Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: UI-2022-002348
EA/11997/2021

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 27th September 2022	**On 10th November 2022**

Before

UPPER TRIBUNAL JUDGE LINDSLEY
UPPER TRIBUNAL JUDGE KEITH

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

KLEJRIS PEPAJ
(ANONYMITY ORDER NOT MADE)

Respondent

Representation:
For the Appellant: Ms A O'Callaghan, of Counsel, instructed by Albany Solicitors
For the Respondent: Mr D Clarke, Senior Home Office Presenting Officer

DECISION AND REASONS

Introduction

1. The claimant is a citizen of Albania born on 3rd November 1997. He arrived in the UK illegally in 2017. He applied under the EU Settlement Scheme Immigration Rules, after getting married in March 2021, to remain in the UK as the spouse of an Italian citizen. His appeal against

the decision dated 1st July 2021 refusing him lave to remain under the EU Settlement Scheme was allowed by First-tier Tribunal Judge Atreya in a determination promulgated on the 16th February 2022.

2. Permission to appeal was granted to the Secretary of State by Judge of the First-tier Tribunal Galloway on 25th April 2022 on the basis that it was arguable that the First-tier judge had erred in law in allowing the appeal as the claimant was not married until after the specified date (31st December 2020); had not obtained or applied for a relevant document with respect to any durable partnership by that date; and the reasoning with respect to the decision of the Secretary of State being disproportionate was arguably insufficient.

3. The matter came before us to determine whether the First-tier Tribunal had erred in law; and, if so, to decide if any such error was material and whether the decision should be set aside.

Submissions – Error of Law & Remaking

4. The grounds of appeal and oral submissions of Mr Clarke contend, in short summary, as follows. The First-tier Tribunal erred in finding that the claimant could qualify under the Immigration Rules relating to the EU Settlement Scheme because it was not relevant that the claimant was in a durable relationship as what was required was that an EU right to remain in the UK had been recognised by the Secretary of State by the issuing of a relevant document, or at least the claimant had applied for this relevant document to be issued prior to the specified date, namely 31st December 2020. As, unarguably, neither of these things had happened the First-tier Tribunal made a material misdirection of law by allowing the appeal on this basis.

5. Further, there was nothing in the Withdrawal Agreement pertaining to proportionality which permitted a durable relationship to succeed without a relevant document or an application for one made prior to the 31st December 2020. The finding that the decision of the Secretary of State was not proportionate was not open to the First-tier Tribunal as it was insufficiently reasoned: the fact that the claimant and his partner were in a relationship found to be genuine and unable to marry prior to the specified date due to Covid-19 was not sufficient. In relation to the issue of the respondent's policy guidance this simply provides some evidential flexibility for those with rights under the Withdrawal Agreement, and does not vary that Agreement or give rights to those who have none, and as such the policy guidance could not assist the claimant. The case of Celik (EU exit; marriage; human rights) [2022] UKUT 00220 is relied upon in support of the conclusion that the First-tier Tribunal had erred in law for all of these reasons.

6. Ms O'Callaghan argued for the claimant that the First-tier Tribunal decision was one reasonably open to it. The First-tier Tribunal Judge found that the definition of durable partner was not met and that the

marriage took place after the specified date, and thus that the requirements of the Immigration Rules were not met, but went on to find in the context of the particular facts of the case to find that the decision was not proportionate. She argued that there was no misdirection of law under the Withdrawal Act as a result. She argued this despite the wording of paragraph 43 of the decision of the First-tier Tribunal which states that: "the appellant was denied his rights under the Withdrawal Agreement and should be allowed to remain on this basis". She argued it was open to the First-tier Tribunal to find that the decision of the Secretary of State was not proportionate in light of the marriage of the claimant not having taken place prior to the specified date because of Covid-19 restrictions and in light of policy documents of the Secretary of State relating to the EU Settlement Scheme. She acknowledged that Celik found that proportionality did not engage on facts materially the same to those of this claimant and that the policies she argued to be relevant to the exercise of proportionality had been considered in Celik and found not to be pertinent.

7. At the end of the hearing we informed the parties that we found that the First-tier Tribunal had erred in law, and that we would be remaking the appeal dismissing it, but that this would be set out in a written decision.

Conclusions – Error of Law & Remaking

8. The First-tier Tribunal found at paragraph 31 of the decision that the claimant's marriage did not assist him in succeeding in his appeal under the Immigration Rules as it had taken place after the specified date. This was clearly correct as the claimant married in March 2021.

9. The First-tier Tribunal then goes on to consider whether the appeal can succeed under the Immigration Rules by way of the claimant being in a durable partnership in the UK on the specified date, as he and his now wife were living together at that time. At paragraph 37 of the decision the First-tier Tribunal finds that the claimant and his partner were in a durable partnership, on the specified date, when the facts of the case are considered. It is clear that the First-tier Tribunal was aware that the claimant held no relevant document as required by the Annex 1 of Appendix EU in the definition of a durable partner, but finds that in all the circumstances that this created an injustice, as set out at paragraphs 38 and 39 of the decision. The Tribunal then goes on to find that the decision of the Secretary of State was unfair and disproportionate, and that the appeal should be allowed applying Article 10 of the Withdrawal Agreement, particularly due to the fact that the Covid-19 Pandemic had prevented the claimant from marrying his fiancé prior to the specified date, and thus this misfortune had prevented him being a family member at the relevant time.

10. The definition of durable partner is to be found in Appendix EU Annex 1(b) of the Immigration Rules. We find, as found by the Presidential Panel in the case of Celik, that the definition of durable partner for the

EU Settlement Scheme Immigration Rules requires that an appellant be in possession of a relevant document by 31st December 2020 or to have applied for this document by this date. To the extent that the First-tier Tribunal relied upon the claimant in this case being a durable partner on this date for the purposes of the Immigration Rules we find that it materially erred in law by way of a misdirection in law.

11. The First-tier Tribunal undoubtedly relied upon the decision of the Secretary of State being disproportionate and unfair due to the deferral of the claimant's wedding until after the specified date due to the Covid-19 Pandemic. We find that this was also a material misdirection of law for the reasons set out in Celik. In short, as there is no EU right engaged (as the claimant in this case was not an extended family member as he had no EU right to remain as an extended family member/beneficiary/durable partner without this being recognised via the issuing of a relevant document – residence card- by the Secretary of State) the appeal could not succeed under the Withdrawal Agreement on the basis of the decision being disproportionate or unfair, as proportionality only comes into play once an EU right is engaged on the facts. As set out in Celik proportionality relates in any case to the issue of redress for someone who meets the requirements to have a substantial right but is subjected to unnecessary administrative burdens, which cannot be relevant here as this claimant has no right, because he did not use the procedure to apply for a relevant document prior to the 31st December 2020 as a durable partner when it was open to him to have done so, and there is no argument that to have made that application would have been disproportionately administratively burdensome. Similarly the policy documents of the Secretary of State simply provide evidential flexibility to someone with rights but do not create rights which do not exist under the Withdrawal Agreement.

12. We remake the appeal by finding that the claimant is unable to fulfil the requirements of Appendix EU as he was not married on 31st December 2020, and so was not a family member of an EU citizen, and because he did he did not hold a relevant document showing his residence as a durable partner had been facilitated under the 2016 EEA Regulations on 31st December 2020, nor had he applied for such a document prior to this specified date, and as such was not a durable partner/ extended family member as defined by Appendix EU. As the claimant had no EU right at this time nothing in the Withdrawal Agreement assists him in succeeding in his appeal: specifically he is unable to argue that the decision is disproportionate, as he does not have a preserved EU right to relate any unfairness to, and similarly the policy of the Secretary of State does not assist him because this only creates evidential flexibility for those with an EU right preserved under the Withdrawal Agreement. We rely upon the reasoning and decision in Celik in coming to these conclusions.

13. Nothing in the Secretary of State's grounds challenges the finding of the First-tier Tribunal that the claimant and his wife are in a genuine and

subsisting marriage and relationship. However, on this basis alone the claimant cannot succeed in this appeal. If he wishes to remain in the UK with his wife may wish to seek advice from a specialist immigration lawyer as to other ways forward to regularise his stay in the UK.

Decision:

1. The making of the decision of the First-tier Tribunal involved the making of an error on a point of law.

2. We set aside the decision of the First-tier Tribunal.

3. We re-make the decision in the appeal by dismissing it under the Immigration Rules and Withdrawal Agreement.

Signed: Fiona Lindsley Date: 27th September 2022
Upper Tribunal Judge Lindsley