Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: UI-2022-002542
EA/11875/2021

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 22 September 2022	**On 10 November 2022**

Before

UPPER TRIBUNAL JUDGE NORTON-TAYLOR

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MR SEJDI SHEHU
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:
For the Appellant: Mr S Walker, Senior Home Office Presenting Officer
For the Respondent: Mr M Fazli, Counsel instructed by Graceland Solicitors

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 Mr Shehu is "the Appellant".

2. The Respondent appeals against the decision of First-tier Tribunal Judge Morgan ("the judge"), promulgated on 25 January 2022, by which he allowed the Appellant's appeal against the Respondent's refusal of his

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application under the EUSS as the family member of an EEA national. The Appellant, a citizen of Albania born in 1996, began a relationship with an EEA national and they married in April 2021. The EUSS application was made on 24 May 2021 and the Respondent's decision was dated 21 July 2021. The appeal to the First-tier Tribunal was bought under the Immigration (Citizens' Rights Appeals) (EU Exit) Regulations 2020.

The decision of the First-tier Tribunal

3. On appeal, the judge found that the Appellant had been in a genuine relationship prior to 31 December 2020 and had intended to marry before that date but this had been delayed due to the Covid-19 lockdowns and subsequent backlog at the relevant registry office: [7]-[8]. Having set out those basic findings, the judge went on at [10] to state the following:

> "On the particular facts of this appeal I find that the Respondent's decision is disproportionate. I find that the couple were in a durable relationship prior to the end of the transition period and wanted to marry earlier but could not do so initially because of various lockdowns and then because of the backlog caused by the lockdown. The couple are now married. I find that the couple are in a genuine and durable relationship and note that had they applied prior to the end of the transition period, on the basis of their durable relationship, I would have allowed the appeal under the EEA Regulations. This route is no longer open to them however it would be disproportionate in my judgment to deny the Appellant leave under the Withdrawal Agreement because the couple waited until they were married before applying under the Scheme."

4. Under the subheading of "Decision" the judge stated that he was allowing the appeal, "because the decision breaches the Appellant's rights under the Withdrawal Agreement."

The grounds of appeal

5. The Respondent's grounds of appeal were threefold. First, it was said that the judge had failed to consider the relevant legal framework, specifically the EUSS. Second, the judge erroneously applied the Withdrawal Agreement to the Appellant's circumstances notwithstanding the fact that the Appellant did not fall within its scope. Third, that even if the judge had been entitled to consider proportionality, his reasoning was inadequate.

6. Permission was granted on all grounds.

The hearing

7. At the hearing before me Mr Walker relied on the grounds and the decision of the Upper Tribunal in Celik (EU exit; marriage; human rights) [2022] UKUT 00220 (IAC), with particular reference to paragraphs 61–66. Mr Walker submitted that the grounds were all made out. He submitted that the judge's decision should be set aside and that I should re-make the decision based on the evidence before me, dismissing the Appellant's appeal.

8. Mr Fazli accepted that I could consider the effect of the decision in Celik notwithstanding that it had been promulgated after the judge's decision. He accepted that the Appellant had never been issued with, nor applied for, a residence card under the Immigration (European Economic Area) Regulations 2016 before 31 December 2020. He rather tentatively submitted that the judge "might have been minded to allow the Appellant's appeal under the EUSS".

9. Mr Fazli definition of what constituted a "durable partner" was not entirely clear in Appendix EU. He submitted that the judge had been entitled to consider proportionality. The judge had accepted the existence of a durable relationship and that the couple's marriage had been delayed because of Covid-19. The lockdowns and subsequent backlog of cases at registry offices could, he submitted, have constituted "unnecessary administrative burdens", but he acknowledged that the judge had made no finding on that particular point.

10. In seeking to distinguish the Appellant's case from what was said by the Tribunal in Celik at paragraphs 63-66, Mr Fazli relied on the judge's positive findings of fact and the reasons for the delay in the couple getting married.

11. If the judge's decision were to be set aside Mr Fazli urged me to preserve positive findings of fact. He agreed that I should go on to re-make the decision in this appeal based on the evidence as a whole and the preserved findings without the need for a resumed hearing.

12. At the end of the hearing I reserved my decision.

Conclusions on error of law

13. I acknowledge the restraint to be applied before interfering with a decision of the First-tier Tribunal. However, it is clear to me that the judge's decision is erroneous in law. I say this for the following reasons.

14. Whilst the judge did not expressly articulate this, it is clear enough that he was dismissing the Appellant's appeal in respect of the Immigration Rules (the second ground of appeal available to the Appellant under the 2020 Regulations). I would mention in passing that where judges are dealing

with cases under those Regulations it is best practice to set out precisely which ground is successful and which, if any, is being rejected.

15. The judge's finding of fact as to the nature of the Appellant's relationship and the intention to marry and the reasons why this was delayed are all perfectly sound. However, the fundamental problems with the judge's decision arise from what he then went on to do. I accept that paragraph 62 of Celik indicates that the issue of proportionality under Article 18.1(r) of the Withdrawal Agreement could in principle apply to an individual who is found not to come within the scope of that Article. Yet, the nature of the duty to consider proportionality is, in my judgment, highly constrained by the what is said in paragraphs 63-66 of Celik.

16. In the present case the Appellant had been found to have been in a durable relationship prior to 31 December 2020 and that he had intended to marry, but was prevented from doing so because of lockdowns and consequent backlogs. This basic factual matrix was in truth the same as that which applied in Celik: see paragraphs 2, 5, and 6. There was no question of the Appellant having held a residence card or having had applied for one prior to the end of the transition period. The judge did not in any way address the potential issue of whether there had been "unnecessary administrative burdens" imposed by the Respondent.

17. What the judge did in [10] was, to all intents and purposes, precisely what the Upper Tribunal held that judges could not do, namely to have "embarked on a judicial re-writing of the Withdrawal Agreement." The Appellant clearly could not have fallen within the substance of Article 18.1. Nor could he bring himself within the scope of Article 10. The existence of the durable relationship and the difficulties relating to marriage prior to 31 December 2020 were part of the consideration undertaken in Celik. I am satisfied that the judge was simply not entitled to have concluded that the Appellant could rely on Article 18.1(r) or, in the alternative, he was not entitled to conclude that the decision was disproportionate.

18. I also agree with the Respondent's third ground of appeal. This in a sense follows on from what I have just said. The judge did not adequately explain why, given the factual matrix before him, the Respondent's decision was disproportionate.

19. For all of these reasons the judge's decision is legally flawed and must be set aside.

Re-making the decision

20. I go on to re-make the decision in this appeal based on the evidence before me and the judge's findings that the Appellant was in a durable relationship, that he had intended to marry his wife prior to 31 December

2020, and that they had been prevented from doing so by lockdowns and consequent delays at registry offices.

21. I regard Celik as an unarguably correct statement of the law as it stands.

22. On the facts, even assuming that the Appellant can rely on proportionality at all, it cannot properly be said that the Respondent's decision was disproportionate. The applicant could not meet the relevant Immigration Rules. It has not been said, nor could it sensibly be, that the Covid-19 lockdowns and subsequent delays constituted "unnecessary administrative burdens" emanating from the Respondent. There is no other feature of the case which comes close to rendering the Respondent's decision disproportionate.

23. In all the circumstances, the Appellant's appeal must be dismissed on both of the grounds available to him under the 2020 Regulations.

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 under the Immigration (Citizens' Rights Appeals) (EU Exit) Regulations 2020.

No anonymity direction is made.

Signed H Norton-Taylor Date: 27 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: 27 September 2022

Upper Tribunal Judge Norton-Taylor