeal by the Secretary of State for the Home Department against the decision of the First-tier Tribunal allowing Mr Lita's appeal against the decision to refuse his application under the EU Settlement Scheme (EUSS) as the spouse/ durable partner of an EEA national.

2. For the purposes of this decision, I shall hereinafter refer to the Secretary of State as the respondent and Mr Lita as the appellant, reflecting their positions as they were in the appeal before the First-tier Tribunal.

3. The appellant, a national of Albania born on 8 March 1998, entered the UK illegally in October 2015. He met the sponsor, Corina Vasile, an EEA national, and it is claimed that they moved in together on 10 November 2020. The appellant proposed and the couple gave notice of intention to marry on 12 December 2020. However owing to the pandemic they were not able to get married until 14 April 2021.

4. On 20 April 2021 the appellant made an application under the EUSS as the spouse of a relevant EEA national. His application was refused by the respondent on 15 July 2021. The respondent considered that the requirements of Appendix EU of the immigration rules were not met as the appellant had not provided sufficient evidence to confirm that he was a family member of a relevant EEA citizen prior to the specified date, 31 December 2020. His marriage took place after the specified date. The required evidence of family relationship as a durable partner was a valid family permit or residence card issued under the EEA Regulations. The respondent had no record of the appellant having been issued with such a document. It was considered by the respondent that the appellant therefore qualified for neither settled nor pre-settled status under the EUSS.

5. The appellant appealed against that decision and his appeal came before First-tier Tribunal Judge Dhaliwal on 4 March 2022. It was accepted that the appellant was not a spouse at the specified date. The judge found that, whilst the appellant and the sponsor had not lived together in a relationship for two years, the fact that they were now married shed light on the situation at the specified date, namely that they were in a committed relationship at that time, and she therefore accepted that the appellant was the durable partner of an EEA national as at 31 December 2020. The judge accepted that the appellant did not have a relevant document so as to satisfy the definition of ‘durable partner’ for the purposes of Appendix EU. However, relying upon Article 10 and Article 18(1)(r) of the Withdrawal Agreement, the judge allowed the appeal on the basis that the respondent’s decision was disproportionate and breached the Withdrawal Agreement, since the additional requirement for a particular document interfered with a primary aim of the Withdrawal Agreement and interfered with the rights of the EEA sponsor.

6. The Secretary of State sought permission to appeal to the Upper Tribunal on the grounds that the judge had incorrectly interpreted the “grace period” ending on 30 June 2021 as extending the time period in which the appellant was able to become lawfully resident under the EEA Regulations 2016; and that the judge had made contradictory findings as to whether the appellant was a ‘durable partner’ and that in any event her finding, that the decision was disproportionate to the aims of the Withdrawal Agreement, was based upon a material misdirection of law.

7. Permission was granted by the First-tier Tribunal and the matter then came before me.

8. Although this was the Secretary of State’s appeal, both parties agreed that it would be helpful to hear submissions for the appellant first, in light of the

President's decision in Celik (EU exit, marriage, human rights) [2022] UKUT 220.

9. Mr West relied on his Rule 24 response produced shortly before the hearing. He submitted that the judge's finding, that the appellant could not meet the requirements of the immigration rules in Appendix EU as a spouse or durable partner, was legally sustainable. He pointed out that the Secretary of State's challenge was to the judge's finding at [32], that the decision was disproportionate and in breach of the Withdrawal Agreement. He submitted in response that it was lawfully and rationally open to the judge to consider proportionality, and that the guidance and findings in Celik did not preclude her from doing so. He submitted that whereas in Celik the First-tier Tribunal had declined to consider proportionality, Judge Dhaliwal had not declined to do so in this case and had properly found that the issue of proportionality was engaged and that the decision was disproportionate.

10. Mr Gazge relied upon headnotes 1 and 2 of Celik whereby it was held that someone in the appellant's position had no substantive rights under the Withdrawal Agreement and could not involve the concept of proportionality. The "grace period" did not extend the period for those who did not have rights . The decision had to be set aside and re-made by dismissing the appeal.

11. In response Mr West submitted that the appellant met the substantive requirements of a durable partner and therefore had substantive rights under the Withdrawal Agreement. As such the judge was entitled to consider proportionality and take into account, when considering proportionality, the fact that the appellant had made his application during the grace period.

12. Both parties accepted that if Judge Dhaliwal's decision was set aside by reason of an error of law in the terms raised in the grounds of appeal, the decision could be re-made without a further hearing on the evidence available.

Discussion

13. It is not disputed by Mr West that Judge Dhaliwal was entitled to find that the appellant could not meet the requirements of Appendix EU as a family member because his marriage took place after 31 December 2020 and he neither held a 'relevant document' as evidence that residence had been facilitated under the EEA Regulations nor had he made such an application for facilitation prior to that date for the purposes of meeting the requirements as a durable partner.

14. The challenge to Judge Dhaliwal's decision is in regard to her findings on proportionality in relation to the respondent's application of the terms of the Withdrawal Agreement. Mr West sought to distinguish the appellant's case from that of Celik on the basis that the First-tier Tribunal Judge in Celik declined to apply the principle of proportionality, whereas it was open to Judge Dhaliwal to do so. However that is undoubtedly not correct. The Upper Tribunal in Celik made it clear at [64] to [66], and in the headnote, that it was simply not open to a claimant to invoke the principle of proportionality in circumstances such as

those of the appellant's, namely where his entry and residence had not been facilitated under the EEA Regulations prior to 31 December 2020 and where he had not made an application for facilitation prior to that date.

15. Mr West submitted that Judge Dhaliwal was entitled to take account of the fact that the appellant had made his application during the grace period and that that was a matter which she was entitled to include as part of a proportionality assessment. However the appellant in Celik had, likewise, made his application during the grace period and the Upper Tribunal made it clear at [60] that that could not assist him. The relevant date was 31 December 2020 and the grace period was not intended to extend the time in which rights could be acquired when they otherwise did not exist.

16. As such, Judge Dhaliwal clearly misdirected herself in law by finding that the principle of proportionality in Article 18.1(r) of the Withdrawal Agreement could be invoked by the appellant. Her decision to allow the appeal on that basis was accordingly misconceived and was based on a material error of law. Accordingly her decision is set aside.

17. For the reasons already given the appellant simply does not fall within the transitional provisions in the Withdrawal Agreement in Article 10(3), having made no application for facilitation of entry or residence under the EEA Regulations 2016 prior to the relevant date. He therefore cannot succeed, and the decision must therefore be re-made by dismissing the appeal.

DECISION

18. The making of the decision of the First-tier Tribunal involved an error on a point of law. The Secretary of State's appeal is accordingly allowed, and First-tier Tribunal Judge Dhaliwal's decision is set aside.

19. I re-make the decision by dismissing Mr Lita's appeal.

Signed: S Kebede
Upper Tribunal Judge Kebede Dated: 27 December 2022