



IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2022-003534
First-tier Tribunal No:
EA/16474/2021

Extempore

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On the 03 July 2023

Before

UPPER TRIBUNAL JUDGE RINTOUL

Between

Elsard Gjidiaj
(NO ANONYMITY ORDER MADE)

Appellant

and

The Secretary of State for the Home Department

Respondent

Representation:

For the Appellant: Mr L Youssefian, of Counsel, Malik & Malik Solicitors
For the Respondent: Mrs A Nolan, Home Office Presenting Officer

Heard at Field House on 21 November 2022¹

DECISION AND REASONS

1. The Secretary of State appeals with permission against the decision of First-tier Tribunal O'Malley allowing the appeal of Mr Gjidiaj against the decision of the Secretary of State to refuse him an EU Settlement Scheme document, a decision taken on 18 November 2021.
2. I refer to Mr Gjidiaj the appellant as he was in the First-tier and the Secretary of State as the respondent simply for ease of reference.

¹ Owing to an administrative error, this decision given extempore was not transcribed until 26 June 2023.

3. The appellant is a citizen of Albania who is married to a Romanian national, who had arrived in the United Kingdom in 2018. At the relevant time she had pre-settled status and they had been in a relationship since 2018 and were married on 16 June 2021. In this case there had been an earlier application under the EEA Regulations for a residence permit as the extended family member in June 2020. That application was refused in October 2020 but the appellant did not exercise his right to appeal against that decision.
4. The Secretary of State refused the application on the basis that she was not satisfied that the appellant met the relevant requirements given that he had not provided evidence that he was a durable partner, as required, as there was no pending application as at that point for facilitation nor was the Secretary of State satisfied, given the date of the marriage, that they otherwise qualified. That was not in dispute before the judge. The judge found that the couple were in a durable relationship and found that they would not have been able to marry before the specified date given the difficulties arising from COVID restrictions, these findings were set out at paragraphs 26 to 28 of the decision and there is no effective challenge to those.
5. The judge found, having had regard to Lumsden [2015] UKSC 41, that the decision was disproportionate relying on Article 18(1)(r) of the Withdrawal Agreement. The full reasoning for that is set out in the decision at paragraphs 36 to 38.
6. The Secretary of State sought permission to appeal on the grounds that the judge had erred in law, in that he had misdirected himself as to the effect of the Withdrawal Agreement, first, as there were no rights under it applicable to a person in his circumstances given the effect of Article 10(3) of the Withdrawal Agreement; and, second, he was not residing in accordance with EU law as he had not his residence facilitated in accordance of the national legislation, that is the Immigration (European Economic Area) Regulations 2016 and so did not fall within the Article 10(3). It was also submitted that, as he did not come within the personal scope of the Withdrawal Agreement, there is no entitlement to the full range of judicial redress including Article 18(1)(r) of the Withdrawal Agreement. Since that application and since permission was granted, the Upper Tribunal handed down Celik (EU exit; marriage; human rights) [2022] UKUT 220
7. The Secretary of State seeks to rely on Celik and argues that this case is on all fours with that.
8. Mr Youssefian argues that in this case, Celik can be distinguished on the basis that here the appellant does indeed fall within Article 10(3) of the Withdrawal Agreement because in this case, the appellant had made an application to be facilitated. Mr Youssefian submits that it is not permissible to put any gloss on that which would require the appellant to have been facilitated after that continuously, there being no suggestion in

the Withdrawal Agreement that the appellant's residence in the United Kingdom had to be based on an application that was made before the end of the transition period; the only requirement is an applicant must have applied for facilitation before the end of the transition period, which was thereafter facilitated by the host State. He submitted that there are no further requirements and certainly no requirement that the subsequent residence after the transition period had to be off the back of successful application made before the end of the transition period.

9. Mr Youssefian submitted that the words set out in Celik at [60] and the appellant's residence continues to be facilitated by the State is not a permissible gloss; the Withdrawal Agreement cannot be interpreted to include that, it being stated and accepted by the Upper Tribunal and indeed on the submission of the Secretary of State that Article 10(3) must be clear and unambiguous. Mr Youssefian submits further that the use of the present tense is being facilitated under 10(3) and also connects the need only for the present facilitation being a requirement rather than a seamless and continuous facilitation before the end of the transition period.
10. I consider, having had regard to Article 10 and how it is constructed as a whole, that the purpose of it is to identify who, at a specific date, falls within the category of persons whose rights are to be preserved. I am not persuaded that the use of the phrase "and whose residence is being facilitated by the host State in accordance with its national legislation thereafter", is open-ended. I considered in the context of the agreement that what it is seeking to do, it means it is somebody who has applied for facilitation and whose application for facilitation is pending as at the commencement date, that is the 31 December 2020 and that is consistent with how the other subparagraphs of Article 10(1) are constructed. I do not consider that it could apply to the circumstances here where the appellant's application was refused in October 2020. It is instructive that on the basis of Macastena v SSHD [2018] EWCA Civ 1558 and SSHD v Albangbee [2019] EWCA Civ 339 it is clear that the appellant would have had no rights of residence under the EEA Regulations 2016 as his application had been rejected and there was no pending appeal.
11. There was no further application made in this case until substantially after 31 December 2020 and I do not consider that on a proper construction of the Withdrawal Agreement that it can be argued that where somebody's application was rejected and then another application is made at a time after the United Kingdom has of course left the EU and EU law no longer has any effect, could properly come within the terms of Article 10(3) of the Withdrawal Agreement.
12. Accordingly, I am not satisfied that the decision in Celik can be distinguished on the basis sought by Mr Youssfian. For these reasons, and I respectfully adopt the reasoning set out in Celik, I concluded the decision of the First-tier Tribunal did involve the making of an error of law. I proceed then to remake the decision on the basis of Celik. I consider that

on the facts of this case, which are preserved, the appellant cannot fall within the terms of the Withdrawal Agreement in terms of personal scope and accordingly he cannot meet the requirements of the relevant Immigration Rules and accordingly I dismiss his appeal on that basis.

Notice of Decision

1. The decision of the First-tier Tribunal involved the making of an error of law and I set it aside.
2. I remake the appeal by dismissing it on all grounds.

Signed

Date: 27 June 2023

Jeremy K H Rintoul
Judge of the Upper Tribunal
Immigration and Asylum Chamber