



IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2022-004084

First-tier Tribunal No: EA/12190/2021

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On 31st May 2024

Before

UPPER TRIBUNAL JUDGE LINDSLEY

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

SAKINA BENNAOUM
(NO ANONYMITY ORDER MADE)

Respondent

Representation:

For the Appellant: Mr K Ojo, Senior Home Office Presenting Officer

For the Respondent: None

Heard at Field House on 21 May 2024

DECISION AND REASONS

Introduction

1. The claimant is a citizen of Algeria. She formed a relationship with her partner, Mr Amine Grachi Crespo, who is a Spanish citizen, in August 2018 and they had a non-legally binding Islamic Nikah ceremony in October 2018. The couple married on 22nd April 2021. She applied on 18th May 2021 to remain in the UK under the EUSS as the family member of her husband. Her application was refused in a decision dated 4th August 2021. Her appeal against the decision was allowed by

First-tier Tribunal Judge Cockburn in a determination promulgated on the 20th April 2022.

2. Permission to appeal was granted to the Secretary of State by Upper Tribunal Judge Pickup on 12th October 2022 on the basis that it was arguable that the First-tier judge had erred in law in misapplying the Withdrawal Agreement and finding that the appellant came within retained EU law when her residence had not be facilitated under the 2016 Regulations prior to the specified date.
3. Upper Tribunal Judge Sheridan sent out directions on 3rd November 2023 inviting the parties to consider if the appeal should conclude by way of a consent order on the basis that the claimant might conclude that she could not succeed in her appeal in light of the decision of the Court of Appeal in Celik v SSHD [2023] EWCA Civ 921. No consent order signed by the claimant has been received by the Upper Tribunal.
4. The matter came before me to determine whether the First-tier Tribunal had erred in law, and if so to decide if any such error was material and whether the decision should be set aside.

Submissions – Error of Law & Remaking

5. The Secretary of State argues in grounds of appeal, in summary, as follows. It is argued that the appeal was allowed by reference to the Withdrawal Agreement but that the Withdrawal Agreement did not create additional rights to a person who like the claimant does not fall within its personal scope at Article 10. As the claimant was not residing in accordance with the EU laws at the relevant date, as she had not had her residence facilitated by the respondent as a durable partner by 31st December 2020, and thus did not hold a relevant document she was not entitled to the benefit of the Withdrawal Agreement. It is of no consequence that the First-tier Tribunal finds that the relationship of the claimant with her partner was on the facts a durable one at that time.
6. The claimant did not submit a Rule 24 notice. The claimant’s solicitors did however send an email dated 1st May 2024 explaining that the claimant left the UK and has re-entered with a spouse visa, and that they would not be attending the hearing. In the event the appellant herself attended the hearing and confirmed that she now had leave to enter as a spouse until February 2026.

Conclusions – Error of Law & Remaking

7. The First-tier Tribunal concludes that the appellant could not meet the requirements of Appendix EU Annex 1 to fulfil the definition of a durable partner at paragraph 28 of the decision due to not holding a relevant document, and thus that the appeal cannot succeed in her appeal by reference to the Immigration Rules. This is clearly correct.

8. However, at paragraphs 29 to 38 the First-tier Tribunal concludes that the claimant can succeed because the decision is disproportionate under the Withdrawal Agreement applying Article 18(1)(r) in all the circumstances particularly because factually it was found that the claimant was in a genuine relationship with her now husband prior to the specified date and their religious marriage had taken place in 2018, and the Covid-19 pandemic meant that their legal marriage was delayed between August 2020 and April 2021.
9. This conclusion is patently contrary to the decision of the Upper Tribunal in Celik (EU exit; marriage; human rights) [2022] UKUT 220 which held that a person in a durable relationship has no substantive rights under the Withdrawal Agreement unless they had their residence facilitated by 31st December 2020 and that without a substantive right under the Withdrawal Agreement an appellant cannot invoke the concept of proportionality under Article 18(1)(r) so as to be able to succeed in an appeal.
10. I therefore set aside the decision of the First-tier Tribunal and remake it dismissing the appeal. This decision is of no practical consequence to the claimant who now properly holds lawfully issued leave to enter as a result of her entry clearance application.

Decision:

1. The making of the decision of the First-tier Tribunal involved the making of an error on a point of law.
2. I set aside the decision of the First-tier Tribunal allowing the appeal under the Withdrawal Agreement.
3. I re-make the decision in the appeal by dismissing it both under the Immigration Rules and under the Withdrawal Agreement.

Fiona Lindsley

Judge of the Upper Tribunal
Immigration and Asylum Chamber

21st May 2024