Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: EA/15867/2021
UI-2022-003004

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On: 27 October 2022	**On: 15 February 2023**

Before

UPPER TRIBUNAL JUDGE KAMARA

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

HYSEN KADIU
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:
For the Appellant: Mr C Avery, Senior Home Office Presenting Officer
For the Respondent: Mr D Coleman, counsel instructed by Malik and Malik Solicitors

DECISION AND REASONS

Introduction

1. This is an appeal against the decision of First-tier Tribunal Judge Sweet, promulgated on 18 March 2022. Permission to appeal was granted by First-tier Tribunal Judge Landes on 17 May 2022.

Anonymity

2. No direction has been made previously, and there is no reason for one now.

Background

3. The respondent is a national of Albania residing in the United Kingdom. He married his spouse, who is a Romanian citizen with settlement under the EUSS, on 19 July 2021. Following the marriage ceremony, the respondent made an application under the EUSS. That application was refused on 15 November 2021 because the respondent had not provided sufficient evidence to confirm that he was a family member of a relevant EEA citizen prior to the specified date of 2300 GMT on 31 December 2020. Nor had the respondent demonstrated that he met the definition of durable partner as set out in Annex 1 of Appendix EU.

The decision of the First-tier Tribunal

4. Following a hearing before the First-tier Tribunal, the appeal was allowed on the basis that the respondent and his spouse were in a durable relationship prior to the specified date, that the requirements of the EUSS Rules were met and that it would be disproportionate to disallow the appeal.

The grounds of appeal

5. The grounds of appeal argued that the First-tier Tribunal made a material misdirection, in that the question of whether the relationship was durable was of no consequence as the respondent's residence had not been facilitated. In addition, the judge erred in finding that the Withdrawal Agreement (WA) had any application and as such there was no entitlement to judicial redress including Article 18(1)(r). In the alternative it was argued that the judge's consideration of proportionality was inadequate given that the respondent did not satisfy the requirements of Appendix EU or fall within the scope of the WA.

6. Permission to appeal was granted on the basis sought.

7. The respondent's representative emailed the Upper Tribunal on 20 October 2022 seeking a stay of proceedings for the reasons reproduced below.

> Since the Rule 24 response was lodged, the Upper Tribunal has promulgated the reported decision in *Celik (EU exit; marriage; human rights).* Those instructed in *Celik* applied to the Upper Tribunal for permission to appeal, but this was refused. As of yesterday, 19th October 2022, it is understood that those instructed in *Celik* have renewed their application directly to the Court of Appeal.
>
> There is no doubt that the points of law raised in *Celik* are similar to those raised in this appeal. The points of law are novel, given that they are based

on a correct interpretation of Appendix EU of HC395 (as amended) ("the Immigration Rules") in light of various provisions enacted to facilitate the UK's withdrawal from the European Union and the preservation of the rights of EU citizens in the UK after 31st December 2020.

Having in mind the over-riding objective set out under Rule 2 of the Rules, and taking into consideration the *ratio* in *AB (Sudan)* at [27], it is submitted that it would be fair and just to stay the appeal until such time as the case of *Celik* has been determined in the Court of Appeal.

Particular attention is drawn to [28]-[32] of *AB (Sudan).* It is submitted that the outcome of the appeal in *Celik* will affect a sizeable class of claimants, and is highly likely to have an effect not only on the interpretation of the Immigration Rules, but may lead to an amendment to the relevant Immigration Rules and associated guidance.

Further, it is arguable that, given the nature of the points of law raised in *Celik,* it is arguable that if the appeal in this case were to proceed as listed it may *"waste time and valuable resources on an exercise that may well be pointless if conducted too soon" (AB (Sudan),* [27] as the claimant may well seek to make an application for permission to appeal to the Court of Appeal should his appeal be set aside and dismissed by the Upper Tribunal.

It is respectfully submitted that staying this case until *Celik* has been determined is of no palpable prejudice to the SSHD. While the effect of the appeal going ahead would mean that the determination is likely to be set aside, and the appeal dismissed, the SSHD has not made a decision to remove the claimant, notwithstanding that she has refused his application.

8. No decision was made on this application in advance of the hearing because the Secretary of State had not indicated her stance.

The hearing

9. Mr Coleman reiterated the application for a stay, relying wholly on the written application and grounds of his colleague, Ms Heybroek. He stated that if the matter was not stayed, he was instructed not to oppose the respondent's appeal.

10. Mr Avery opposed the application for a stay, stating that the matter should proceed on the basis of current case law. He invited me to set aside the decision and dismiss it while thanking Mr Coleman for his pragmatic approach.

11. I declined to stay this appeal owing to the lack of any detail of the basis for the challenge to *Celik* or the likelihood of success of the application for permission to appeal to the Court of Appeal. I proceeded to set aside the decision of the First-tier Tribunal and to substitute a decision to dismiss it based on the existing case law, including *Celik*.

Decision on error of law

12. The First-tier Tribunal judge materially erred in failing to properly consider the provisions of Appendix EU. The respondent's application for status under the EU Settlement Scheme was as the family member of a relevant EEA national. The respondent could not succeed as a spouse, as the marriage took place after the specified date of 31 December 2020, and so the application was considered under the durable partner route. The respondent could not succeed under the durable partner route because the Rules require a "relevant document" as evidence that residence was facilitated under the EEA regulations. The respondent held no such document because no application for facilitation had ever been made. That the judge found the substance of the relationship to be durable was irrelevant in such circumstances. Accordingly, the judge failed to provide adequate reasons to support the findings at [11] that the respondent met the requirements of the Appendix EU.

13. The respondent's appeal to the First-tier Tribunal had two available grounds, that the decision was not in accordance with Scheme rules and that the decision breached rights under the WA. Contrary to what was found by the judge, the respondent did not come within Article 10(1)(e) of the WA, the beneficiaries of which are applicants who were residing in the United Kingdom in accordance with EU law as of 31 December 2020. Therefore, the respondent was not entitled to the judicial redress contained within the WA, including the proportionality requirement in Article 18(1)(r). It follows that the judge erred in finding at [10] that the impugned decision was in breach of the WA. Furthermore, the judge's finding that that it would be 'disproportionate to disallow the appeal' lacked any reasoning or consideration of the respondent's immigration and relationship history.

14. In *Celik*, Article 10.3 was considered in detail, with the panel concluding that the appellant in that case would have come within its scope '*if (he) had applied for facilitation of entry and residence before the end of the transition period*.' The claimant in *Celik* made no such application under the Immigration (European Economic Area) Regulations 2016 and neither did the respondent here. At [56] of *Celik*, the panel found that the appellant's failure to make an application under the Regulations was 'destructive' of his ability to rely on the substance of Article 18.1.

15. Owing to the material errors of law referred to above, the decision of the First-tier Tribunal is set aside with no findings preserved.

Remaking

16. Given the current case law, including *Celik,* as well as the absence of any submissions on behalf of the respondent, the appeal is dismissed on the basis that the Secretary of State's decision was in accordance with the EUSS rules as well as the Withdrawal Agreement.

Conclusions

The making of the decision of the First-tier Tribunal involved the making of an error on a point of law.

I set aside the decision to be re-made.

I substitute a decision dismissing the appeal on the basis that the decision under challenge was in accordance with the EUSS rules as well as the Withdrawal Agreement.

No application for anonymity was made and I saw no reason to make such a direction.

Signed: T Kamara Date: 29 October 2022

Upper Tribunal Judge Kamara

I have dismissed the appeal and therefore there can be no fee award.

Signed: T Kamara Date: 29 October 2022

Upper Tribunal Judge Kamara

NOTIFICATION OF APPEAL RIGHTS

1. A person seeking permission to appeal against this decision must make a written application to the Upper Tribunal. Any such application must be **received** by the Upper Tribunal within the **appropriate period** after this decision was **sent** to the person making the application. The appropriate period varies, as follows, according to the location of the individual and the way in which the Upper Tribunal's decision was sent:

2. Where the person who appealed to the First-tier Tribunal is **in the United Kingdom** at the time that the application for permission to appeal is made, and is not in detention under the Immigration Acts, the appropriate period is **12 working days (10 working days, if the notice of decision is sent electronically).**

3. Where the person making the application is in detention under the Immigration Acts**, the appropriate period is 7 working days (5 working days, if the notice of decision is sent electronically)**.

4. Where the person who appealed to the First-tier Tribunal is **outside the United Kingdom** at the time that the application for permission to appeal is made, the appropriate period is **38 days (10 working days, if the notice of decision is sent electronically).**

5. A "working day" means any day except a Saturday or a Sunday, Christmas Day, Good Friday or a bank holiday.

6. The date when the decision is "sent' is that appearing on the covering letter or covering email