Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: UI-2022-003204
EA/16347/2021

THE IMMIGRATION ACTS

Heard at Field House **Decision & Reasons Promulgated**
On 28 November 2022 **On 23 February 2023**

Before

UPPER TRIBUNAL JUDGE BLUNDELL
DEPUTY UPPER TRIBUNAL JUDGE LEWIS

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT
Appellant

and

Elvis SELIMAJ
(No anonymity direction made)
Respondent

Representation:
For the Appellant: Ms A Everett, Senior Home Office Presenting Officer
For the Respondent: Mr J Collins of Counsel instructed by Bhogal Partners Solicitors

DECISION AND REASONS

1. This is an appeal brought by the Secretary of State for the Home Department against a decision of First-tier Tribunal Judge Latta promulgated on 29 April 2022.

2. Although before us the Secretary of State is the appellant and Mr Selimaj is the respondent for the sake of consistency with the decision of the First-

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tier Tribunal we shall hereafter refer to the Secretary of State as the 'Respondent' and Mr Selimaj as the 'Appellant'.

3. Mr Selimaj is a citizen of Albania born on 10 November 1996. On 17 June 2021 he married Ms Eridona Lufi (d.o.b. 10 January 2000), a citizen of Greece. On 22 June 2021 he made an application under the European Union Settlement Scheme ('EUSS'). The application was refused on 30 November 2021. In substance the application was refused firstly because the marriage had taken place after the specified date of 31 December 2020, and accordingly the Appellant did not satisfy the definition of a 'family member' of an EEA citizen; consideration was given in the alternative to the 'durable partner' route, but the Respondent's decision-maker determined that the Appellant did not hold specified documentation under the EEA Regulations as a durable partner.

4. The Appellant appealed to the IAC.

5. Before the First-tier Tribunal "*it was accepted that the Appellant could not meet the strict requirements of Appendix EU, as he did not have a relevant document*" (First-tier Tribunal decision at paragraph 25). However, it was argued that the Appellant was indeed in a durable relationship prior to the specified date, and that in all the circumstances of the case a refusal would be disproportionate (see paragraphs 25-27). Judge Latta found that the Appellant and Ms Lufi had "*been in a durable relationship since at least September 2017*" (paragraph 34). He went on to conclude that any refusal based on a lack of relevant documentation "*would be disproportionate, and a breach of the Appellant's rights under the Withdrawal Agreement*" (paragraph 39), with particular reference to Article 18.1(r). The appeal was allowed accordingly.

6. The Respondent was granted permission to appeal by First-tier Tribunal Judge Mills on 15 June 2021, on the basis that it was arguable the Judge was in error in considering proportionality under Article 18.1(r) of the Withdrawal Agreement. Permission to appeal was also granted on the alternative grounds that if there were scope for considering proportionality the First-tier Tribunal Judge had given inadequate reasons for finding that the Respondent's decision was disproportionate in circumstances where the EEA sponsor had only moved to the UK in December 2020.

7. Since the hearing before the First-tier Tribunal, and since the grant of permission to appeal, the issues raised in this case have been the subject of consideration by the Upper Tribunal in the cases of **Batool and others (other family members: EU exit) [2022] UKUT 00219 (IAC)** and **Celik (EU exit; marriage; human rights) [2022] UKUT 00219 (IAC)**.

8. Paragraphs 1 and 2 of the headnote in **<u>Celik</u>** are in these terms:

> "*(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.*"

9. Before us Ms Everett essentially relied upon **Celik** as supporting the substance of the Respondent's challenge.

10. Mr Collins was candid in acknowledging the impact of **Celik** and the difficulty it presented him in seeking to protect the decision of the First-tier Tribunal. He accepted that this was a 'Celik type' case, and commented that it would be a bold submission to invite us not to follow it: be that as it may, he noted that although the Upper Tribunal had refused permission to appeal to the Court of Appeal, an application was pending with the Court of Appeal – and he submitted that the law was not settled. He submitted that the headnote in **Celik** did not reflect the full text of the decision, observing with particular reference to paragraph 63 that the Upper Tribunal had seemingly acknowledged that there would be scope for considering proportionality in some cases.

11. In respect of the alternative ground of appeal, Mr Collins also acknowledged that there was substance in the Respondent's grounds that the First-tier Tribunal Judge had not given adequate reasons for the conclusion on proportionality favourable to the Appellant. He accepted that the decision would require to be remade in this regard if this were the only outstanding issue.

12. We decline Mr Collins' 'bold' invitation not to follow **Celik**. Irrespective of what might be made of paragraph 63, in our judgement the facts in the instant case are materially indistinguishable from those in **Celik** as summarised at paragraph 64:

    "*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.*"

13. We otherwise find ourselves in agreement with the approach in **Celik**.

14. Accordingly we conclude that the First-tier Tribunal Judge erred in law in finding that Article 18.1 applied, and necessarily further erred in embarking upon a proportionality consideration pursuant to it. Inevitably

this was a material error because it was the sole basis upon which the appeal was allowed. In consequence we set aside the decision of the First-tier Tribunal.

15. Further, given that it was otherwise conceded before the First-tier Tribunal that the Appellant could not succeed under the EUSS – and in any event - the only option in remaking the decision under appeal is to dismiss the appeal. There is no purpose in remitting the matter to the First-tier Tribunal to complete such an exercise; we perform it ourselves.

Notice of Decision

16. The decision of the First-tier Tribunal contained a material error of law and is set aside.

17. The decision in the appeal is remade. The appeal is dismissed.

Signed: I A Lewis Date: **28 November 2022**

Deputy Upper Tribunal Judge I A Lewis