Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: UI-2022-003642
[EA/02877/2022]

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 14 September 2022	**On 3 November 2022**

Before

UPPER TRIBUNAL JUDGE NORTON-TAYLOR

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MRS BRIXHILDA VUKZAJ
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:
For the Appellant: Ms A Nolan, Senior Home Office Presenting Officer
For the Respondent: Mr Q Ahmed, Counsel, instructed by Norton Folgate Solicitors LLP

DECISION AND REASONS

Introduction

1. I shall refer to the parties as they were before the First-tier Tribunal. Thus, the Secretary of State is once more "the Respondent" and Mrs Vukzaj is "the Appellant".

2. The Respondent appeals against the decision of First-tier Tribunal Judge Sweet ("the judge"), promulgated on 7 July 2022 by which he allowed the

Appellant's appeal against the Respondent's refusal of her application under the EUSS, dated 22 February 2022.

3. The Appellant, a citizen of Albania born in 1994, applied under the Scheme (and by extension, the provisions of Appendix EU of the Immigration Rules) as the family member of the Sponsor, a Bulgarian citizen. The EUSS application was made on 12 April 2021 following the couple's marriage a couple of days earlier.

4. The Respondent refuse the application onto bases. She concluded that the Appellant could not succeed as a spouse of an EEA national because the marriage occurred after 31 December 2020. The Appellant could not succeed as a "durable partner" because he had not held a "relevant document" issued under the Immigration (European Economic Area) Regulations 2016.

5. The Appellant appealed under the Immigration (Citizens' Rights Appeals) Regulations 2020.

The decision of the First-tier Tribunal

6. In light of the evidence before him, the judge found that the Appellant and Sponsor had been in a durable relationship since January 2020 and had cohabitated since July of that year. They had intended to marry in late 2020, but had been unable to do so due to the COVID-19 pandemic. On that basis, the judge found that but for the COVID-19 pandemic the couple would have married prior to the end of the transition period on 31 December 2020 and would have been granted what he described as an "EUSS Permit". The judge also purportedly took into account the terms of the Withdrawal Agreement, including Article 18(1)(r) insofar as it related to the proportionality of the Respondent's decision. The appeal was allowed.

The Respondent's challenge

7. The Respondent appealed on a number of grounds which can be summarised as follows. Whether or not the Appellant was in a durable relationship with the Sponsor could not have led to success under the EUSS because she was neither a spouse nor a person holding a relevant document at the time. The judge had failed to engage with the relevant provisions and the conclusions reached were not open to him. It was also said that the judge was wrong to have considered the issue of proportionality under the Withdrawal Agreement and he had in any event failed to conduct any proper assessment. Permission was granted on all grounds.

The hearing

8. At the hearing Ms Nolan relied on the grounds and, significantly, the decision of the Upper Tribunal in Celik (EU exit; marriage; human rights) [2022] UKUT 00220 (IAC), which had been promulgated on 19 July 2022 and published on the Tribunal's website on 10 August 2022. She submitted that this decision covered the circumstances arising in the present case and demonstrated that the judge had materially erred in law as contended for in the grounds (albeit that the grounds pre-dated that decision).

9. In response, Mr Ahmed adopted what I consider to be a commendably professional and realistic position. He accepted that Celik said what it said and that its conclusions were applicable to the present case. He did not seek to suggest that Celik was wrongly decided and did not attempt to put forward any unmeritorious submissions as to why the present case could be distinguished from Celik.

Conclusions on error of law

10. Mr Ahmed was correct to have adopted that position. Celik clearly covers the situation arising in this case and unarguably demonstrates that the judge erred in law by: first, concluding that a finding of fact as to the existence of a durable relationship before 31 December 2020 was, of itself, sufficient for the Appellant to have succeeded under the EUSS; and second, to have concluded that the Withdrawal Agreement assisted the Appellant's case to the extent that it justified allowing the appeal.

11. Celik makes it clear that those in the Appellant's particular situation could not gain any material assistance from the Withdrawal Agreement, whether in respect of proportionality or otherwise. For present purposes, the relevant paragraphs are 61-66:

> "61. The appellant places great reliance on Article 18.1(r) of the Withdrawal Agreement. As we have seen, this gives a right for "the applicant" for new residence status to have access to judicial redress procedures, involving an examination of the legality of the decision as well as of the facts and circumstances on which the decision is based. These redress procedures must ensure that the decision "is not disproportionate".
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> 62. 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.

> 63. 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.
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> 64. In the present case, there was no dispute as to the relevant facts. The appellant's residence as a durable partner was not facilitated by the respondent before the end of the transitional period. He did not apply for such facilitation before the end of that period. As a result, and to reiterate, he could not bring himself within the substance of Article 18.1.
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> 65. Against this background, the appellant's attempt to invoke the principle of proportionality in order to compel the respondent to grant him leave amounts to nothing less than the remarkable proposition that the First-tier Tribunal Judge ought to have embarked on a judicial re-writing of the Withdrawal Agreement. Judge Hyland quite rightly refused to do so.
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> 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. This is a further reason for rejecting the appellant's submissions."

12. In light of the above, the judge's decision must be set aside.

Re-making the decision

13. Both representatives were agreed that I could and should go on to re-make the decision in this appeal, based on the evidence before me. This I now do.

14. There is no reason to doubt the genuineness of the relationship between the Appellant and the Sponsor and I do not do so. Like the judge, I accept that they had been in such a relationship since the beginning of 2020. I accept that that relationship remains genuine and subsisting. However, in light of Celik, the application made to the Respondent under the EUSS was bound to fail. Further, the Appellant simply cannot, in the circumstances of her case, rely on the issue of proportionality under the Withdrawal Agreement.

15. No human rights issues have been raised in this case and I need not consider that issue.

16. I therefore re-make the decision in this appeal by dismissing it.

Notice of Decision

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

I set aside the decision of the First-tier Tribunal.

I re-make the decision by dismissing the appeal on all grounds.

Signed H Norton-Taylor Date: 22 September 2022

Upper Tribunal Judge Norton-Taylor

TO THE RESPONDENT

FEE AWARD

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

Signed H Norton-Taylor Date: 22 September 2022

Upper Tribunal Judge Norton-Taylor