



**Upper Tribunal  
(Immigration and Asylum Chamber)**

Appeal Number: UI-2022-001915  
First-tier case number: EA/14138/2021

**THE IMMIGRATION ACTS**

**Decision & Reasons  
Promulgated  
On 09<sup>th</sup> of January 2024**

**Before**

**DEPUTY UPPER TRIBUNAL JUDGE WOODCRAFT**

**Between**

**MS ORNELA HOXHA  
(Anonymity order not made)**

Appellant

**and**

**SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Respondent

**Representation:**

For the Appellant: The appellant did not appear and was not represented  
For the Respondent: Mr A Basra, Home Office Presenting Officer

**DECISION AND REASONS**

**Heard at Field House on 11 December 2023**

**The Appellant**

1. The appellant is a citizen of Albania born on 17 February 1993. She appealed against a decision of the respondent dated 21 September 2021 refusing her application (dated 29 June 2021) for leave to remain under the EU SS scheme. The appellant is the spouse of Viroel Barci a Greek citizen (“the sponsor”). The appellant’s appeal was allowed in the First-tier by Judge of the First-tier Tribunal Aldridge on 10 March 2022. The respondent appeals with leave against that decision. Although the matter comes before me in the first place as an appeal by the respondent, I shall

for the sake of clarity continue to refer to the parties as they were known at first instance.

### **The Appellant's Case**

2. The appellant's case is that she married her spouse on 27 May 2021 after the United Kingdom had left the European Union on 31 December 2020 ("the specified date") She had formed a durable relationship with her sponsor prior to the specified date but because of Covid restrictions she and her spouse had been unable to fix a date for their wedding any earlier than 27 May 2021 when it took place. Although she acknowledged that she did not have a valid family permit or residence card at the time of her application for leave to remain, she contended nevertheless that the decision to refuse her application was disproportionate under the provisions of the Withdrawal Agreement. Further, EU 14 of appendix EU which requires evidence to confirm that an applicant is in a durable relationship, did not apply to her.

### **The Decision at First Instance**

3. The First-tier Tribunal Judge accepted that the appellant had no documentation to support her application for leave to remain but nevertheless allowed the appeal. This was on the basis that he self directed that he was obliged to consider whether the decision was disproportionate under the terms of the Withdrawal Agreement. He took into account that there had been barriers to the appellant and her sponsor marrying because of the Covid restrictions; that the rules themselves which governed the EU SS settlement scheme were complex; that the Home Office guidance to caseworkers appeared to be at odds with those rules and finally that the couple had been in a genuine durable relationship by exit day and indeed they had since married.

### **The Onward Appeal**

4. The respondent appealed that decision arguing:

"It is asserted that the Withdrawal Agreement provides no applicable rights to a person in the Appellant's circumstances. Article 10(1)(e) of the Withdrawal Agreement confirms that beneficiaries of the Agreement are those who were residing in accordance with EU law as of 31 December 2020 (the specified date). The Appellant was not residing in accordance with EU law as of the specified date, as she had not had her residence facilitated in accordance with national legislation (The Immigration (European Economic Area) Regulations 2016). She was also not married to her spouse prior to the specified date. This is in accordance with Article 3.2(b) of Directive 2004/38/EC. Article 10(2) of the Withdrawal Agreement permits the continued residence of a former documented Extended Family Member, with an additional transitional provision in Article 10(3) for those who had applied for such facilitation before 31

December 2020. 4. It is therefore submitted that the Appellant does not come within the personal scope of the Withdrawal Agreement.”

5. Permission to appeal was initially refused by the First-tier but was granted on further application by the Upper Tribunal, Upper Tribunal Judge O’Callaghan. He wrote:

“The FtT found that the appellant was unable to satisfy the requirements of Appendix EU of the Immigration Rules. However, the appeal was allowed under the Withdrawal Agreement, primarily on the ground that the couple were denied the opportunity to be married before the United Kingdom’s withdrawal from the European Union consequent to restrictions imposed during the Covid-19 pandemic. The respondent contends that the Withdrawal Agreement provides no applicable rights to a person in the appellant’s circumstances as she was not residing in accordance with EU law at the specified date. I am satisfied that the respondent’s grounds of appeal are arguable. The appellant will be expected to establish at the error of law hearing that she lodged an appeal on Withdrawal Agreement grounds with the First-tier Tribunal.

6. Following the grant of permission the appellant submitted a cross application to appeal combined with a rule 24 response arguing that it was not necessary for the appellant to have documentary evidence of her relationship with the sponsor and that the rules in any event were impenetrable.

### **The Hearing Before Me**

7. In consequence of the grant of permission the matter came before me to determine in the first place where there was a material error of law in the decision of the First-tier Tribunal such that it fell to be set aside. If there was then I would make directions on the rehearing of the appeal. If there was not the decision at first instance would stand.

8. At the hearing there was no attendance by or on behalf of the appellant. Following the grant of permission there had been some correspondence between the Upper Tribunal and solicitors instructed by the appellant. An e-mail from Mayfairs solicitors dated 28 November 2023 was received by the Upper Tribunal which stated:

*“Our client has received notice of hearing scheduled at Field House, 15-25 Breems Buildings, London EC4A 1DZ on 11 Dec 2023. Our client left the country and applied for entry clearance under appendix FM rules. She wishes to withdraw from appeal. The appeal will be withdrawn or abandoned when our client left the country. “*

9. The Tribunal responded to this email on 5 December 2023 by letter pointing out that the appeal before it had been lodged by the respondent not the appellant therefore it was a question for the respondent to inform

the Upper Tribunal if he did not wish to continue with his onward appeal. In those circumstances the Upper Tribunal indicated it would take no further action on the appellant's communication.

10. The respondent then wrote to the Tribunal confirming that he did intend to proceed with his appeal adding:

"The Respondent respectfully submits that if the Appellant accepts the Respondent's grounds of appeal are made out then the appropriate course of action would be for the Appellant to agree by consent that the decision of the First-Tier Tribunal contains a material error of law and for the Upper Tribunal to issue a decision to dismiss the Appellant's appeal."

11. At the hearing itself I indicated to the presenting officer that I would deal substantively with the appeal rather than dispose of the appeal on the basis that the appellant had given an indication through her solicitors that she wished to withdraw. Her whereabouts were unclear from the solicitor's email but it was clear that she and her representatives had been served with notice of the hearing. The Upper Tribunal had previously indicated that the email would not be treated as a notice of withdrawal because the appellant was informed that no further action would be taken on the appellant's solicitors email.

### **Discussion and Findings**

12. The issue in this case is a narrow one and the point of law involved has now been confirmed by the Court of Appeal in the case of **Halil Celik v SSHD [2023] EWCA Civ 921**. Contrary therefore to the argument made by counsel for the appellant at first instance, the law is not impenetrable. The Withdrawal Agreement does not give rise to a freestanding application as the respondent correctly asserted in his grounds of onward appeal. The position is that to succeed under the EUSS scheme an applicant must have documentary evidence in the form either of a family permit or residence card at the relevant time. The appellant in this case accepted that she did not have such documentation.
13. In the circumstances it is not perhaps surprising that the appellant no longer seeks leave to remain on the basis of her application in the instant case but appears to be considering some other form of application under Appendix FM. That is a matter for her and is not an issue before me. What is clear is that the case of **Celik** puts the matter beyond doubt. The judge made a material error of law in considering that he was entitled to allow the appeal by assessing the proportionality of the respondent's decision to refuse. As the respondent put it in his grounds and with which I concur:

*"There was no entitlement to the full range of judicial redress including the Article 18(1)(r) requirement that the decision was proportionate. As no such right is conveyed to the Appellant by the relevant parts of the*

*Withdrawal Agreement, there is no conceivable breach of rights in this Appellant's case.... the FTTJ has materially erred in law by finding that the decision to refuse the Appellant's application under Appendix EU, due to her inability to marry prior to the specified date, is in breach of the Appellant's rights under the Withdrawal Agreement."*

14. I find that there is a material error of law in the First-tier Tribunal decision and I set it aside. As the law has now been clarified by the Court of Appeal and as the appellant has indicated she does not wish to continue to argue the point, I consider that the correct course to take is to proceed to rehear the appeal myself. I have written submissions from both parties including lengthy submissions from counsel for the appellant. He sought to argue that documentation is not necessary, but that is a submission which I can dismiss in the light of the decided case law. The facts of this case are not in dispute and I find I am in a position to be able to make a decision on the appellant's original appeal against the respondent's decision. For the reasons given above I dismiss the appellant's appeal.

**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 decision by dismissing the appellant's appeal against the respondent's decision dated 21 September 2021.

Appellant's appeal dismissed

I make no anonymity order as there is no public policy reason for so doing.

Signed this 28 December 2023

.....  
Judge Woodcraft  
Deputy Upper Tribunal Judge

**TO THE RESPONDENT**  
**FEE AWARD**

As the appeal has been dismissed there can be no fee award.

Signed this 28 December 2023

.....  
Judge Woodcraft  
Deputy Upper Tribunal Judge