Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: UI-2022/002416
EA/13962/2021

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 9 September 2022	**On 13 November 2022**

Before

UPPER TRIBUNAL JUDGE BLUNDELL
DEPUTY UPPER TRIBUNAL JUDGE CHAPMAN

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

v

MR EDISON HYSENAJ
(NO ANONYMITY DIRECTION MADE)

Respondent

Representation:
For the Appellant: Ms A. Ahmed, Senior Presenting Officer
For the Respondent: Ms K. Tobin, counsel instructed by Morgan Pearse LLP solicitors

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DECISION AND REASONS

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1. The Respondent, to whom we shall refer as the Claimant, is a national of Albania, born on 20 July 1995. He arrived in the United Kingdom in August 2016. In June 2020, he met Mrs Ivelina Petrova Mavrodieva, a Bulgarian national granted pre-settled status on 27

January 2020. They began cohabiting on 1 September 2020, became engaged to be married on 20 September 2020 and gave notice of intention to marry at Haringey Registry office on 5 October 2020. They waited for the 28 day referral period and were informed that the SSHD had not extended the notice period to 70 days and that they were free to marry. However, lockdown restrictions meant that they were unable to marry until 18 March 2021. On 27 January 2021 the Claimant made an application under the EUSS as the family member of his partner. This application was refused on 14 August 2021, on the basis that he did not meet the requirements as a family member of a relevant EEA citizen under Appendix EU to the Immigration rules.

2. The Claimant appealed and his appeal came before First tier Tribunal Judge Robinson for hearing on 21 February 2022. In a decision and reasons promulgated on 4 March 2022 the appeal was allowed. The Judge made the following findings of fact:

   (i) The Claimant did not meet the definition of family member under Appendix EU because his marriage was contracted after 31 December 2020; a notice of marriage is different from an actual marriage and no exceptions are made for individual circumstances such as a pandemic [33];

   (ii) The Claimant does not meet the definition of “durable partner” under Appendix EU because he did not have the “relevant document” as defined by Annex 1 to Appendix EU: a notice of marriage receipt does not fall within this definition [35];

   (iii) The Claimant does not fall within the definition of “family members” in the Withdrawal Agreement given that he was not married to the Sponsor until 18 March 2021 [36];

   (iv) The Judge accepted on the basis of the evidence adduced that the Sponsor and the Claimant attended a notice of marriage appointment on 5 October 2020; they paid £210 for the marriage ceremony as evidenced by a receipt dated 4 December 2020 and were given the date of 8 January 2021 for their marriage which was then changed to 18 March 2021, as per email from Haringey Register Office [45];

   (v) The Judge found it plausible given the lockdown subsisting at that time (end of 2020) that it was not possible for the marriage to go ahead as early as planned and that there was some delay in obtaining a date [46];

   (vi) The oral evidence was overall consistent with regard to the asserted phone call from the Register Office where the Claimant was given Covid 19 as the reason for the cancellation of the date of 8 January 2021 [47];

(vii) The Judge found the evidence of both witnesses to be credible and on balance, also bearing in mind that the Claimant previously accepted that they did not marry prior to 31 December 2020 due to Covid-19, he accepted their explanation for the marriage being delayed until 18 March 2021. In addition he found on all the evidence adduced that they lived together since September 2020 [48];

(viii) The Judge found on balance that the relationship was durable at the relevant date. Whilst it was clear that they did not meet the requirement of living together for at least two years prior to the end of the transition period, they met this requirement at the date of hearing, the evidence he had seen of the relationship being durable is significant, due in particular to their giving notice of marriage on 5 October 2020, the delay due to Covid-19, their subsequent marriage and cohabitation since September 2020. The subsistence of the relationship had not been challenged and it was accepted that it is not a marriage of convenience [49];

(ix) Although the provision at article 18.1(n) of the Withdrawal Agreement does not apply to the Claimant the provision at article 18.1(r) did apply [50];

(x) In all the circumstances it would be disproportionate to dismiss the appeal under article 18.1(r) of the Withdrawal Agreement because the SSHD has given concessions in other parts of Appendix EU for Covid-19 related delays adversely affecting applicants, referred to in the EUSS guidance which refers to compelling practical reason due to Covid-19. He accepted that the relationship was durable, at the relevant date, the Claimant gave notice of intention to marry before the relevant date, paid for the wedding on 4 December 2020 and the couple were not able to marry before 8 March 2021 due to circumstances beyond their control, namely the Covid-19 pandemic [52]. The Judge found that a thorough examination was not conducted by the SSHD of the evidence provided by the Claimant which he had not considered. He found that the Claimant had discharged the burden of proving that, by reference to the Withdrawal Agreement, he was in a durable relationship with the Sponsor at the relevant date and it would be disproportionate to dismiss his appeal [53].

3. The SSHD sought permission to appeal, in time, on the basis that the Judge erred in finding that the Claimant could come within the scope of the withdrawal agreement as a durable partner.

4. Permission to appeal was granted by First tier Tribunal Judge Barker in a decision dated 28 April 2022, on the basis that it was arguable that the Judge’s assessment of whether the Claimant falls within the personal scope of the agreement as a durable partner of a Union

citizen is flawed and the finding at [36] that the Claimant did not fall within the scope of the Withdrawal Agreement is arguably inconsistent with her applying the terms of the agreement and finding that the Claimant can benefit from it.

5. The Appellant's representatives lodged a rule 24 response arguing that there was no error of law in the decision of the First tier Tribunal.

Hearing

6. At the outset of the hearing, Ms Tobin acknowledged that in light of the decision of the Presidential panel in Celik (EU exit; marriage; human rights)[2022] UKUT 00220 (IAC) she was in difficulty maintaining the position, as set out in the rule 24 response, that there was no error of law in the decision of the First tier Tribunal.

7. However she sought to argue that the Appellant's EU partner's rights had not been considered in *Celik* when considering the proportionality of the decision and that she was clearly in scope of Article 10(1) of the Withdrawal Agreement, read with Article 18.1 (r). She informed us that permission to appeal to the Court of Appeal had been sought in Celik although she was unsure what stage that application had reached. She made no application to adjourn this appeal to await the decision on the application for permission to appeal.

8. In response, Ms Ahmed drew our attention to [80]-[85] of the judgment in *Celik* where the rights of the EU national spouse were considered as part of a discrimination argument put forward by the Appellant and rejected by the Presidential panel on the basis that the grounds of appeal are in respect of the Appellant's rights and not those of his wife. Ms Tobin accepted that [85] caused her argument difficulty albeit consideration was given to the point through the prism of discrimination rather than proportionality.

9. At the end of the hearing we informed the parties that we had reached the clear conclusion that the Respondent succeeded in her appeal and that Ms Tobin's additional argument would be addressed in our written decision.

Decision and reasons

10. The First tier Tribunal Judge allowed the Appellant's appeal on the basis that Article 18.1 (r) of the Withdrawal Agreement applied to him and it would be disproportionate to dismiss the appeal: [50]-[53] refer.

11. It is now clear in light of the judgment of the Presidential panel in *Celik* that the approach by the First tier Tribunal Judge was erroneous. The appeal in that case was listed before a Presidential

panel due to the fact that there were a number of similar cases involving applicants who claimed to be in a durable relationship with an EEA national prior to 31 December 2020 but had not by that date been issued with a registration certificate, family permit or residence card under the Immigration (EEA) Regulations 2016 as an extended family member of the EEA national and therefore, did not meet the requirements of the EUSS as a family member of a relevant EEA citizen. In Mr Celik's case, as in this Claimant's case, the reason put forward for the inability to obtain the relevant documentation is that the couple were unable to marry prior to 31 December 2020 due to covid-19 restrictions and lockdown rules.

12. At [44] onwards the Presidential panel considered how the Withdrawal Agreement applied to Mr Celik, holding *inter alia* at [52]-[58]:

> *"52. There can be no doubt that the appellant's residence in the United Kingdom was not facilitated by the respondent before 11pm on 31 December 2020. It was not enough that the appellant may, by that time, have been in a durable relationship with the person whom he married in 2021. Unlike spouses of EU citizens, extended family members enjoyed no right, as such, of residence under the EU free movement legislation. The rights of extended family members arose only upon their residence being facilitated by the respondent, as evidenced by the issue of a residence permit, registration certificate or a residence card: regulation 7(3) and regulation 7(5) of the 2016 Regulations.*
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> *53. If the appellant had applied for facilitation of entry and residence before the end of the transition period, Article 10.3 would have brought him within the scope of that Article, provided that such residence was being facilitated by the respondent "in accordance with … national legislation thereafter". This is not, however, the position. For an application to have been validly made in this regard, it needed to have been made in accordance with regulation 21 of the 2016 Regulations. That required an application to be submitted online, using the relevant pages of www.gov.uk, by post or in person, using the relevant application form specified by the respondent; and accompanied by the applicable fee.*
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> *54. After 30 June 2021, a favourable decision of the respondent by reference to a pre-31 December 2020 application, results in a grant of leave under the EUSS, rather than a grant of residence documentation under the 2016 Regulations.*
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> *55. As we have seen, the appellant made no such application.*
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> *56. The above analysis is destructive of the appellant's ability to rely on the substance of Article 18.1. He has*

no right to call upon the respondent to provide him with a document evidencing his "new residence status" arising from the Withdrawal Agreement because that Agreement gives him no such status. He is not within the terms of Article 10 and so cannot show that he is a family member for the purposes of Article 18 or some other person residing in the United Kingdom in accordance with the conditions set out in Title II of Part 2.

57. The appellant's attempt to rely on his 2021 marriage to an EU citizen is misconceived. EU rights of free movement ended at 11pm on 31 December 2020, so far as the United Kingdom and the present EU Member States are concerned. The Withdrawal Agreement identifies large and important classes of persons whose positions in the host State are protected, following the end of the transition period. The appellant, however, does not fall within any such class.

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…

60. Sub-paragraphs (a) to (d) of Article 18 make specific provision for late submission of an application for a new residence status. One looks in vain in Article 18 and elsewhere in the Withdrawal Agreement for anything to the effect that a person who did not meet the relevant requirements as at 11pm on 31 December 2020 can, nevertheless, be treated as meeting those requirements by reference to events occurring after that time. If that had been the intention of the United Kingdom and the EU, the Withdrawal Agreement would have so specified. Article 31 of the Vienna Convention on the Law of Treaties (1969) requires a treaty to be "interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose". It would plainly be contrary to the Vienna Convention to interpret the Withdrawal Agreement in the way for which the appellant contends."

13. It is entirely clear that, as a matter of law, the Claimant cannot succeed in his appeal for exactly the same reasons that Mr Celik was unable to succeed.

14. As to Ms Tobin's argument in relation to article 18 on behalf of the Claimant's spouse, the Presidential panel held *inter alia* at [80]-[85]:

> *"80. We turn to the ground which alleges discrimination, contrary to Article 12 of the Withdrawal Agreement. This concerns the position of an EEA citizen resident in the United Kingdom before the end of the transition period. We have seen that the Minister's letter of February 2022 refers to such a person as having "a lifetime right to be joined by their existing close family members resident outside the UK at 31 December 2020" and for a person who was "living in the UK before the end of the transition period as the durable partner of an EEA citizen resident here by then (and who may now be their spouse or civil partner) but who did not obtain a residence card under the EEA Regulations … still to bring themselves within the scope of the scheme as a joining family member". These situations are provided for by Article 10.4 of the Withdrawal Agreement, as given effect by the EUSS. Where spouses are concerned, this "lifetime right" applies irrespective of the date of the marriage, provided that the couple were durable partners within the scope of Article 10 at the end of the transition period. Consistently with Article 3(2)(b) of Directive 2004/38/EC, the EUSS requires an applicant who relies on being in a durable relationship with a relevant EEA citizen to show that the couple have lived together in a relationship akin to a marriage or civil partnership for at least two years or that there is other significant evidence of the durable relationship.*
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> *81. The appellant submits that the definition of "required evidence of family relationship" in Annex 1 to Appendix EU shows that a durable partner of an EEA sponsor who married after the specified date must have the required document to satisfy the requirement to be considered to be a durable partner. In contrast, however, individuals who rely upon their sponsor being a British citizen or from Northern Ireland can submit other evidence to the respondent to prove that their relationship was formed and durable before the specified date.*
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> *82. The appellant submits that this is discriminatory, contrary to Article 12, albeit not against him. It discriminates against his wife because, while she has evidence of the durable relationship which has been submitted to the respondent, this is not evidence that the respondent will take into account. However, if the same evidence had been submitted by a British citizen sponsor or a sponsor from Northern Ireland, then the respondent would take it into account…*
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> *84. There is, however, no merit in this new ground. Article 12 prohibits discrimination on the grounds of nationality within the meaning of Article 12 of the TFEU "in respect*

of the persons referred to in Article 10 of this Agreement". Since, for the reasons we have given, the appellant is not a person within Article 10, Article 12 cannot assist him.

85. The appellant's attempt to rely upon the position of his wife, on the basis that she was exercising her right to reside in the United Kingdom in accordance with EU law before 31 December 2020 and continues to do so, cannot enable the appellant to succeed in the appeal. Article 8(2) states in terms that the first ground of appeal is that the decision "breaches any right which the appellant has ..." not a third party. Likewise, the appellant's wife cannot be invoked in respect of the second ground of appeal in that the respondent's decision was not contrary to the immigration rules, so far as the wife was concerned."

15. We consider that the analysis by the Presidential panel provides a complete answer to Ms Tobin's additional argument in relation to the Claimant's EEA national spouse. The ground of appeal available to the appellant concerns his rights; not those of his wife or any other third party.

16. Nothing we say, however, impacts on the findings of fact made by First tier Tribunal Judge Robinson, which were unchallenged by the SSHD and are thus preserved.

Notice of decision

17. The appeal by the Secretary of State for the Home Department is allowed.

Rebecca Chapman

Deputy Upper Tribunal Judge Chapman

22 September 2022