Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: UI-2022-003066
[EA/12192/2021]

THE IMMIGRATION ACTS

Heard at Field House
On 7 November 2022

Decision & Reasons Promulgated
On 4 January 2023

Before

UPPER TRIBUNAL JUDGE KOPIECZEK

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT
Appellant

and

TAULANT META
(ANONYMITY DIRECTION NOT MADE)
Respondent

Representation:
For the Appellant: Ms S. Cunha, Senior Home Office Presenting Officer
For the Respondent: Mr A. Shohan, Counsel instructed by NWL Solicitors

DECISION AND REASONS

1. Although the appellant in these proceedings is the Secretary of State, it is convenient to continue to refer to the parties as they were before the First-tier Tribunal.

2. The appellant is a citizen of Albania born in 1996. On 16 June 2021 he made an application under the EU Settlement Scheme ("EUSS") as the spouse of an EEA citizen. That application was refused in a decision dated 5 August 2021 on the basis that the appellant did not meet the requirements of Appendix EU of the Immigration Rules.

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3. In particular, although the appellant provided a marriage certificate dated 10 May 2021 as evidence that he was the spouse of an EEA citizen, he had not provided sufficient evidence to confirm that he was a family member of a relevant EEA citizen prior to the 'specified date' as defined in Annex 1 of Appendix EU, the specified date being 31 December 2020. Similarly, he had not established that he met the eligibility requirements for settled status under the EUSS as a durable partner. Records did not show that he had been issued with a family permit or residence card under the EEA Regulations as the durable partner of an EEA national.

4. The appellant appealed the decision and his appeal came before First-tier Tribunal Morgan ("the FtJ") at a hearing on 24 March 2022 following which the appeal was allowed.

The FtJ's decision

5. At [6] of his decision the FtJ said that he found the appellant and his partner's evidence broadly credible and consistent, noting in any event that the Secretary of State did not dispute the evidence. He found that the appellant and his wife moved in together in October 2020 and have been living together ever since. He found that they sought to get married in October 2020 but were precluded from doing so because of delays caused by the COVID-19 lockdown. They married on 10 May 2021 in London.

6. At [8] he found that they were in a genuine, subsisting and durable relationship, having lived together at the same property since October 2020 and having been engaged to be married since that date (and subsequently marrying).

7. At [9] he said that although the Secretary of State did not challenge the marriage certificate, the issue concerned the fact that the marriage postdated the transition period. He went on to state that "in respect of the withdrawal agreement I also need to consider the proportionality of the respondent's decision".

8. There is then the following at [10]:

> "10. On the particular facts of this appeal I find that the respondent's decision is disproportionate. I find that the couple were in a durable relationship prior to the end of the transition period. The couple are now married. I find that the couple are in a genuine and durable relationship and note that had they applied prior to the end of the transition period, on the basis of their durable relationship, I would have allowed the appeal under the EEA regulations. This route is no longer open to them however it would be disproportionate in my judgement to deny the appellant leave under the withdrawal agreement because the couple waited until they were married before applying under the Scheme."

9. He then went on to state that in the light of those findings, the appellant had satisfied him on a balance of probabilities that he met the requirements of the Withdrawal Agreement because the respondent’s decision is disproportionate.

The grounds of appeal and submissions

10. The Secretary of State’s grounds contend as follows. The appellant’s application for status under the EUSS was as the family member of a relevant EEA national. However, the appellant could not succeed as a spouse as the marriage took place after the specified date of 31 December 2020. Thus, the application was considered under the durable partner route where it was also bound to fail. The Rule requires a “relevant document” as evidence that residence had been facilitated under the EEA Regulations which had transposed Article 3.2(b) of Directive 2004/38/EC. No such document was held as no application for facilitation had ever been made by the appellant.

11. The grounds continue that the question of whether and how the relationship was in fact ‘durable’ at any relevant date as found by the FtJ at [8] is of no consequence. The EUSS requirements could simply not be met by a durable partner whose residence had not been facilitated. The grounds argue that this is reflected in Article 10(2) of the Withdrawal Agreement permitting the continued residence of the former documented extended family member, with an additional transitional provision in Article 10(3) for those who had applied for such facilitation before 31 December 2020. The appellant had not made any such application.

12. It is further contended in the grounds that the FtJ misapplied the requirements of the “appeal regulations” (the Immigration (Citizens’ Rights Appeals) (EU Exit) Regulations 2020). Under those Regulations two available grounds were permissible. Firstly, that the decision was not in accordance with the EUSS rules, in respect of which the FtJ failed to make any findings, or that the decision breached rights under the Withdrawal Agreement. The appellant was not residing in accordance with EU law as of 31 December 2020 and therefore had no rights as a beneficiary under the Withdrawal Agreement. He was not entitled to redress in terms of proportionality (Article 18(1)(r) of the Withdrawal Agreement).

13. The grounds argue in the alternative that the FtJ’s proportionality consideration was “wholly inadequate” in the context of an applicant who did not meet the Immigration Rules. Whilst a subsequent marriage may have been some indication that a relationship which preceded it had been durable at a certain point, this, so far as was relevant, could only flow from a more careful consideration of the facts. Furthermore, it is argued that it appeared that the FtJ found that the delay in marrying attributed to COVID-19 would in any circumstances have rendered an inevitable refusal disproportionate. However, the appellant did not acquire any protected rights under EU law prior to 31 December 2020.

14. In submissions Ms Cunha relied on the grounds. I was referred to *Secretary of State for the Home Department v Rahman* [2012] EUECJ C-83/11, [2013] QB 249, in particular at [18] – [25]; *Macastena v Secretary of State* [2018] EWCA Civ 1558 at [17]–[23] and *Secretary of State for the Home Department v Aibangbee* [2019] EWCA Civ 339 at [35] – [37] in terms of the extent of rights of residence of extended family members. It was submitted that the Secretary of State was entitled to decide how she would consider a durable relationship and she had no opportunity to do so in this case prior to 31 December 2020. Furthermore, even if there was a durable relationship that does not mean that the appellant would come within Article 10 of the Withdrawal Agreement and could not, therefore, benefit from any proportionality assessment.

15. Furthermore, the decision in *Celik (EU exit; marriage; human rights)* [2022] UKUT 00220 (IAC) was a complete answer to the appellant's appeal. Even though judgement in that case had not been given at the time of the appeal before the FtJ it nevertheless governed the position.

16. In his submissions, Mr Shohan accepted that the decision in *Celik* does present a problem for the appellant in this appeal but pointed out that the FtJ did not have that decision before him. Mr Shohan suggested that the practical steps that the Secretary of State was taking at the relevant time was inviting people to make EUSS applications. This appellant gave notice before the deadline to submit an application and the Secretary of State had all the relevant information before her, prior to the decision to refuse his application.

17. It was accepted that on the basis of *Celik* a proportionality argument was not available to the appellant. However, I was invited to take into account that *Celik* is being appealed to the Court of Appeal.

18. The appellant, it was submitted, was discriminated against in the sense that he was unable to marry because of the particular circumstances at the time and he is penalised because he was marrying an EU national. It was submitted that the FtJ came to the right decision on the basis of the law and the facts that were before him at the time.

Assessment and conclusions

19. *Celik* is a decision of a three person presidential panel of the Upper Tribunal. It concluded on the facts of the case before it, as follows:

> "52. There can be no doubt that the appellant's residence in the United Kingdom was not <u>facilitated</u> by the respondent before 11pm on 31 December 2020. It was not enough that the appellant may, by that time, have been in a durable relationship with the person whom he married in 2021. Unlike spouses of EU citizens, extended family members enjoyed no right, as such, of residence under the EU free movement legislation. The rights of extended family members arose only upon their residence being facilitated by the respondent, as evidenced by the issue of a residence permit,

> registration certificate or a residence card: regulation 7(3) and regulation 7(5) of the 2016 Regulations."

20. In addition, at [64] it decided that the appellant's residence in that case as a durable partner was not facilitated by the respondent before the end of the transition period. He did not apply for such facilitation before the end of that period and accordingly he was unable to bring himself within the substance of Article 18.1 of the Withdrawal Agreement. Thus, he was unable to invoke the concept of proportionality in the Withdrawal Agreement.

21. The precise guidance in *Celik*, as in the headnote, is as follows, the first two paragraphs being those pertinent to this appeal:

> (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.

22. Having considered the decision in *Celik*, it's analysis and the guidance given in it, I respectfully agree with it. Whilst the FtJ did not have the benefit of that guidance before him when he made his decision, it nevertheless states the law as it was at the time of the hearing before the FtJ. *Celik* provides a complete answer to the appellant's appeal in that on the facts of his case there was no alternative before the FtJ but to dismiss the appeal.

23. Although I was invited to take into account that there is an application for permission to appeal to the Court of Appeal in *Celik* (permission in fact having been refused by the Upper Tribunal but renewed as an application to the Court of Appeal), that is not the point. The decision in *Celik* stands unless overruled or distinguished, or if it can be shown to have been decided *per incuriam*. The facts of this appellant's case do not suggest that *Celik* can be distinguished on the facts, nor was such a proposition put to me.

24. In all the circumstances, I am satisfied that the FtJ erred in law in allowing the appeal for the reasons explained above. His decision must be set aside. I re-make the decision by dismissing the appeal.

Decision

25. The decision of the First-tier Tribunal involved the making of an error on a point of law. Its decision is set aside and the decision is re-made, dismissing the appeal.

A.M. Kopieczek

Upper Tribunal Judge Kopieczek 28/12/2022