IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case Nos.: UI-2022-003365

First-tier Tribunal Nos: EA/00171/2022

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On 1 July 2024

Before

UPPER TRIBUNAL JUDGE L SMITH

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

And

EGZON SHETA

Respondent

DECISION AND REASONS
[MADE WITHOUT A HEARING PURSUANT TO RULE 39 OF THE TRIBUNAL PROCEDURE (UPPER TRIBUNAL) RULES 2008]

1. This is an appeal by the Secretary of State. For ease of reference, I refer to the parties as they were before the First-tier Tribunal. The Respondent appeals against the decision of First-tier Tribunal Judge Dineen promulgated on 31 May 2022 ("the Decision") allowing the Appellant's appeal against the Respondent's decision dated 1 July 2021 refusing him status under the EU Settlement Scheme ("EUSS") as the spouse of an EEA national.

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2. The Respondent refused the Appellant's application on the basis that his marriage was not contracted until after 31 December 2020. Accordingly, the Appellant was not a family member prior to the date of the UK's departure from the EU and could not benefit as such under either the rules relating to EUSS (Appendix EU) or the withdrawal agreement between the UK and the EU on the UK's departure from the EU ("the Withdrawal Agreement").

3. It was accepted that the Appellant could not establish his case as a family member under Appendix EU. However, the Appellant also argued that the Respondent's decision was contrary to the Withdrawal Agreement. He relied in particular on Articles 18(1)(r) of the Withdrawal Agreement. Judge Dineen did not accept that argument but found that he could determine the proportionality of the Respondent's decision including the impact on the family and private life of the Appellant, his wife and stepchildren. He also took into account that the Appellant was unable to marry his wife before he did due to the Covid-19 pandemic. He purported to allow the appeal on the basis that the Respondent's decision was disproportionate applying regulation 9(4) of the Immigration (Citizens Rights Appeals) (EU Exit) Regulations 2020 ("the 2020 Regulations") and concluding that the appeal therefore fell to be allowed under Appendix EU (in spite of having found that the Appellant could not meet the definition section of that appendix).

4. The Respondent appealed the Decision on two grounds. First, he argued that Article 18(1)(r) of the Withdrawal Agreement did not have the effect contended for by the Appellant (although it does not appear that Judge Dineen accepted that argument in any event). Second, however, he argued that the Judge's allowing of the appeals having regard to the 2020 Regulations arose from a misinterpretation of those regulations and that the Judge had failed to show how reliance on those regulations and the principle of proportionality could lead to the appeal succeeding under either the Withdrawal Agreement or Appendix EU. It was pointed out that Article 8 ECHR was not relevant to this appeal.

5. Permission to appeal was granted by First-tier Tribunal Judge I D Boyes on 22 June 2022 on the basis that all grounds were "clearly arguable".

6. The appeal was thereafter stayed in this Tribunal in consequences of this Tribunal's decision in Celik (EU exit; marriage; human rights) [2022] UKUT 00220 (IAC) ("Celik"). The Tribunal's guidance in that case was upheld by the Court of Appeal ([2023] EWCA Civ 921).

7. By directions dated 3 June 2024 and sent on 6 June 2024, I indicated my provisional view that the guidance in Celik and the Court of Appeal's judgment upholding that guidance was likely to be determinative of the Respondent's appeal in his favour. Whilst the 2020 Regulations were not at issue in the arguments before the Tribunal or Court of Appeal in Celik, Article 18(1)(r) of the Withdrawal Agreement was. Further, the facts of this

case are essentially on all fours with Celik. I therefore invited the parties to consider agreeing a consent order to dispose of the appeal.

8. By a consent order dated 19 June 2024, both parties agreed with that view. The consent order reads as follows:

> "Pursuant to Rule 39(1) of the Tribunal Procedure (Upper Tribunal) Rules 2008, the parties consent to the disposal of the above appeal on the following agreed basis:
> 1. UPON Upper Tribunal Judge L K Smith having issued directions dated 3rd June 2024, requiring the parties to consider whether the appeal can be disposed of by consent of the parties;
> 2. AND UPON the parties having reached agreement, following the decision of the Court of Appeal in *Celik v Secretary of State for the Home Department* [2023] EWCA Civ 921, that the only possible outcome of these proceedings is for the First-tier Tribunal's decision and reasons to be set aside, and the underlying appeal to be dismissed.
> 3. The Upper Tribunal is invited to set aside the decision of the First-tier Tribunal; and to remake the underlying appeal so as to dismiss it."

9. I am satisfied that it is appropriate to make a decision without a hearing and in accordance with the terms of the consent order. I therefore make that decision below.

NOTICE OF DECISION

The Decision of Judge Dineen promulgated on 31 May 2022 involved the making of an error of law. I therefore set aside that Decision. I re-make the decision by dismissing the Appellant's (Mr Sheta's) appeal.

L K Smith
Judge of the Upper Tribunal
Immigration and Asylum Chamber
25 June 2024