IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Ce-File Number: UI-2022-002794
First-tier Tribunal No: EA/14093/2021

THE IMMIGRATION ACTS

Heard at Field House IAC
On the 13 October 2022
Extempore

Decision & Reasons Promulgated
On the 27 February 2023

Before

UPPER TRIBUNAL JUDGE RINTOUL

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MR IMERR HIDA
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:
For the Appellant: Ms S Cunha, Home Office Presenting Officer
For the Respondent: Ms K Tobin, Counsel instructed by Haris Ali Solicitors

DECISION AND REASONS

1. The Secretary of State appeals with permission against a decision of First-tier Tribunal Judge Shore promulgated on 25 March 2022 in which the judge allowed the appeal of Mr Imerr Hida against a decision of the

Secretary of State made on 15 September 2021 to refuse him entry clearance on a family permit under the EU Settlement Scheme (EUSS). That was subsequent to an application on 2 June 2021 for a family permit.

2. This is a case in which Mr Hida (to whom I refer for the sake of convenience only as the appellant as he was below) was in a relationship with an EU national, a citizen of Romania, had been since October 2019 and the partner, to whom I will refer to as the sponsor, was granted indefinite leave to remain in December 2020. The basis of the refusal was that the appellant had not provided the required evidence of a family relationship for a durable partner of the sponsor, that is a valid family permit or residence card issued under the Immigration (European Economic Area) Regulations 2016.

3. The Secretary of State was not represented in the First-tier Tribunal.

4. There is little dispute as to the facts of this case. The judge's findings are set out at paragraph 18 of the decision and it is of note that he found that the appellant and sponsor were in a committed relationship but were not married before 31 December 2020. The judge did not accept that Article 8 was engaged or could be and the judge rejected the submission that the appellant and sponsor being in a durable relationship was a ground on which he could grant the appeal.

5. He did, however, find that he should assess whether the refusal of the appellant's application was a proportionate interference by the respondent with the appellant's rights and fundamental freedoms under EU law. He found that it was not proportionate to have denied the respondent's application for a residence card in the circumstances and found that it was not proportionate to limit the eligibility for a family permit under the EUSS to those who have a marriage certificate or an EEA residence card. He found that it could not be proportionate to require the appellant to leave the United Kingdom for six months in order to make an application that is bound to succeed, given that it is not challenged that he is in a durable relationship with the sponsor. He therefore allowed the appeal.

6. The Secretary of State sought permission to appeal against that decision on the basis that the judge had misdirected himself as to law and that the Scheme Rules could not be met by a durable partner whose residence had not been facilitated and that thus, the appellant did not fall within Article 10 of the Withdrawal Agreement and in light of that there was no entitlement to the full range of judicial redress including Article 18(1)(r) of the Withdrawal Agreement requirement that the decision was proportionate and in the alternative, it is submitted that the judge's consideration of proportionality is wholly inadequate in the context of an applicant who did not meet the Immigration Rules.

7. When the matter came before me Ms Tobin submitted that the matter should be adjourned, pending the reference in the decision in Celik (EU exit, marriage, human rights) [2022] UKUT 220 to the Court of Appeal

recognising that in effect in light of Celik it was difficult to resist the Secretary of State's application or to argue that the respondent was entitled to leave to remain. I refused the application on the basis that so far as I am aware, permission to appeal to the Court of Appeal has not been granted. This is not a case in which a matter has been listed in the Court of Appeal, let alone a case where argument has already been heard and a decision is awaited.

8. I note also that Ms Tobin sought to persuade me that there were two bases on which Celik should not be followed, first, that it is wrong in law and second, that it requires further clarification. Ms Cunha for the Secretary of State does not accept either of those provisions.

9. I consider that I should follow the decision of the Upper Tribunal in Celik which I am satisfied is a clear and correct statement of the law. The judge should not have entertained arguments regarding proportionality, given that the appellant did not fall within the personal scope of the Withdrawal Agreement, Article 10, given that he was in a durable relationship which had not been facilitated prior to 31 December 2020, and thus he was not within the personal scope of Article 10 of the Withdrawal Agreement. I am satisfied in the light of what was said in Celik first, that the decision of the First-tier Tribunal involved the making of an error of law and second, that the decision should be remade by dismissing the appeal on all grounds.

10. In reaching that conclusion, I make the following additional observations. First this is a case in which the respondent had no right of residence under the Immigration (EEA) Regulations 2016 or otherwise. He did not have leave to remain in the United Kingdom and he had not made an application for his residence to be facilitated. Thus, and in following the binding authority of the Court of Appeal in Macastena [2018] EWCA Civ 1558 and in Aibangbee [2019] EWCA Civ339, he had no residence rights under EU law. At best, he had a right to have his residence facilitated.

11. It is an interesting proposition to suggest that somebody in that position should somehow have rights under EU law because of the United Kingdom withdrawing from the European Union with effect from 31 December 2020. Further, as the Secretary of State also submits, the decision in this case is such, or rather is framed by the judge in such a way as to make the entirety, or rather to make all decisions where this had occurred disproportionate. The judge says in terms, "I find that it is not proportionate for the respondent to limit the eligibility for a family permit under the EUSS to those who have a marriage certificate or an EEA residence card". That is nothing to do with the specific facts of the case and goes considerably wider; and well beyond the permissible ground of appeal. There is simply no basis on which a judge could rationally have come to that conclusion nor is there any sufficient reasoning on that point.

12. Further, and although it is not necessarily relevant to this case, given my findings in respect of Celik, it may well be the case, and this is a matter which would require further argument, that Article 18(1)(r) does not, even

if it applies, permit it to be argued that proportionality is a ground of appeal, given that it is not expressly stated that it would be a ground and it is difficult to see how arguments regarding proportionality could succeed where the person in question simply had no right under EU law or for that matter domestic law as at 31 December 2020 when individuals' rights crystallised. The effect of the provisions is to take a snapshot as at the time the United Kingdom left and to accord rights to those who had rights as at that point, as is clear from Celik.

13. For these reasons, I find that the decision of the First-tier Tribunal involved the making of an error of law and I set it aside. I remake the appeal by dismissing it on all grounds and that concludes my decision.

Notice of Decision

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

I remake the appeal by dismissing it on all grounds.

No anonymity direction is made.

Signed Date 23 December 2022

Jeremy K H Rintoul

Upper Tribunal Judge Rintoul