



IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM
CHAMBER

Case No: UI-2022-004663

First-tier Tribunal No:
EA/02523/2022

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On 25 June 2024

Before

UPPER TRIBUNAL JUDGE RINTOUL
DEPUTY UPPER TRIBUNAL JUDGE A METZER KC

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

FAHAD REZA KHAN
(NO ANONYMITY ORDER MADE)

Respondent

Determined at Field House on 7 May 2024

Representation:

For the appellant: Mr N Wain, Senior Home Office Presenting Officer
For the respondent: No appearance

DECISION AND REASONS

1. The Secretary of State appeals with permission against the decision of the First-tier Tribunal (Judge Atreya) promulgated on 29 July 2022, allowing the respondent's decision against a decision made on 15 February 2022 to refuse his application for leave to remain under EU Settlement Scheme ("EUSS") set out in Appendix EU to the Immigration Rules.

2. The refusal was based materially on the fact that the respondent and his EU national spouse were not married until 9 August 2021; and, as there had been no application for a residence card, the respondent's residence was not being facilitated.
3. The judge concluded that the respondent and his wife had been in a durable relationship prior to 31 December 2002, and that they were still in a genuine and subsisting relationship. She held, applying article 18 (2) (r) of the Withdrawal Agreement, that the decision to refuse the application was disproportionate.
4. The Secretary of State sought permission to appeal on the grounds that the Withdrawal Agreement did not apply, as there had been no facilitation of entry.
5. The appeal was stayed pending the outcome of Celik v Secretary of State for the Home Department [2023] EWCA Civ 921.
6. Subsequent to that, directions were issued on 11 October 2023 in which it was directed that:

3. If, having considered that judgement, the [respondent] accepts that the SSHD's appeal to the UT cannot be resisted, and the only possible outcome would be a finding of material error of law and the outright dismissal of the original appeal, parties are invited to agree a consent order that is to be made by the Upper Tribunal pursuant to rule 39 of the Tribunal Procedure (Upper Tribunal) Rules 2008 disposing of the proceedings. The request to make a consent order must be received by the Upper Tribunal within 21 days of the date these directions are sent.

4. If the parties cannot agree to request an agreed consent order they must inform the Upper Tribunal in writing Tribunal within 21 days of the date these directions are sent. Thereafter the appeal will be listed for hearing.

7. No consent order was agreed; instead, the respondent has sought to withdraw his appeal. In an email from his representatives, it is stated that:

Please note that our client has decided to withdraw his appeal ,therefore our client will not be attending his hearing due on the 09.05.2024

8. As Mr Khan is the respondent, he cannot withdraw his appeal. In the circumstances, and in the light of the directions issued, we consider that in effect, the respondent does not resist the Secretary of State's submission that the decision of the FtT involved the making of an error of law, and is content for the Upper Tribunal to conclude that is so, and to remake the decision dismissing the appeal.
9. We are satisfied that that decision of the FtT involved the making of an error of law as the Respondent's residence in the United Kingdom had

not been facilitated, as he had not applied for a document to confirm his status as the durable partner of an EEA national prior to 31 December 2020. It follows, therefore, applying Celik that he could not benefit from the Withdrawal Agreement and did not meet the requirements of the EUSS. We therefore find that the decision of the FtT involved the making of an error of law, and we set it aside. We remake the appeal by dismissing it.

Notice of Decision

1. The decision of the First-tier Tribunal involved the making of an error of law and is set aside.
2. The appeal is remade by dismissing the appeal.

Signed

Date: 19 June 2024

Jeremy K H Rintoul
Judge of the Upper Tribunal