IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2022-004730

First-Tier Tribunal No:
EA/02681/2022

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On 24th April 2024

Before

UPPER TRIBUNAL JUDGE MANDALIA

Between

Secretary of State for the Home Department

Appellant

and

Sofiane Bacha
(NO ANONYMITY DIRECTION MADE)

Respondent

REPRESENTATION

For the Appellant: Mr M Parvar, Senior Home Office Presenting Officer
For the Respondent: No appearance by or on behalf of the respondent

Heard at Field House on 11 April 2024

DECISION AND REASONS

INTRODUCTION

1. Although the appellant in the appeal before the Upper Tribunal is the Secretary of State for the Home Department, for ease of reference I continue to refer to the parties as they were before the First-tier Tribunal ("FtT"). Hereafter I refer to Mr Bacha as the appellant and the Secretary of State as the respondent.

2. The appellant is a national of Algeria. His appeal against the respondent's decision of 22 February 2022 to refuse his application for leave to remain under the EU Settlement Scheme under the Immigration (Citizens' Rights Appeals) (EU Exit) Regulations 2020 was allowed by First-tier Tribunal Judge Shakespeare ("the judge") for reasons set out in a decision promulgated on 29 July 2022.

3. The judge noted the appellant made an application on 3 June 2021 for pre-settled status under the EU Settlement Scheme as the spouse of Wilma Noelia Nunez Ramirez ("the sponsor"), a Spanish national residing in the UK in exercise of her Treaty rights. The judge accepted the appellant and sponsor married at the Old Marylebone Town Hall in Westminster on 30 May 2021. The judge also noted the appellant cannot meet the definition of 'spouse' in Appendix EU because he was not party to a legally recognised marriage contracted before the specified date of 31 December 2020.

4. The judge found the evidence of the appellant and the sponsor regarding their relationship to be consistent. She accepted they met in December 2019 and started a relationship soon after. She also accepted that they moved in together on 15 March 2020, and have lived together ever since. The judge accepted the evidence that the appellant and sponsor decided to get married on 8 March 2020, when the appellant proposed, but faced difficulties in securing an appointment due to the restrictions in place as a result of the pandemic. She noted they were eventually married on 30 May 2021 and said the clear intention to marry was supported by the evidence that the appellant and sponsor married in a Nikah ceremony at the South London Islamic Centre on 20 March 2021.

5. Having already concluded, at paragraph [21] that the appellant cannot meet the definition of 'spouse' in Appendix EU, the judge said at paragraph [26] that the definition of durable partner in Appendix EU also requires that applicants hold a 'relevant document', being a permit or residence card issued under the EEA Regulations 2016. She went on to say:

> "…The Appellant accepts that he does not hold a relevant document for the purposes of Appendix EU. On that basis, I find that he does not meet the definition of a 'durable partner' in Annex 1 to Appendix EU and therefore does not meet the requirements of the Immigration Rules."

6. The judge was not persuaded that the respondent's decision breaches Article 12 of the Withdrawal Agreement but concluded that looking at the evidence in the round, the refusal of the appellant's application is disproportionate, under Article 18(1)(r) of the Withdrawal Agreement.

GROUNDS OF APPEAL

7. The respondent claims the judge made a material error of law in allowing the appeal by reference to Article 18(1)(r) of the Withdrawal Agreement because Article 18(1) makes clear it only applies to those *'who reside in its territory in accordance with the conditions set out in this Title..'*. The appellant has never resided in accordance with any conditions in the Title

(he is an illegal entrant who has never had leave to enter or remain or other right to reside). The respondent claims the appellant does not come within the scope of the Withdrawal Agreement. The respondent claims the Withdrawal Agreement and Appendix EU of the Immigration Rules are clear and it is not possible to reconstruct them to achieve an outcome the decision maker may view as more fair or proportionate.

8. Permission to appeal was granted by First-tier Tribunal Judge Fisher on 23 September 2023. Judge Fisher said:

> "3. I am satisfied that these grounds are arguable, especially in light of the Upper Tribunal's conclusions on proportionality as set out in Celik (EU exit; marriage; human rights) [2022] UKUT 00220 (IAC). The Withdrawal Agreement is complicated in terms of its provisions, and the grounds are interlinked. In all of the circumstances, permission to appeal is granted on all matters raised."

9. The appeal was listed for hearing before Upper Tribunal Judge Gill on 27 January 2023. The appellant attended the hearing and was unrepresented. He did not seek an adjournment. Upper Tribunal Judge Gill explained to the appellant the key points arising from the Upper Tribunal's guidance in *Celik (EU exit: marriage; human rights)* [2022] UKUT 0220 (IAC). She informed the appellant that applying *Celik*, it would seem that the judge had erred in allowing the appeal given that the appellant's marriage was entered into after 31 December 2020, he had not been issued with a residence card as a durable partner before 31 December 2020, and he had not applied for facilitation as a durable partner before 31 December 2020. Upper Tribunal Judge Gill reserved her decision "exercising an abundance of caution." After the hearing, Upper Tribunal Judge Gill became aware that the Court of Appeal had, on 26 January 2023, granted permission to appeal against the Upper Tribunal's decision in *Celik (EU exit: marriage; human rights)*. She therefore issued Directions staying the appeal pending the judgment of the Court of Appeal.

10. The appeal was reviewed by Upper Tribunal Judge Rimington on 11 October 2023, and she issued further Directions. She noted the judgement of the Court of appeal in *Celik v Secretary of State for the Home Department* [2023] EWCA Civ 921 was given on 31 July 2023. She expressed the provisional view:

> "…that the grounds of appeal in this case asserting an error of law by the First-tier Tribunal are bound to succeed. Applying Celik, it would seem that the judge had erred in allowing Mr Bacha's appeal given that his marriage was entered into after 31 December 2020, he had not been issued with a residence card as a durable partner before 31 December 2020 and he had not applied for facilitation as a durable partner before 31 December 2020."

11. The parties were invited to reconsider their respective positions, and if possible, to agree a consent order. There has been no further response from the appellant.

THE HEARING OF THE APPEAL BEFORE ME

12. The appellant did not attend the hearing of the appeal before me. There is no explanation for the appellant's absence and there has been no application for an adjournment.

13. Notice of the hearing of this appeal was sent to the appellant, by post, on 20 March 2024. A copy was also sent to the appellant by email on the same day. Neither the email nor the Notice of Hearing have been returned to the Tribunal undelivered, and I am satisfied the appellant has had Notice of the Hearing in accordance with Rule 36 of The Tribunal Procedure (Upper Tribunal) Rules 2008.

14. In the absence of any response form the appellant to the Directions issued by Upper Tribunal Judge Rimington on 11 October 2023, and the absence of any application for an adjournment or reasons to explain the appellant's absence, I am satisfied that it is in accordance with the over-riding objective and the interests of justice for me to determine the hearing in the absence of the appellant.

DECISION

15. The Court of Appeal held in *Celik v SSHD* [2023] EWCA Civ 921 that on the proper interpretation of Article 10 of the EU Withdrawal Agreement, a Turkish national who had married an EU national after the end of the post-EU exit transition period, did not have any right to reside in the UK. The fact that their marriage had been delayed due to the COVID-19 pandemic did not alter the interpretation of the Withdrawal Agreement.

16. Lord Justice Lewis (with whom Lord Justice Moylan Lord Justice Singh agreed) said:

> "54. Family members are defined to include spouses or civil partners (but not persons in a durable relationship): see Article 9(a) of the Withdrawal Agreement. In order to be resident in accordance with EU law before the end of the transition period, such persons would have to have married (or contracted a civil partnership) before that date and be residing in the United Kingdom on the basis that they were the spouse or civil partner. The wording of Article 10(1)(e)(i) is clear. It does 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. That reflects a rational agreement for the protection of UK and EU nationals, and their families who, in the words of the sixth recital, "have exercised free movement rights before a date set in this Agreement". The date set was the end of the transition period. On the ordinary meaning of the words in Article 10(1)(e)(i) read in context and having regard to the purpose underlying the Withdrawal Agreement, therefore, persons such as the appellant who marry after the end of the transition period do not fall within the scope of that provision.
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> 55. The fact that persons did not, or could not, exercise free movement rights, or did not or could not marry, until after that date does not alter the meaning or purpose of the Withdrawal Agreement. That does not involve any breach of Article 5 of the Withdrawal Agreement. That is an obligation

> to act in good faith and to take all appropriate measures to ensure "fulfilment of the obligations arising from the agreement". The relevant obligation, in this context, is to ensure that family members defined to include spouses and civil partners of EU nationals (but not unmarried partners in a durable relationship) resident in the United Kingdom at the end of the transition period can continue to enjoy rights of residence after the end of the transition period. The United Kingdom is complying with that obligation. Article 32 of the Vienna Convention does not assist. That permits recourse to supplementary means of interpreting treaties where the interpretation resulting from the application of Article 31 leads to a meaning which is ambiguous or obscure (which is not the position here) or where that leads to "manifestly absurd or unreasonable results". Again, a treaty providing that those exercising certain rights at a particular date should continue to enjoy those rights after that date is not manifestly absurd or unreasonable. It is the agreement reached between the European Union and the United Kingdom as to the appropriate extent of reciprocal protection for their nationals. The fact that unforeseen events meant that certain people were not able to exercise those rights (even if as a result of events outside their control) before the set date does not lead to manifestly absurd or unreasonable results.
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> 56. Further, the principle of proportionality, whether as a matter of general principle, or as given express recognition in Article 18(1)(r) of the Withdrawal Agreement, does not assist the appellant. Article 18(1)(r) is intended to ensure that decisions refusing the "new residence status" envisaged by Article 18(1) are not disproportionate. That status must ensure that EU citizens and United Kingdom nationals, and their respective family members and other persons may apply for a new residence status "which confers the rights under this Title". The principle of proportionality, in this context, is addressed to ensuring that the arrangements adopted by the United Kingdom (or a Member State) do not prevent a person who has residence rights under the Withdrawal Agreement being able to enjoy those rights after the end of the transition period. The principle of proportionality is not intended to lead to the conferment of residence status on people who would not otherwise have any rights to reside. The appellant did not have any rights under Article 10(1)(e)(i) of the Withdrawal Agreement. The refusal to grant residence status is not therefore a disproportionate refusal of residence status which would have conferred rights already enjoyed under the Withdrawal Agreement. Rather, it is a recognition that the appellant did not have any such rights under Article 10(1)(e)(i).”

17. It is clear therefore that in allowing the appeal for the reasons that she did, the judge of the First-tier Tribunal erred in law and the decision must be set aside.

DISPOSAL

18. As to disposal, I can re-make the decision in relation to the appellant’s appeal pursuant to section 12(2)(b)(ii) of the Tribunals, Courts and Enforcement Act 2007. By virtue of section 12(4) of that Act, I may make any decision which the FtT could make if it were re-making the decision and may make such findings of fact as I consider appropriate.

19. The factual matrix is uncontroversial. The respondent does not challenge any of the findings that were made by Judge Shakespeare. The judge accepted the appellant and sponsor met in December 2019 and they were eventually married on 30 May 2021. Notwithstanding those positive findings made in favour of the appellant, in light of the decision of the Court of Appeal in *Celik,* the appellant is unable to succeed under the EUSS and it follows that I dismiss the appeal.

NOTICE OF DECISION

20. The decision of First-tier Tribunal Judge Shakespeare promulgated on 29 July 2022 is set aside.

21. I remake the decision in the Upper Tribunal and dismiss the appeal by Mr Sofiane Bacha against the SSHD's decision of 22 February 2022 to refuse his application under the EU Settlement Scheme.

V. Mandalia
Upper Tribunal Judge Mandalia

Judge of the Upper Tribunal
Immigration and Asylum Chamber

11th April 2024