IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2023-000931

First-tier Tribunal No: EA/05482/2022

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On 25 June 2023

Before

UPPER TRIBUNAL JUDGE FRANCES
DEPUTY UPPER TRIBUNAL JUDGE JARVIS

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

SOFIA MEHMOOD
(NO ANONYMITY ORDER MADE)

Respondent

Representation:
For the Appellant: Ms E. Everett, Senior Home Office Presenting Officer
For the Respondent: No representation

Heard at Field House on 9 June 2023

DECISION AND REASONS

Introduction

1. In this appeal the Secretary of State is the Appellant but for ease of reading we shall continue to refer to the parties as they were at the First-tier Tribunal hearing.

2. In short, the Respondent was granted permission to appeal to the Upper Tribunal by Upper Tribunal Judge Kebede in a decision dated 4 May 2023 against the decision of Judge Wyman (hereafter "the Judge") promulgated on 19 January 2023.

3. In the appealed decision, the Judge allowed the Appellant's appeal against the refusal decision issued by the Respondent on 1 June 2022 which was taken under Appendix EU of the Immigration Rules.

The decision of the Judge

4. In the decision the Judge noted that the Appellant entered the United Kingdom using her Italian passport on 5 January 2022, §3.

5. The Judge also recorded the evidence that the Appellant's father had moved to the United Kingdom in October 2022, §5.

6. For completeness the Judge also recorded that the Appellant's mother and brother remained living in Italy, §6.

7. Importantly, at §19, the Judge recorded the concession of the Appellant's counsel (Mr Raza) that the Appellant's application (and indeed appeal) could not succeed under Appendix EU of the Rules as she had not resided in the United Kingdom in December 2020 and that her father only had pre-settled status under the Rules and so could not be her Sponsor. At §29, the Judge formally accepted the concession made by counsel and also recorded that the Appellant's father could not act as a Sponsor due to his pre-settled status given under EU3A as a *joining family member.*

8. In light of that the Judge concluded that the key issue before the Tribunal was whether or not the Appellant could take the benefit of Article 18 of the Withdrawal Agreement, §31.

9. In terms of specific findings, the Judge observed that the Appellant was still under 21 years old at the date of hearing and therefore met the definition of a child of an EEA citizen, §35.

10. The Judge also found that the Appellant's father is in the UK, working in stable employment and can meet the financial criteria set out in Appendix FM but opined that the Appellant could not apply as a child under Appendix FM given her age.

11. The Judge further concluded that at some point in the future, i.e. after the Appellant's mother and younger brother have made an application for entry clearance to the UK, succeeded under Appendix FM and then entered, the Appellant would be left alone in Italy, §36.

12. At §38, the Judge ultimately concluded that had the Appellant come to the United Kingdom even for a single day prior to 31 December 2020 she would have been granted pre-settled status. In the same paragraph the Judge also

found that if the Appellant's father had been able to sponsor her then the current application, refusal and appeal would not have been necessary.

13. The Judge sought to weigh in this consideration, the Appellant's age, previous studies and the fact that her whole family intend to settle in the United Kingdom and concluded that the Secretary of State's refusal decision was a disproportionate response.

14. The Judge therefore allowed the appeal in non-specific terms.

The Respondent's challenge

15. In the Grounds of Appeal dated 19 January 2023, the Respondent asserted that the Appellant's non-compliance with the Rules (as in fact found by the Judge at §29) was decisive of the appeal. The author of the Grounds also asserted that the Appellant had the option of continuing her life and education in Italy.

The error of law hearing

16. The Appellant did not attend the in-person hearing at Field House and there was no attendance by her representatives. Enquiries were made by the Tribunal's clerk and we were informed that the Appellant's representatives had previously come off the record.

17. The clerk tried ringing the Appellant on both telephone numbers provided to the Tribunal but both lines were dead. The clerk also informed the panel that the notice of hearing had been sent by post to the Appellant on 22 May 2023 and there was no indication this had been unsuccessful.

18. We therefore took the view that the Tribunal had provided sufficient notice to the Appellant and had equally made appropriate endeavours to contact her on the day of the hearing. Under the circumstances we decided that there was no unfairness to the Appellant by proceeding with the appeal and that it was in the interests of justice to do so in accordance with r. 38 of the Upper Tribunal Procedure Rules.

19. We heard brief submissions from Ms Everett who indicated that whether the Upper Tribunal's decision in Celik (EU exit, marriage, human rights) [2022] UKUT 220 (IAC) allowed the application of Article 18(1)(r) of the Withdrawal Agreement or not, that ultimately the Tribunal's decision was unlawful.

Findings and reasons

20. There is no dispute that the Judge was right to accept the concession made by the Appellant's previous counsel that she was not able to meet the requirements of Appendix EU of the Rules for the reasons given in §§19 & 29 of the judgment.

21. In respect of the Judge's application of Article 18 of the Withdrawal Agreement, we note that this point was not particularly elaborated upon in the Respondent's Grounds of Appeal but nonetheless was raised by Upper Tribunal Judge Kebede in her grant of permission on 4 May 2023 (at para. 2).

22. In our judgment, we conclude that the Judge did materially err in law when concluding that the impact of the refusal decision caused a breach of Article 18(1)(r).

23. In reaching that conclusion, we fully recognise that the Judge cited the Upper Tribunal's decision in Celik and we take note of the Upper Tribunal's view at §62 in respect of those who are able to rely upon Article 18:

> *"Ms Smyth submitted at the hearing that, since the appellant could not bring himself within Article 18, sub-paragraph (r) simply had no application. Whilst we see the logic of that submission, we nevertheless consider that it goes too far. The parties to the Withdrawal Agreement must have intended that an applicant, for the purposes of sub-paragraph (r), must include someone who, upon analysis, is found not to come within the scope of Article 18 at all; as well as those who are capable of doing so but who fail to meet one or more of the requirements set out in the preceding conditions."*

24. It is likely that more is to be said about these issues in the upcoming appeal of this decision to the Court of Appeal and we also note that there is some general disagreement as to what the Upper Tribunal intended in respect of §62 of the decision.

25. Therefore taking §62 at its highest, and proceeding on the basis that the Appellant was able to rely upon Article 18 despite the fact that she (and indeed her father as a potential Sponsor) do not fall within the relevant definitions in the gateway provision in Article 10 of the Withdrawal Agreement, we have assessed the reasoning given by the Judge in respect of the proportionality assessment in Article 18(1)(r).

26. We conclude that the Judge manifestly erred by failing to balance the personal circumstances of the Appellant as noted earlier in this judgment, with the express limitations and purpose of the Withdrawal Agreement and indeed, where relevant, the EUSS rules.

27. Though the Judge did refer to Celik, she failed to show any reference in her conclusions to the approach to proportionality in such cases detailed by the Upper Tribunal at §§61 – 66.

28. At §63, the Upper Tribunal found:

> *"The nature of the duty to ensure that the decision is not disproportionate must, however, depend upon the particular facts and circumstances of the applicant. The requirement of proportionality may assume greater significance where, for example, the applicant contends*

that they were unsuccessful because the host State imposed unnecessary administrative burdens on them. By contrast, proportionality is highly unlikely to play any material role where, as here, the issue is whether the applicant falls within the scope of Article 18 at all."

29. Furthermore, at §66:

"We also agree with Ms Smyth that the Appellant's interpretation of Article 18(1)(r) would also produce an anomalous (indeed, absurd) result. Article 18 gives the parties the choice of introducing "constitutive" residence schemes: see Article 18.4. Article 18.1(r) applies only where a State has chosen to introduce such a scheme. If sub-paragraph (r) enables the judiciary to re-write the Withdrawal Agreement, this would necessarily create a divergence in the application of the Withdrawal Agreement, as between those States that have constitutive schemes and those which do not..."

30. In effect, the Judge predominantly allowed the appeal on the basis that the Appellant would have succeeded if she had been in the United Kingdom before 31 December 2020 and/or if her father had been a qualifying Sponsor for the purposes of Appendix EU.

31. The Judge has provided no reasons at all for why the clear temporal and qualification requirements in (for instance) Article 10 of the Withdrawal Agreement read with Appendix EU should not carry determinative or at the very least heavy weight where the Judge has not identified any *unnecessary* administrative burdens in the Appellant's case.

32. There is simply no explanation from the Judge as to why the requirements for qualification under the Withdrawal Agreement should be overridden by the personal circumstances of an Appellant who simply does not meet those requirements.

33. We therefore concluded that the Judge's conclusions in respect of proportionality under Article 18(1)(r), if she did in fact have jurisdiction to consider the terms of that provision, were unlawful.

Notice of Decision

34. We therefore concluded that the Judge has materially erred in allowing the appeal and set aside the decision promulgated on 19 January 2023.

35. We remake the decision by dismissing the appeal under the Rules and the Withdrawal Agreement for the reasons outlined above.

36. The appellant's appeal against the refusal to grant status under Appendix EU is dismissed under The Immigration (Citizens' Rights Appeals) (EU Exit) Regulations 2020.

I P Jarvis

Deputy Upper Tribunal Judge
Immigration and Asylum Chamber

15 June 2023