



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

**Ce-File Number: UI-2022-  
003154**  
**First-tier Tribunal No:  
EA/16814/2021**

**THE IMMIGRATION ACTS**

**Heard at Field House IAC  
On the 02 November 2022**

**Decision & Reasons Promulgated  
On the 07 March 2023**

**Before**

**UPPER TRIBUNAL JUDGE ALLEN**

**Between**

**ENTRY CLEARANCE OFFICER**

Appellant

**and**

**SIDORELA SINANAJ  
(ANONYMITY DIRECTION NOT MADE)**

Respondent

**Representation:**

For the Appellant: Mr S Whitwell, Senior Home Office Presenting Officer  
For the Respondent: Mr R Sharma, Bhogal Partners Solicitors

**DECISION AND REASONS**

1. The Secretary of State appeals with permission to the Upper Tribunal against the decision of the First-tier Tribunal Judge promulgated on 18 May 2022 in which she allowed the appeal of Mrs Sinanaj against the Secretary of State's decision of 23 December 2021 refusing her application for status

under the EU settlement scheme (EUSS), as the spouse of her husband a Romanian national.

2. I shall refer hereafter to the Secretary of State as the respondent, as she was before the judge, and to Mrs Sinanaj as the appellant, as she was before the judge.
3. The appellant met her future husband in May 2019 and they began a relationship shortly thereafter. In July 2020 they decided to marry. They began living together in October 2020. They registered a notice of intention to marry on 23 November 2020 and attempted to book a date for their wedding at the local registry office, but because of COVID 19 restrictions then in place marriages could not take place at that time.
4. They made an application for an EEA residence card on 29 December 2020. This application was rejected on 15 February 2021 on the basis that the appellant had not produced a valid passport and it was asserted that the appellant had no right of appeal. The couple married on 30 April 2021, and the appellant made her application under the EUSS on 13 May 2021, the refusal of which led to the appeal.
5. The judge noted the relevant provisions of the EU settlement scheme. She did not accept the argument the lack of provision for individuals such as the appellant could properly be said to amount to discrimination on the grounds of nationality. She noted that the appellant had not been prevented from making an application under the Immigration (European Economic Area) Regulations 2016 or the EUSS prior to 1 January 2021 and indeed she had made such an application as a durable partner. It was accepted that no concession had been made by the respondent as to the impact of COVID 19 and the inability of couples such as the appellant and her husband to marry prior to 31 December 2020. It was accepted that the appellant was not a spouse at the specified date, the marriage only having taken place on 30 April 2021.
6. In light of the evidence that the couple had been cohabiting for just over two months and were engaged to be married at the specified date of 31 December 2020, the judge observed that this two months of cohabitation fell well short of two years living together. She also considered the documentation including the significant level of commitment to the relationship that this and the other evidence had demonstrated and that they would have married before 31 December 2020 but for the COVID 19 restrictions.
7. The judge went on to find on balance that the marriage between the appellant and the sponsor was indicative of the durability of their historic relationship and that the evidence indicated that they were in a durable relationship at the specified date and were in a genuine marriage at the date of the hearing. The judge accepted that the appellant was a durable partner of an EEA citizen on and before 31 December 2020.

8. The judge observed however that in order to satisfy the definition of “durable partner” the Rules required a person to have a “relevant document”, and there was no dispute that she had not been granted a family permit and accepted that she did not have a relevant document to prove she was a durable partner before the specified date. Accordingly the judge found that she did not satisfy the strict definition of “durable partner” for the purposes of Appendix EU.
9. The judge went on to consider whether the respondent’s decision breached the Withdrawal Agreement. Having set out and considered relevant provisions, he found that the appellant and her spouse were both within the contemplation of the Withdrawal Agreement and that Article 10(5) provided for “an extensive examination of the personal circumstances of the persons concerned” to be undertaken. The judge found that the appellant had made a historic effort to secure her status in the UK prior to the specified date and made an application under the EEA Regulations for a family permit. That application had only been refused on account of the absence of a passport and not because of any express concerns as to the durability of the relationship between the appellant and the sponsor. The respondent had not argued that the relationship was anything other than a genuine marriage. The judge accepted that the couple would have married before the specified date had it not been for the pandemic, and noted that no public policy grounds were raised against the appellant.
10. The judge concluded that on the particular facts of the appeal, in line with Article 18(1)(r) the decision to refuse the application was disproportionate. This was because it impacted significantly upon the rights of the appellant’s husband who was currently living and working in the United Kingdom and in so doing had exercised treaty rights for the past fifteen years. In line with Article 9 of the Withdrawal Agreement the judge found that the appellant’s presence in the United Kingdom was required for the sponsor to continue to remain in the United Kingdom and that the appellant had now lost her opportunity to apply for entry clearance under the scheme because the deadline had now passed. The judge found that it would be disproportionate for the appellant to leave the UK or be required to make a further application, taking into account the fact that she had already made two applications in an attempt to regularise her stay. The appeal was therefore allowed on basis that the decision breached the Withdrawal Agreement in that the decision was disproportionate.
11. The Secretary of State sought and was granted permission to appeal on the basis that the judge had failed properly to consider the provisions of Appendix EU. The EEA Regulations which had transposed Article 3.2(b) of Directive 2004/38/EC required residence as a “durable partner” to have been facilitated in accordance with national legislation. No such document was held as no successful application for facilitation had ever been made by the appellant prior to the specified date. It was argued therefore that the judge’s interpretation of the requirements of paragraph (b)(ii), (bb),

(aaa) of Annex 1 of Appendix EU was incorrect or not compatible with the requirements of the Withdrawal Agreement that the EUSS scheme was designed to implement.

12. It was also asserted that the Withdrawal Agreement provided no applicable rights to a person in the appellant's circumstances. The appellant had not been residing in accordance with EU law as of 31 December 2020 and therefore did not come within the personal scope of the Withdrawal Agreement. Accordingly there was no entitlement to the full range of judicial redress including the Article 18(1)(r) requirement that the decision was proportionate.
13. In his submissions Mr Whitwell relied on the grounds.
14. Mr Sharma acknowledged the decisions in Celik [2022] UKUT 00220 (IAC) and Batool [2022] UKUT 00219 (IAC) and disagreed with what had been concluded there that on that basis it appeared that the Secretary of State's case was made out.
15. Mr Whitwell made the point that the couple had married after the specified date and the application was also thereafter. The appeal had only been allowed under the Withdrawal Agreement and the findings in Celik and Batool were on all fours with this case. At the date of the Withdrawal Agreement the appellant was an undocumented family member and this was a category not in contemplation.
16. Mr Sharma argued that in Celik and Batool the Upper Tribunal had erred in its interpretation of the Withdrawal Agreement in particular in respect of Article 4 which required when considering the Withdrawal Agreement any inconsistency in definition or in law we preferred in consideration over domestic legislation. This went to the issue of definition under Article 9 and there was a clear conflict in definition between the EUSS terming of a family member and how it was defined in the Citizens' Directive. This was in respect of the cut-off date in the Citizens' Directive. So the definition to be preferred was that in the Directive and not in the EUSS and this was relevant to the issue of personal scope in respect of Article 10.1(e), and hence the judge had overall come to the correct conclusion that the appellant was entitled to rely on the Withdrawal Agreement.
17. He also argued that in any event the decision was distinguishable in particular in respect of what was found in Celik. Here the facts were similar, a point not considered there was Article 10 in respect of interpretation of those falling under Article 3(2) as being within personal scope. These were people who applied for facilitation before the end of the transition period and that Article 10.2 of the Withdrawal Agreement was relevant. It was clear that the appellant was a person who in accordance with Article 10.2 and Article 10.3 had applied for facilitation before the end of the transitional period so despite the decisions in Celik and Batool she had applied for facilitation so this fell within the personal scope and it did not matter that the later decision was a refusal. At the

time of the Withdrawal Agreement coming into force on 31 December 2020 the appellant was being facilitated with reference to national legislation and Article 3.2 so she fell within Article 10.2 as her claim was being facilitated as the term came from the Citizens' Directive. Article 3.2 required a process by which an extended family member could apply and the process was the facilitation. The appellant had been in the process of applying at the relevant date so she was being facilitated in respect of national law and the Citizens' Directive. The making of the application engaged facilitation and an application was pending at the time of the Withdrawal Agreement coming into force so she could claim personal scope under the Withdrawal Agreement. Her case was therefore distinguishable from Celik and Batool and there was no error in the ultimate conclusion by the judge. The judge could rely on the Withdrawal Agreement even if via a slightly erroneous path. There was no disagreement about the proportionality evaluation so any error was immaterial.

18. Mr Sharma's final point was that an outstanding issue had not been resolved by the judge and this could be relevant to disposal. As regards the underlying grounds before the judge paragraph 4 in particular was relevant. The Secretary of State had been aware of the relationship as an application had been made by the appellant as an unmarried partner in 2020, so she was aware of the relationship before withdrawal. There was an issue of a new matter. The appellant had said she was in a genuine relationship and tying the knot showed the relationship was durable and therefore raised a new matter. The judge should have considered this and it needed consent that the judge had not considered whether the issue of a new matter and the question of consent so if the Tribunal found there was an error by the judge it should go back for a remaking where the new matter issue was specifically flagged and the Secretary of State to consider whether to give consent or not.
19. By way of reply Mr Whitwell argued that there was no Rule 24 response with regard to the points made above and the facts were clear on the forms. The so called distinguishing features from Celik were simply different facts. The third argument made by Mr Sharma was not before the Tribunal in respect of an error of law argument and there had been no cross appeal.
20. I reserved my decision.
21. Given the relevance of the decision in Celik to this case, concerned as it was with the issue of a person in a durable relationship in the United Kingdom with an EU citizen, it will assist to consider exactly what was addressed in that decision and what impact it has on this particular case.
22. The appellant in Celik, began a relationship with a Romanian national in December 2019, they began to cohabit some time in or after February 2020, and the Romanian national was granted limited leave to remain in

the United Kingdom pursuant to Appendix EU of the Immigration Rules on 10 March 2020.

23. Prior to the end of the post-EU exit transitional period, the appellant, who is a citizen of Turkey, made an application on 19 October 2020 for leave to remain under the EUSS. That application was refused in a decision dated 2 March 2021. The refusal was on the basis that the appellant had not been issued with a registration certificate, family permit or residence card under the Immigration (European Economic Area) Regulations 2016 as an extended family member (durable partner) of the Romanian national and therefore did not meet the requirements of the EUSS as a family member of a relevant EEA citizen. In the meantime the appellant and his partner sought to marry, having tried to obtain a date for a wedding on 20 October 2020, but that due to pandemic restrictions and lockdown they were unable to get married until 9 April 2021. Following his marriage the appellant made an application under the EU settlement scheme for leave to remain on the basis that he was the spouse of a relevant EEA citizen. That application was refused on the basis that he had not provided sufficient evidence to confirm that he was a family member of a relevant EEA citizen prior to the specified date (i.e., 23:00 GMT on 31 December 2020).
24. The respondent went on to consider whether the appellant met the eligibility requirements for settled status under the EU settlement scheme as a durable partner. Home Office records did not show that he had been issued with a family permit or residence card as a durable partner of the EEA national. Accordingly the respondent concluded that the appellant did not meet the requirements for settled status under the EU settlement scheme. It was also concluded that he had not shown he was a family member of a relevant EEA national as defined in Annex 1 of Appendix EU, he did not meet the eligibility requirements for presettled status as set out in paragraph EU14 of Appendix EU. As he did not meet the requirements of EU11 or EU14 the application fell to be refused by reason of EU6.
25. Having considered the arguments made and the relevant new provisions, the Tribunal considered in detail the Withdrawal Agreement which, as is stated at paragraph 44 of its decision, lay at the heart of the case.
26. The appellant was not a family member to whom Part 2 of the Withdrawal Agreement applied as he was not a person who in the words of Article 10.1(e)(i), resided in the United Kingdom in accordance with Union law before 11 pm on 31 December 2020 and who continued to reside here afterwards. Nor did he fall within the scope of Article 10.1(e)(ii) or (iii) when nor did he fall within Article 10.1(f) as he was not someone who resided in the United Kingdom in accordance with Articles 12, 13, 16(2), 17 and 18 of Directive 2004/38/EC. Accordingly the only way he could bring himself within the scope of Part 2 and thus Article 18 was if he could fall within Article 10.2. This enabled persons falling under points (a) and (b) of Article 3(2) of Directive 2004/38/EC whose residence was facilitated by the host state in accordance with its national legislation before the end of the

transition period in accordance with Article 3(2) of that Directive to retain their right of residence in the host state in accordance with its Part provided that they continue to reside in the host state thereafter. There was no doubt that the appellant's residence in the United Kingdom had not been facilitated by the respondent before 11 pm on 31 December 2020. The Tribunal said that it was not enough that the appellant might by that time have been in a durable relationship with a person whom he married in 2021. Unlike spouses of EU citizens, extended family members enjoyed no right, as such, residence under the EU free movement legislation. The rights of extended family members arose only upon their residence being facilitated by the respondent, as evidenced by the issue of a residence permit, registration certificate or a residence card: Regulation 7(3) and Regulation 7(5) of the 2016 Regulations. For an application for facilitation of entry and residence to have been validly made before the end of the transitional period it needed to have been made in accordance with Regulation 21 of the 2016 Regulations. No such application had been made. The Tribunal concluded, at paragraph 56 of its decision, that this analysis was destructive of the appellant's ability to rely on the substance of Article 18.1. He had no right to call upon the respondent to provide him with a document evidencing his "new residence status" arising from the Withdrawal Agreement because that Agreement gave him no such status. He was not within the terms of Article 10 and so could not show that he was a family member for the purposes of Article 18 or some other person residing in the United Kingdom in accordance with the conditions set out in Title II of Part 2.

27. His attempt to rely on his 2021 marriage to an EU citizen was misconceived. He did not fall within a class of persons whose position in the host state was protected following the end of the transition period. It was not possible to invoke principles of EU law in interpreting the Withdrawal Agreement, save and so far as that Agreement specifically provides. This was clear from Article 4(3).
28. As regards the argument placing reliance on Article 18.1(r) of the Withdrawal Agreement, though, the Tribunal held, it went too far to say that since the appellant could not bring himself within Article 18, subparagraph (r) simply had no application, proportionality was highly unlikely to play any material role whereas in the instant case the issue was whether the applicant falls within the scope of Article 18 at all. As his residence as a durable partner was not facilitated by the respondent before the end of the transitional period, need not apply for such facilitation before the end of that period, he could not bring himself within the substance of Article 18.1.
29. The situation in the appeal before me is similar in material aspects to the situation addressed by the Upper Tribunal in Celik. Both cases are of a person who was in a durable relationship before 31 December 2020 with an EU citizen and who did not marry the EU citizen until after that time. Article 10 of the Withdrawal Agreement sets out who is within scope of Part 2. Neither case was the appellant a family member to whom Part 2

applies as not being a person in the words of Article 10.1(e)(i) resided in the United Kingdom in accordance with the Union law before 11 pm on 31 December 2020 and who continues to reside here afterwards. Such a person has no substantive rights under the Withdrawal Agreement unless their entry and residence were being facilitated before the deadline date. That was not so in the case of the appellant in Celik and nor is it the case in the appeal before me. The appellant cannot come within Article 10.2 as she is not a person whose residence was facilitated before the deadline 11 pm on 31 December 2020. An application for facilitation of entry and residence before the end of the transitional period would under Article 10.3 have brought her within the scope of that Article provided that such residence was being facilitated by the respondent in accordance with national legislation thereafter.

30. I do not agree with the first argument made by Mr Sharma that the Upper Tribunal in Celik erred in its interpretation of the Withdrawal Agreement. It is clear from Article 4 that the Withdrawal Agreement is given direct effect in the United Kingdom by section 7A of the European Union (Withdrawal) Act 2018. The Tribunal correctly interpreted the Agreement and applied it in its analysis of the law in that case and I am entirely satisfied that there was no error of law in the approach adopted.
31. However, I agree that there is a material difference between the situation addressed in Celik and the facts of this case. There is force in the point that Mr Sharma makes with regard to the making of an application for an EEA residence card on 29 December 2020 as being an application for facilitation before the end of the transition period. As the Tribunal said at paragraph 53 in Celik, for an application to have been validly made, it needed to have been made in accordance with regulation 21 of the 2016 Regulations, which may well have been the case here. The point does not appear to have been argued out before the judge. This has clear implications for the appellant's ability to rely on the substance of Article 18.1.
32. As regards Mr Sharma's third ground, I agree with Mr Whitwell that this is not a point that was raised by way of Rule 24 response or cross appeal. It is a matter that is open to the appellant to raise either before or at the time of the further hearing that will be necessary in this case. I consider in light of the errors of law that I find there are in this case that the matter will have to be reheard in the First-tier Tribunal in its entirety and as I say that is a matter that the appellant may wish to raise before or at that time.
33. The Secretary of State's appeal is allowed. However, in light of the points set out in paragraph 31 above, the consequences of the application made prior to the end of the transition period will have to be explored, together with the other issues, in a further hearing. This will most appropriately be done in the First-tier Tribunal



No anonymity direction is made.

A handwritten signature in black ink, appearing to read 'Allen', written in a cursive style.

Signed

Date 27<sup>th</sup> January 2023

Upper Tribunal Judge Allen