



**Upper Tribunal
(Immigration and Asylum Chamber)**

Appeal Number:

UI-2022-000135 (EA/10580/2021)

THE IMMIGRATION ACTS

**Heard at Field House
On 19 July 2022**

**Decision & Reasons Promulgated:
On 4 December 2022**

Before

**UPPER TRIBUNAL JUDGE RIMINGTON
DEPUTY UPPER TRIBUNAL JUDGE SHEPHERD**

Between

MR VLADIMIR ULAJ
(Anonymity direction not made)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms E Harris, Goldsmith Chambers

For the Respondent: Ms Cunha, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The Appellant appeals with permission a decision of First-tier Tribunal Judge Swinnerton ('the Judge') promulgated on 31 December 2021. The Judge dismissed the Appellant's appeal against the Respondent's refusal of an application for status under the EU Settlement Scheme in

Appendix EU of the Immigration Rules as the family member of a EEA national exercising treaty rights in the UK.

2. The Appellant is a citizen of Albania born on 5 December 1985.
3. In its refusal letter, the Respondent noted the Appellant had applied on 27 January 2021 for status as the spouse of a Bulgarian national in the UK and considered the application under EU11 of Appendix EU. It said that insufficient evidence of relationship had been provided. Specifically, the Appellant needed a valid family permit, residence card or valid marriage certificate which he did not have. The evidence provided stated that a marriage had been booked for 21 April 2021, however, the letter said, it needed to have taken place on or prior to 31 December 2020. He also failed to meet EU14, again because he did not have a residence card or valid family permit as a durable partner and had also not provided sufficient evidence that the durable partnership continued to exist.
4. The Appellant's appeal against the refusal decision was heard by the Judge on 10 December 2021 and dismissed for reasons set out in a decision promulgated on 31 December 2021. The Judge referred to the Respondent's reasons for refusing the application in paragraph [2] of her decision. She set out, at paragraphs [3] to [7] and [12], the evidence before the First-tier Tribunal and what occurred at the hearing. Her findings and reasons are set out at paragraphs [11] to [16] of the decision. She concluded at paragraph [17] by saying "The appeal is dismissed". The key findings of the decision can be summarised as follows:
 - a. The Appellant and Sponsor met on 3.10.19. The Sponsor was made aware by the Appellant of his immigration status at the time they met. Their marriage was reserved for 10.11.20 but could not take place on that date due to the covid-19 pandemic and related restrictions. They married on 21.4.21.
 - b. The Appellant accepted that he could not meet the requirements to be a spouse or a durable partner under Appendix EU. The only issue was whether the Respondent's decision was proportionate. The Respondent had refused consent to article 8 being raised as a new matter.
 - c. Shortly after the Sponsor had been granted pre-settled status, the couple started cohabiting on 9.1.20. It was not in dispute that they had lived together for a little under 12 months as at 31.12.20 and so were not in a relationship akin to marriage or civil partnership for at least two years as at 31.12.20.
 - d. The second national lockdown in England commenced on 5.11.2020 and ended on 2.12.20. There was therefore a national lockdown in place on 10.11.20, the date when the marriage was

booked to take place. The covid-19 pandemic and related restrictions disrupted their wedding. That said, the Appellant proposed to the Sponsor on 18.6.20 at a point in time several months after the first lockdown had commenced on 23.2.20 and the Appellant *“would have been aware, at the point in time of proposing marriage to the sponsor and certainly before the date the marriage was booked, that events might not unfold as planned and that the marriage may not be able to take place in 2020”*.

- e. Having considered all the available evidence, on the balance of probabilities, the decision of the Respondent was not disproportionate.
5. The Appellant sought permission to appeal on grounds which raised the following criticisms of the decision:
- a. The Judge’s conclusion was irrational; namely because the Appellant could not have predicted or known at the time the wedding was booked in July 2020 that there would be a second lockdown; and
 - b. The Judge failed to conduct a full proportionality assessment as was required under Article 18(1)(r) of the Withdrawal Agreement. The question should not have been whether the Appellant could have reasonably expected to get married before the deadline but should have been an assessment of whether the refusal was a proportionate interference by the Respondent with the Appellant’s rights and fundamental freedoms under European law i.e. was it proportionate to require the Appellant to hold a residence card as either spouse or durable partner under the EUSS in circumstances where he had intended and attempted to marry his partner before the deadline and had in fact married her by the date of the hearing. The Judge should have considered whether the requirements of the EUSS were necessary to achieve the Respondent’s pursued objectives of limiting the number of people eligible for status to those who were in a durable, genuine and subsisting relationship as at the time of the UK’s withdrawal from the EU, or whether they went beyond what was necessary.
6. Permission to appeal on all grounds was granted on 9 February 2022 by First-tier Tribunal Judge Hatton who stated:

“[3]. In considering the factual matrix of this case, I note from [11] of the Judge’s decision that it was not disputed that the Appellant and his sponsor’s marriage was reserved for 10 November 2020 but unable to take place on that date due to the Covid-19 pandemic and related restrictions. Accordingly, the Appellant was not the spouse of an EEA national prior to 31 December 2020 as mandated by the Appendix EU of the Immigration Rules.

[4]. Thereafter, the Judge asserted at [14] that the Appellant was not the durable partner of an EEA national prior to 31 December 2020. In so asserting, the Judge found the Appellant and his sponsor had not been in a durable relationship akin to marriage for at least 2 years as at 31 December 2020. Whilst I note the parties accepted this, I am mindful that in accordance with Annex 1 of Appendix EU of the Immigration Rules, a person can still satisfy the durable partner requirement in respect of a relationship akin to marriage of less than 2 years' duration if "there is other significant evidence of the durable relationship".

[5]. Given the Judge expressly accepted that the Appellant and his sponsor had a firm and settled intention to marry by 10 November 2020 [see above], the Judge arguably erred in failing to find that their relationship had acquired the requisite characteristics of permanence by 31 December 2020, as asserted in the Appellant's grounds at [18]. Correspondingly, the Judge's finding that the Respondent's refusal decision was not disproportionate is arguably erroneous."

7. The Secretary of State filed a Rule 24 response dated 17 March 2022 in which it stated that the Judge directed themselves appropriately and their decision did not amount to a material error of law for several reasons which we do not consider it necessary to repeat here.
8. The appeal was listed for an oral Error of Law hearing before us at Field House. Ms Harris attended and made submissions for the Appellant and Ms Cunha did the same, in person, for the Respondent. A discussion was had as to whether the hearing should be adjourned awaiting a case which, Ms Cunha said, was due to be handed down as a reported decision in September and would contain guidance on the subject of the requirement for a residence card. However, given the lack of clarity at the time about the contents of that case, and the date by which it would be promulgated, together with a lack of provision by the Respondent of any documentation concerning the case, Ms Harris opposed an adjournment and we agreed that the matter should be heard without further delay.
9. The full submissions are set out in the record of proceedings. In summary, they were as follows:
10. Ms Harris expanded on the two grounds of irrationality and the failure to carry out a full proportionality assessment. In terms of the first ground, she said the Judge made her decision on only one basis, being that the Appellant should have been aware that events may not unfold as planned, and this was irrational. Ms Harris appreciated there was a high threshold for irrationality but considered this was met due to the lack of adequate (or any) reasoning. She asked for the Judge's finding at para 19, that the pandemic and consequent restrictions disrupted the wedding as there was a lockdown in place at the time of

the first scheduled ceremony, to be preserved. She said despite this finding, the Judge did not take into account the fact (under a proportionality assessment or otherwise) that the Appellant had tried and failed to get married before the deadline through no fault of his own. This, she said, was irrational.

11. As to proportionality, she cited Article 18(1)(r) of the Withdrawal Agreement and said the requirement to conduct an assessment could arise in one of several ways, and went on to detail four possible ways.
12. She said she continued to rely upon the grounds of appeal as to the nature of the assessment required; there was no consideration of the circumstances of this couple and what the refusal meant for them. She disputed whether judicial review was open to the Appellant as a remedy at this stage and also submitted that it was wrong to say there was discretion to go beyond Appendix EU.
13. She added that there is no finding in the Judge's decision as to whether the couple were in a durable relationship as at 31 December 2020 or not. She submitted that the Judge should have made a finding on it, whether or not the Appellant had a residence permit, given that a proportionality assessment was required.
14. Ms Cunha accepted that it was an error that the Judge did not make a finding as to whether there was a durable relationship as at 31 December 2020 but overall, however, Ms Cunha did not accept that any errors in the decision were material.
15. Ms Harris said this error was material given that proportionality was required to be considered; if they were not in a durable relationship, they could not have succeeded but the fact that they were is evidenced by their attempt to marry and their cohabitation, which she accepted was for less than two years.
16. Ms Cunha said even if a proportionality assessment were required, there was insufficient evidence of a durable relationship as at the deadline, as the Sponsor's previous marriage only dissolved in May 2020 and so they could not have been in a relationship akin to marriage for 2 years. She said there was no other substantial evidence of relationship and this could only have been assessed if a proportionality assessment was required, which it was not. She said irrationality is a high threshold, requiring it to be found that the Judge reached a conclusion which no other reasonable judge would reach, which was not applicable here. She detailed, as regards proportionality, how extended family members and durable partners did not enjoy automatic residence rights under EU law, and how the Appellant was not recognised as having an existing right to reside, such that he could not have a continued right to reside. She said there was no error of law in not conducting a proportionate assessment as the safeguards in article

21, as supported by article 52, are clearly referred to in article 10 and the Appellant does not fall within the scope of Article 10.

17. Ms Harris replied to dispute this, saying limiting the EUSS to those who already have residence rights means the right of redress would be redundant as they would not need it.
18. It was agreed that article 8 could not be argued as consent had not been given to its being raised as a new matter.

Further Submissions following Celik

19. Following the hearing but prior to promulgation of our decision, this Tribunal gave guidance in the case of Celik (EU exit; marriage; human rights) [2022] UKUT 00220 (IAC) which deals definitively with many of the points raised.
20. In the interests of fairness, we gave both parties the opportunity to make submissions as to the impact of **Celik** on their respective positions. We have since had the benefit of these submissions which may be summarised as follows:
 21. The Appellant submits that:
 - a. These proceedings should be stayed pending the final outcome of **Celik** in the Court of Appeal if permission for that onward appeal is granted by the Court of Appeal, it having been refused by the Upper Tribunal.
 - b. If a stay is not granted, and the interpretation of the Withdrawal Agreement and Appendix EU as set out in **Celik** is applied to the current case, the Appellant's appeal would now fail as the Appellant would concede that his appeal cannot factually be distinguished from the facts of the case of **Celik**.
 22. The Respondent submits that:
 - a. The proceedings should not be stayed as there is no grant of leave to appeal to the Court of Appeal, and a stay would not be in the interests of justice in the absence of grounds of appeal that have real prospect of success; and/or raise an important point of principle.
 - b. Due to the findings in **Celik**, as set out in the headnote therein, the Appellant's appeal must fail notwithstanding the Appellant's desire to marry prior to the 12 December 2020. The principle of fairness accorded in Article 18(1)(r), does not apply because the Appellant would not have met the definition under Article 10 of the withdrawal agreement. The decision in **Celik** was good law, for reasons set out in detail in the submissions.

Error of Law

23. We have considered the entirety of the submissions and evidence before us even where not specifically mentioned.
24. We remind ourselves of the important guidance handed down by the Court of Appeal that an appellate court must not interfere in a decision of a judge below without good reason. The power of the Upper Tribunal to set aside a decision of the First-tier Tribunal and to proceed to remake the decision only arises in law if it is found that the tribunal below has made a genuine error of law that is material to the decision under challenge. In this appeal the decision is the decision to dismiss the Appellant's appeal against the refusal of the Respondent to grant him pre-settled status.
25. As to staying the proceedings, critically we have not been provided with any evidence that permission to appeal to the Court of Appeal has been sought or granted further to the Upper Tribunal's refusal to grant such permission. The Appellant's application, the subject of the appeal, was made in January 2021, twenty-one months ago. Even if permission were granted for an onward appeal, we do not know how long that appeal would take to be concluded, during which time the Appellant is in 'limbo' as regards the status of his presence in the UK. This appeal has already been prolonged due to the impact of **Celik** and the need for further submissions. Overall, taking into account the entirety of the submissions and caselaw cited therein, we are satisfied that it would not be in the interests of justice or fairness to prolong this appeal any further. We therefore decline the application to stay the proceedings and go on to deal with the appeal before us now.
26. As to the first appeal ground of irrationality, we find that rather than simply being one ground of 'irrationality' in the sense of a perverse or irrational finding, this ground was conflated to also cover the ground of failure to give reasons or any adequate reasons. We do not find the former to be made out in the sense that the Judge's decision was so unreasonable that no reasonable judge could have made it. As said at the hearing, this is a high bar, and another judge may well have reached the same conclusion as to the refusal decision not being disproportionate. Indeed, as per **Celik**, finding the refusal decision not to be disproportionate was the correct decision.
27. It is now well established that what is required in a decision is that the reasons provided must give sufficient detail to show the parties and the appellate Tribunal the principles upon which the lower Tribunal has acted, and the reasons that led it to its decision, so that they are able to understand why it reached its decision. It was accepted before the Judge that the Appellant did not meet the requirements of the EUSS for want of a residence card or his marriage having taken place by 31 December 2020. The question was then whether the Appellant still had the ability to succeed either under the EUSS or Withdrawal Agreement

in any event, and the Judge does not appear to address this. In relation to the marriage, the reason for the Judge's decision was that she found the Appellant "would have been aware...that events might not unfold as planned".

28. We also note the Judge did not consider whether the Appellant was in a durable relationship with the Sponsor, either prior to the deadline, or since. Ms Cunha accepted that this was an error but disputed that it was material. As to materiality, the Refusal Letter specifically considered whether the Appellant met the requirements of being a durable partner under EU14 of Appendix EU and found that he did not, due to insufficient evidence. It said the required evidence of relationship was a valid family permit or residence card issued under the Regulations "*and, where the applicant does not have a documented right of permanent residence, evidence which satisfies the Secretary of State that the durable partnership continues to subsist*". The Judge did not address this element of the appeal and appears, in para 14 of her decision, to say that the Appellant and Sponsor could not have been in a durable relationship because they had not cohabited for at least two years as at 31.12.20. The Judge did not set out which legislative provisions she referred to in assessing the Appellant's case and also did not refer to evidence of relationship beyond that of cohabitation, including whether the fact of the marriage itself could be evidence of a durable relationship having existed prior to the deadline which is precisely what the Appellant was arguing. Had the Judge set out the relevant definitions of 'spouse' and 'durable partner' in Appendix EU, she would have appreciated that "other significant evidence of the durable relationship" may be assessed where a couple have not lived together in a relationship akin to a marriage or civil partnership for at least two years. All that considered, we find the error not to be material because, even if the Judge had set out the specific legislative provisions and assessed all the material in the round, given the lack of a residence card, or any application prior to the specified date (2300 hours on 31 December 2020), there was no other conclusion she could have reached under the EUSS.
29. As to the second appeal ground of proportionality, we consider this ground to be erroneously argued and therefore not made out. It is clear that the Judge considered an assessment of proportionality to be applicable, stating in para 13 that "*the only issue to be determined was whether or not the decision of the Respondent was proportionate*" and at para 16 that "*I find on a balance of probabilities that the decision of the Respondent was not disproportionate*". Although the Judge did not state the legal basis on which this assessment was made, **Celik** has now confirmed that one was not required in these circumstances. As Ms Cunha argued, there is no requirement to conduct a proportionality assessment "outside the rules" so to speak, if the Appellant did not fall within Article 10 of the Withdrawal Agreement and **Celik** confirms that this is correct. Although this is not made explicit in the decision and although the Judge might have set out the relevant

parts of the Withdrawal Agreement relied upon, and assessed which parts of them applied to the Appellant, in the light of **Celik** we consider this omission not to be material.

30. The headnote of **Celik** states as follows:

(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.

(3) Regulation 9(4) of the 2020 Regulations confers a power on the First-tier Tribunal to consider a human rights ground of appeal, subject to the prohibition imposed by regulation 9(5) upon the Tribunal considering a new matter without the consent of the Secretary of State.

31. As the Appellant concedes in para 14 of the Further Submissions, the facts of his case "*cannot factually be distinguished from the facts of the case of Celik*". In **Celik**, as here, a non-EEA national applied under the EUSS after the end of the transition period on the basis of his relationship with his wife, a EEA national, whom he married after the deadline without having applied under the scheme as a durable partner beforehand. As here, that appellant sought to argue that a concession should have been made as covid prevented him from marrying prior to the deadline.

32. Pursuant to **Celik**, it can be seen that even if the Judge had assessed the durability of the relationship and given fuller reasons as to why she reached her conclusion that the refusal was not disproportionate, there was no other conclusion she could have reached on the evidence, given that the Appellant had no residence card either from marriage or following 'facilitation' as a durable partner and did not apply for facilitation prior to the deadline on the basis of his relationship. For this reason, we find the errors in her decision not to be material as they would not have affected the outcome of her decision in any case.

33. To confirm, whether a proportionality assessment was actually required was not the appropriate ground of appeal and as such, is not

made out. However, **Celik** has now confirmed [para 65] that such an assessment was not required on facts similar to these as “*the appellant’s attempt to invoke the principle of proportionality in order to compel the respondent to grant him leave amounts to nothing less than the remarkable proposition that the First-tier Tribunal Judge ought to have embarked on a judicial re-writing of the Withdrawal Agreement*”.

34. For the same reason, we will not comment on whether this Tribunal is the appropriate forum for assessing whether the EUSS went beyond what was necessary in terms of achieving the Respondent’s objectives.
35. We also note that the Charter of Fundamental Rights as at 31 December 2020 is no longer part of domestic law, following the European Union (Withdrawal Act) 2018 as amended by the European Union (Withdrawal Agreement Act) 2020.
36. To conclude, we find the decision is not materially infected by the error of failure to provide reasons and/or inadequate reasoning. The decision therefore stands.

Decision

37. The decision of First-tier Tribunal Judge Swinnerton promulgated on 31 December 2021 is maintained.

Anonymity.

38. The First-tier Tribunal made no order pursuant to rule 45(4)(i) of the Asylum and Immigration Tribunal (Procedure) Rules 2005.
39. We make no such order pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008.

Signed L. Shepherd

Deputy Upper Tribunal Judge Shepherd

Dated: 31 October 2022