



IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2022-003149
First-tier Tribunal No:
EA/13120/2021

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On the 09 March 2023

Before

UPPER TRIBUNAL JUDGE STEPHEN SMITH
DEPUTY UPPER TRIBUNAL JUDGE SAINI

Between

The Secretary of State for the Home Department

Appellant

and

Mr Fatbardh Hidri
(NO ANONYMITY ORDER MADE)

Respondent

Representation:

For the Appellant: Mr E. Tufan, Senior Home Office Presenting Officer

For the Respondent: Mr S. Tawiah, Counsel instructed by Turpin & Miller LLP

Heard at Field House on 9 December 2022

DECISION AND REASONS

1. This is the Secretary of State's appeal against a decision of First-tier Tribunal Judge Barker ("the judge") promulgated on 19 April 2022. The judge allowed an appeal brought by the appellant, a citizen of Albania born on 5 March 1991, against a decision of the Secretary of State dated 8 September 2021 to refuse his application for pre-settled status under the EU Settlement Scheme ("the EUSS") as the spouse of a relevant EEA citizen.
2. For ease of reference, this decision will refer to the appellant before the First-tier Tribunal as "the appellant".

Factual background

3. In December 2019 the appellant met Manuela Panciu (“the sponsor”). She is a citizen of Romania with pre-settled status under the EUSS. They began to cohabit in February 2020, got engaged in September 2020, and had arranged to marry on 14 November 2020. That date was postponed until 21 November due to the need to obtain permission from the Home Office, and in turn the rescheduled date was postponed due to the Covid-19 restrictions then in force. It was not until 2 June 2021 that the appellant and sponsor were able to get married. At 11PM on 31 December 2020, the “implementation period” (“the IP”) under the EU-UK Withdrawal Agreement (“the WA”) came to an end. On 8 June 2021, the appellant applied for pre-settled status under the EUSS.
4. The application was refused by the Secretary of State because the appellant was unable to present the required evidence of a family relationship. His marriage certificate post-dated the conclusion of the IP, so he could not be regarded as married “within the correct timeframe”. He could not succeed as a “durable partner” as he had not been issued with a residence card in that capacity under the Immigration (European Economic Area) Regulations 2016 (“the 2016 Regulations”).

The appeal to the First-tier Tribunal

5. The appellant appealed to the First-tier Tribunal. It appears to have been common ground before the judge that the appellant could not succeed under Appendix EU, as the judge carefully set out at paras 28 to 36. The judge then examined the appellant’s case under the WA directly. He observed that Article 10 WA extends to third country nationals whose residence was being “facilitated” by the UK prior to the end of the IP: see para. 39. The judge observed that Article 10 WA:

“... includes no provision or requirement for a document confirming the right to reside in the UK, but simply states that it applies to those people ‘whose residence was facilitated in the host state in accordance with its national legislation’ before the end of the transition period in accordance with Article 3(2) of Directive 2004/38/EC.”

6. See also para. 42:

“I interpret the detail above, to mean that as long as the Appellant’s residence in the UK was in accordance with the UK’s national legislation before the end of the transition period in accordance with Article 3(2) of that Directive, and he made an application for residence or entry to the UK before the time allowed for such applications (which was extended to 30th June 2021 by the Respondent for those who were resident in the UK before the end of the transition period on 31st December 2020), he is entitled to the protection of the [WA].”

7. The judge then said that the “real issue is whether the Appellant’s residence was in accordance with the UK’s national legislation before the end of the transition period in accordance with Article 3(2)...” (para. 43).
8. Against that background, the judge found that the appellant and the sponsor were in a committed, durable relationship at the conclusion of the IP (para. 47). But for the pandemic, their wedding ceremony would have taken place before the

conclusion of the IP (para. 48). It had been “plausible” for the appellant to wait until he had been able to get married to apply to the EUSS as the spouse of an EEA national, rather than to apply as a durable partner under the 2016 Regulations before the conclusion of the IP (para. 49).

9. The judge’s operative conclusions were that the appellant could:

“... take advantage of the safeguards set out in Article 15 and Chapter VI of Directive 2004/38/EC, as set out in Article 21 of the Withdrawal Agreement, and can legitimately argue that before his marriage to the sponsor he fell within its scope as a durable partner who was resident in the UK as such, prior to 31 December 2020.” (para. 52)

10. At paras 54 and 55 the judge considered the question of proportionality. He considered the “nature and timing” of the relationship between the sponsor and the appellant, and the impact of the Covid-based delays being able to get married. Notwithstanding the strong public interest in maintaining effective immigration controls, he found that the decision to refuse the appeal “solely on the basis of a lack of a relevant document” was disproportionate.

11. The judge allowed the appeal.

Grounds of appeal

12. The grounds of appeal pre-date *Celik (EU exit; marriage; human rights)* [2022] UKUT 220 (IAC). They contend that the WA confers no rights on a person in the appellant’s position, as those within its scope are limited to individuals who were residing in accordance with EU law on 31 December 2020. The appellant was incapable of coming within the personal scope of the WA, and the judge was wrong to allow the appeal on the basis that he did. The judge’s reliance on the so-called “grace period” was in error; the relevant policy merely provided that those with existing rights had until 30 June 2021 to apply under the EUSS. It did not allow an appellant to acquire rights after the conclusion of the IP.

13. Permission to appeal was granted by First-tier Tribunal Judge I. D. Boyes.

Submissions

14. Mr Tufan relied on the headnote to *Celik*, and the grounds of appeal. The relevant paragraphs of that headnote provide:

“(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.”

15. For the appellant, Mr Tawiah relied on his skeleton argument dated 8 December 2022. He submitted that the Secretary of State had urged the tribunal to adopt an unduly restrictive interpretation of the role of proportionality. The substantive decision in *Celik* preserved the potential for proportionality to be engaged in a case involving an individual who was ostensibly otherwise outside the personal scope of the WA: see paras 62 and 63. The analysis conducted by the judge was entirely in line with the envisaged by the panel in *Celik*.
16. Mr Tawiah submitted that, in any event, the appellant *did* meet the requirements of the EUSS concerning durable partners, in particular paragraph (b)(ii)(bb)(aaa) of Annex 1 to Appendix EU. Paragraph (aaa) contains two clauses, separated by the word “unless”, the effect of which is to disapply the requirement otherwise imposed by Appendix EU for a putative durable partner to have had his or her residence “facilitated” under the 2016 Regulations. The appellant meets the criteria that follows the “unless” in paragraph (aaa). The appeal should be dismissed.

THE LAW

17. The judge set out most of the relevant legal framework at paragraphs 8 to 15 of his decision. Where necessary, this decision will refer in depth to the relevant provisions in the course of the discussion, below.

DISCUSSION

18. By way of a preliminary observation, it is necessary to note that, although the judge said that “the real issue” was whether the appellant’s residence “was in accordance with the UK’s national legislation before the end of the transition period” (para. 43), the operative analysis which led to the appeal being allowed did not address or reach findings upon that issue. The judge’s operative analysis focussed on the proportionality of the Secretary of State’s refusal decision and did not make any finding that the appellant enjoyed leave to remain or a right to reside on some other basis.
19. But for Mr Tawiah’s reliance on paragraphs 62 and 63 of *Celik*, that authority would be dispositive in favour of the Secretary of State’s appeal in relation to the judge’s reliance on the principle of proportionality.
20. Mr Tawiah is, of course, correct to submit that, in *obiter* comments, *Celik* preserved the possibility that a person ostensibly outside the personal scope of the WA may be able to invoke the principle of proportionality. In those paragraphs, *Celik* held:

“62. [Counsel for the Secretary of State] Ms Smyth submitted at the hearing that, since the appellant could not bring himself within Article 18, sub-paragraph (r) simply had no application. **Whilst we see the logic of that submission, we nevertheless consider that it goes too far. The parties to the Withdrawal Agreement must have intended that an applicant, for the purposes of sub-paragraph (r), must include someone who, upon analysis, is found not to come within the scope of Article 18 at all;** as well as those who are capable of doing so but who fail to meet one or more of the requirements set out in the preceding conditions.

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.**” (Emphasis added)

21. The premise of Mr Tawiah’s submission is that it was disproportionate for the appellant not to be able to marry, at relatively short notice, during a global pandemic. As the judge found at para. 48, the earliest the appellant and sponsor could have married with permission from the Home Office was 17 November 2020, which was just over six weeks ahead of the IP coming to an end on 31 December 2020. It follows that the indicative example at para. 63 of *Celik* is of no assistance to this appellant; he has not demonstrated, for example, that any Covid-19 based restrictions that the judge found led to his marriage being delayed were “unnecessary”, or “administrative” in character. He had not demonstrated, for example, that his attempts to marry were best by egregious and systemic delays over a considerable period of time.
22. Further, the circumstances of the appellant in these proceedings correlate with those of Mr Celik; this appellant did not marry an EEA national until after the conclusion of the implementation period, and, prior to the conclusion of the implementation period, he, like Mr Celik, had not applied for his residence to be facilitated as a durable partner. In evidence before the judge, this appellant went so far as to accept that he could have applied for his residence to be facilitated as a durable partner but chose not to do so (see para. 49). It was the appellant’s choice not to apply for a route that would have been open to him, not the fault of the Secretary of State.
23. While Mr Tawiah is right to submit that the indicative example given at para. 63 of *Celik* is just that, namely an indicative example, that is of no assistance to the appellant. If one reads the surrounding discussion in *Celik*, it is clear that the Presidential panel regarded Mr Celik’s attempted reliance on the principle of proportionality as a means to bring himself within the scope of the WA as an attempt to “rewrite” the WA. The principle of proportionality cannot be used to expand the scope of the WA, which is the result for which Mr Tawiah contends. It cannot be used to create a substantive right where no such right otherwise exists.
24. Mr Tawiah’s submissions resisting the application of *Celik* are therefore without merit.

Paragraph (b)(ii)(bb)(aaa)

25. The appellant’s second attempt to resist the Secretary of State’s appeal is by reference to paragraph (b)(ii)(bb)(aaa) of the definition of “durable partner” in Annex 1 to Appendix EU (“para. (aaa)”), which was quoted at para. 14 of the judge’s decision. The relevant extracts are set out in the discussion that follows below, but for ease of reference it will be helpful to set out para. (aaa) here:

“(aaa) was not resident in the UK and Islands as the durable partner of a relevant EEA citizen (where that relevant EEA citizen is their relevant

sponsor) on a basis which met the definition of ‘family member of a relevant EEA citizen’ in this table, or, as the case may be, as the durable partner of the qualifying British citizen, at (in either case) any time before the specified date, unless the reason why, in the former case, they were not so resident is that they did not hold a relevant document as the durable partner of a relevant EEA citizen for that period (where their relevant sponsor is that relevant EEA citizen) and they did not otherwise have a lawful basis of stay in the UK and Islands for that period...”

26. Mr Tawiah submitted that the effects of paragraph (aaa) are such that the Secretary of State has made provision to enable those in the position of this appellant to succeed, such that the judge would have been bound to allow the appeal in any event. Any error on the part of the judge was therefore immaterial, he submits.
27. These submissions were not advanced before the First-tier Tribunal and did not feature in a rule 24 notice. Nevertheless, it is appropriate to consider them for if Mr Tawiah is correct, they go to the materiality of the Secretary of State’s grounds of appeal.

Analysis – para. (aaa)

28. The drafting of paragraph (aaa) is complex. Particular confusion has arisen due to the “unless” clause towards the end of the paragraph. On some constructions, the “*unless*” serves to benefit a person unlawfully present in the UK, as though the rules render an applicant’s otherwise unlawful presence in the UK a positive attribute, and part of the criteria to be recognised as a durable partner.
29. Such a construction would lead to an absurdity. It would enable putative durable partners who would otherwise not enjoy any lawful immigration status to be able to rely on their unlawful presence as a means to regularise their stay. In our judgment, it is unlikely that the Secretary of State sought to introduce such a far-reaching amnesty through the drafting of paragraph (aaa). Properly understood, it cannot have that effect.
30. It is important to recall that, by definition, paragraph (b)(ii)(bb)(aaa) only applies to applicants who are or were in a durable relationship with a relevant EEA citizen: see paragraph (a) of the definition of “durable partner”. The analysis that follows therefore takes place on the footing that the existence of a durable relationship with an EEA sponsor is not in issue. Merely being in a durable partnership with an EEA national does not render an applicant a “durable partner”, of course; that is the question the definition of “durable partner” goes onto address, and which is considered below.
31. Paragraph (b)(ii)(bb)(aaa) is in two halves, separated by the “unless”. The requirement imposed by the “first half” is as follows:

“the person... (aaa) was not resident in the UK and Islands as the durable partner of a relevant EEA citizen (where that relevant EEA citizen is their relevant sponsor) on a basis which met the definition of ‘family member of a relevant EEA citizen’ in this table, or, as the case may be, as the durable partner of the qualifying British citizen, at (in either case) any time before the specified date...”

32. The “first half criteria”, as it is helpful to call them, are relatively self-explanatory. The term “not resident... as” introduces a qualitative requirement for the applicant’s residence not to have been in a capacity which met the definition of a “family member of a relevant EEA citizen.” The “not” means that an applicant’s residence must not have been in that capacity in order to meet that criterion. It is hardly surprising that such residence must “not” have been on that basis, since paragraph (b)(i) addresses cases where such residence was in that capacity.
33. Most applicants falling within the *Celik* paradigm (that is, a third country applicant with no pre-IP lawful status who marries an EEA sponsor after the conclusion of the IP: “a *Celik* applicant”) will meet the “first half criteria” with ease: by definition, they will not have been resident as the durable partner of a relevant EEA citizen or qualifying EEA citizen during the relevant period. On a straightforward reading an application of the “first half” of paragraph (aaa), therefore, most *Celik* applicants would succeed.
34. The first half criteria, taken in isolation, cast the net very broadly: the criteria encompass unlawfully resident *Celik* applicants, on the one hand, and migrants with a lawful immigration status, on the other. For example, a student lawfully resident in the UK in a durable relationship with an EEA national without a relevant document would not have been “resident in the UK and Islands as the durable partner of a relevant EEA citizen... on a basis which met the definition of ‘family member of a relevant EEA citizen...’”
35. It follows that the “first half criteria” are strikingly broad. But for an exception to their scope, most unlawfully resident *Celik* applicants would succeed as durable partners, even though they were unlawfully resident at the relevant times, had not applied for their claimed durable partnership to be facilitated prior to the conclusion of the implementation period, and did not marry an EEA national until after the UK’s withdrawal from the EU was complete. That cannot have been the intention of the rules. It would lead to the absurdity identified above.
36. It is at this stage in the analysis that the “unless” enters the equation. It is a conjunction; it introduces an exception to the previous criteria, namely the otherwise very broad “first half criteria” in paragraph (aaa).
37. The scope of the first half criteria is narrowed in the following way. If the “unless” exception is engaged, the “first half” criteria in paragraph (aaa) are incapable of being satisfied, and this route to qualify as a durable partner falls away. Put another way, if the “unless” applies, an applicant will not be able to avail themselves of the route to recognition as a durable partner provided by the first half criteria in paragraph (aaa).
38. It is necessary to turn to the “unless” criteria in the “second half” of paragraph (aaa). Understood against the above background, the “second half” criteria assume a significance and clarity which is not otherwise readily apparent.
39. The “second half” of paragraph (aaa) provides:

“...unless the reason why, in the former case, they were not so resident is that they did not hold a relevant document as the durable partner of a relevant EEA citizen for that period (where their relevant sponsor is that

relevant EEA citizen) and they did not otherwise have a lawful basis of stay in the UK and Islands for that period...”

40. Application of the “unless” requirement involves an examination of the reasons why an applicant ostensibly meets the first half criteria. It involves consideration of two factors, both of which must be present in order to disqualify an applicant from enjoying the otherwise broad benefit of the first half criteria in paragraph (aaa). The two “unless” requirements are as follows:
 - a. First, “the reason why... they were not so resident is that they did not hold a relevant document as the durable partner of a relevant EEA citizen...”
 - b. Secondly, “and they did not otherwise have a lawful basis of stay in the UK and Islands for that period...”
41. As to “*did not hold a relevant document*”, this criterion means that the applicant had not been issued with a relevant document, namely a residence card as a durable partner under the 2016 Regulations. The inclusion of this criterion underlines the centrality of holding a relevant document to an individual’s recognition as a durable partner under the regime under Article 3(2)(b) of Directive 2004/38/EC. The requirement to have held a relevant document reflects the nature of the facilitation duty to which the UK was subject under Article 3(2)(b) of Directive 2004/38/EC (both in its application to the UK as a Member State, and pursuant to the Withdrawal Agreement). The need to hold a relevant document as a durable partner flows from the fact that residence rights enjoyed by durable partners were those that were conferred by the host Member State following an extensive examination of the personal circumstances of an applicant, rather than existing as a matter of law, pursuant to the EU Treaties or Directive 2004/38/EC. To enjoy a right to reside as a durable partner required a positive step on the part of the UK as the host Member State in the form of issuing a relevant document.
42. Again, the class of persons who would not have been resident as a durable partner because they did not hold a document in that capacity would, in principle, be very broad. It would encompass unlawfully resident *Celik* applicants, on the one hand, and a potentially limitless cadre of others holding leave to remain, or holding a right to reside, on the other.
43. The operative wording of the “unless” exception is therefore found in the final clause: “*and they did not otherwise have a lawful basis of stay in the UK and Islands for that period...*” A person who does “not otherwise have a lawful basis of stay in the UK...” is a person who is in the UK unlawfully, whether through overstaying, or clandestine entry (or on some other basis). This is the crucial wording that gives effect to the “unless” and avoids the otherwise absurd consequences that would result. It requires an examination of the immigration status of the applicant at the relevant time. It is the means by which paragraph (aaa) distinguishes between unlawfully resident *Celik* applicants, on the one hand, and persons lawfully resident on some other basis, on the other.
44. A person with no lawful basis of stay at the relevant times is incapable of satisfying paragraph (aaa). By contrast, an applicant who held leave in some other capacity, for example as a student, would otherwise have had a lawful basis of stay in the UK.

45. Take the example of the student referred to above. A student with limited leave to remain would “otherwise have a lawful basis of stay in the UK...”; the “unless” exception would not be engaged, and the applicant would, in principle, be capable of meeting the definition of durable partner at the relevant time.
46. There is a logic to this construction, which must reflect the intention of the EUSS and the Withdrawal Agreement. Those who enjoyed leave to remain in their own capacity will not be penalised for having failed to obtain a document they didn’t need. By contrast, those who did not hold a relevant document (nor apply for the facilitation of their relationship prior to the conclusion of the implementation period) yet were present unlawfully prior to the end of the implementation period and remain so unlawfully resident in the UK cannot regularise their status through the EUSS. That is entirely consistent with the Withdrawal Agreement, and the Immigration Rules drafted to give it effect.
47. For these reasons, paragraph (aaa) does not achieve the consequences Mr Tawiah for which Mr Tawiah contended. The appeal could not have been (and was not) allowed under paragraph (aaa) in any event.

Conclusion on error of law

48. The Secretary of State’s appeal is allowed. The judge, who did not have the benefit of *Celik* at the time of the appeal, fell into error by purporting to allow the appeal on the basis of the principle of proportionality under Article 18(1)(r) of the WA.
49. The decision of the judge is set aside, with all findings of fact retained.

REMAKING THE DECISION

50. In light of the extent of the preserved findings of fact, it is appropriate for the decision to be remade in this tribunal, acting under section 12(2)(b)(ii) of the Tribunals, Courts and Enforcement Act 2007.
51. The appellant was not married to the sponsor by the conclusion of the IP on 31 December 2020 and had not been issued with a residence card as her durable partner. He does not enjoy the benefit of para. (aaa) for the reasons given above and is unable to satisfy any other provision of Appendix EU.
52. His appeal must be dismissed: the tribunal remakes the decision and dismisses the appeal.

Notice of Decision

The decision of Judge Barker involved the making of an error of law and is set aside with all findings of fact preserved.

The decision is remade; the appeal is dismissed.

Stephen H Smith

Judge of the Upper Tribunal
Immigration and Asylum Chamber

24 January 2023

TO THE RESPONDENT
FEE AWARD

The tribunal has dismissed the appeal and therefore there can be no fee award.

Stephen H Smith

Judge of the Upper Tribunal
Immigration and Asylum Chamber

24 January 2023