IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2023-003987

First-tier Tribunal No:
EU/51282/2023; LE/00112/2023

THE IMMIGRATION ACTS

Decision and Directions Issued:

On 23rd of April 2024

Before

UPPER TRIBUNAL JUDGE SMITH

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

And

MR PELLUMB SHURBI

Respondent

Representation:
For the Appellant: Mr E Terrell, Senior Home Office Presenting Officer
For the Respondent: Mr A Slatter, Counsel instructed by Haris Ali solicitors

Heard at Field House on Tuesday 16 April 2024

DECISION

1. By a decision issued on 5 February 2024, the Tribunal (myself sitting with Deputy Upper Tribunal Judge Lewis) adjourned a previous hearing of this matter. We did so for reasons explained in our adjournment decision which is annexed to this decision for ease of reference.

2. The appeal remains that of the Secretary of State and remains at error of law stage. For ease of reference, we refer to the parties as they were before the First-tier Tribunal. The Respondent challenges the decision of First-tier Tribunal Judge Mark Eldridge promulgated on 9 August 2023, allowing the Appellant's appeal against the Respondent's decision refusing the Appellant status under the EU Settlement Scheme ("EUSS").

3. The facts are set out in the Tribunal's adjournment decision, and I do not repeat them. In short summary, the Respondent refused the Appellant status under the EUSS only on the basis that he was the subject of a deportation order. However, at the last hearing before this Tribunal, the Respondent raised a new issue (which the Tribunal had already identified for itself prior to the hearing) whether the Appellant could succeed in his appeal in any event because, although he was the durable partner of a Polish national, his status as such had never been facilitated by the Respondent prior to that date under the Immigration (European Economic Area) Regulations 2016 ("the EEA Regulations").

4. In accordance with the directions given in the Tribunal's adjournment decision, the Respondent provided written submissions, albeit slightly later than directed but with time extended. He indicated that he did not wish to withdraw his decision under appeal as the Tribunal had suggested might be done. He saw difficulties with the status of the ongoing appeal, particularly the outcome of the First-tier Tribunal's decision which was favourable to the Appellant.

5. The Respondent rejected any suggestion that his decision had been taken under the 'wrong legal framework' as was suggested at [12] of the adjournment decision. He pointed out that the decision under appeal was one to refuse status under the EUSS which related to both suitability and eligibility. The Respondent recognised that no point was taken on eligibility notwithstanding the lack of facilitation of the Appellant's status under the EEA Regulations. The Respondent pointed out that the Presenting Officer had raised the issue before the First-tier Tribunal Judge but recognised that the submission had then been withdrawn.

6. The submissions then seek to draw a distinction between the Tribunal's decision in Celik (EU exit, marriage, human rights) [2022] UKUT 220 ("Celik") and the Court of Appeal's judgment in that case ([2023] EWCA Civ 921). This is said to be an important distinction because the former decision was persuasive only whereas the Court of Appeal's judgment was binding. The Court of Appeal's judgment in Celik was handed down only two days before the First-tier Tribunal's decision.

7. The Respondent sought to "introduce this point as an additional ground of appeal …excusing the absence earlier in the challenge by virtue of the magnitude of the issue and its newness before the First-tier Tribunal". The additional ground is pleaded as follows:

> "In addition to the grounds on which permission to appeal was previously sought and granted and which are pursued in full, the Secretary of State asserts that the First-tier Tribunal erred in not having proper regard to a newly issued decision of the Court of Appeal which was on its face dispositive of the appeal. The Court's binding ruling that an applicant as a durable partner had – other than in circumstances not relevant here – to have held a 'relevant document' was not something that the Judge or the

> Presenting Officer could simply disavow even though no 'eligibility' point had been taken in the refusal letter. Judge Eldridge refers at [12] to an attempt to raise 'the decision in Celik' without clear regard to the fact that that decision of the Upper Tribunal had now so recently been affirmed by the Court of Appeal."

8. The Appellant filed a Rule 24 Response to the amended ground. The Appellant submitted that the Respondent should be refused permission to amend on the basis that it was inconsistent with the overriding objective in rule 2 of the Tribunal Procedure (Upper Tribunal) Rules 2008.

9. As Mr Slatter pointed out, the Respondent's application was in essence one for relief from sanctions having failed to take the eligibility point earlier and having given no reason for failing to take the point earlier. As he also pointed out, the distinction between the Tribunal's decision in Celik and the Court of Appeal's judgment in that case was without a difference. The First-tier Tribunal was still required to follow the Tribunal's reported decision in Celik unless it could show reason why it was wrong.

10. That latter point however does not avail the Appellant either. If the First-tier Tribunal Judge should have considered relevant Tribunal guidance but failed to do so, that is as much an error as if he disregards relevant binding Court of Appeal authority.

11. In that regard, the Appellant submits that the Judge could not be criticised for not determining an issue which was not raised by either party.

12. I recognise as Mr Slatter submits that there is a significant delay in the raising of the amended ground by the Respondent and the taking of issue on eligibility. The decision under appeal was made on 8 April 2021, just over three years ago. Even assuming that the Respondent was not on notice that the eligibility ground might be determinative of the Appellant's case, he has been aware of the potential relevance of Celik to this case since July 2022 (nearly two years ago). Even assuming in the Respondent's favour that it was reasonable for him not to take the point until the Court of Appeal had approved the Tribunal's guidance, the Court of Appeal gave judgment in July 2023. Although the Respondent had sought to introduce the issue before the First-tier Tribunal Judge in August 2023, the submission was abandoned. It is not clear why that submission was not pursued. It was not raised thereafter as a ground of challenge to the First-tier Tribunal's decision until the error of law hearing.

13. However, even accepting that the delay is significant and without explanation, I permitted the Respondent to amend his grounds. I did so for the following reasons.

14. First, the Respondent did raise the issue before First-tier Tribunal Judge Eldridge. I accept that the Presenting Officer withdrew the submission but the Judge was on notice that Celik might be relevant. He failed to consider whether it was and that was itself an error. Although the submission was withdrawn, the Judge does not say that this was by way of a concession that the issue did not arise. Even if it were, that concession ought not to have been accepted as it was wrong in law.

15. However, there is a more fundamental objection to me refusing to permit amendment. This stems from the grounds of appeal against a decision in an EUSS appeal. In broad summary, the grounds of appeal against a decision in an EUSS appeal are that the decision under appeal is not in accordance with the provisions of the Immigration Rules under which it was made (here Appendix EU) or is contrary to an appellant's rights under the EU Withdrawal Agreement. The latter does not apply here. However, it is for the Tribunal to determine whether the decision under appeal is in accordance with Appendix EU. That requires consideration of how those rules are met.

16. Whilst I recognise that the Respondent ought to identify the rule(s) relevant to the case in the decision under appeal, a failure to do so does not of itself obviate the Judge from considering another rule if that applies or potentially applies. This is an appeal and not a judicial review of the Respondent's decision. The fact that the Respondent does not raise an issue therefore does not mean that it does not need to be determined in order to consider whether the decision under appeal is in accordance with the rules.

17. Here, in any event, the Presenting Officer did at least allude to the case of Celik which should have put the Judge on notice of its potential relevance even if that submission was abandoned as it is said to have been.

18. The foregoing is relevant to the overriding objective. That requires the Tribunal to decide cases fairly and justly but also using any special expertise which it may have in order to do so.

19. As I pointed out to Mr Slatter in the course of his submissions, if I were to accede to the Appellant's request to refuse the amendment, I would in so doing be upholding a decision of the Tribunal which was patently wrong in law. That would not be consistent with the overriding objective.

20. It might be argued that the result of permitting the amendment at this late stage is unfair to and prejudices the Appellant. However, I do not consider that could be argued. If I permitted the First-tier Tribunal's decision to stand, the Appellant would potentially be gaining a benefit to which he was not entitled. That is not fair. Moreover, if the Respondent had withdrawn his decision under appeal, the Appellant would have been in no better position. The Respondent could still have taken this issue and re-determined the application by refusing it. The Appellant has had

the opportunity to consider the issue now that it has arisen and has been given time to put forward his case in that regard.

21. For the foregoing reasons, I permitted the amendment.

22. The parties were thereafter agreed as to next steps. Mr Slatter conceded that the First-tier Tribunal's decision was wrong in law for allowing the appeal and must be set aside. Celik is fatal to the Appellant's position. He is not entitled to status under the EUSS. Accordingly, the appeal must be re-determined by dismissing the appeal.

23. As I pointed out to Mr Slatter, it is of course open to the Appellant to apply under domestic scheme rules (Article 8 ECHR) to remain in the UK with his partner (on the assumption that she has a relevant status in order to sponsor him). For that reason, I preserve the finding made by Judge Eldridge that the Appellant is in a durable relationship with Ms Nowak (see [21] of the First-tier Tribunal's decision).

NOTICE OF DECISION

The decision of First-tier Tribunal Judge Mark Eldridge promulgated on 8 August 2023 contains an error of law. I set aside that decision but preserve the finding at [21] of that decision. I re-make the decision by dismissing the appeal.

L K Smith

Upper Tribunal Judge Smith

Judge of the Upper Tribunal
Immigration and Asylum Chamber
18 April 2024

APPENDIX: ADJOURNMENT DECISION

IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2023-003987

First-tier Tribunal No:
EU/51282/2023; LE/00112/2023

THE IMMIGRATION ACTS

Decision and Directions Issued:

.....5 February 2024.....

Before

UPPER TRIBUNAL JUDGE SMITH
DEPUTY UPPER TRIBUNAL JUDGE LEWIS

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

And

MR PELLUMB SHURBI

Respondent

Representation:
For the Appellant: Mr E Tufan, Senior Home Office Presenting Officer
For the Respondent: Mr A Slatter, Counsel instructed by Haris Ali solicitors

Heard at Field House on Friday 26 January 2024

ADJOURNMENT DECISION AND DIRECTIONS

1. This is an appeal by the Secretary of State. For ease of reference, we refer to the parties as they were before the First-tier Tribunal. The Respondent challenges the decision of First-tier Tribunal Judge Mark Eldridge promulgated on 9 August 2023, allowing the Appellant's appeal against the Respondent's decision refusing the Appellant status under the EU Settlement Scheme ("EUSS").

2. The Appellant seeks status as the durable partner of a Polish national. He made an application under the EUSS on 8 April 2021 in that capacity. It is common ground that his status as a durable partner had never been facilitated by the Respondent prior to that date under the Immigration (European Economic Area) Regulations 2016 ("the EEA Regulations"). The Appellant is also the subject of a deportation order made on 17 December 2018 as a result of the Appellant's criminal convictions.

3. The Respondent refused the Appellant status under the EUSS on the basis that he was the subject of a deportation order. His application was refused on grounds of suitability. Nonetheless, the Respondent went on to consider the basis for deportation under the EEA Regulations. In so doing, it was said that, because the deportation related to conduct committed before the UK's exit from the EU in December 2020, it was necessary to consider the position under the EEA Regulations. No transitional provisions are cited in that regard. There is no recognition that the Appellant's claimed status under EU law was as a durable partner. He is not himself an EU citizen nor is he a family member under EU law. Having considered the position under the EEA Regulations, the Respondent concluded that the Appellant's deportation was justified on grounds of public policy etc. He also concluded that the Appellant's deportation was proportionate.

4. The appeal before Judge Eldridge proceeded on the basis of what was said in the Respondent's decision letter. It is recorded at [12] of the Decision that the Respondent's presenting officer sought to address the Judge "at one stage on the decision in Celik" (which is reference to this Tribunal's guidance in Celik (EU exit; marriage; human rights) [2022] UKUT 220 (IAC) as upheld by the Court of Appeal ([2023] EWCA Civ 921) ("Celik") but the Judge noted that the presenting officer "then withdrew that submission".

5. Judge Eldridge therefore considered the appeal on the basis only of whether suitability grounds were made out. He concluded that "the Appellant presents no genuine, present or serious threat to any of the fundamental interests of society". He also concluded that the Respondent's decision was not proportionate. He therefore allowed the appeal.

6. The Respondent appealed the Decision on the basis that the Judge had failed to give adequate reasons for his conclusions, particularly as regards the proportionality of deportation.

7. Permission to appeal was refused by First-tier Tribunal Judge Austin on 11 September 2023 on the basis that the grounds did not disclose any material error of law. However, when the application for permission was repeated to this Tribunal, permission was granted by Upper Tribunal Judge Gleeson on 21 November 2023 on the basis that the grounds of appeal were arguable.

8. The matter came before us to determine whether the Decision contains an error of law. If we decide that it does, we have to consider whether to set it aside. If we do so, we either have to re-make the decision or remit the appeal to the First-tier Tribunal to do so.

9. We need say no more about the pleaded grounds of appeal at this stage. In light of the developments at the hearing before us, we did not consider it necessary or appropriate to hear submissions about those grounds. We were unpersuaded by Mr Tufan's attempts to suggest that the way forward would be to find an error of law on that basis, set aside the Decision and proceed to a re-making on the basis of his submissions as to the correct legal position. Such would not have been fair to the Appellant. In any event, we would take considerable persuading that the pleaded grounds did identify any error of law in the Decision had the Judge proceeded on the correct legal footing.

10. As it was, and with no advance warning save on the day of the hearing orally to his opponent, Mr Tufan raised an entirely new point. He submitted that the Appellant's case was caught by Celik and that his application under the EUSS ought to have been refused on that basis. He also submitted, flowing from that, that there was an error in the application of the EEA Regulations to the Appellant's case, particularly since he was only claiming to be the durable partner of his Polish national partner and had never had his status in that regard facilitated.

11. Mr Slatter very properly and fairly conceded that there might be some merit in Mr Tufan's submission. However, he had not had the opportunity to consider the position nor to take instructions.

12. As we pointed out to Mr Tufan, if, as appeared to be the case, he was arguing that the Respondent had applied the wrong legal framework to the Appellant's case, the most appropriate way forward would be to withdraw the Respondent's decision under appeal. There were two obstacles applying to that course at the hearing before us. The first was that Mr Tufan had not had the opportunity to obtain authorisation to take that course. The second was that the Respondent was the appellant before us and the Appellant has a decision in his favour which he might not be willing to forego, at least without some consideration of the position and/or (as Mr Slatter suggested) preservation of favourable factual findings.

13. Having discussed the matter with the parties, we resolved to grant an adjournment of our own motion and gave directions for the onward disposal of this appeal which are confirmed below. Both parties agreed that this was the most appropriate course at this stage.

DECISION AND DIRECTIONS

The error of law hearing is hereby adjourned with the following directions:

1. **By no later than 4pm on Friday 16 February 2024, the Respondent shall notify the Tribunal and the Appellant whether he wishes to withdraw his decision under appeal or, if he does not wish to withdraw that decision, shall file and serve proposed amended grounds of appeal.**
2. **If the Respondent seeks to withdraw the decision under appeal, the parties are to seek to agree disposal of the appeal by consent.**
3. **If the Respondent does not wish to withdraw the decision under appeal and files amended grounds, or the parties are unable to agree on disposal of the appeal, the Appellant (Mr Shurbi) is to file a Rule 24 Reply by no later than 4pm on Tuesday 2 April 2024.**
4. **In the event that the appeal is not disposed of by consent, the matter is to be listed for a further hearing before UTJ L Smith on the first available date after 15 April 2024, face to face, with a time estimate of 1.5 hours. No interpreter is required.**

L K Smith

Upper Tribunal Judge Smith

Judge of the Upper Tribunal
Immigration and Asylum Chamber
29 January 2024