IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2022-003003
First-tier Tribunal No: EA/15215/2021

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On 27 April 2023

Before

UPPER TRIBUNAL JUDGE MCWILLIAM

Between

Secretary of State for the Home Department

Appellant

and

Denis Graceni
(NO ANONYMITY ORDER MADE)

Respondent

Representation:
For the Appellant/SSHD: Mr S Walker Home Office Presenting Officer
For the Respondent: No attendance

Heard at Field House on 26 January 2023

DECISION AND REASONS

1. I shall refer to the Respondent as the Appellant as he was before the First-tier Tribunal.

2. The Appellant is a citizen of Albania. His date of birth is 18th July 2001.

3. In a decision of 17 May 2022 the First-tier Tribunal (Judge Landes) granted permission to the SSHD to appeal against the decision of the First-tier Tribunal (Judge Sweet) to allow the Appellant's appeal against the decision of the SSHD dated 9th July 2021.

4. The matter came before me to determine whether the First-tier Tribunal had erred in law in allowing the Appellant's appeal. At the hearing on 26 January 2023 I communicated my decision in open court.

5. The Appellant made an application under the EU Settlement Scheme (EUSS) on 13 April 2021 for pre-settled status. The application was refused by the SSHD because the Appellant had not provided evidence that he met the requirements

of the EUSS. The Appellant had not been issued with (or applied for) a family permit or a residence card under the Immigration (European Economic Area) Regulations 2016 (the 2016 Regulations). Therefore he did not hold a relevant document by 31st December 2020.

6. The judge heard evidence from the Appellant and his partner, a Romanian national. They married on 13 April 2021. Their evidence was that they had been in a relationship since March 2020.

7. The judge stated as follows:

> "6. In essence, the respondent's refusal is for the reasons that they were not married prior to the cut-off date of 31 December 2020, nor was the respondent satisfied that they were in a durable relationship prior to that date. However, as submitted by Counsel for the appellant – who made oral submissions today and provided a skeleton argument dated 21 February 2022 - the appellant should not be put in a worse position that he (sic) would have been in under the EEA Regulations. It is clear that they were in a durable relationship (as defined in Annex 1) prior to 31 December 2020, and proof of that ongoing relationship is satisfied by their marriage on 13 April 2021 and attendance at the hearing today. Nor would putting them in a worse position than under the EEA Regulations be consistent with the spirit of the Withdrawal Agreement, or with Article 18(l)(r) as to the redress procedures against any decision refusing to grant residence status to ensure that the decision is not disproportionate.
>
> 7. I am satisfied that the appellant does meet the requirements for pre-settled status under EU14 of Appendix EU, and therefore this appeal should be allowed."

8. The Appellant's solicitors emailed the Tribunal at 11:13 am on the morning of the hearing before the UT to request an adjournment. The email reads;-

> "We note that we received notification of this hearing early this month and we immediately notified our client, Mr Graceni. He confirmed receipt of the notice hearing and the date. We note that attempts to contact him afterwards have been unsuccessful. We note that this is extremely out of character for our client however we are left without instruction.
>
> We submit that our client is the Respondent in this matter having initially been successful in his appeal in the First-Tier Tribunal and thus has an incentive to follow through with the appeal process. While we are without instruction, it would be in the best interest of our client and these proceedings if we could request the Court to adjourn this matter."

9. I refused the application for an adjournment. I note that the matter was adjourned in October 2022 as a result of the Appellant's failure to attend the hearing. There was no good reason for an adjournment. Giving effect to the overriding objective (Rule 2 of the Tribunal Procedure (Upper Tribunal) Rules 2008), I decided that fairness demanded that the matter proceeded in the Appellant's absence. In any event, the solicitors are seeking an adjournment without instructions. Moreover, if they are still acting for the Appellant, it is not clear why they did not attend the hearing.

Grounds of Appeal

10. The SSHD's grounds of appeal in summary contend that the judge gave inadequate reasons for allowing the appeal. The Appellant has no documented right to reside in the United Kingdom. He married an EEA national after the revocation of the 2016 Regulations.

11. The Appellant has not filed a response under Rule 24. There is no challenge to the SSHD's grounds of appeal.

Error of Law

12. The Appellant has a right of appeal against the decision of the SSHD pursuant to Regulation 3 of the Immigration (Citizens' Rights Appeals) (EU Exit) Regulations 2020. There are, in summary, two grounds of appeal available to this Appellant pursuant to Regulation 8. The first ground available to this Appellant is that the decision breaches any right he has, by virtue of the Withdrawal Agreement. The second ground available to him is that the decision is not in accordance with the Immigration Rules, Appendix EU.

13. The judge stated that the Appellant meets the requirements of the Immigration Rules; however, no reasons were given. Whilst the judge accepted that the relationship was durable prior to 31 December 2020 and that it was ongoing, he did not explain how the Appellant met the requirements of Appendix EU. Insofar as the judge allowed the appeal because the decision would not "be consistent with the spirit of the Withdrawal Agreement or with Article 18(1)(r)", this is inadequately reasoned and contrary to the findings of the UT in Celik (EU exit; marriage; human rights) [2022] UKUT 00220. Applying Celik the Appellant cannot satisfy the requirements of Appendix EU because despite being in a durable relationship with his Sponsor prior to 31 December 2020, his entry and residence had not been facilitated and nor had he applied for facilitation before that time. The Appellant had no substantive rights under the EU Withdrawal Agreement and it was not open to the judge to invoke the concept of proportionality in order to succeed under the 2020 Exit Regulations.

Re-make

14. I set aside the decision of the First-tier Tribunal to allow the Appellant's appeal. Properly applying Celik, I dismiss the appeal.

15. The appeal is dismissed.

Joanna McWilliam

Judge of the Upper Tribunal
Immigration and Asylum Chamber

2 March 2023