



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

Appeal Number: UI-2022-003058
(EA/12490/2021)

THE IMMIGRATION ACTS

**Heard at: Field House
On: 25 October 2022**

**Decision & Reasons Promulgated
On: 29 November 2022**

Before

UPPER TRIBUNAL JUDGE KEBEDE

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

YOUSRA TEGGUER

Respondent

Representation:

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

For the Respondent: Mr A Chohan of NWL Solicitors

DECISION AND REASONS

1. This is an appeal by the Secretary of State for the Home Department against the decision of the First-tier Tribunal allowing Ms Tegger's appeal against the decision to refuse her application for settled status under the EU Settlement Scheme (EUSS) as the spouse of an EEA national.

2. For the purposes of this decision, I shall hereinafter refer to the Secretary of State as the respondent and Ms Tegger as the appellant, reflecting their positions as they were in the appeal before the First-tier Tribunal.

3. The appellant, a national of Algeria born on 25 October 2001, arrived in the UK on 28 September 2019. In January 2020 she started a relationship with the sponsor, Wajid Shinware, an EEA (French) national, and they started living together on 25 September 2020. In September 2020 they decided to get married and on 30 September 2020 they had an Islamic marriage. On 7 October 2020 they contacted their local registry office to give notice for marriage and were told that owing to the pandemic they could not have an appointment until 11 November 2020. They tried to book a date for their wedding in December 2020 but were told that the registry office was fully booked. Due to covid-19 they were unable to book their wedding date until after the end of March 2021 and finally underwent a civil marriage on 12 April 2021. On 18 May 2021 the appellant made an application under the EUSS as a family member of an EEA national.

4. The appellant's application was refused by the respondent on 18 August 2021. The respondent noted that the appellant's marriage had taken place after 31 December 2020 and considered that the requirements of Appendix EU were therefore not met in order for her to qualify as a family member of an EEA citizen. It was considered further that there was insufficient evidence to show that she qualified as the durable partner of Wajid Shinware as she did not have a valid family permit or residence card issued under the EEA Regulations as a durable partner. It was considered by the respondent that the appellant therefore qualified for neither settled nor pre-settled status under the EUSS.

5. The appellant appealed against that decision and her appeal came before First-tier Tribunal Judge Symes on 2 March 2022. The respondent was not represented at the hearing. The appellant and sponsor appeared and provided evidence before the Tribunal and submissions were made on their behalf. It was argued that the respondent's decision was disproportionate, having regard to Article 10 of the Withdrawal Agreement which protected those whose residence had been facilitated as extended family members before the end of the transition period. The judge found that the appellant's relationship with the sponsor was genuine and subsisting, that it was a durable relationship and that the appellant and sponsor had done all they reasonably could to marry before 31 December 2020 but were prevented from doing so by administrative obstacles arising as a result of the pandemic. The judge found that the procedural protections in the Withdrawal Agreement were available to the appellant and sponsor only if they came within its scope, but decided to apply a purposive interpretation to those procedural protections and concluded, in allowing the appeal, that the respondent's decision was incompatible with the Withdrawal Agreement.

6. The Secretary of State sought permission to appeal to the Upper Tribunal on the grounds that the judge had materially erred in law by failing properly to consider the provisions of Appendix EU contained within the immigration rules and the terms of the Withdrawal Agreement. It was asserted that the appellant's application under the EUSS was bound to fail as the marriage had taken place after 31 December 2020 and, in regard to the durable partner route, no 'relevant document' was held as evidence that residence had been facilitated under the EEA Regulations nor had any application for facilitation

been made prior to the specified date. The appellant could not, therefore, satisfy the requirements of Appendix EU. Neither could she come within the scope of the Withdrawal Agreement nor benefit from the range of judicial redresses including the requirement for proportionality under Article 18(1)(r). The judge had therefore erred in finding that the decision to refuse the appellant's application was in breach of her rights under the Withdrawal Agreement.

7. Permission was granted by the First-tier Tribunal. No rule 24 response was provided.

8. The matter then came before me. I asked Mr Chohan how he could challenge the Secretary of State's appeal in light of the President's decision in Celik (EU exit, marriage, human rights) [2022] UKUT 220 which appeared to be on all fours with the appellant's case. His response was that, whilst the decision in Celik was against him, the appellant's position had to be appreciated. She and the sponsor had had an Islamic marriage and then went to solicitors to enquire about making an application for a family permit. They had at least tried to make an application and believed that they may have done so but nothing came of it. Mr Chohan submitted that it was important to consider that the appellant and the sponsor had done everything they could and to consider proportionality on that basis. In the alternative, if the decision was set aside, there should be a remittal to the First-tier Tribunal so that the appellant could obtain the Secretary of State's consent to argue Article 8 and, as part of the Article 8 claim, would produce evidence to show that she and the sponsor had in fact applied for a family permit.

9. Mr Tufan's response was that the appellant's case fell directly within Celik where the proportionality argument in relation to the delays caused by the pandemic was considered at [67] and [68] and where it was found that the principle of fairness did not apply. Article 8 had not been raised before the judge, but in any event consent was refused by the Secretary of State to raise it as a new issue. As per [98] of Celik, the appellant could make an Article 8 claim and pay the relevant fee. The decision should be re-made by dismissing the appellant's appeal.

Discussion

10. It is not disputed by Mr Chohan that the decision in Celik applies to the appellant and is on all fours with her case. That is indeed the case. Although the judgment in Celik post-dated Judge Symes' decision, it clarified the law and effectively binds this Tribunal in its assessment of Judge Symes' decision. In any event, Judge Symes' decision was consistent with that of Celik in all respects other than the basis upon which he ultimately allowed the appeal. As the judge found, the appellant could not meet the requirements of Appendix EU as a family member because her marriage took place after 31 December 2020 and she neither held a 'relevant document' as evidence that residence had been facilitated under the EEA Regulations nor had she made such an application for facilitation prior to that date. Neither could the appellant come within the scope of the Withdrawal Agreement nor benefit from the range of

judicial redresses including the requirement for proportionality under Article 18(1)(r), for the reasons set out in Celik at [64] to [66].

11. Judge Symes allowed the appellant's appeal by giving a purposive interpretation to the Withdrawal Agreement. However, such an approach was effectively addressed under the heading of 'fairness' at [67] and [68] of Celik and was rejected by the presidential panel. Accordingly Judge Symes' decision to allow the appeal on that basis, being in direct conflict with the findings and conclusions in Celik, simply cannot stand. For the same reasons, Mr Chohan's arguments based upon an appreciation of the appellant's situation as a whole and the fact that she and the sponsor had tried everything they could in order to marry before 31 December 2020, cannot succeed.

12. Accordingly Judge Symes' decision is set aside. Whilst Mr Tufan asked that the decision be re-made by dismissing the appellant's appeal, Mr Chohan sought to persuade me to remit the case to the First-tier Tribunal for consent to be obtained in order to argue Article 8 and produce evidence that an application for facilitation had in fact been made. There are several problems with such an approach, the most obvious one being that the appellant had never previously suggested that she had made an application for facilitation before 31 December 2020 and, according to Mr Chohan, could not even be sure that such an application had been made. Indeed, the suggestion that it had was very weak. A further problem was that there had never previously been mention of an Article 8 claim and Mr Tufan made it clear that consent would not be given for it to be raised as a new matter. The circumstances were the same as those discussed at [97] and [98] of Celik where the Tribunal ultimately said that, *"if the appellant now wishes to claim that he should be permitted to remain in the United Kingdom in reliance on Article 8, he can and should make the relevant application, accompanied by the appropriate fee"*.

13. For all those reasons it seems to me that there is no basis for remitting the case to the First-tier Tribunal and the decision in the appellant's appeal should simply be re-made by dismissing the appeal.

DECISION

14. The making of the decision of the First-tier Tribunal involved an error on a point of law. The Secretary of State's appeal is accordingly allowed and First-tier Tribunal Judge Symes' decision is set aside.

15. I re-make the decision by dismissing Ms Tegguer's appeal.

Signed: S Kebede

Upper Tribunal Judge Kebede

Dated: 26 October 2022