



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

**Appeal No : UI-2022-003524
EA/53646/2021; IA/15963/2021**

THE IMMIGRATION ACTS

**Heard at George House, Decision & Reasons Promulgated
Edinburgh on 6 October 2022 On 20 November 2022**

Before

UPPER TRIBUNAL JUDGE MACLEMAN

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MALYUUN MOHAMUD DIRIYE

Respondent

*For the Appellant, Mr D Clarke, Senior Home Office Presenting Officer
For the Respondent, Aden, Solicitors; no representative present; sponsor
attending*

DETERMINATION AND REASONS

1. Parties are as above, but the rest of this determination refers to them as they were in the FtT.
2. The appellant is a citizen of Somalia, born on 2 April 2005. She applied on 5 June 2021 for a family permit under the Immigration Rules, Appendix EU (Family Permit) pursuant to the EU Settlement Scheme (the "EUSS"), as the dependent relative of an EEA national, her sister Sagal Diriye, (the "sponsor") a citizen of Norway with pre-settled status in the UK.

3. On 6 October 2021, the SSHD refused the application because the appellant had not provided adequate evidence that she is a “family member”. She appealed to the FtT, founding on Regulations 3 and 8 of the Immigration (Citizens' Rights Appeals) (EU Exit) Regulations 2020, on the basis that the SSHD’s decision is not in accordance with the Withdrawal Agreement.
4. The decision of FtT Judge Karbani is dated 16 June 2022. She found at [17] that the appellant did not meet the definition of “family member”, which does not include siblings or other dependent relatives, and was not a “relevant person” under the EEA Regulations 2016 (which were in effect during a “grace period” until 30 June 2021). Those findings are not disputed.
5. The Judge at [18-21] considered whether the SSHD’s decision was in breach of the Withdrawal Agreement in terms of failure to undertake an extensive examination under article 10, or as being disproportionate under article 18, and found in favour of the appellant in both respects.
6. At [22-23] the Judge also found a breach of the SSHD’s obligations under article 8 of the ECHR.
7. The Judge allowed the appeal “because the decision is not in accordance with the Withdrawal Agreement and is a breach of article 8”.
8. The SSHD sought permission to appeal to the UT on two grounds:

(1) Misdirection.

The Judge refers to article 10 (3) & 10 (5) of the withdrawal agreement but the appellant does not come within its scope ... article 10(3) applies to those who, amongst other things, applied for residence before the end of the transition period and whose residence is being facilitated in the host state thereafter. The appellant did not apply for facilitation of entry prior to the end of the transition period (under Directive 2004/38/EC or otherwise) and, as might be expected given the absence of an application, her residence was never, on any definition, facilitated by the host state thereafter. The appellant has never been resident in the UK; she made an application under the immigration rules after the transition period. As article 10(3) does not apply then article 10(5) does not apply either. Given the appellant does not come within the scope of the withdrawal agreement the Judge makes material error by applying it to the appellant and considering ... proportionality ...

(2) Article 8 of the ECHR.

This is not a ground of appeal available to the appellant, see [8] of The Immigration (Citizens’ Rights Appeals) (EU Exit) Regulations 2020 ... it is a material error, and *ultra vires*, to allow the appeal under article 8 ...

Even if the appellant had an article 8 ECHR ground available ... the Judge has materially erred ... by failing to conduct any reasoned and balanced proportionality assessment reflecting the requirement to take the respondent’s policy (as reflected in the immigration rules) into account as well as the

statutory factors in s.117B of the 2002 Act. There is also an arguable lack of reasoning as to why, in the particular circumstances it was held that family life was engaged 'amongst them all'...

9. On 18 July 2022 FtT Judge Roots granted permission, on the view that both grounds were arguable.
10. There was no written response for the appellant to the grounds and grant of permission.
11. On 5 October 2022 the appellant's solicitors advised the UT by email that the sponsor would be attending the hearing, but no representative.
12. The sponsor does not have a good command of English. She was accompanied by a friend, Ms Najna Yusuf, who speaks English and Somali, and who was able, at least to some extent, to enable her to follow the proceedings. I explained that we were concerned now with issues of law only, and that there was no present dispute over family relationships and circumstances. After I had heard from the SSHD's representatives, the sponsor expressed the concerns she and her mother have for the appellant's wellbeing and safety.
13. On ground 1, Mr Clarke referred to the Immigration (Citizens' Rights Appeals) (EU Exit) Regulations 2020 and to *Batool and others* (other family members: EU exit) [2022] UKUT 002198 (IAC), a decision of the Hon Mr Justice Lane, President, and UT Judge Smith promulgated on 19 July 2022 (which of course was not available to Judge Karbani). He said that case was authoritative and in point.
14. It is sufficient to quote the headnote:
 - (1) An extended (oka other) family member whose entry and residence was not being facilitated by the United Kingdom before 11pm GMT on 31 December 2020 and who had not applied for facilitation of entry and residence before that time, cannot rely upon the Withdrawal Agreement or the immigration rules in order to succeed in an appeal under the Immigration (Citizens' Rights Appeals) (EU Exit) Regulations 2020.
 - (2) Such a person has no right to have any application they have made for settlement as a family member treated as an application for facilitation and residence as an extended/other family member.
15. On ground 2, Mr Clarke referred to *Celik* (EU exit; marriage; human rights) [2022] UKUT 00220 (IAC) (also not available to Judge Karbani) which is headnoted thus:
 - (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.

16. Mr Clarke said that *Celik* is not so directly in point, but he relied on what was said from the last sentence of [63] through to [65]:

63. The nature of the duty to ensure that the decision is not disproportionate must, however, depend upon the particular facts and circumstances of the applicant. The requirement of proportionality may assume greater significance where, for example, the applicant contends that they were unsuccessful because the host State imposed unnecessary administrative burdens on them. By contrast, proportionality is highly unlikely to play any material role where, as here, the issue is whether the applicant falls within the scope of Article 18 at all.

64. In the present case, there was no dispute as to the relevant facts. 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.

65. Against this background, 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. Judge Hyland quite rightly refused to do so.

17. The SSHD's grounds, as developed in submissions and by reference to case law subsequent to the FtT hearing, amount to a strong case of legal error by the FtT in both aspects of its decision.

18. It is readily understandable that the appellant wishes to join her relatives in the UK, and that they are keen for her to do so. It may be that the silence in the UT of her solicitors reflects an awareness that she had no satisfactory answer on the law; but as they are still acting, they ought to have stated her position, as a duty to her and to the UT.

19. The SSHD's appeal to the UT is upheld. The decision of the FtT is set aside. The following decision is substituted: the appeal, as brought to the FtT, is dismissed.

20. No anonymity direction has been requested or made.

H Macleman

10 October 2022
UT Judge Macleman

NOTIFICATION OF APPEAL RIGHTS

1. A person seeking permission to appeal against this decision must make a written application to the Upper Tribunal. Any such application must be **received** by the Upper Tribunal within the **appropriate period** after this decision was **sent** to the person making the application. The appropriate period varies, as follows, according to the location of the individual and the way in which the Upper Tribunal's decision was sent:
2. Where the person who appealed to the First-tier Tribunal is **in the United Kingdom** at the time that the application for permission to appeal is made, and is not in detention under the Immigration Acts, the appropriate period is **12 working days (10 working days, if the notice of decision is sent electronically)**.
3. Where the person making the application is in detention under the Immigration Acts, **the appropriate period is 7 working days (5 working days, if the notice of decision is sent electronically)**.
4. Where the person who appealed to the First-tier Tribunal is **outside the United Kingdom** at the time that the application for permission to appeal is made, the appropriate period is **38 days (10 working days, if the notice of decision is sent electronically)**.
5. A **"working day"** means any day except a Saturday or a Sunday, Christmas Day, Good Friday or a bank holiday.
6. The date when the decision is "sent" is that appearing on the covering letter or covering email.