IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2022-002183

First-tier Tribunal No: EA/14815/2021

THE IMMIGRATION ACTS

Decision & Reasons Issued:

On 18th of July 2024

Before

UPPER TRIBUNAL JUDGE SHERIDAN
DEPUTY UPPER TRIBUNAL JUDGE HARIA

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT
(NO ANONYMITY ORDER MADE)

Appellant

and

JULIAN KOCI

Respondent

Representation:
For the Appellant: None in attendance (Osprey Solicitors)
For the Respondent: Ms S Lecointe, Senior Presenting Officer

Heard at Field House on 8 July 2024

DECISION AND REASONS

1. Although the appellant in the appeal before the Upper Tribunal is the Secretary of State for the Home Department, for ease of reference we continue to refer to the parties as they were before the First-tier Tribunal. Hereafter we refer to Mr Koci as the appellant and the Secretary of State as the respondent.

Background

2. The appellant is a citizen of Albania born in 1990. He formed a relationship with Ms Maria–Denisa Pricop, a Romanian national, and they married on 30 May 2021. The appellant applied on 23 June 2021 for leave to remain in the UK under the EU Settlement Scheme under the Immigration (Citizens' Rights Appeals) (EU Exit) Regulations 2020. His application was refused in a decision dated 12 October

2021. His appeal against the respondent's decision was allowed by First-tier Tribunal Judge Quinn ("the Judge") in a decision promulgated on 7 March 2022.

Grounds

3. The respondent sought permission to appeal the Judge's decision. Permission was refused by First-tier Tribunal Judge Hatton in a decision dated 28 April 2022.

4. The respondent renewed the application for permission to the Upper Tribunal. Permission was granted by Upper Tribunal Judge Frances on all grounds in a decision date 26 Oct 2022 on the following basis:

> "It was accepted the appellant did not have a family permit or residence document. It is arguable the judge erred in law in finding the respondent's decision was
> disproportionate following Celik (EU exit; marriage; human rights) [2022] UKUT 00220 (IAC), in which the Upper Tribunal held:
> (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."

Directions

5. Upper Tribunal Judge Canavan issued directions on 17 November 2023, informing the parties of her provisional view having reviewed the decision of the Judge and the grounds of appeal asserting an error of law by the Judge that the grounds are bound to succeed. The parties were invited to consider if the appeal should be concluded by way of a consent order on the basis that the appellant having properly considered the judgment in Celik concludes that he could not resist the respondent's appeal and the only possible outcome would be a finding of a material error of law and the outright dismissal of the appellant's original appeal.

Hearing

6. The matter came before us at a hearing on 8 July 2024. The respondent was represented by Ms Lecointe. There was no appearance from the appellant or his representative. There is no explanation for the appellant's absence and there has been no application for an adjournment.

7. The appellant did not submit a Rule 24 notice and no response to the directions issued by Upper Tribunal Judge Canavan or consent order signed by the appellant has been received by the Upper Tribunal.

8. Notice of the hearing of this appeal was sent to the appellant and his representative, by email, on 31 May 2024. Neither the email nor the Notice of Hearing have been returned to the Tribunal undelivered, and we are satisfied the

appellant and his representative have had Notice of the Hearing in accordance with Rule 36 of The Tribunal Procedure (Upper Tribunal) Rules 2008.

9. In the absence of any response form the appellant to the directions issued by Upper Tribunal Judge Canavan on 24 October 2023, and the absence of any application for an adjournment or reasons to explain the appellant's absence, we are satisfied that it is in accordance with the over-riding objective and the interests of justice for us to determine the hearing in the absence of the appellant.

Submissions – Error of Law & Remaking

10. The respondent argues in the grounds of appeal, that the appeal was allowed on the basis that the respondent's refusal is disproportionate under the Withdrawal Agreement. The Withdrawal Agreement did not create additional rights for a person who like the appellant does not fall within its personal scope at Article 10. Since the appellant was not residing in accordance with the EU law at the relevant date, as he had not had his residence facilitated by the respondent as a durable partner by 31st December 2020, and thus did not hold a relevant document he was not entitled to the benefit of the Withdrawal Agreement. It is of no consequence that the Judge finds that the relationship of the appellant with his partner was on the facts a durable one at that time.

Conclusions – Error of Law & Remaking

11. At the outset we acknowledge that the Judge's decision was written without the benefit of guidance from either this tribunal (in Celik) or the onward appeal in that case to the Court of Appeal in Celik v Secretary of State for the Home Department [2023] EWCA Civ 921.

12. The appellant had a right of appeal under regulation 3 of the Immigration (Citizens' Rights Appeals)(EU Exit) Regulations 2020. The grounds of appeal set out under Regulation 8 are that the refusal decision:

    (i) breaches certain rights which the appellant has by virtue of the EU Withdrawal Agreement, or
    (ii) is not in accordance with the 'residence scheme immigration rules' (under s17 of the European Union (Withdrawal Agreement) Act 2020, the 'residence scheme immigration rules' include those in Appendix EU).

13. The presenting officer in his submissions sought to guide the Judge stating that the matter had to be considered under Appendix EU (paragraph 12) and by pointing out that as the appellant did not have the necessary permit his application was bound to fail (paragraph 19). The Judge was clearly aware of the relevant provisions under the Immigration Rules as he notes that the relevant paragraphs are EU11 and EU14 of Appendix EU (paragraph 26).

14. Unfortunately the Judge failed to consider whether the respondent's decision breaches the appellant's rights under the Withdrawal Agreement or whether the decision was not in accordance with Appendix EU of the Immigration Rules.

15. The Judge records the appellant had no significant immigration history but had entered the country illegally around 2004 (paragraph 4).

16. It was common ground before the Judge that the appellant had not been issued with a “relevant document” as the durable partner of the EEA national sponsor prior to the conclusion of the implementation period, or applied for his residence to be “facilitated” in that capacity before that date. It appears that the appellant had no other lawful basis to stay in the UK.

17. The Withdrawal Agreement provides no applicable rights to a person in the appellant’s circumstances. Article 10 (1) (e) confirms that the beneficiaries of the Withdrawal Agreement are limited to individuals residing in accordance with EU law as of 31st December 2020 (“the specified date”). The appellant was not ‘in scope’ of the Withdrawal Agreement’ as he had not had his residence facilitated in accordance with national legislation. There was therefore no entitlement to the full range of judicial redress including Article 18(1)(r).

18. The Judge failed to make findings as to whether appellant meets the definition of a “durable partner” under Appendix EU Annex 1. The Judge simply proceeded to make findings on the evidence, concluding that the appellant and his partner were in a durable relationship and the respondent’s decision was disproportionate.

19. The Judge acknowledges the appellant married Ms Pricop on 30 May 2021 and that this was after the UK left the European Union at 11pm on 31 December 2020 (paragraph 27).

20. The Judge accepts the appellant and his partner met in January 2020, they began living together on 23 November 2021 and were in a durable relationship (paragraphs 32-39). The Judge notes one of the reasons for rejecting the appellant’s application was that he was not in possession of a relevant residence card or family permit confirming his right to live in the UK.

21. In conclusion, at paragraphs 40 to 51, the Judge finds that the appellant can succeed because the decision is disproportionate as the appellant was in a subsisting relationship with an EEA national and he merely lacked a permit. The Judge determines that it “…would infringe Ms Pricop’s rights as an EEA national to deny her husband the right to live with her in the UK and require him to leave the UK merely to apply from abroad would be a disproportionate approach.” The Judge simply allows the appeal without specifying whether it is allowed under the Immigration Rules or the Withdrawal Agreement.

22. The Judge’s conclusion is patently contrary to the decision of the Upper Tribunal in Celik, upheld in the Court of Appeal, which held that a person in a durable relationship has no substantive rights under the Withdrawal Agreement unless they had their residence facilitated by 31st December 2020 and that without a substantive right under the Withdrawal Agreement an appellant cannot invoke the concept of proportionality under Article 18(1)(r) so as to be able to succeed in an appeal.

23. Despite the clarity with which the decision of the Judge was drafted, it involved the making of an error of law for the reasons set out above, and must be set aside. The Secretary of State’s appeal is allowed.

24. We therefore set aside the decision of the First-tier Tribunal and remake it dismissing the appeal.

Notice of Decision:

1. The making of the decision of the Judge involved the making of an error on a point of law.

2. We set aside the decision of the Judge allowing the appeal.

3. We re-make the decision in the appeal by dismissing it both under the Immigration Rules and under the Withdrawal Agreement.

N Haria

Deputy Upper Tribunal Judge Haria
Immigration and Asylum Chamber

9 July 2024