



IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2022-004403
FtT No: EA/11808/2021

THE IMMIGRATION ACTS

Decision & Reasons Issued:

On 23rd of May 2024

Before

UPPER TRIBUNAL JUDGE O'CALLAGHAN

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

ROMARJO BOJA

Respondent

Rule 34 Decision at Field House on 14 May 2024

DECISION AND REASONS

Introduction

1. This is an appeal by the Secretary of State against the decision of Judge of the First-tier Tribunal Khosla ('the Judge'), sent to the parties on 8 August 2022, allowing Mr Boja's appeal under the EUSS on proportionality grounds.

2. Mr Boja sought status under the EUSS on the basis of his marriage to an EU citizen exercising EEA Treaty rights in the United Kingdom. The couple were married on 21 April 2021.
3. The Secretary of State refused the EUSS settlement application by a decision dated 6 July 2021, observing:

‘You have provided a marriage certificate dated 21 April 2021 as evidence that you are the spouse of an EEA citizen.

However, you have not provided sufficient evidence to confirm that you were a family member of a relevant EEA citizen prior to the specified date, as defined in Annex 1 of Appendix EU (i.e. 2300 GMT on 31 December 2020). Your marriage certificate shows your marriage took place on the 21 April 2021.

Therefore, consideration has also been given as to whether you meet the eligibility requirements for settled status under the EU Settlement Scheme as a durable partner.

...

Home Office records do not show that you have been issued with a family permit or residence card under the EEA Regulations as the durable partner of the EEA national and you have not provided a relevant document issued on this basis by any of the Islands.

Therefore, you do not meet the requirements for settled status under the EU Settlement Scheme.

...

However, for the reasons already explained above, you have not provided sufficient evidence to confirm that you are a family member of a relevant EEA citizen as defined in Annex 1 of Appendix EU.

It is therefore considered that the information available does not show that you meet the eligibility requirements for settled status set out in rule EU11 or for pre-settled status set out in rule EU 14 of Appendix EU to the Immigration Rules. This is for the reasons explained above.’

4. The Judge noted Mr Boja’s concession, made through counsel, that he could not bring himself within the provisions of Appendix EU because he was not married to his EU citizen spouse prior to 23.00 GMT on 31 December 2020.

5. Noting that the couple had a child the Judge concluded:

‘28. I accept that it is in the public interest to maintain immigration control, however, I do not accept, on the particular facts of this case, that refusal of the appellant’s application, and in consequence, the requirement for him to leave the UK, is proportionate. This is a case where the appellant and his wife had done all that could be expected of them but were thwarted due to circumstances entirely outside their control. I do not consider that the public interest is served by the appellant’s removal.

29. In conclusion, while I find that the appellant cannot satisfy the provisions of Appendix EUSS, I find that his removal would be disproportionate.’

6. In allowing the appeal the Judge identified that he relied upon the Withdrawal Agreement in respect of his proportionality decision.

7. The Secretary of State appealed on the ground that a person cannot invoke the concept of proportionality in Article 18.1(r) of the Withdrawal Agreement: *Celik (EU Exit; Marriage: Human Rights)* [2022] UKUT 220 (IAC), [2022] Imm AR 1438.

8. Judge of the First-tier Tribunal Monaghan granted the Secretary of State permission to appeal by a decision dated 21 September 2022.

Rule 34 Decision

9. Over time the Upper Tribunal issued various directions to the parties.

10. Upper Tribunal Judge Gill issued a Note to the parties on 10 December 2023 observing, *inter alia*:

i) By an email dated 10 January 2023 at 19.28 hours, Sentinel Solicitors, who were then acting as the representatives of Mr Romarjo Boja, informed the Upper Tribunal that Mr Boja ‘*is not opposing the Secretary of State’s appeal*’; that he did not propose to attend the hearing on 11 January 2023 and that he had instructed them to come off record.

ii) Nevertheless, the appeal was stayed pending the judgment of the Court of Appeal in *Celik*.

11. UTJ Gill indicated a provisional view that the Secretary of State's appeal asserting a material error of law by the First-tier Tribunal was bound to succeed. She proposed that the appeal be disposed of without a hearing and granted Mr Boja 21 days to object to this course of action in writing.
12. I am satisfied upon inspecting CE:File, the Upper Tribunal's online database, that UTJ Gill's note was sent to Mr Boja. Further, Mr Boja has not to date filed a written objection to UTJ Gill's proposal.
13. In the circumstances, and observing rule 34 of the Tribunal Procedure (Upper Tribunal) Rules 2008, I consider that it is just and fair that the Upper Tribunal dispose of this appeal without a hearing in the terms proposed by UTJ Gill at [6] of her Note:

'I propose to allow the Secretary of State's appeal. I further propose to set aside the decision of Judge of the First-tier Tribunal Khosla and to re-make the decision on Mr Boja's appeal against the Secretary of State's decision by dismissing his appeal.'
14. I am satisfied that the Judge erred in allowing the appeal on proportionality grounds for the reasons identified by the Upper Tribunal in its decision in *Celik*, as confirmed by the Court of Appeal in *Celik v. Secretary of State for the Home Department* [2023] EWCA Civ 921, [2024] 1 WLR 1946, at [54]-[56].

Notice of Decision

15. The decision of the First-tier Tribunal sent to the parties on 8 August 2022 is set aside for material error of law.
16. The decision is remade and Mr Boja's appeal is dismissed.
17. No anonymity order is made.

D O'Callaghan
Judge of the Upper Tribunal
Immigration and Asylum Chamber

14 May 2024