IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2022-003761
First-tier Tribunal No: EA/03038/2022

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On the 08 March 2023

Before

UPPER TRIBUNAL JUDGE RIMINGTON
DEPUTY UPPER TRIBUNAL JUDGE CHANA

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

ABDELHAKIM OUHAB
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:
For the Appellant: Mr D Clarke, Senior Home Office Presenting Officer
For the Respondent: Ms B Asanovic instructed by Kamberley Solicitors

Heard at Field House On 24 November 2022

DECISION AND REASONS

1. The application for permission to appeal was made by the Secretary of State but nonetheless we will refer hereinafter to the parties as they were described in the First-tier Tribunal, that is Mr Ouhab the appellant, and the Secretary of State the respondent.

2. The Secretary of State appeals against the decision of First-tier Tribunal Judge Pears who allowed the appellant's appeal under the Immigration Citizens' Rights Appeals (EU Exit) Regulations 2020. The appellant, a citizen of Algeria born on 14th June 1987, appealed against the decision of the Secretary of State dated 10th February 2022 refusing him settled or pre-settled status under the EU Settlement Scheme as the spouse or durable partner of an EEA citizen, Ms Imen Hannachi. The appellant made the application on 17th April 2021 under the EU Settlement Scheme ("EUSS") and married his sponsor wife on 2nd April 2021. The appellant asserted that he would have married before 31st December 2020 (the specified date per Annex 1 of Appendix EU), but for Covid.

3. The grounds of appeal to the FtT set out that (i) the terms of the EUSS were satisfied (ii) applying the authorities that concern EU proportionality the 'attestation' required should be interpreted to allow for 'attestation' with reference to his subsequent marriage (iii) Article 8 was engaged by virtue of Section 7 of the Human Rights Act 1998.

4. The FtT allowed the appeal on this basis at [25]

> *"I find on the basis of all the evidence that the Appellant was a durable partner in a durable relationship with Ms Hannachi which was formed and durable prior to 31st December 2020".*

Grounds for permission to appeal

5. The grounds for permission to appeal submitted that the judge, in allowing the appeal under the Withdrawal Agreement, had made a material misdirection of law on a material matter and the judge had failed properly to consider the provisions of the Appendix EU contained within the Immigration Rules as follows:

> *"The Appellant's application for status under the EU Settlement Scheme was as the family member of a relevant EEA national and the Appellant could not succeed as a spouse, as the marriage took place after the specified date (31 December 2020).*
>
> *The application was additionally considered under the durable partner route, where it was also bound to fail. The rule requires a "relevant document" as evidence that residence had been facilitated under the regulations. This requirement of Appendix EU transposed the stipulations contained in Article 3.2(b) of Directive 2004/38/EC. No such document was held by the Appellant as no application for facilitation had ever been made by the by him, prior to the specified date.*
>
> *It is submitted that the question of whether and how the relationship was in fact "durable" at any relevant date, as is found by the FTTJ at [25] of the determination, is of no consequence. The requirements of Appendix EU cannot be met by a durable partner whose residence*

had not been facilitated. This is reflected in Article 10(2) of the Withdrawal Agreement permitting 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. The Appellant had not made any such application and therefore could not satisfy the requirements of Appendix EU.

Therefore, it is asserted that the FTTJ has failed to indicate why the requirements of Appendix EU are satisfied by the Appellant and why the decision to refuse the Appellant pre-settled status under Appendix EU, is not in accordance with the Immigration Rules.

It is submitted that the FTTJ has incorrectly determined the appeal on the sole basis that the Appellant was in a durable relationship, without taking into account the requirement for that residence to have been facilitated residence that was issued prior to the UK's exit from the EU. Therefore, it is submitted that the FTTJ has materially erred in law by failing to correctly consider the requirements of Appendix EU of the Immigration Rules".

The Hearing

6. Ms Asanovic accepted at the hearing before us that **Celik (EU exit, marriage, human rights) [2022] UKUT 00220**, had been decided but nonetheless submitted, in reliance on her rule 24 response and her 'note for the error of law hearing' that Article 13 of the Withdrawal Agreement contained a provision as to discretion in 'applying the limitations and conditions' in favour of the person concerned and a discretion was necessary because, for example, an applicant would qualify for leave under the EUSS if he were outside the UK prior to 31 December 2020 or if he left the UK for 6 months breaking his continuity of residence or perversely, if he were convicted of a custodial sentence even if it only lasted for one day. The FtT agreed that discretion should be exercised. This was not considered in **Batool** and others (other family members: EU exit) **[2022] UKUT 219 (IAC)** or **Celik** which merely assumed that there were no substantive rights under EU law in the absence of an application for an EEA regulation document. The provisions of the Withdrawal Agreement should be interpreted in accordance with EU law.

7. Ms Asanovic also submitted that Section 7 of the Human Rights Act 1998 applied to this appeal.

Analysis

8. The appellant did not possess a residence card or any form of registration as the durable partner of an EU national at the point of his application under Appendix EU of the immigration rules on 30th December 2020 nor had he made an application.

9. The Upper Tribunal issued guidance on the application of the EU withdrawal agreement in **Celik (EU exit, marriage, human rights) [2022] UKUT 00220** as follows:

> *"(1) A person (P) in a durable relationship in the United Kingdom with an EU citizen has as such no substantive rights under the EU Withdrawal Agreement, unless P's entry and residence were being facilitated before 11pm GMT on 31 December 2020 or P had applied for such facilitation before that time.*
>
> *(2) Where P has no such substantive right, P cannot invoke the concept of proportionality in Article 18.1(r) of the Withdrawal Agreement or the principle of fairness, in order to succeed in an appeal under the Immigration (Citizens' Rights) (EU Exit) Regulations 2020 ('the 2020 Regulations'). That includes the situation where it is likely that P would have been able to secure a date to marry the EU citizen before the time mentioned in paragraph (1) above, but for the Covid-19 pandemic.*
>
> *(3) Regulation 9(4) of the 2020 Regulations confers a power on the First-tier Tribunal to consider a human rights ground of appeal, subject to the prohibition imposed by regulation 9(5) upon the Tribunal considering a new matter without the consent of the Secretary of State".*

10. This appeal is on very similar facts to those in **Celik** which to date remains good law. By the specified date the appellant was not married and thus could not succeed as a spouse.

11. With reference to interpretation, it is correct that Article 4 of the Withdrawal Agreement states that

> *'…*
>
> *3. The provisions of this Agreement referring to Union law or to concepts or provisions thereof shall be interpreted and applied in accordance with the methods and general principles of Union law'.*

12. However, the categories of 'family member' and 'other family members' which include 'durable partner', and to which the Withdrawal Agreement makes reference, are carefully delineated under Article 2 and Article 3(2) of the EU Directive 2004/38/EC. 'Other family members' fall within Article 3(2). There are no substantive rights afforded to the 'durable partner' until their claim has been duly attested. As underscored by **AP and FP (Citizens Directive Article 3(2); discretion; dependence) India** [2007] UKAIT 00048, Article 3(2) of Directive 2004/38/EC gives no substantive rights of entry or residence. Such rights are a matter for national legislation only.

13. The appellant made his application under the EU Settlement Scheme, (the immigration rules which are part of national law) not under the Immigration (European Economic Area) Regulations 2016. Put simply as set out in **Celik** in the period leading up to the specified date the appellant had no substantive right; he had not even made an application to have that substantive right decided. We are clear that when **AP and FP** was decided this was on the basis of applying and interpreting the provisions in accordance with EU law.

14. The landscape has since dramatically altered. Article 4(3) of the Withdrawal Agreement states

> *(3) The provisions of this Agreement referring to Union law or to concepts or provisions thereof shall be interpreted and applied in accordance with the methods and general principles*

15. That said, article 6(1) of the Withdrawal Agreement sets out that

> *'With the exception of Parts Four and Five, unless otherwise provided in this Agreement all references in this Agreement to Union law shall be understood as references to Union law, including as amended or replaced, as applicable on the last day of the transition period'.*

16. Part 4 specifies that the transition period ends on 31st December 2020 and Part 5 relates to financial provisions.

17. The appellant thus cannot fall within either article 10(3) or 13 of the Withdrawal Agreement. That the appellant does not fall within article 10, can be seen from the reasoning in **Celik** above.

18. Article 13 of the Withdrawal Agreement states:

> *'13(4). the host State may not impose any limitations or conditions for or losing residence rights on the persons referred to in paragraphs, 1, 2 and 3 other than those provided for in this Title. There shall be discretion in applying the limitations provided for in this Title, other than in favour of the person concerned.'*

19. The appellant falls in none of the categories in paragraphs 1, 2 or 3. Article 13, where relevant, applies to 'family members', one of which the appellant is not and concerns 'residence rights' of which of the appellant has none. Further, there is no obligation on the Secretary of State to exercise any discretion in favour of the appellant.

20. Appendix EU is drawn *from* the Withdrawal Agreement and that does not afford 'discretion' for those who have no substantial right or fall without the parameters of article 10 or as drawn in Article 13.

21. The appellant clearly does not fall within the provisions of Appendix EU and the definition of 'durable relationship' because he had made no

application as required by b(i) and could not fulfil the provision under b(ii) (there was no indication or evidence produced that the appellant was in the UK legally).

22. That Appendix EU makes allowance for categories of person who, for example, may be in prison for one day, and thus 'gold plates' the Withdrawal Agreement provisions, does not mean that the appellant can derive benefit from the Withdrawal Agreement if he can comply with neither the Withdrawal Agreement nor Appendix EU.

23. We are not persuaded that the concept of EU proportionality can be engaged in this instance, and we refer to our observation in relation to articles 4 and 6 above. The Charter on Fundamental Rights no longer applies to the United Kingdom following the European Union (Withdrawal) Act 2018.

24. As set out in **Celik** at [58]

> *'It is not possible to invoke principles of EU law in interpreting the Withdrawal Agreement, save insofar as that Agreement specifically provides. This is apparent from Article 4(3). It is only the provisions of the Withdrawal Agreement which specifically refer to EU law or to concepts or provisions thereof which are to be interpreted in accordance with the methods and general principles of EU law. EU law does not apply more generally'.*

25. It is asserted that article 8 is engaged. We note that the judge did not address this ground of appeal. When we indicated to Ms Asanovic that should we find an error of law we would proceed to remake the decision she invited us on the submissions she made to remake the appeal and allow it. She did not suggest, sensibly in our view, that the matter should be remitted to the FtT. We have considered the 'procedural aspect raised' in that the judge did not consider the 'human rights' rights ground of appeal.

26. We make various observations notwithstanding that the appellant *appealed* in relation to the Withdrawal Act and on article 8 grounds to the FtT.

27. First, the application to the Secretary of State was made under the EUSS not as a human rights claim, and further the Secretary of State's decision under appeal was made in relation to the EUSS and not on human rights grounds. This further ground of appeal was not a matter which was given 'consent' by the Secretary of State in the FtT or in the Upper Tribunal as a 'new matter' under Regulation 9 of the Immigration (Citizens' Rights Appeals) (EU Exit) Regulations 2020 ("EU Exit Regulations 2020"). Mr Clarke pointed to the findings on Article 8 in **Celik**. We appreciate that the grounds of appeal stated that Section 7 of the Human Rights Act permitted the appellant to rely on the human rights grounds, but this is a

‘permissive’ section and would depend on the underlying section 6. Section 7 effectively defines who can bring proceedings.

28. The Secretary of State may come under an obligation under section 6(1) of the Human Rights Act 1998 ("the HRA") to exercise her discretion outside the Rules where that is necessary to satisfy a Convention right of the applicant, for example under Article 8, but the right of appeal governs, as shown by **Amirteymour** [2017] EWCA Civ 353, the jurisdiction of the court.

> *‘[26] A right of appeal under regulation 26(1) is only a right to appeal "against an EEA decision". Regulation 26(1) creates no right of appeal against any other kind of decision. In particular, it does not create a right of appeal in relation to a claim for leave to enter or remain under the Immigration Rules or by exercise of the Secretary of State's discretion by reference to Article 8. Where the Secretary of State makes a relevant decision by reference to the Immigration Rules or Article 8, that is an "immigration decision" with a separate right of appeal under section 82(1).*
>
> *[27] In my judgment, the natural meaning of the phrase "may appeal under these Regulations against an EEA decision", as used in regulation 26(1), is that the appeal right thereby created is in respect of an EEA decision and is to proceed by reference to grounds of claim and grounds of appeal of a kind recognised as creating entitlements under the Regulations themselves (reflecting, as they do, entitlements under EU law). This interpretation means that it was not within the jurisdiction of the FTT in this case to allow the appellant to introduce in his appeal under regulation 26 a claim directed to the exercise of the Secretary of State's discretionary powers under the 1971 Act and based upon Article 8’.*

29. Similarly, the appellant’s right of appeal derives not from Section 82(1) of the Nationality Immigration and Asylum Act 2002 but from the EU Exit Regulations 2020 which state as follows:

> *3.— Right of appeal against decisions relating to leave to enter or remain in the United Kingdom made by virtue of residence scheme immigration rules*
>
> *(1) A person ("P") may appeal against a decision made on or after exit day—*
>
> > *(a) to vary P's leave to enter or remain in the United Kingdom granted by virtue of residence scheme immigration rules, so that P does not have leave to enter or remain in the United Kingdom,*
> >
> > *(b) to cancel P's leave to enter or remain in the United Kingdom granted by virtue of residence scheme immigration rules,*

(c) not to grant any leave to enter or remain in the United Kingdom in response to P's relevant application, or

(d) not to grant indefinite leave to enter or remain in the United Kingdom in response to P's relevant application (where limited leave to enter or remain is granted, or P had limited leave to enter or remain when P made the relevant application).

(2) In this regulation, "relevant application" means an application for leave to enter or remain in the United Kingdom made under residence scheme immigration rules on or after exit day.

30. The grounds of appeal are set out at Regulation 8 of the Exit Regulations 2020. In effect the appellant's grounds are confined to two grounds of appeal, first under the Withdrawal Agreement, secondly against the immigration rules under which the decision was made (Appendix EU) as follows:

8.— Grounds of appeal

(1) An appeal under these Regulations must be brought on one or both of the following two grounds.

(2) The first ground of appeal is that the decision breaches any right which the appellant has by virtue of—

(a) [Chapter 1, or Article 24(2), 24(3), 25(2) or 25(3) of Chapter 2] 1 , of Title II [, or Article 32(1)(b) of Title III,] 2 of Part 2 of the withdrawal agreement,

(b) [Chapter 1, or Article 23(2), 23(3), 24(2) or 24(3)] 3 , of Title II [, or Article 31(1)(b) of Title III,] 4 of Part 2 of the EEA EFTA separation agreement, or

(c) Part 2 [, or Article 26a(1)(b),] 5 of the Swiss citizens' rights agreement6 .

(3) The second ground of appeal is that—

(a) where the decision is mentioned in regulation 3(1)(a) or (b) or 5, it is not in accordance with the provision of the immigration rules by virtue of which it was made;

(b) where the decision is mentioned in regulation 3(1)(c) or (d), it is not in accordance with residence scheme immigration rules;

31. There is no freestanding ground of appeal on human rights grounds. The appellant would need to draw on his personal ground of appeal in relation to the Withdrawal Agreement to secure consideration of 'proportionality'.

32. We accept that that **Amirteymour** makes the distinction between the appellant applying directly under EU law and under Section 82 NIA but if Section 7 of the HRA were to apply by overall effect, with reference to Section 6(1) that *'It is unlawful for a public authority to act in a way which is incompatible with a Convention right',* it would have equally applied to the considerations raised in **Amirteymour** regardless that the matter was said to come under EU law; nevertheless human rights grounds were not considered to be in play.

33. Secondly, as can be seen from the EU Exit Regulations 2020, the appellant's relevant application was confined to the EUSS and did not extend to a human rights claim; thus the extent of the jurisdiction in this matter is similarly confined. No section 120 notice was raised. Simply, there was no human rights claim on which to hook an appeal.

34. Thirdly, as set out in **Celik** at [97]

> *'97. In the present case, the respondent's consent was not sought by the appellant, let alone given. As a result, even though the First-tier Tribunal Judge might have been mistaken as to the ambit of regulation 9(4), any error in this regard is immaterial. Since the respondent had not consented, the First-tier Tribunal Judge was prevented by regulation 9(5) from considering any Article 8 argument.*
>
> *98. As the respondent submits, if the appellant now wishes to claim that he should be permitted to remain in the United Kingdom in reliance on Article 8, he can and should make the relevant application, accompanied by the appropriate fee'.*

35. Similarly the child was born on 7th May 2022 and *after* the Secretary of State's refusal letter. The information given by the appellant in relation to the child was minimal in order for any assessment under Section 55. All that can be gleaned is that the best interests of the child are for the status quo, but those rights are not paramount. That said, **Hydar (s 120 response; s 85 "new matter": Birch)** [2021] UKUT 176 (IAC) confirms that stipulations in relation to new matters applies to both the FtT and the Upper Tribunal. As held by **Mahmud (S. 85 NIAA 2002 - 'new matters')** [2017] UKUT 488 (IAC) the birth of a child is likely to be factually distinct from that raised in a previously by an appellant and a new matter. Indeed, it is not even recorded in the chronology of the appellant's skeleton argument before the FtT.

36. We set aside the conclusions of the First-tier Tribunal decision. The Secretary of State's challenge is made out. The Judge erred materially for the reasons identified. We set aside the decision pursuant to Section 12(2)(a) of the Tribunals Courts and Enforcement Act 2007 (TCE 2007), and remake the decision under section 12(2)(b)(ii) of the TCE 2007. The appellant applied as a family member of a relevant EEA national but could

not succeed as a spouse, as the marriage took place after the specified date nor was he a durable partner. He cannot succeed under the Appendix EU or the Withdrawal Agreement. For the reasons given he cannot succeed on human rights grounds.

37. For the reasons given above the appeal of Mr Ouhab is dismissed.

Notice of decision

Mr Ouhab's appeal is dismissed.

No anonymity direction is made.

Signe Helen Rimington Date 23rd January 2023

Upper Tribunal Judge Rimington

TO THE RESPONDENT
FEE AWARD

We have dismissed the appeal and therefore there can be no fee award.

Signed Helen Rimington Date

Upper Tribunal Judge Rimington