



IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2022-004558

First-tier Tribunal No: EA/16133/2021

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On 20th May 2024

Before

UPPER TRIBUNAL JUDGE STEPHEN SMITH

Between

Secretary of State for the Home Department

Appellant

and

Besjan Kovaci
(NO ANONYMITY DIRECTION MADE)

Respondent

Determined on the papers on 13 May 2024

DECISION AND REASONS

1. By a decision promulgated on 17 May 2022, First-tier Tribunal Judge J. M. McKinney (“the judge”) allowed an appeal against a decision of the Secretary of State dated 7 November 2021 to refuse an application under the EU Settlement Scheme for pre-settled status as the family member of a relevant EEA national.
2. The Secretary of State now appeals against the decision of the judge with the permission of First-tier Tribunal Judge R. Choudhury dated 20 August 2022.
3. For ease of reference, I will refer to the parties as they were before the First-tier Tribunal.
4. I have decided to determine this appeal without a hearing, under rule 34(1) of the Tribunal Procedure (Upper Tribunal) Rules 2008, for the reasons set out below.

Summary of decision

5. The decision of the First-tier Tribunal involved the making of an error of law, in light of the clarification of the law provided by *Celik v Secretary of State for the Home Department* [2023] EWCA Civ 921.

6. I set the decision aside, and remake the decision by dismissing the appeal, acting under section 12(2)(b)(ii) of the Tribunals, Courts and Enforcement Act 2007.

Factual background

7. The appellant is a citizen of Albania. He applied for pre-settled status under the EU Settlement Scheme (“the EUSS”) in respect of his relationship with, and later marriage to, Maria Veronika Dimitriadou, a citizen of Greece (“the sponsor”).
8. The appellant and sponsor met in 2019. They began cohabiting later that year, and wanted to get married before the end of 2020. The appellant did not apply for his residence to be facilitated as a “durable partner” under the Immigration (European Economic Area) Regulations 2016. The COVID-19 restrictions then in force meant that it had not been possible to secure a date until 1 April 2021, which is when the marriage took place. By then, the United Kingdom’s withdrawal from the European Union was complete, since the “implementation period” under the EU Withdrawal Agreement concluded at 11 PM on 31 December 2020. On 13 May 2021, the appellant applied for pre-settled status.
9. It was common ground before the judge that the appellant could not satisfy the requirements of Appendix EU of the Immigration Rules. He had not been issued with a “relevant document” as the durable partner of the sponsor prior to the conclusion of the implementation period, or applied for his residence to be “facilitated” in that capacity before that date.
10. The appellant submitted to the judge that the decision to refuse his application for pre-settled status was disproportionate within the meaning of Article 18 (1)(r) of the EU Withdrawal Agreement. The judge found that the appellant and the sponsor were in a genuine and subsisting relationship, and that it was disproportionate to refuse to grant pre-settled status to him in light of the difficulties he had experienced in seeking to marry before the conclusion of the implementation period. Had he done so, he would have been entitled to pre-settled status on account of his marriage to the sponsor. Accordingly, at paras 42 to 55, the judge concluded that the decision to refuse the appellant’s application for pre-settled status was disproportionate, and allowed the appeal.

Issues on appeal to the Upper Tribunal

11. The Secretary of State appealed on the basis that Article 18(1)(r) of the Withdrawal Agreement was incapable of entitling an individual in the circumstances of this appellant to succeed.

Making a decision without a hearing

12. Rule 34 of the Tribunal Procedure (Upper Tribunal) Rules 2008 states, where relevant:
 - “34.— Decision with or without a hearing
 - (1) Subject to paragraphs (2) and (3), the Upper Tribunal may make any decision without a hearing.
 - (2) The Upper Tribunal must have regard to any view expressed by a party when deciding whether to hold a hearing to consider any matter, and the form of any such hearing.”
13. By directions dated 11 October 2023, Upper Tribunal Judge Macleman invited the parties to reconsider their respective positions in light of the Court of Appeal’s

judgment in *Celik v Secretary of State for the Home Department* [2023] EWCA Civ 921, and gave directions for the parties to consider agreeing a consent order. The parties were unable to agree a consent order because the appellant did not agree to doing so.

14. On 12 February 2024, Upper Tribunal Judge Norton Taylor gave further directions requiring the parties to agree a consent order in light of *Celik*, or, in the absence of agreement being reached, directing the Secretary of State to serve an 'error of law bundle'. The directions noted that the Upper Tribunal may make a decision about the appeal without a hearing.
15. The Secretary of State again invited the appellant to agree to a consent order; he does not appear to have replied, but the sponsor informed the Secretary of State that the appellant's "status has been resolved" and that "this case is already closed" (see the email from the sponsor dated February 17, 2024 at 9:06 AM). That appears to be a reference to separate human rights proceedings in which the appellant was involved under the reference HU/52710/2022. Ms S. Rushforth, a Senior Home Office Presenting Officer, explained to the sponsor that these proceedings remain live.
16. In my judgment, the appellant – through the sponsor – has been given the opportunity to engage with these proceedings, and to state whether he wishes to contest the appeal or convene a hearing. He has not engaged with the directions. Judge Norton-Taylor's directions explained that a decision in this matter may be reached by the Upper Tribunal without a hearing.
17. Bearing in mind the overriding objective to decide cases fairly and justly, I consider that it is in the interests of justice to decide this matter on the papers. The appellant has demonstrated no engagement with the process. He has informed the Secretary of State that he has human rights-based leave (see para. 2 of Ms Rushforth's skeleton argument dated 29 February 2024, "It has additionally been confirmed by the Sponsor that the Appellant has now been granted Human Rights leave"), although I have not seen express confirmation of that fact from the Secretary of State. In any event, for the reasons that are set out below, I consider that the decision of the Court of Appeal in *Celik* means that the Secretary of State's appeal must succeed. In these circumstances, in the absence of any sign of engagement by the appellant, and bearing in mind the merits of the Secretary of State's case, I consider that it is consistent with the overriding objective to determine this matter on the papers.

Celik v Secretary of State for the Home Department

18. Pursuant to *Celik v Secretary of State for the Home Department*, it is now well established that Article 18(1)(r) of the EU Withdrawal Agreement is incapable of bringing within the personal scope of the EU Withdrawal Agreement a person who was not a family member of an EU citizen prior to the conclusion of the implementation period. See, for example, para. 56, per Lewis LJ:

"The principle of proportionality is not intended to lead to the conferment of residence status on people who would not otherwise have any rights to reside. The appellant did not have any rights under Article 10(1)(e)(i) of the Withdrawal Agreement. The refusal to grant residence status is not therefore a disproportionate refusal of residence status which would have conferred rights already enjoyed under the Withdrawal Agreement. Rather, it is a recognition that the appellant did not have any such rights under Article 10(1)(e)(i)."

19. See also para. 95 of *Celik*, concerning the meaning of Article 10(2) and (3) of the Withdrawal Agreement, concerning the facilitation of durable partners before the conclusion of the implementation period.
20. I agree with the following extract from Ms Rushforth’s skeleton argument dated 29 February 2024:

“The Respondent maintains the Grounds of appeal and continues to rely on *Celik* [2023] EWCA Civ 921 and submits that considering this decision the grounds are plainly made out. As the Appellant’s residence was not facilitated under the [Immigration (European Economic Area) Regulations 2016] as a durable partner he cannot succeed as a durable partner under the EUSS and is not a beneficiary of the withdrawal agreement, the [judge] has erred in accepting [that] he can. In view of the clear error of law the SSHD would invite the Upper Tribunal to determine the appeal without a hearing, finding that the error of law is established and substituting the decision to allow the Appellant’s EUSS appeal with a decision to dismiss it.”
21. The judge’s decision was written without the benefit of guidance from either this tribunal (in *Celik (EU exit; marriage; human rights)* [2022] UKUT 220 (IAC)) or the onward appeal in that case to the Court of Appeal. Despite the clarity and care with which the decision of the judge was drafted, it involved the making of an error of law for the reasons set out above, and must be set aside.

Secretary of State’s appeal allowed

22. For the reasons set out above, I allow the appeal of the Secretary of State. I set the decision of the judge aside.
23. Acting under section 12(2)(b)(ii) of the Tribunals, Courts and Enforcement Act 2007, I remake the decision by dismissing the appeal. The factual matrix before the judge, and before this tribunal, admits of only one answer, namely that the appeal must be dismissed.

Notice of Decision

The decision of Judge J. M. McKinney involved the making of an error of law and is set aside.

I remake the decision, dismissing the appeal, acting under section 12(2)(b)(ii) of the Tribunals, Courts and Enforcement Act 2007.

Stephen H Smith

Judge of the Upper Tribunal
Immigration and Asylum Chamber

13 May 2024