



IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2022-003117
FTT No: EA/14731/2021

THE IMMIGRATION ACTS

Decision & Reasons Issued:

6 September 2024

Before

UPPER TRIBUNAL JUDGE BRUCE
UPPER TRIBUNAL JUDGE RASTOGI

Between

Secretary of State for the Home Department

Appellant

and

Floreta Zela
(no anonymity order made)

Respondent

Representation:

For the Appellant: Ms Nolan, Senior Home Office Presenting Officer
For the Respondent: No Appearance

Heard at Field House on 21 August 2024

DECISION AND REASONS

1. The Respondent is a national of Albania born on the 11th September 1991. On the 28th March 2022 her appeal was allowed by the First-tier Tribunal (Judge Shiner). The Secretary of State now has permission to appeal against that decision.
2. The first matter in issue before Judge Shiner was whether the Respondent was entitled to be granted pre-settled status in accordance with the provisions set out in Appendix EU of the Immigration Rules. She contended that she had been in a durable relationship with an EEA national from 2019 and that leave should be granted on that basis. Judge Shiner considered the definition of 'durable partner' set out in Annex 1 of Appendix EU and found that the Respondent did not qualify. Her difficulty was that she had not been in possession of a relevant document confirming that status prior to the specified date when the UK left the EU. The Respondent has not sought to contest that part of the decision.

3. In the alternative Judge Shiner considered whether the Respondent should have the benefit of the provisions of the Withdrawal Agreement. Although he was not satisfied that any of the provisions therein had any direct application to her, he did accept Counsel's argument that the Secretary of State had been bound to consider whether it was proportionate to refuse pre-settled status to a woman whom on the uncontested facts had been a durable partner of a Latvian national since 2019 and had been, since the 29th March 2021, his wife. The Secretary of State had failed to consider this matter; Judge Shiner did so on her behalf and found that the balance falls strongly in favour of the Respondent, who had only been unable to marry her partner prior to the specified date because of Covid-19 restrictions. In a decision dated the 10th March 2022 he allowed the appeal on that limited basis.
4. The Secretary of State sought permission to appeal on the 5th April 2022. Her principal complaint was framed as follows:

The Appellant was not within the personal scope of the Withdrawal Agreement under any part of Article 10, as she was at its very highest on 31 December 2020 an undocumented durable partner under regulation 8(5) of the 2016 Regulations. That was not "residing in accordance with Union law" which left to national legislation the facilitation of entry and residence under Article 3.2 of the 2004 Directive, and barring such facilitation having taken place Articles 10(2) and 10(3) are not engaged. In passing, such facilitation would have resulted in possession of the "relevant document" required by Scheme rules and obviated the need to rely on Withdrawal Agreement rights.
5. Permission was granted by First-tier Tribunal Judge Murray on the 11th May 2022 who considered it arguable that the Respondent was not within scope of the Withdrawal Agreement and so could not benefit from any of its provisions.
6. On the 19th July 2022 the Upper Tribunal handed down the decision in Celik (EU Exit-marriage-human rights) [2022] UKUT 00220 (IAC) which *inter alia* confirmed that the Secretary of State's central ground in this case was correct.
7. On the 29th November 2022 Upper Tribunal Judge Jackson gave Directions drawing the parties' attention to the decision in Celik, and expressing the preliminary view that that there is a material error of law in the First-tier Tribunal's decision for failure to apply the correct legal framework to applications under the EU Settlement Scheme where a marriage has taken place after the 31 December 2020 and the Appellant's entry and residence had not been facilitated or even applied for as a durable partner prior to 31 December 2020, even where a marriage might have taken place before this date but for the Covid-19 pandemic. She observed that "following Celik there appears to be no way in which the Appellant's appeal can succeed on its facts". In those circumstances, Upper Tribunal Judge Jackson indicated that she was minded to find a material error of law in the decision of the First-tier Tribunal, set aside the decision of the First-tier Tribunal and substitute the decision on the appeal to dismiss the appeal. She gave directions that any party who opposed this course of action should inform the Tribunal within 21 days.
8. As it happened these directions were not acted upon. That is because the appellant in Celik was granted permission to appeal to the Court of Appeal and so all cases involving the same facts were stayed. The Court of Appeal decision,

which in material part upheld the Upper Tribunal's reasoning, was handed down on the 31st July 2023: Celik [2013] EWCA Civ 921.

9. Further to that judgment the Upper Tribunal issued further directions, this time given by Upper Tribunal Judge L Smith on the 13th October 2023. These were, in essence, couched in the same terms as those given by Judge Jackson.
10. On the 24th January 2024 the Respondent's representatives Sentinel Solicitors responded to Judge Smith's Directions requesting a further stay until it was known whether Celik's case would be heard by the Supreme Court.
11. Celik was refused permission to appeal to the Supreme Court on the 31st January 2024.
12. The Tribunal has received no further communication from Sentinel Solicitors, or the Respondent herself. Neither were in attendance at the hearing before us. We considered whether we could justly proceed in their absence. We noted that the Notice of Hearing had been sent to Sentinel Solicitors by email on the 9th July 2024. The Respondent had herself been served by post on the same date to her last known address. We are satisfied that this constituted good service. We were further satisfied that the Respondent had been given the opportunity to respond to the Secretary of State's case on three occasions: she could have served a Rule 24 response after permission was granted by Judge Murray, or made submissions in response to either the Directions of Judge Jackson or Judge Smith. In view of that chronology, and having regard to the overriding objective, we decided to proceed to hear the Secretary of State's appeal.
13. Ms Nolan relied on the written grounds and the decisions of this Tribunal and the Court of Appeal in Celik. She submitted that there was a material error of law in the First-tier Tribunal allowing the appeal for the reasons given. The Respondent could not succeed as a spouse, as the marriage took place after the specified date of the 31st December 2020. Furthermore, the Withdrawal Agreement provides no applicable rights to a person in the Respondent's circumstances: she had not been residing in the UK in accordance with EU law as of the specified date, and had not had her residence as a 'durable partner' facilitated in accordance with national legislation (ie the Immigration (European Economic Area) Regulations 2016). She was not therefore within the personal scope of the Withdrawal Agreement. Accordingly, there was no entitlement to the full range of judicial redress including the Article 18(1)(r) requirement that the decision was proportionate, relied upon by Judge Shiner in allowing the appeal.
14. We agree. We further agree that applying Celik there is no way, on the facts as found, that the Respondent could succeed before a properly directed Tribunal. We therefore set the decision of Judge Shiner aside and remake the decision in the appeal by dismissing it.

Decisions

15. The decision of the First-tier Tribunal is set aside.
16. The decision in the appeal is re-made as follows: the appeal is dismissed.
17. There is no order for anonymity.

Upper Tribunal Judge Bruce
Immigration and Asylum Chamber

27th August 2024