



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

Case No: UI-2022-003286

First-tier Tribunal No: EA/14932/2021

**THE IMMIGRATION ACTS**

**Decision & Reasons Issued:**

27<sup>th</sup> October 2023

**Before**

**UPPER TRIBUNAL JUDGE NORTON-TAYLOR**

**Between**

**SECRETARY OF STATE FOR THE HOME DEPARTMENT**

**Appellant**

**and**

**TIMOTHY DE WET**  
**(NO ANONYMITY ORDER MADE)**

**Respondent**

**Representation:**

For the Appellant: Mr N Wain, Senior Presenting Officer

For the Respondent: Mr A Kaihiva, Counsel, instructed by Jaycee Gold Solicitors

**Heard at Field House on 9 October 2023**

**DECISION AND REASONS**

**Introduction**

1. This is the re-making of a decision in the Appellant's appeal against the Respondent's refusal of his application under the EUSS.
2. By a decision promulgated on 20 January 2023 a panel of the Upper Tribunal (comprising myself and Deputy Upper Tribunal Judge Mailer) concluded that the First-tier Tribunal had materially erred in law when allowing the Appellant's

appeal. That decision is attached to the present decision and the two should be read together.

3. In summary, the Upper Tribunal concluded that whilst the judge had been entitled to find as a fact that the Appellant had a genuine relationship with his partner and her children and also had been entitled to conclude that the Appellant could not meet the Immigration Rules, he erred in law in respect of the application of the Withdrawal Agreement to the Appellant's circumstances. The relevant analysis is contained at [18]-[29] of the error of law decision. In addition it was made clear that Article 8 ECHR played no part in the proceedings.
4. Between the promulgation of the error of law decision and the resumed hearing a significant legal development occurred, namely the handing down of judgment by the Court of Appeal in Celik v SSHD [2023] EWCA Civ 921 on 31 July 2023. That judgment covered a range of issues, but in essence it confirmed that persons in the Appellant's situation could not rely on the provisions of the Withdrawal Agreement

### **The resumed hearing**

5. Mr Kaihiva confirmed that there was no new evidence, although reliance was placed on the factual findings made by the First-tier Tribunal, as preserved in the error of law decision with reference to [33]. Mr Kaihiva quite properly acknowledged Celik and the fact that the Upper Tribunal was bound by that judgment. He very fairly and quite properly acknowledged that there was in reality little more that he could say. He did suggest that given the factual findings in this case, I might be inclined to make a recommendation for the Secretary of State to grant leave to remain on an exceptional basis. I pointed out that any such recommendation would inevitably be a rare occurrence and that even then it would only ever arise as a possibility if an individual had already pursued a human rights claim. That is not the case here. Mr Kaihiva confirmed that the Appellant had not yet made a human rights claim, but was discussing this issue with his legal representatives. I need say nothing more about that.

6. Mr Wain relied on Celik and submitted that the Appellant simply could not rely on the Withdrawal Agreement. He had not applied for a residence card prior to 31 December 2020 as a durable partner and there had been no facilitation. Thus, the Appellant could not fall within the personal scope of the withdrawal agreement and could not rely on the principle of proportionality.
7. At the end of the hearing I reserved my decision.

### **Conclusions**

8. I confirm the preserved factual findings made by the First-tier Tribunal Judge. There is no doubt that the Appellant continues to enjoy a genuine and subsisting relationship with his partner and her children. He is very much part of their lives in the United Kingdom. However, it is equally clear that he cannot succeed in his appeal. He had never resided in the United Kingdom as a durable partner in accordance with EU law prior to 31 December 2020. He had never applied for or been granted a residence card with reference to the Immigration (European Economic Area) Regulations 2016, nor had any such application been made but undecided as at that date. The judgment in Celik makes it clear that a person in the Appellant's circumstances simply cannot rely on the Withdrawal Agreement. He was not within the personal scope with reference to Article 10 and as a result could not rely on the principle of proportionality with reference to Article 18: see [56] and [60]–[61] of Celik.
9. The Appellant's appeal must be dismissed.
10. As discussed earlier, Article 8 is not a live issue in this appeal.

### **Notice of decision**

11. The decision of the First-tier Tribunal involved the making of an error of law and that decision has been set aside.
12. I re-make the decision in the Appellant's case by dismissing his appeal.

Anonymity

13. There is no basis for making a direction in this case.

*H Norton-Taylor*

**Judge of the Upper  
Tribunal Immigration and  
Asylum Chamber**

**Dated: 16 October 2023**

**ERROR OF LAW DECISION**

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

**Appeal Number: UI-2022-003286**

**THE IMMIGRATION ACTS**

**Heard at Field House on 11 November 2022**

**Decision & Reasons Promulgated**

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**Before**

**UPPER TRIBUNAL JUDGE NORTON-TAYLOR  
DEPUTY UPPER TRIBUNAL JUDGE MAILER**

**Between**

**SECRETARY OF STATE FOR THE HOME DEPARTMENT**

**Appellant**

**and**

**TIMOTHY DE WET  
(ANONYMITY DIRECTION NOT MADE)**

**Respondent**

**Representation:**

**For the appellant: Ms S Lecointe, Senior Home Office Presenting Officer**

**For the respondent: Mr A Jafar, Counsel, instructed by Jaycee Gold Solicitors**

**DECISION AND REASONS**

**Introduction**

1. We shall refer to the parties as they were before the First-tier Tribunal. Thus, the Secretary of State is once more “the respondent” and Mr De Wet is “the appellant”.
2. This is an appeal by the respondent against the decision of First-tier Tribunal Judge Field (“the judge”), promulgated on 1 June 2022 following a hearing on 16 May 2022. By that decision, the judge allowed the appellant’s appeal against the respondent’s decision, dated 18 October 2021, refusing his application under the EUSS.
3. The appellant, a citizen of South Africa, has been resident in the United Kingdom since 2004 and has been in a relationship with an EEA national (“the sponsor”) since 2007 cohabiting with her and her two children from a previous relationship since 2009.
4. In refusing the application, the respondent concluded that the appellant had not held a residence card issued under the Immigration (European Economic Area) Regulations 2016 prior to 31 December 2020. As such, the appellant was not a “durable partner” under Appendix EU to the Immigration Rules.

5. The appellant appealed to the First-tier Tribunal under the Immigration (Citizens' Rights Appeals)(EU Exit) Regulations 2020.

#### **The decision of the First-tier Tribunal**

6. The judge identified the two issues for determination in the appeal: first, whether the appellant could meet the Immigration Rules, specifically those contained within Appendix EU; second, whether the respondent's decision breached rights under the Withdrawal Agreement: [8].
7. There were no factual disputes as regards the appellant's relationship with the sponsor and her children; both were entirely genuine and subsisting and the couple's relationship was "durable": [21]-[23]. However, the judge went on to consider Appendix EU and, for reasons which have not been challenged by the appellant, concluded that the existence of the durable relationship did not, of itself, permit the appellant to succeed under the Immigration Rules: [24]-[31].
8. The judge then turned to consider the Withdrawal Agreement. He addressed Article 9 of the Withdrawal Agreement and concluded that the appellant had acted as a father to the sponsor's own children over the course of time and that because of this he satisfied the definition of "family member" under that provision stating at the end of [33] that: "I accept that the children of this family require the Appellant's presence in the United Kingdom." In the following paragraph, judge concluded that because the appellant was the "durable partner" of the sponsor prior to the end of the transition period, he had been residing in the United Kingdom "in accordance with Union law."
9. The judge turned to Article 18 of the Withdrawal Agreement and, for reasons set out at [35]-[37] concluded in the final paragraph that, "... it would be disproportionate in the circumstances to require the Appellant to leave his family in the United Kingdom and break his continuity of residence in the United Kingdom in order that he may return and submit a new application in due course as a joining family member." The appeal was accordingly allowed.

#### **The grounds of appeal and grant of permission**

10. The respondent's grounds of appeal were narrowly focused on the judge's finding that the appellant was the durable partner of the sponsor. It was said that in such circumstances, the judge should not have allowed the appeal because the appellant had not had any rights as a durable partner prior to 31 December 2020.
11. Permission was granted by the First-tier Tribunal in a decision dated 23 June 2022.
12. Following the grant of permission, Mr Jafar provided a rule 24 response, dated 1 November 2022. Unfortunately, this had not been sent through to us prior to the hearing.
13. Mr Jafar's concise written argument was as follows. It was accepted that the judge was correct to have concluded that the appellant could not benefit from either the Rules or the Withdrawal Agreement as a "durable partner". However, the judge had based his decision on an alternative basis, namely that the appellant had resided here within Article 9 of the Withdrawal Agreement as a "family member" because of his role in the lives of the sponsor's children. That conclusion had not been challenged by the respondent. The judge had been fully entitled to take this into account when assessing proportionality under Article 18. Any other errors in the judge's decision were immaterial.

## The hearing

14. We considered the rule 24 response and ensured that Ms Lecointe had had sufficient time to do so before we proceeded.
15. Ms Lecointe accepted that the conclusion on Article 9 of the Withdrawal Agreement had not been challenged in the respondent's grounds of appeal. She made no formal application to amend those grounds. She suggested that the existing grounds could be read so as to cover the Article 9 point. She did not concede that the judge's decision was sustainable.
16. Mr Jafar relied on his response and emphasised that the judge had undertaken a fact-based on proportionality. The conclusions reached were, he submitted, sustainable.

## Discussion and conclusions

17. Before turning to our analysis of this case we remind ourselves of the need to show appropriate restraint before interfering with a decision of the First-tier Tribunal, having regard to numerous exhortations to this effect emanating from the Court of Appeal in recent years: see, for example, *Lowe* [2021] EWCA Civ 62, at paragraphs 29-31, *AA (Nigeria)* [2020] EWCA Civ 1296; [2020] 4 WLR 145, at paragraph 41, and *UT (Sri Lanka)* [2019] EWCA Civ 1095, at paragraph 19.
18. In our judgment, the judge was plainly correct to have concluded that the appellant could not meet the requirements of Appendix EU. There has been no challenge this and we need say no more about it.
19. Conversely, the judge was plainly wrong to have concluded at [34] that the appellant was, prior to the end of the transition period, a "durable partner" and was therefore residing in the United Kingdom "in accordance with Union law." It is well-established that there is a fundamental difference between family members and other family members (of which durable partners have been a sub-category). The former enjoyed a right under EU law by virtue of being family members, without more. The latter had no automatic rights of residence; these only crystallised following an application and the issuing of a residence card: see, for example, the discussion in *Batool and Others (other family members: EU exit)* [2022] UKUT 00219 (IAC), at paragraph 41.
20. In the present case, the appellant had never applied for a residence card under the Immigration (European Economic Area) Regulations 2016 and had never been issued with such a document. Therefore, he had not been residing in the United Kingdom "in accordance with Union law" as a durable partner.
21. The judge has accordingly erred in law.
22. The question then is; was the judge's conclusion on Articles 9 and 18 of the Withdrawal Agreement sufficient to justify him allowing the appellant's appeal on an apparently alternative basis?
23. Article 9(a) of the Withdrawal Agreement provides as follows:

### "Definitions

- (a) "family members" means the following persons, irrespective of their nationality, who fall within the personal scope provided for in Article 10 of this Agreement:

- (i) family members of Union citizens or family members of United Kingdom nationals as defined in point (2) of Article 2 of Directive 2004/38/EC of the European Parliament and of the Council (5);
- (ii) persons other than those defined in Article 3(2) of Directive 2004/38/EC whose presence is required by Union citizens or United Kingdom nationals in order not to deprive those Union citizens or United Kingdom nationals of a right of residence granted by this Part

...”

24. There was no question of the appellant falling within the definition under Article 9(a)(i). The judge concluded, correctly in our judgment, that the appellant could not fall within the definition of “family member” under Article 9(a)(ii) by virtue of being a “durable partner”. This was because the provision expressly excludes those covered by Article 3(2) of the Citizens’ Directive 2004 /38/EC and durable partners fell within that category. Instead, the judge relied on his finding of fact that the appellant had acted as a father to the sponsor’s children over a significant period of time. This, he concluded, brought the appellant brought the appellant within the definition of “family members” under Article 9(a)(ii).
25. The problem with the judge’s analysis is as follows. Even if his approach to Article 9(a)(ii) was correct in terms of the final sentence at [33] (about which we have real concerns: it is arguably insufficient to say that the children required the appellant’s presence in the United Kingdom; rather, the question is whether those children would be compelled to leave this country if he were to be removed), that provision of the Withdrawal Agreement relates to definitions, not substantive matters. Article 9(a) makes this clear: “family members means the following persons, irrespective of their nationality, who fall within the personal scope provided for in Article 10 of this Agreement...” One then has to look to Article 10, which determines who falls within the “personal scope” of that Part of the Withdrawal Agreement. Article 10.1 provides, in so far as relevant:

“1. Without prejudice to Title III, this Part shall apply to the following persons:

- (a) Union citizens who exercised their right to reside in the United Kingdom in accordance with Union law before the end of the transition period and continue to reside there thereafter;
- (b) United Kingdom nationals who exercised their right to reside in a Member State in accordance with Union law before the end of the transition period and continue to reside there thereafter;
- (c) Union citizens who exercised their right as frontier workers in the United Kingdom in accordance with Union law before the end of the transition period and continue to do so thereafter;
- (d) United Kingdom nationals who exercised their right as frontier workers in one or more Member States in accordance with Union law before the end of the transition period and continue to do so thereafter;
- (e) family members of the persons referred to in points (a) to (d), provided that they fulfil one of the following conditions:



- (i) they resided in the host State in accordance with Union law before the end of the transition period and continue to reside there thereafter;
- (ii) they were directly related to a person referred to in points (a) to (d) and resided outside the host State before the end of the transition period, provided that they fulfil the conditions set out in point (2) of Article 2 of Directive 2004/38/EC at the time they seek residence under this Part in order to join the person referred to in points (a) to (d) of this paragraph
- (iii) [related to the children of relevant persons]...”

26. On the undisputed facts of this case, the appellant could not have satisfied any of the conditions set out under Article 10.1(e)(i) or (ii), or indeed 10.3 and 10.4. In particular, he had not resided in the United Kingdom “in accordance with Union law before the end of the transition period” (that being 31 December 2020).
27. It follows that the judge failed to appreciate that the appellant did not fall within the personal scope of the relevant Part of the Withdrawal Agreement. In turn, we are satisfied that that there is a very real possibility that he considered Article 18.1(r) and the issue of proportionality on a false premise, believing that (a) the appellant resided in the United Kingdom “in accordance with Union law” prior to 31 December 2020 when he had not been; and/or (b) that he fell within the scope of Article 10, when he did not.
28. In our judgment, it does not matter that the respondent failed to specifically challenge the judge’s conclusions on Article 9 and Article 18.1(r). She has made out an error of law which was properly articulated in the grounds of appeal, namely the judge’s conclusion that the appellant had resided in this country “in accordance with Union law”. We are satisfied that this constituted a material aspect of the judge’s reasoning and ultimate conclusion on the appeal. In saying this, we have sought to read the judge’s decision sensibly and holistically. Although Mr Jafar has described the judge’s conclusion on Article 9 as “an alternative”, the decision itself is not expressed in those terms. What is said at [34] appears to us an element of the step- by-step analysis undertaken by the judge, ultimately leading to the conclusion on proportionality. It is by no means inevitable, or even tolerably clear, that the outcome would have been the same if the error of law were excised from the judge’s decision.
29. In all the circumstances, and having regard to the need for restraint, we conclude that the judge’s decision should be set aside.
30. Article 8 ECHR was not in play in this appeal and we need say nothing more about it.

### **Disposal**

31. There is no sound reason to remit this case to the First-tier Tribunal. It will be retained in the Upper Tribunal.
32. Having considered the issue, we have concluded that it is appropriate to list this appeal for a resumed hearing in due course. Directions to the parties are issued, below.
33. We make it clear that the central background facts in this case are not in dispute. We preserve the judge’s findings as to the length of the appellant’s relationship with the sponsor and her children, and its obvious genuineness over the course of time. However, the judge’s conclusion

on Article 9(a)(ii), as expressed at [33], is not preserved.

34. It is of course a matter for the appellant, but it would presumably be open to him to make an application to the respondent based on Article 8 ECHR and his relationships with the sponsor and her children. As it stands, Article 8 ECHR does not feature in this appeal.

#### **Anonymity**

35. The First-tier Tribunal did not make a direction and there is no reason for us to do so.

#### **Notice of Decision**

36. The making of the decision of the First-tier Tribunal did involve the making of an error on a point of law.
37. We exercise our discretion under section 12(2)(a) of the Tribunals, Courts and Enforcement Act 2007 and set aside the decision of the First-tier Tribunal.
38. This appeal is retained in the Upper Tribunal and will be listed for a resumed hearing in due course.

#### **Directions to the parties**

1. No later than 14 days after this decision is sent out the appellant is to confirm with the Upper Tribunal whether he in fact wishes to have a resumed hearing of his appeal;
2. If a resumed hearing is sought, the appellant shall file and serve any further evidence relied on, no later than 21 days after this decision is sent out;
3. Any further evidence relied on by the respondent shall be filed and served no later than 35 days after this decision is sent out;
4. The parties may apply to vary these directions.

**Signed: H Norton-Taylor**

**Date: 25 November 2022**

**Upper Tribunal Judge Norton-Taylor**