



**IN THE UPPER TRIBUNAL**  
**IMMIGRATION AND ASYLUM CHAMBER**

**Case No: UI-2022-003324**  
**First-tier Tribunal No:**  
**EA/15708/2021**

**THE IMMIGRATION ACTS**

**Decision & Reasons Issued:**  
**On the 10 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 Elton Hoxha**  
**(NO ANONYMITY ORDER MADE)**

Respondent

**Representation:**

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

For the Respondent: Ms K. Tobin, Counsel instructed by Malik and Malik Solicitors

**Heard at Field House on 9 December 2022**

**DECISION AND REASONS**

1. This is an appeal by the Secretary of State against a decision of First-tier Tribunal Judge Aldridge (“the judge”) promulgated on 31 May 2022. The judge dismissed an appeal brought by the appellant, a citizen of Albania born on 25 September 1994, against a decision of the respondent dated 16 October 2021 to refuse his application for leave to remain under Appendix EU of the Immigration Rules as the spouse of Michelle Stefany Serrato Fajardo, a citizen of Spain (“the sponsor”).
2. For ease of reference, this decision will refer to the appellant before the First-tier Tribunal as “the appellant”.

3. This decision records the conclusion of the panel reached immediately following the hearing.

*Factual background*

4. The appellant entered the UK clandestinely in August 2015. The sponsor arrived in the UK in August 2019 and was granted pre-settled status under the EU Settlement Scheme (“the EUSS”) on 20 December 2020.
5. The judge found that the appellant and sponsor met in August 2020 and began to cohabit as a couple in September 2020. In November 2020 they got engaged and wanted to get married before the end of December 2020. However, the earliest appointment they were able to make with the registry office was on 4 January 2021, but it was cancelled due to the Covid-19 restrictions then in force. They eventually married on 20 June 2021.
6. The appellant applied under the EUSS for pre-settled status as the spouse of an EU citizen shortly after the marriage. The application was refused because the appellant had not been a qualifying “family member” by the specified date of 31 December 2020, on account of his marriage on 20 June 2021. Nor had he been issued with a “relevant document”, namely a residence card or an EEA family permit issued under the Immigration (European Economic Area) Regulations 2016, as the durable member of an EEA national. The application was refused on 16 October 2021, and it was that refusal decision that was under appeal before the judge below.

*Decision of the First-tier Tribunal*

7. It was common ground before the judge that the appellant could not meet the requirements of Appendix EU on account of the marriage having taken place after the conclusion of the “implementation period” (“the IP”) at 11.00PM on 31 December 2020. The judge found that the parties to the marriage had been in a durable relationship by the conclusion of the IP, and that Covid-19 was the cause of the delay in the appellant and the sponsor being able to get married (see para. 22).
8. At para. 23, the judge found that the refusal decision was disproportionate, within the terms of the EU-UK Withdrawal Agreement (“the WA”). The Covid-19 barriers encountered by the appellant and sponsor weighed heavily “when one conducts a balancing exercise as opposed to the public interest.” The denial of the application would have a disproportionate effect on the free movement of the sponsor, an EEA national. It would discourage her from moving and residing in another Member State “or in a non-member country”. The judge allowed the appeal. The Secretary of State now appeals to this tribunal.

*Grounds of appeal*

9. The grounds of appeal predate *Celik (EU exit; marriage; human rights)* [2022] UKUT 220 (IAC).
10. The Secretary of State’s grounds contend that the judge was wrong to conclude that the WA would have been breached by dismissing the appeal. In summary, the WA preserves and protects previously recognised rights, and does not confer rights that crystallise after the conclusion of the IP on previously undocumented migrants. The appellant was unable to satisfy the requirements of the EUSS as

he was not a “family member” upon the conclusion of the IP, nor had he been issued with a “relevant document” as a durable partner before then. That Covid-19 may have impacted the appellant’s ability to get married was incapable of negating the fact that the appellant could not meet the requirements at the specified time. Being outside the scope of the WA, the appellant did not enjoy the benefit of the proportionality-based protections conferred upon its beneficiaries. Had the judge properly directed himself, the only option would have been to dismiss the appeal.

11. Permission to appeal was granted by First-tier Tribunal Judge Povey.

#### *Submissions*

12. Mr Tufan relied on the grounds of appeal, and on the headnote to *Celik*, which provides, where relevant:

“(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.”

13. For the appellant, Ms Tobin invited the tribunal to adjourn hearing the appeal pending the Court of Appeal’s consideration of the application for permission to appeal in *Celik*. In the alternative, in the event that the tribunal did not adjourn the hearing, she submitted that at paras 62 and 63, *Celik* preserved some scope for those ostensibly outside the scope of the WA to enjoy the benefit of the principle of proportionality, and that this was such a case.

#### *The law*

14. The relevant legal framework is cited at length at paragraph 20 of *Celik* and it is not necessary to repeat it here; the parties are familiar with it, and this decision will refer to it in detail when necessary.

#### *Discussion*

15. The panel refused the appellant’s application to adjourn the hearing pending the Court of Appeal’s consideration of the application for permission to appeal in *Celik*. Permission to appeal against *Celik* had not been granted. An adjournment would have introduced unnecessary delay into the proceedings, on a speculative and potentially lengthy basis. The overriding objective of the Tribunal Procedure (Upper Tribunal) Rules 2008 is to deal with cases fairly and justly, which includes (see rule 2(2)(e)) avoiding delay, so far as compatible with proper consideration of the issues; an adjournment would have been contrary to these principles.

16. Very fairly, Ms Tobin accepted that the appellant was on “all fours” with *Celik*. Her fall-back submissions concerning the role of the proportionality principle in light of *Celik* at paragraphs 62 and 63 were not pursued with any rigour. In those paragraphs, the panel 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.”
17. Paras 62 and 63 of *Celik* are of no assistance to this appellant. His circumstances are on all fours with those of Mr Celik, as Ms Tobin realistically accepted. Whatever potential there is for a putative beneficiary of the WA to rely on the principle of proportionality as a means to defeat an otherwise restrictive application of the Article 10 WA scope provisions, it is of no assistance to this appellant.
18. It follows that by allowing the appeal for the reasons he gave, the judge made an error of law, and the decision must be set aside.
19. There was no challenge to the judge’s findings of fact, and those findings should therefore be preserved. Nor did Ms Tobin submit that there was any additional evidence upon which the appellant wished to rely in the event that the decision has to be remade. It is appropriate, therefore, for the decision to be remade in the Upper Tribunal.
20. In remaking the decision, the following factors are relevant. First, the appellant was not married to the sponsor prior to the conclusion of the IP. Secondly, the appellant had not applied for, or been issued with, a “relevant document” under the Immigration (European Economic Area) Regulations 2016 as a durable partner of the sponsor. Thirdly, the appellant does not, in light of *Celik*, enjoy any rights under the WA. He can therefore neither meet the requirements of the EUSS, nor rely on the WA directly. The (remade) appeal is therefore dismissed on all grounds.

### **Notice of Decision**

The decision of the First-tier Tribunal involved the making of an error of law and is set aside.

The decision of the First-tier Tribunal is remade and the appeal of the appellant before the First-tier Tribunal is dismissed on all grounds.

**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**