Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: UI-2022-002959**
(EA/14193/2021)

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On the 26 March 2023

Before

UPPER TRIBUNAL JUDGE MANDALIA

Between

JATINDER SINGH
(NO ANONYMITY DIRECTION)

Appellant

And

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr M Azmi, instructed by Connaught Law
For the Respondent: Mr C Williams, Senior Home Office Presenting Officer

Heard at Birmingham Civil Justice Centre on 26 January 2023

DECISION AND REASONS

Introduction

1. The appellant is a national of India. He is said to have arrived in the United Kingdom on 2nd August 2010. He has been in a relationship with Jurgite Liutkeviciute, a Lithuanian national, since January 2018. In November 2018, the appellant and Ms Liutkeviciute contacted the register Office and attempted to give Notice of Intention to get married. They were told that there were delays due to the backlog created by the Covid pandemic. They eventually married on 17th September 2021.

2. On 15th March 2021, the appellant made an application under Appendix EU for leave to remain as an extended family member (durable partner). The respondent refused that application with reference to Appendix EU to the Immigration Rules for reasons set out in a decision dated 16th September 2021, the day before the appellant married Liutkeviciute. The respondent said:

> "The required evidence of family relationship for a durable partner of a relevant EEA citizen is a valid family permit or residence card issued under the EEA Regulations (or by the Bailiwick of Jersey, the Bailiwick of Guernsey or the Isle of Man) as the durable partner of that EEA citizen and, where the applicant does not have a documented right of permanent residence, evidence which satisfies the Secretary of State that the durable partnership continues to subsist.
>
> Home Office records do not show that you have been issued with a family permit or residence card under the EEA Regulations as the durable partner of the EEA national and you have not provided a relevant document issued on this basis by any of the Islands.
>
> Therefore, you do not meet the requirements for settled status as a family member of a relevant EEA citizen.
>
> Careful consideration has been given as to whether you meet the eligibility requirements for pre-settled status under the EU Settlement Scheme. The relevant requirements are set out in rule EU14 of Appendix EU to the Immigration Rules.
>
> However, for the reasons already explained above, you have not provided any evidence to confirm that you are a durable partner of a relevant EEA citizen. Therefore, you do not meet the requirements for pre-settled status on this basis."

3. The appellant appealed and his appeal under the Immigration (Citizens' Rights Appeals) (EU Exit) Regulations 2020, was dismissed by First-tier Tribunal Judge Plowright for reasons set out in a decision promulgated on 19th April 2022.

<u>The decision of First-tier Tribunal Judge Plowright</u>

4. The appellant, his partner, Dr Constance Kolbe, Mr Mathew James Driver, Mrs Kulvir Kaur, Mr Angrej Dhaliwal and Mr Surjit Mal gave evidence before the First-tier Tribunal. At paragraphs [20] to [23], Judge Plowright said:

> "20. The appellant did not marry the EEA sponsor until the 17th September 2021. Therefore the appellant cannot meet the definition under (a)(i) of a 'family member of a relevant EEA national' because his marriage to an EEA national was not contracted before the 'specified date' which is defined as the 31st December 2020.
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> 21. The appellant cannot meet the definition under a(ii) of a 'family member of a relevant EEA citizen' because, although the marriage was contracted after the 'specified date', namely the 31st December 2020,

> he does not have a 'relevant document' as a durable partner, namely a family permit, registration certificate or a residence card as the durable partner of an EEA citizen.
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> 22. The appellant cannot meet the definition under (e) of a 'family member of a relevant EEA national', on the basis of him being the 'durable partner' of an EEA national. Because he did not have a 'relevant document' as the durable partner of an EEA citizen.
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> 23. For these reasons I find that the appellant cannot succeed in his appeal on the ground that the decision is not in accordance with Appendix EU."

5. Judge Plowright went on to address the claims made by the appellant regarding the Withdrawal Agreement at paragraphs [24] to [36] of his decision. He concluded the appellant cannot meet the criteria under Article 10(1) to (3) of the Withdrawal Agreement. At paragraphs [37] to [49], he addressed the appellant's claim that the respondent's decision is disproportionate under Article 18. He said:

> "39. The first matter I need to consider is whether Article 18(l)(r) applies to the appellant at all. Looking at the introductory paragraph to Article 18(1) quoted above, it makes it clear that Article 18 only applies to "Union citizens or United Kingdom nationals. Their respective family members and other persons, who reside in its territory in accordance with the conditions set out in this title". However, this appellant is none of these. He is not a Union citizen. He is not a United Kingdom national. He is not the "family member" in that he does not meet the definition of a family member in Article 9 of the Withdrawal Agreement and he is not an other person residing in its territory in accordance with the conditions set out in this title because he does not meet the requirements of Article 10 of the Withdrawal Agreement. Therefore I find that Article 18(1)(r) does not apply to the appellant."

6. Nevertheless, at paragraphs [40] to [48], Judge Plowright went on to consider whether the refusal of the appellant's application for leave to remain under the EUSS was a proportionate interference by the respondent with the appellant's rights and fundamental freedoms under EU law. He found that the decision to refuse the application on the basis that the appellant was not in possession relevant document is a proportionate one, and dismissed the appeal.

The grounds of appeal

7. The appellant claims Judge Plowright (i) irrationally concluded that Article 18 of the Withdrawal Agreement does not apply to the appellant, (ii) erred in his conclusion regarding the 'extensive consideration of the appellant's circumstances' and (iii), reached irrational conclusions on proportionality.

8. Permission to appeal to the Upper Tribunal was granted by First-tier Tribunal Judge Haria on 23rd May 2022. The appeal was listed before me

to determine whether there is a material error of law in the decision of the First-tier Tribunal Judge, and if so, to remake the decision.

The hearing before me

9. At the outset of the hearing before me, Mr Azmi, quite properly in my judgement, acknowledged that the decisions of the Upper Tribunal in Celik (EU exit; marriage; human rights) [2022] UKUT 00220 (IAC) and Batool & Ors (other family members: EU exit) [2022] UKUT 00219 (IAC) now pose the appellant's appeal significant difficulties. Those decisions post-date the decision of Judge Plowright and the appellant's grounds of appeal.

10. Mr Azmi applied for a stay of the appeal. He submits the decision of the Upper Tribunal in Celik is the subject of an application for permission to appeal that is now before the Court of Appeal. He was unable to draw my attention to the grounds of appeal being advanced before the Court of Appeal and neither was he able to provide me with any further details about the application before the Court of Appeal, including whether permission to appeal has been granted. I refused the application for a stay of this appeal. In the absence of any information regarding the application for permission to appeal before the Court of Appeal let alone confirmation that permission to appeal has been granted by the Court of Appeal, it is not in my judgment in the interests of justice or in accordance with the overriding objective for the hearing of this appeal to be unnecessarily delayed.

11. Mr Azmi did not make any further submissions as to the grounds of appeal advanced. I did not call upon Mr Williams to respond.

Discussion

12. As Mr Azmi quite properly acknowledged, the reported decisions of the Upper Tribunal in Celik (EU exit; marriage; human rights) [2022] UKUT 00220 (IAC) and Batool & Ors (other family members: EU exit) [2022] UKUT 00219 (IAC), that post-date the decision of First-tier Tribunal Judge Plowright, do pose significant difficulties for the appellant.

13. At paragraphs [51] to [53], the Upper Tribunal in Celik said:

> "51. Article 3(2) of Directive 2004/38/EC requires Member States to "facilitate entry and residence" for "any other family members" who are dependents or members of the household of the Union citizen; or where serious health grounds strictly require the personal care of the family member by the Union citizen. A person is also within Article 3.2 if they are a "partner with whom the Union citizen has a durable relationship, duly attested". (*my emphasis)* For such persons, the host Member State is required to "undertake an extensive examination of the personal circumstances and shall justify any denial of entry or residence to these people".
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> 52. There can be no doubt that the appellant's residence in the United Kingdom was not facilitated 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. *(my emphasis)* 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.
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> 53. If the appellant had applied for facilitation of entry and residence before the end of the transition period, Article 10.3 would have brought him within the scope of that Article, provided that such residence was being facilitated by the respondent "in accordance with … national legislation thereafter". This is not, however, the position. For an application to have been validly made in this regard, it needed to have been made in accordance with regulation 21 of the 2016 Regulations. That required an application to be submitted online, using the relevant pages of www.gov.uk, by post or in person, using the relevant application form specified by the respondent; and accompanied by the applicable fee."

14. In paragraph [56] of its decision, the Upper Tribunal went on to say:

> "The above analysis is destructive of the appellant's ability to rely on the substance of Article 18.1. He has no right to call upon the respondent to provide him with a document evidencing his "new residence status" arising from the Withdrawal Agreement because that Agreement gives him no such status. He is not within the terms of Article 10 and so cannot show that he is a family member for the purposes of Article 18 or some other person residing in the United Kingdom in accordance with the conditions set out in Title II of Part 2."

15. If there were any doubt, in Batool & Ors, the Upper Tribunal confirmed:

> "(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."

16. It is unnecessary to recite the full principles set out in those decisions. As the Upper Tribunal in Celik had pointed out, Article 3 of Directive 2004/38/EC requires member states to facilitate entry and residence for any other family members. In Celik's case, the appellant's residence in the UK was not facilitated by the respondent before the end of the relevant transition period, nor did he apply for such facilitation (64). It was not enough that the appellant may by that time have been in a durable

relationship with the person whom he later married in 2021. Unlike spouses of EEA nationals, extended family members enjoyed no such right of residence under the EU free movement legislation and their rights only arose upon their residence being facilitated by the respondent as evidenced by the issue of a residence permit (52).

17. If the appellant had applied for facilitation of entry and residence before the end of the transition period, Article 10.3 of the Withdrawal Agreement would have brought him within the scope of that Article but that was not the case in Celik, nor is it the case in this appeal. As the Tribunal said in Batool, an extended (oka other) family member whose entry and residence were 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. The appellant here 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. Following Batool and Celik, the appellant cannot rely on the Withdrawal Agreement and his appeal was therefore bound to fail.

18. The decision reached by Judge Plowright is not in the circumstances vitiated by a material error of law. It was open to Judge Plowright to dismiss the appeal for the various reasons set out in his decision, and it follows that I dismiss the appeal before me.

Notice of Decision

19. **The decision of First-tier Tribunal Judge Plowright is not vitiated by a material error of law and his decision stands.**

20. **The appeal before me is dismissed.**

Signed V. Mandalia Date 26th January 2023

Upper Tribunal Judge Mandalia