IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2022-003147
First-tier Tribunal No: EA/00609/2022

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On the 20 August 2024

Before

UPPER TRIBUNAL JUDGE RIMINGTON
UPPER TRIBUNAL JUDGE HOFFMAN

Between

Secretary of State for the Home Department

Appellant

and

Fatos Qelia
(NO ANONYMITY ORDER MADE)

Respondent

Representation:
For the Appellant: Mrs A Nolan, Senior Presenting Officer
For the Respondent: No attendance

Heard at Field House on 12 August 2024

DECISION AND REASONS

Introduction

1. We will refer to the parties as they were before the First-tier Tribunal even though it is the Secretary of State who is the appellant before the Upper Tribunal. Therefore, Mr Qelia is "the appellant" and the Secretary of State is "the respondent".

2. The respondent appeals the decision of First-tier Tribunal Judge Mill promulgated on 11 May 2022 allowing the appellant's appeal against her decision dated 4 January 2022 refusing to grant leave to remain under the EU Settlement Scheme ("EUSS"). Permission to appeal was granted by First-tier Tribunal Judge Boyes on 1 June 2022.

3. In an order dated 28 March 2024, Upper Tribunal Judge Gleeson made directions following judgment by the Court of Appeal in Celik v Secretary of State for the Home Department [2023] EWCA Civ 921 on 31 July 2023. The parties were

directed to reconsider their respective positions and, if appropriate, to agree a consent order disposing of the proceedings or otherwise update the Upper Tribunal within 21 days of the date of the order. Those directions were not complied with and the appeal was therefore listed for hearing.

4. The appellant and his representative were given written notice to attend the hearing at Field House at 10 am on 12 August 2024. However, neither he nor his representatives were present. By the time we turned to this case at 12:51 there had still been no appearance. We therefore considered whether to adjourn the hearing taking into account the principle of fairness: see Nwaigwe (adjournment: fairness) [2014] UKUT 418. We satisfied ourselves that the notice of hearing had been correctly served on both the appellant and his representatives. The notice of hearing informed the parties that the hearing may proceed in their absence and no application for an adjournment had been made. We also took into account the failure to comply with Judge Gleeson's directions of 28 March 2024. Having had regard to the overriding objective to deal with cases fairly and justly, including avoiding delay, and the fact that the case was a straightforward one to decide, we concluded that it would be fair in the circumstances to proceed with the appeal in appellant's absence.

Background

5. The appellant, who is an Albanian national, entered the UK in July 2018. In or around September 2019, he met Ms Valeria-Elena Ianca, a Romanian citizen, and they entered into a relationship. They began living together in July 2020. On 1 October 2020, the couple booked an appointment at Merton Register Office which was due to take place on 12 October 2020. However, on 6 October 2020, the appellant attended an appointment at the Home Office following which he claims that his passport was retained. (Whether the passport had in fact been retained was a point of dispute during the hearing, but Judge Mill found in favour of the appellant.) As the appellant was no longer in possession of his passport, Merton Register Office was unable to process the couple's application to give notice of their marriage. As a consequence of the respondent's failure to return his passport, the appellant applied to the Albanian consulate to obtain a new copy, which he received on 10 October 2020. At 2300 GMT on 31 December 2020 ("the relevant date"), the UK left the European Union. Ms Iancu was granted indefinite leave to remain under the EUSS on 19 February 2021. On 20 May 2021, the appellant and Ms Ianca married. The following day, the appellant made an application for leave to remain under the EUSS.

6. In a decision dated 4 January 2022, the respondent refused the appellant's EUSS application. The reasons given were, first, that the appellant married his wife after the relevant date and, furthermore, there was insufficient evidence to show that the couple were in a durable partnership prior to the relevant date. The second reason was that the appellant had not been issued with a registration certificate, family permit or residence card under the Immigration (European Economic Area) Regulations as the durable partner of an EEA national ("a relevant document").

7. The appellant exercised his right of appeal to the First-tier Tribunal. In the decision of 11 May 2022, Judge Mill allowed his appeal. The judge accepted that the appellant and his wife had been in a durable relationship prior to the relevant date. That finding has not been challenged by the respondent. What has been challenged in the appeal before us is Judge Mill's finding that while the appellant had not been issued with a residence card prior to the relevant date, that this was

not a material factor in his entitlement to status under the EUSS. While the requirement to hold a relevant document was an express requirement of Appendix EU to the Immigration Rules, Judge Mill found that the criterion was "an unnecessary administrative burden" on applicant and was therefore contrary to article 18(1)(e) of the EU-UK Withdrawal Agreement. The judge also found that the respondent's failure to assist the appellant by giving him a relevant document resulted in a disproportionate decision that was contrary to article 18(1)(r). There was, however, no consideration by the judge as to whether the appellant fell within the personal scope of the Withdrawal Agreement in accordance with article 10(1)(e).

8. In her application for permission to appeal, the respondent raises the following grounds:

   a. The judge made a material misdirection of law by failing to have proper regard to the provisions of Appendix EU, in particular that the requirement to produce a relevant document is necessary for a person to prove that their residence had been facilitated in accordance with national legislation prior to the relevant date.

   b. The judge made a material misdirection of law by finding that the decision to refuse EUSS status was in breach of the appellant's rights under the Withdrawal Agreement because the appellant had no such rights under that Agreement because he was not resident in the UK in accordance with EU law prior to the relevant date.

Conclusion – Error of Law

9. We have no hesitation in finding that the decision of the First-tier Tribunal contains the material errors of law identified by the respondent. Since the respondent was granted permission to appeal, the Court of Appeal has handed down its judgment in the case of Celik in which it was held at paras 54 to 56 that article 10(1)(e) of the Withdrawal Agreement does not include persons who, like the appellant in the present case, did not marry their EEA partner until after the relevant date or who were in an unmarried durable relationship prior to the relevant date. Furthermore, the Court of Appeal held that the reference to an applicant's residence being "facilitated" under articles 10(2) and (3) required that the person had sought the right to enter or reside in the relevant state prior to the relevant date and that they had been granted such residence: see para 61. In the present case, the appellant had made no such application.

10. Accordingly, contrary to the findings of Judge Mill, the Withdrawal Agreement did not apply to the appellant and the requirement under Appendix EU of the Immigration Rules for the appellant to be in possession of a relevant document could not be "an unnecessary administrative burden" contrary to article 18(1)(e). Neither could the decision to refuse EUSS status be disproportionate contrary to article 18(1)(r). We therefore set aside the decision of Judge Mill.

Conclusion – Remaking the Decision

11. We have considered whether to retain remaking in the Upper Tribunal pursuant to para 7.2.(a) and (b) of the Senior President's Practice Statement. We are alert to the absence of the appellant on the remaking but in the light of (i) the overriding objective of The Tribunal Procedure (Upper Tribunal) Rules 2008, (ii) the failure of the appellant to engage with any of the directions issued by the

Tribunal or attend, (iii) the undisputed facts and (iv) the law as decided by the Court of Appeal in this particular area, we considered it fair and in the interests of justice to proceed to remaking. Remaking is clearly appropriate in this Tribunal.

12. In the circumstances, we remake the decision by dismissing the appellant's appeal, because the appellant cannot meet the requirements of Appendix EU; has no such rights under the Withdrawal Agreement; and has submitted no basis on which he does.

Notice of Decision

Judge Mill erred in law in his decision dated 11th May 2022, such that his decision cannot stand and is set aside. We have remade the decision by dismissing the appellant's appeal.

M R Hoffman

Judge of the Upper Tribunal
Immigration and Asylum Chamber

15th August 2024