



IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2022-002876

First-tier Tribunal No: EA/15572/2021

THE IMMIGRATION ACTS

Decision & Reasons Issued:

27th October 2023

Before

UPPER TRIBUNAL JUDGE STEPHEN SMITH
DEPUTY UPPER TRIBUNAL JUDGE FARRELLY

Between

Secretary of State for the Home Department
(NO ANONYMITY DIRECTION MADE)

Appellant

and

Mr Inest Haxhiaj

Respondent

Representation:

For the Appellant:

Ms J. Isherwood, Senior Home Office Presenting Officer

For the Respondent:
withdrawn)

The respondent did not attend and was not represented (case

Heard at Field House on 8 September 2023

DECISION AND REASONS

1. In this appeal, the appellant's appeal against the refusal of his application under the EU Settlement Scheme was successful before the First-tier Tribunal, and the Secretary of State appealed. Shortly before the hearing before us, the appellant, as we shall continue to refer to him, applied to withdraw his case in light of the judgment in *Celik v Secretary of State for the Home Department* [2023] EWCA Civ 921. Upper Tribunal Judge Stephen Smith consented to the withdrawal of the appellant's case under rule 17(2) of the Tribunal Procedure (Upper Tribunal) Rules 2008 on 7 September 2023. However, as this is an appeal of the Secretary of

State and not the appellant's appeal to withdraw, the matter was heard without the participation of the appellant, who was no longer a party. The notice consenting to the withdrawal of the appellant's case made the above procedural position clear.

2. We announced at the hearing that we would allow the Secretary of State's appeal and remake the decision by dismissing it, with full reasons to follow, which we now give.

Factual background

3. By a decision promulgated on 24 May 2022, First-tier Tribunal Judge Jepson ("the judge") allowed an appeal brought by the appellant against a decision of the Secretary of State dated 4 November 2021 to refuse his application for pre-settled status under the EU Settlement Scheme ("the EUSS"). The Secretary of State now appeals against the decision of the judge with the permission of Upper Tribunal Judge Plimmer (as she then was).
4. In summary, the appellant is a citizen of Albania. On 23 June 2021 he married a Greek citizen ("the sponsor") who holds pre-settled status. Shortly afterwards, he applied for pre-settled status under the EUSS. The application was refused on the basis that the appellant's marriage to the sponsor had not taken place prior to the conclusion of the implementation period under the EU Withdrawal Agreement, at 11 PM on 31 December 2020. His residence had not been facilitated as a "durable partner" either. It followed that he did not meet the requirements for either settled or pre-settled status under the EUSS.
5. The appellant's case was that he and the sponsor had been unable to marry before the end of the limitation period due to the restrictions imposed by the Covid-19 pandemic, and due to the delay in obtaining the sponsor's parental consent to marry, since she was a minor at the time they married. It was disproportionate to refuse his application.
6. The judge accepted the Secretary of State's submissions that the appellant could not meet the requirements of the Immigration Rules (para. 43). The judge engaged in a careful and lengthy discussion of the competing submissions he heard concerning the EU Withdrawal Agreement and the associated primary and secondary domestic legislation. The judge concluded at para. 44 that the appellant benefited from the principle of proportionality pursuant to Article 18(1)(r) of the Withdrawal Agreement. There had been a delay in obtaining the sponsor's parental consent to her marriage to the appellant which were in addition to those occasioned by the Covid pandemic (para. 49). The judge concluded at para. 50 and following that it would be disproportionate to hold the appellant's delay in getting married against him and allowed the appeal.
7. The judge did not have the benefit of the judgment of this tribunal in *Celik (EU exit; marriage; human rights)* [2022] UKUT 220 (IAC), or of the onward appeal judgment of the Court of Appeal. We pay tribute to the careful manner in which the judge approached the novel and complex issues before him in the absence of authority or other guidance.

Issue before the Upper Tribunal

8. There is a single ground of appeal, namely that the appellant was not within the personal scope of the Withdrawal Agreement, and so could not benefit from the principle of proportionality. The appeal should have been dismissed.

Appellant not within the personal scope of the Withdrawal Agreement

9. We find that in light of *Celik* in the Court of Appeal, the appellant is outside the scope of the Withdrawal Agreement because he did not marry the appellant *before* the conclusion of the

implementation period and had not applied for his relationship to be facilitated as a durable partner before then. As Lewis LJ put it in *Celik* in the Court of Appeal at para. 56:

“The principle of proportionality is not intended to lead to the conferment of residence status on people who would not otherwise have any rights to reside.”

10. We therefore allow the Secretary of State’s appeal and set the decision of the judge aside.

Remaking the decision in the Upper Tribunal

11. There are no findings of fact which need to be reached in order to remake the decision, and, of course, the appellant has withdrawn his case from these proceedings.

12. The practice direction requires the Upper Tribunal in these circumstances to remake the decision itself. Acting under section 12(2)(b)(ii) of the Tribunals, Courts and Enforcement Act 2007 we remake the decision of the First-tier Tribunal by dismissing the appeal. That is because the appellant does not meet the criteria for pre-settled status contained in Appendix EU for the reasons set out in the refusal letter. He is not within the personal scope of the Withdrawal Agreement and so does not enjoy the ability to contend that the decision was disproportionate, and there is no other basis upon which the appeal can succeed.

13. The appeal is dismissed.

Notice of Decision

The decision of Judge Jepson involved the making of an error of law and is set aside.

We remake the decision by dismissing the appeal.

Stephen H Smith

Judge of the Upper Tribunal
Immigration and Asylum Chamber

17 October 2023