Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: UI-2022-004908
EA/13871/2021

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 25 November 2022	**On 4 January 2023**

Before

UPPER TRIBUNAL JUDGE RINTOUL
DEPUTY UPPER TRIBUNAL JUDGE CHANA

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

JULIEN MADAMBA CONSOLACION
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:
For the Appellant: Ms S Cunha, Senior Home Office Presenting Officer
For the Respondent: no appearance

DECISION AND REASONS

1. The Secretary of State appeals with permission against the decision of First-tier Tribunal Judge Wilding, promulgated on 21 March 2022, allowing the Ms Consolacion's appeal against a decision by the Secretary of State to refuse to issue her with a family permit under the EU Settlement Scheme ("EUSS"). We refer to Ms Consolacion as the appellant as she was below solely for convenience. We refer to the Secretary of State as the respondent for the same reason.

Background

2. The appellant and her husband, Mr Diego Molinaro, an Italian national were married in March 2021. They had entered into a relationship in late 2019, moved in together in October 2019 and were engaged in 2020. They had an appointment to get married on the 29 December 2020, but this was cancelled due to the enhanced Tier 4 restrictions introduced by the Government in mid-December 2020. Subsequently attempts were made in January and February 2021 to get married but were also cancelled due to the continuing restrictions; they finally married on 23 March 2021.

3. The Secretary of State refused the application on 19 August 2021 on the basis that although she had provided a marriage certificate dated 23 March 2021 as evidence that she is the spouse of an EEA citizen, that was not sufficient evidence that she was the spouse of an EEA citizen during the qualifying period, which ended on the specified date of 31 December 2020 as she was married on 23 March 2021, after the specified date. She considered also that the appellant was not a durable partner of an EEA national as she had not been issued with a valid permit or residence card under the EEA Regulations as the durable partner of the EEA citizen.

4. The Secretary of State was not represented at the hearing before the First-tier Tribunal. The judge noted that [11] that the appellant's representative conceded that the rules could not be met. He found that the appellant and her spouse had been in a durable relationship at the relevant time. He found that the appellant was in scope of the withdrawal agreement [15], stating that

> … She is married to an EEA national, having been in a durable relationship with him before that marriage. EU Rights, including the Charter of Fundamental Rights, are engaged courtesy of the Withdrawal Agreement. An extended family member under the citizens directive is a family member of an EEA national for the purposes of the Withdrawal Agreement. The question of whether a document is required is not relevant to Article 18(1)(r).

5. He concluded [17]:

> The only reason why the appellant does not qualify is on the basis that she does not have the relevant EEA residence document. Furthermore, the only reason why she was not married before 31.12.20 was because she was prevented by the UK government's COVID-19 restrictions, the evidence in the appellant's bundle makes it clear that the couples wedding was cancelled because of the Tier 4 restrictions.

Grounds of appeal

6. The Secretary of State sought permission to appeal on the grounds that the judge had erred in law as:

   (i) The appellant did not qualify under the EUSS as the relevant family member s the marriage took place after the specified date

(ii) The question of whether the relationship was a “durable” one was not relevant; EUSS rules cannot be met by a durable partner whose residence has not been facilitated as reflected on article 10 (2) of the Withdrawal Agreement

(iii) The appellant had no rights under the Withdrawal Agreement as she had not been residing in the United Kingdom in accordance with EU law as at 31 December 2020 as required by article 10 (1) (e) ; and.

(iv) The assessment of proportionality was wholly inadequate

Preliminary matter – proceeding in absence of the respondent

7. When the matter came before us at 10.00am there was no appearance by or on behalf of the appellant. We therefore deferred consideration of the matter until the end of the list. There was no appearance by the appellant by 12 noon, nor any explanation for not attending; nor has there been any explanation since then. Having had regard to the overriding objective and rule 2 of the Tribunal Procedure (Upper Tribunal) Rules 2008, the lack of any rule 24 response from the appellant and the nature of the issues involved, we were satisfied that it was in the interests of justice to proceed to determine the appeal in the appellant’s absence.

Submissions

8. Ms Cunha relied on the grounds submitting that this case fell to be decided in line with Celik (EU exit: marriage, human rights) [2022] UKUT 220. She submitted further that all the appellant had been entitled to under Directive 2004/38 was to have her residence facilitated under the relevant national legislation, pursuant to article 3.2 of the Directive. She submitted the judge had erred in concluding that the appellant benefited from the Withdrawal Agreement.

Decision

9. The headnote in **Celik** provides as follows:

> *(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.*

10. It was accepted in the First-tier Tribunal that the appellant could not meet the requirements of the EUSS.

11. In light of Celik, and as the appellant did not hold a relevant document, that is, a residence card confirming the durable relationship, and the marriage post-dated 31 December 2020, it follows that the judge erred in concluding that the appellant came within the scope of the Withdrawal Agreement and that she benefitted from the application of article 18 (1)(r). Accordingly, he erred in allowing the appeal on the basis of proportionality. We therefore set the appeal aside, but we preserve the findings of fact that the couple were in a durable relationship as at 31 December 2020.

12. In terms of remaking, in the absence of any submissions that the appellant otherwise meets the requirements of the Immigration Rules or has rights under the Withdrawal Agreement, we remake the decision by dismissing the appeal.

Notice of Decision

1. The decision of the First-tier Tribunal involved the making of an error of law and we set it aside.

2. We remake the appeal by dismissing it on all grounds

Signed Date: 29 December 2022

Jeremy K H Rintoul
Upper Tribunal Judge Rintoul