IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2022-003342
First-tier Tribunal No:
EA/12596/2021

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On the 11 April 2024

Before

UPPER TRIBUNAL JUDGE BLUNDELL

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

BESART LUSHA

Respondent

Representation:
For the Appellant: Mr Wain, Senior Presenting Officer
For the Respondent: No appearance or representation

Heard at Field House on 26 March 2024

DECISION AND REASONS

1. The Secretary of State appeals with the permission of Upper Tribunal Judge Stephen Smith against the decision of First-tier Tribunal Judge Bagral. By her decision of 13 June 2022, Judge Bagral ("the judge") allowed Mr Lusha's appeal against the Secretary of State's refusal of his application for leave to remain under Appendix EU of the Immigration Rules.

2. To avoid confusion, I will refer to the parties as they were before the FtT: Mr Lusha as the appellant and the Secretary of State as the respondent.

3. It is not necessary to set out much of the background. The appellant is an Albanian national who was born on 14 December 1995. He entered the UK illegally in 2018 and has resided here since, without leave to remain. In August 2019, he met a Bulgarian national named Elitsa Krasimirova Kirilova and a relationship began between them six months later. She is a self-employed cleaner who has enjoyed status under the settlement scheme since August 2019. They cohabited from June 2020. The appellant proposed to the sponsor on 22

November 2020. They gave notice of their intention to marry on 14 December 2020 but their plans were disrupted by the pandemic. It was only on 16 April 2021 that they were able to marry.

4. On 21 May 2021, the appellant made an application for pre-settled status under Appendix EU of the Immigration Rules, relying on his relationship with his wife. It was refused because the appellant had married his wife after the 'specified date' (31 December 2020) and he was not eligible for leave as her spouse for that reason. The respondent also noted that the appellant had not had a documented right to reside as Ms Kirilova's durable partner at any point.

5. The appellant appealed to the First-tier Tribunal. The judge found that the appellant and the sponsor were in a genuine and subsisting relationship; that they had cohabited since June 2020; and that it was through no fault of their own that they had been unable to marry until April 2016. She did not accept that the appellant satisfied the requirements for leave to remain under the Immigration Rules, but she accepted the appellant's alternative argument that the refusal was contrary to the Withdrawal Agreement, in that it was disproportionate under Article 18 thereof.

6. The Secretary of State appealed to the Upper Tribunal, contending that the judge had misdirected herself as to the scope of the Withdrawal Agreement. Permission was refused at first instance but granted by Judge Stephen Smith, who noted that it was arguable that the judge's reliance on Article 18 of the Withdrawal Agreement was in error, in light of Celik [2022] UKUT 220 (IAC).

7. There was then a delay before the appeal was listed before the Upper Tribunal. In many such cases, such a delay is evidently attributable to a judge having stayed the appeal to await the decision in Celik v SSHD [2023] EWCA Civ 921 [2023] Imm AR 5 but I can find no indication on the Tribunal's systems that this case was stayed, whether for that reason or at all.

8. Be that as it may, the appeal was duly listed for a hearing today and notice of the hearing was sent to the parties on 7 March 2024. That notice prompted immediate communication from the appellant's solicitors, who stated that the appellant had been granted leave to remain and inviting the Tribunal to 'update your records' and vacate the hearing. That email was seen by an Upper Tribunal Lawyer, who quite properly invited the parties to agree a consent order if the matter was to be disposed of by consent.

9. No draft consent order was received until yesterday afternoon. It was immediately brought to my attention, but I was unable to approve it because it stated that the appeal was to be treated as abandoned under section 104(4A) of the Nationality, Immigration and Asylum Act 2002.

10. As I pointed out in my response to that draft order, that provision is inapplicable as this is not an appeal under section 82(1) of that Act. It is an appeal under the Immigration (Citizens' Rights Appeals) (EU Exit) Regulations 2020. Section 104 is not one of the provisions which is listed in schedule 3 to those regulations as applying in an appeal of this nature, and the only potentially relevant abandonment provision is regulation 13(5), which applies only where an appellant has been granted leave to remain *under the residence scheme immigration rules*. That is not the case here; the appellant

was granted limited leave to remain under the Ten Year Route in Appendix FM of the Immigration Rules, valid from 9 December 2022 to 9 June 2025. I suggested that the parties might consider alternative settlement terms but there was no response to that suggestion. It was in those circumstances that the appeal remained in the list.

11. When the matter was called on before me this morning, there was no appearance by or on behalf of the appellant. Mr Wain indicated that he had been in contact with the appellant's solicitors the previous day and he expressed the hope that the matter might settle by consent. As this was the final case on my list, I gave Mr Wain three hours in which to engage with the appellant's solicitors. On my return to the hearing room after the short adjournment, Mr Wain indicated that his emails and telephone calls had all gone unanswered and that he was unable even to obtain any response from the solicitor's offices. He invited me to proceed in the appellant's absence and to determine the appeal.

12. I indicated that I was prepared to proceed in the appellant's absence. Notice of the hearing had clearly been given and I was satisfied that it was in the interests of justice to proceed.

13. Mr Wain made a short submission in which he contended that Judge Bagral had plainly fallen into error in light of Celik v SSHD. I indicated that I accepted that submission and that the Secretary of State's appeal to the Upper Tribunal would be allowed, and that I would substitute a decision dismissing the appellant's appeal. My reasons for reaching that conclusion were as follows.

14. The decision of the Court of Appeal in Celik v SSHD was handed down on 31 July 2023.

15. In relation to those who married after the end of the transition period, Lewis LJ (with whom Moylan and Singh LJJ agreed) held that Article 10(1)(e)(i) of the Withdrawal Agreement clearly did not include persons who married an EU national after the end of the transition period and who were not, therefore, residing in the UK as a spouse or civil partner in accordance with EU law at the end of the transition period. The fact that unforeseen events meant that certain people were not able to exercise rights of residence (even if as a result of events outside their control) before the set date did not lead to manifestly absurd, arbitrary or unreasonable results. The principle of proportionality, whether as a matter of general principle, or under article 18(1)(r), was not intended to lead to the conferment of residence status on people who would not otherwise have any rights to reside.

16. In relation to those who submitted that they had been 'durable partners' before the end of the transition period, the Court of Appeal held that Article 10(2) and (3) of the Withdrawal Agreement dealt with situations where the residence of a person was 'facilitated' by the host state in accordance with legislation. The reference to residence being 'facilitated' meant that a decision had been taken in relation to a particular individual under the relevant national legislation *granting* that individual a right to enter or reside in the relevant state.

17. The position in law is therefore clear. The appellant married after the end of the transition period. The fact that he was prevented from marrying earlier as a result of the pandemic is legally irrelevant. He made no application for facilitation of residence as a durable partner before the end of the transitional period, nor was he granted a residence card in that capacity. He did not therefore fall within the personal scope of the Withdrawal Agreement and the principle of proportionality was of no application.

18. The appellant could not succeed on either of the grounds which were available to him under the Immigration (Citizens' Rights Appeals) (EU Exit) Regulations 2020. The judge erred in concluding otherwise. In the circumstances, the only course open to me is to allow the respondent's appeal to the Upper Tribunal and to remake the decision on the appeal by dismissing it.

19. I make it clear, however, that the conclusions I have reached above have no effect on the appellant's leave to remain. That leave was granted on a different legal basis and will continue, all things being equal, until 9 June 2025, whereupon the appellant can apply for further leave on the same basis. Upon completion of ten years in that capacity, he will be entitled to apply for settlement if his family and other circumstances remain the same. In making any such application, the starting point will be the acceptance by Judge Bagral that the relationship is a genuine and subsisting one which began in mid-2020. That finding is not disturbed by anything in this decision, which turns on questions of law relating to the UK's withdrawal from the EU.

Notice of Decision

The decision of the First-tier Tribunal was erroneous in law and is set aside. I remake the decision on the appeal by dismissing it.

Mark Blundell

Judge of the Upper Tribunal
Immigration and Asylum Chamber

26 March 2024