Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: EA/00819/2022
CE-File: UI-2022-003143

THE IMMIGRATION ACTS

Heard at Field House
On: 31 October 2022

Decision & Reasons Promulgated
On: 6 December 2022

Before

UPPER TRIBUNAL JUDGE KAMARA

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

ARLINDA ALIAJ
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:
For the Appellant: Mr T Melvin, Senior Home Office Presenting Officer
For the Respondent: No appearance

DECISION AND REASONS

Introduction

1. This is an appeal against the decision of First-tier Tribunal Judge Ripley, promulgated on 4 May 2022. Permission to appeal was granted by First-tier Tribunal Judge Sills on 7 June 2022. The parties will be referred to as they were before the First-tier Tribunal.

Anonymity

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2. No direction has been made previously, and there is no reason for one now.

Background

3. The appellant is a national of Albania residing in the United Kingdom. She married her spouse, who is an Italian citizen during June 2021, having had difficulties in doing so earlier owing to the pandemic. Following the marriage ceremony, the appellant made an application under the EUSS. That application was refused on 11 January 2022 because she had not provided sufficient evidence to confirm that she was a family member of a relevant EEA citizen prior to the specified date of 2300 GMT on 31 December 2020. Nor had the appellant demonstrated that she met the definition of durable partner as set out in Annex 1 of Appendix EU.

The decision of the First-tier Tribunal

4. Following a hearing before the First-tier Tribunal, the appeal was allowed under the Withdrawal Agreement (WA) on the basis that the literal application of Appendix EU was disproportionate and that it was not proportionate for the Secretary of State to require the appellant to provide a residence document as a durable partner.

The grounds of appeal

5. The grounds of appeal argued, firstly, that the First-tier Tribunal made a material misdirection, in applying the benefits of a proportionality assessment under Article 18, despite having found that the respondent did not fall within any of the categories specified under Article 10 of the WA. Secondly, while the judge was not entitled to consider proportionality, he failed to consider Appendix EU to the Immigration Rules as a whole, including that the pandemic would not have prevented an application as a durable partner. The grounds contend that the judge 'accepted a flimsy and apparently often retold hard luck story in the guise of a proportionality exercise.'

6. Permission to appeal was granted on the basis sought.

7. In advance of the error of law hearing, the appellant's solicitors wrote to the Upper Tribunal stating that the appellant did not wish to pay for a legal representative to attend the hearing and requesting that the submissions contained in the appended skeleton argument be considered.

8. In addition, a skeleton argument was served by the respondent.

The hearing

9. At the hearing, I heard briefly from Mr Melvin who indicated from the outset that the appellant would not attending or represented. At the end of the hearing, I announced that there was a material error of law in the

decision of the First-tier Tribunal, that the decision was set aside and dismissed, on remaking. I give my reasons below.

Decision on error of law

10. In reaching this decision, I have taken into consideration the written arguments from both representatives.

11. The judge materially misdirected themselves by carrying out a proportionality assessment under Article 18 of the WA, notwithstanding that the appellant did not fall within any of the categories specified under Article 10 of the WA. Furthermore, in carrying out that proportionality assessment, the judge failed to make a rounded assessment which took into consideration that it was open to the appellant to make an application as a durable partner, and she failed to do so.

12. The judge rightly found at [17] that the appellant did not fall within the terms of Appendix EU. In Annex 1 of Appendix EU the definition of a durable partner includes, at (b)(i), the requirement that the applicant holds a 'relevant document as the durable partner of the relevant EEA citizen for the period of residence relied upon.' Accordingly, the appellant did not fall within the scope of the WA because she had not been issued with a relevant document before the end of the transition period. The judge considered the WA at [19] onwards of the decision, including Article 10 and was wrong to find that the appellant could benefit from its terms. Indeed, in *Celik*, Article 10.3 was considered in detail, with the panel concluding that the appellant in that case would have come within its scope '*if (he) had applied for facilitation of entry and residence before the end of the transition period*.' The claimant in *Celik* made no such application under the Immigration (European Economic Area) Regulations 2016 and neither did the appellant.

13. I have considered the judge's view that the Secretary of State was obliged to address the appellant's claimed inability to marry owing to Covid and to advise her that she ought instead to make an application as a durable partner before the specified date however, at [56] of *Celik*, the panel found that the appellant's failure to make an application under the Regulations was 'destructive' of his ability to rely on the substance of Article 18.1.

Remaking

14. Given the current case law, including *Celik,* as well as the absence of any submissions of substance on behalf of the appellant, the appeal is dismissed on the basis that the Secretary of State's decision was in accordance with the EUSS rules as well as the Withdrawal Agreement.

Conclusions

The making of the decision of the First-tier Tribunal involved the making of an error on a point of law.

I set aside the decision to be re-made.

I substitute a decision dismissing the appeal on the basis that the decision under challenge was in accordance with the EUSS rules as well as the Withdrawal Agreement.

No application for anonymity was made and I saw no reason to make such a direction.

Signed: T Kamara Date: 2 November 2022

Upper Tribunal Judge Kamara

FEE AWARD

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

Signed: T Kamara Date: 2 November 2022

Upper Tribunal Judge Kamara

NOTIFICATION OF APPEAL RIGHTS

1. A person seeking permission to appeal against this decision must make a written application to the Upper Tribunal. Any such application must be **received** by the Upper Tribunal within the **appropriate period** after this decision was **sent** to the person making the application. The appropriate period varies, as follows, according to the location of the individual and the way in which the Upper Tribunal's decision was sent:

2. Where the person who appealed to the First-tier Tribunal is **in the United Kingdom** at the time that the application for permission to appeal is made, and is not in detention under the Immigration Acts, the appropriate period is **12 working days (10 working days, if the notice of decision is sent electronically).**

3. Where the person making the application is in detention under the Immigration Acts**, the appropriate period is 7 working days (5 working days, if the notice of decision is sent electronically)**.

4. Where the person who appealed to the First-tier Tribunal is **outside the United Kingdom** at the time that the application for permission to appeal is made, the appropriate period is **38 days (10 working days, if the notice of decision is sent electronically).**

5. A "working day" means any day except a Saturday or a Sunday, Christmas Day, Good Friday or a bank holiday.

6. The date when the decision is "sent' is that appearing on the covering letter or covering email