



IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2022-006291

First-tier Tribunal No: EA/12074/2021

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On 29th May 2024

Before

UPPER TRIBUNAL JUDGE HANSON

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

SHKELQIM SHAHINI
(NO ANONYMITY ORDER MADE)

Respondent

Representation:

For the Appellant: Mrs Arif, a Senior Home Office Presenting Officer.

For the Respondent: No appearance.

Heard at Birmingham Civil Justice Centre on 20 May 2024

DECISION AND REASONS

1. The Secretary of State appeals with permission a decision of First-tier Tribunal Judge Juss ('the Judge') promulgated on 27 April 2022 in which he allowed Mr Shahini's appeal.
2. Notices specifying the date, time, and place of this hearing were sent to the nominated addresses for service. There has been no attendance on behalf of Mr Shahini. I am satisfied he has been properly served. There is no application for an adjournment, no explanation for his non-attendance. I am satisfied it is the interests of justice to proceed in absence as on the information currently available nothing will be achieved by adjourning to a future date.
3. The sentence written by the Judge at [2] appears to relate to a different appeal.
4. The Judge correctly notes at [6] that Mr Shahini claimed to be the spouse of an EU national, a citizen of Cyprus. The marriage certificate shows the marriage occurred on 23 March 2021 which it was not accepted showed that he was a family member of an EU national at the specified date of 11 PM 31 December 2020 ('the specified date'). His application on that basis was therefore rejected by the Secretary of State who did not find Mr Shahini could satisfy the eligibility requirements for settled status under the EU Settlement Scheme (EUSS).

5. The application was considered on the basis of a durable partnership but it found Mr Shahini could not succeed on that basis as there was a requirement for the family relationship with a durable partner to be evidenced by a valid family permit or residence card under the Immigration (EEA) Regulations 2016 ('the 2016 Regulations') of which there was no evidence that such should be issued or any application for the same made before the specified date.
6. The Judge's findings are set out from [22] of the decision under challenge. The Judge sets out the reasons why he concludes Mr Shahini is able to succeed. At no point within the decision does the Judge find that Mr Shahini was in possession of a relevant document or had applied for leave as an extended family members/durable partner to be facilitated before the specified date.
7. The Secretary of State sought permission to appeal on the basis that as no relevant document was held and no successful application for facilitation had ever been made prior to the specified date, the Judge's interpretation of the requirements of (b)(ii)(bb)(aaa) Annex 1 of Appendix EU was not compatible with the requirements of the Withdrawal Agreement.
8. Permission to appeal was granted by another judge of the First-tier Tribunal who noted that the decision under appeal was promulgated a number of months before Celik and Batool.
9. That is a reference to two cases within the Upper Tribunal reported as Celik (EU exit, marriage, human rights) [2022] UKUT 00220 and Batool and Ors (other family members: EU exit) [2022] UKUT 00219. The significance of these cases is that they confirmed the need for an extended family member, such as a durable partner, to have made an application for a Residence Card in recognition of such status prior to the specified period, even if not granted by that date. It was found the Withdrawal Agreement preserved the situation that existed under the 2016 Regulations and earlier case law, which confirmed such person did not have a right to reside in United Kingdom unless it had been facilitated. The Withdrawal Agreement did not create any new rights for this group.
10. As a result of permission to appeal to the Court of Appeal being granted in Celik cases such as this were stayed. The decision of the Court of Appeal, which upheld the Upper Tribunal decision, was handed down with neutral citation Celik v Secretary of State for the Home Department [2023] EWCA Civ 921 on 31 July 2023.
11. Following a review Upper Tribunal Judge Norton-Taylor issued the following directions on 28 November 2023:
 1. Permission to appeal was granted to the Secretary of State by the First-tier Tribunal on 12 January 2023. Following this, the Court of Appeal gave its judgment in Celik v SSHD [2023] EWCA Civ 921 31 July 2023.
 2. Having considered the decision of First-tier Tribunal Judge Juss, the Secretary of State's grounds of appeal, and the judgment in Celik, I am of the provisional view that the appeal to the Upper Tribunal is highly likely to succeed as regards the finding of an error of law.
 3. Mr Shahini's current legal representatives (now AG Law) must now give careful consideration to the prospects of success at the error of law stage and also the re-making of the decision in this case.
 4. If it is accepted that the Secretary of State's appeal to the Upper Tribunal is bound to succeed and that a re-making decision would result in Mr Shahini's appeal being dismissed, the parties are invited to agree a consent order, pursuant to rule 39 of the Tribunal Procedure (Upper Tribunal) Rules 2008, disposing of the proceedings. Any request to make a consent order must be received by the Upper Tribunal within 21 days of this Directions Notice being sent out.

5. If the parties cannot agree to request an agreed consent order, they must inform the Upper Tribunal in writing within 21 days of this Directions Notice being sent out. Thereafter, the appeal will be listed for hearing.
6. In the absence of a substantive response to these directions within 21 days of this Directions Notice being sent out, or if for any other reason the Tribunal considers it appropriate, the appeal will be listed on notice to the parties shortly after the expiry of the 21 days.
12. The directions were served upon the parties. There has been no response from either party, as a result of which the matter was listed for a disposal hearing before me today.
13. I find the Judge has erred in a manner material to the decision to allow the appeal. It was accepted that Mr Shahini had never applied for his residence as an extended family member to be facilitated by the Secretary of State at any time. He did not hold the required document i.e. evidence that his status in the UK had been facilitated.
14. It is not disputed that he may well have married his wife and be in a loving relationship with her in the UK. There was, however, no application made to the Secretary of State for Article 8 ECHR to be considered which is required as this would amount to a new matter.
15. I find the Judge has misapplied the provisions of the immigration rules under Appendix EU and has materially erred in law for the reasons set out in the application for permission to appeal.
16. As there is nothing before me other than the evidence that was before the Judge, I find it in accordance with the interests of justice and overriding objective to proceed to remake the decision in this appeal by substituting a decision to dismiss the appeal. The reason for that is that there is nothing on the evidence that shows that Mr Shahini is, or has ever been able to, satisfy the requirements of Appendix EU under the terms of the Withdrawal Agreement.
17. If Mr Shahini has not not already done so, he will be advised to take advice as it maybe he has family life in the UK that warrants an application being made under Article 8 ECHR. That is, however, a matter for him.

Notice of Decision

18. I find the Judge has materially erred in law. I set the decision of the Judge aside.
19. I substitute a decision to dismiss the appeal.

C J Hanson

Judge of the Upper Tribunal
Immigration and Asylum Chamber

20 May 2024