IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2022-002034

First-tier Tribunal No:
EA/12801/2021

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On 31st May 2024

Before

UPPER TRIBUNAL JUDGE NORTON-TAYLOR
DEPUTY UPPER TRIBUNAL JUDGE SAINI

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

OKBA DERRADJI
(NO ANONYMITY ORDER MADE)

Respondent

Representation:
For the Appellant: Mr E Banham, Senior Home Office Presenting Officer
For the Respondent: No appearance by Mr Derradji or BMAP

Heard at Field House on 8 May 2024

EXTEMPORE DECISION AND REASONS

1. To avoid confusion we shall refer to the parties as they were before the First-tier Tribunal and therefore the Secretary of State is once again the Respondent and Mr Derradji the Appellant.

2. The Respondent appeals with permission against the decision of First-tier Tribunal Judge Manuell, who by a decision promulgated on 31 January 2022, allowed the Appellant's appeal against the Respondent's refusal of his EUSS application.

3. The Appellant, a citizen of Algeria, had married a Greek national in May 2021, that clearly being after the specified date of 31 December 2020. The appeal against the Respondent's refusal was brought under the Immigration (Citizens' Rights Appeals)(EU Exit) Regulations 2020, which meant that the Appellant had only two grounds available to him: first, that the decision was not in accordance with the relevant Immigration Rules, specifically Appendix EU; and secondly, whether the decision breached any rights under the Withdrawal Agreement.

4. The judge concluded that as a matter of fact the Appellant's relationship was subsisting and genuine and that it constituted a durable relationship. In light of what might be described as the relatively uncertain legal landscape at the time and possibly led somewhat astray by the position of the HOPO at the hearing, the judge considered the Withdrawal Agreement and the issue of proportionality, ultimately concluding that in light of the genuine relationship and the absence of any countervailing "public policy issues" the decision was disproportionate and the appeal was accordingly allowed.

5. The Respondent appealed on the grounds that the judge had failed to properly apply the relevant Immigration Rules, had failed to properly apply the terms of the Withdrawal Agreement and/or had failed to provide adequate reasoning in respect of the proportionality issue if that avenue had been open to him.

6. Permission was granted on all grounds.

7. Following the grant of permission, this case was one of the cohort cases stayed pending the outcome of Celik v SSHD in the Court of Appeal. Judgment was handed down on 31 July 2023: [2023] EWCA Civ 921. Following that, the Upper Tribunal issued directions to the parties requiring them to state their positions in light of Celik. A concise response was provided by the Respondent in due course, but nothing was heard from the Appellant.

8. The matter was therefore listed for an error of law hearing which came before us on 8 May 2024.

9. Neither the Appellant nor his legal representatives appeared at the hearing. Having investigated the matter, we were satisfied that BMAP remained on record, that the notice of hearing had been sent out to the representatives at 9:49 on 17 April 2024, and that there had been no communications from either the Appellant or his representatives as to why there was no attendance. The Tribunal's clerk helpfully attempted to contact the representatives by telephone and through email, but no response was received.

10. We consider the position as at 12:55 on the day of the hearing and asked Mr Banham for his position, which he confirmed was that we should proceed in the Appellant's absence.

11. Having considered Rule 38 of the Upper Tribunal's Procedure Rules and the core issue of fairness, we concluded that we should indeed proceed given the absence of any explanation for non-attendance and what we were satisfied was the proper service of the notice of this hearing.

12. It is quite clear to us that in light of Celik the judge materially erred in law by allowing the Appellant's appeal. On the basic facts as found, the Appellant could not satisfy the relevant definition of "durable

partner" under Annex 1 to Appendix EU as he did not hold a "relevant document" (no alternative basis has ever been put forward on the Appellant's behalf). In addition and again in light of Celik, the Appellant was not able to rely on the Withdrawal Agreement, specifically the issue of proportionality under Article 18.

13. There was no Article 8 issue in the appeal before the judge.

14. In light of the above, the judge's decision must be set aside.

15. There is no reason as matters stand why we could and should not go on and remake the decision in this appeal based on the information currently before us and this we now do.

16. The nature of the Appellant's relationship with the EEA national has never been challenged and we preserve the judge's finding of fact that that relationship was durable, subsisting and perfectly genuine. However, it is plain to us that the Appellant could not satisfy the requirements of Appendix EU, given that he did not hold a "relevant document" at the material time. For the sake of completeness it is now also clear that even if an argument based on what has been described as the "(aaa)" argument had been put forward, this would be bound to fail in light of the recent reported case of Hani (EUSS durable partners: para. (aaa)) [2024] UKUT 00068 (IAC). Further, the Appellant cannot rely on the provisions of the Withdrawal Agreement to assist him in terms of proportionality, or otherwise. He was not a person whose entry had been "facilitated" in any relevant way as at the specified date of 31 December 2020. As mentioned earlier Article 8 does not arise in the context of this appeal.

17. It follows that the Appellant's appeal against the Respondent's decision of 1 July 2021 refusing his application under the EUSS must be dismissed.

18. There is no basis on which to make an anonymity direction in this case.

Notice of Decision

The making of the decision of the First-tier Tribunal did involve the making of an error on a point of law.

We exercise our discretion under section 12(2)(a) of the Tribunals, Courts and Enforcement Act 2007 and set aside the decision of the First-tier Tribunal.

We re-make the decision by dismissing the appeal under the Immigration (Citizens' Rights Appeals)(EU Exit) Regulations 2020.

As we have dismissed the appeal, we make no fee award.

H Norton-Taylor

Judge of the Upper Tribunal
Immigration and Asylum Chamber

Dated: 21 May 2024