IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2022-005773

First-tier Tribunal No: EA/14954/2021

THE IMMIGRATION ACTS

Decision & Reasons Issued:

6th February 2024

Before

DEPUTY UPPER TRIBUNAL JUDGE BEN KEITH

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

BUKUROSH KECI
(NO ANONYMITY ORDER MADE)

Respondent

Representation:

For the Appellant: Mr T Melvin, Senior Home Office Presenting Officer
For the Respondent: No attendance

Heard at Field House on 30 January 2024

DECISION AND REASONS

1. This is the Secretary of State for the Home Department's appeal, however I will refer to the parties as they were referred to in the First-tier Tribunal.

2. This is an appeal by the Secretary of State against the decision of First-tier Tribunal Judge Sweet dated 16 May 2022.

3. Mr Keci, the appellant, is a citizen of Albania, born on 11 December 1976. He appealed against the decision of the Secretary of State dated 24 September 2021 to refuse his application for settlement under the EU Settlement Scheme (EUSS) as set out in Appendix EU of the Immigration Rules.

©CROWN COPYRIGHT 2024

4. The Secretary of State appealed on a number of grounds as set out in the IAFT 4 form but in particular that the First-tier Tribunal Judge made a material misdirection of law in relation to whether or not the Appellant was exercising his EU rights prior to the date of the withdrawal agreement.

5. Before I deal with the law and the facts of this matter I shall deal first with the issue of adjournments. This case was previously listed before Deputy Upper Tribunal Judge Skinner ("DUTJ Skinner") on 3 November and DUTJ Skinner gave directions on 2 November which I do not repeat in full but in essence he adjourned the case on the basis of medical issues with the Appellant's wife but required the Appellant to provide that medical evidence in original format, required the Appellant to explain whether or not he was in the country or not as his appeal might then be forfeit, and also noted that any further adjournment application might be looked on unfavourably.

6. Mr Melvin for the Home Office has been directly communicating with the Appellant who wrote to Mr Melvin on 29 January last night late in the evening asking for an adjournment. Of course the Appellant should have made an application to the Tribunal and has not done. This was in response to Mr Melvin's helpful email to him on Monday 29 January checking whether he was going to attend the hearing and whether there was any further evidence that the Appellant wished to supply.

7. I therefore have no application for adjournment before me. However, even if I did have an application for an adjournment before me I would refuse it. The appellant in his email to Mr Melvin says:

> "I am writing to inform you that unfortunately, my wife will not be able to attend the hearing scheduled for tomorrow, 31 January 2024. She is currently out of the country as she had to undergo an eye surgery, and she is still in the process of healing. Therefore, I am unable to attend the hearing without her presence.
>
> I apologize for the short notice, but this situation was unexpected. To support my claim, I have attached a doctor's letter confirming the need for her absence and the ongoing recovery process.
>
> I kindly request your understanding and cooperation rescheduling the hearing to a later date when my wife will be able to attend. We are committed to participating fully in the process, but unfortunately, her current medical condition prevents her from doing so at this time.
>
> Thank you for your attention to this matter. I look forward to your prompt response and a suitable resolution".

8. In my judgment the appellant is doing anything but engaging with the process. This is exactly the same reason that DUTJ Skinner adjourned the hearing in November 2023. There is no formal application for an adjournment and I would not grant one because there is no proper evidence that the appellant has engaged, that he is in the country or that he could not attend today but also because the appeal by the Secretary of State is bound on the law to be successful. Therefore in my judgment the case must procced today.

9. Dealing very briefly with the law, this case is governed by the case of **Celik (EU exit, marriage, human rights) [2022] UKUT 00220 (IAC)** and as DUTJ

Skinner noted in his adjournment request the Court of Appeal in **Celik v Secretary of State for the Home Department [2023] EWCA Civ 921** confirmed that that judgment was correct. Dealing very briefly with the headnote from Celik:

> "(1) A person (P) in a durable relationship in the United Kingdom with an EU citizen has as such no substantive rights under the EU Withdrawal Agreement, unless P's entry and residence were being facilitated before 11pm GMT on 31 December 2020 or P had applied for such facilitation before that time.
>
> (2) Where P has no such substantive right, P cannot invoke the concept of proportionality in Article 18.1(r) of the Withdrawal Agreement or the principle of fairness, in order to succeed in an appeal under the Immigration (Citizens' Rights) (EU Exit) Regulations 2020 ('the 2020 Regulations'). That includes the situation where it is likely that P would have been able to secure a date to marry the EU citizen before the time mentioned in paragraph (1) above, but for the Covid-19 pandemic.
>
> (3) Regulation 9(4) of the 2020 Regulations confers a power on the First-tier Tribunal to consider a human rights ground of appeal, subject to the prohibition imposed by regulation 9(5) upon the Tribunal considering a new matter without the consent of the Secretary of State".

10. The decision of Judge Sweet was made before the Upper Tribunal gave judgment in **Celik** and in any event does not deal correctly with the test, only dealing with whether or not there is a durable partnership between the appellant and his wife which although the judge found there was a durable relationship did not deal with the issue of whether in fact the appellant had a right to reside. The evidence is accepted that the appellant has no document which shows that he had a right to reside in the United Kingdom before the date of the withdrawal agreement and therefore under **Celik** and the EUSS Scheme cannot qualify as a durable partner under that Scheme. As a result there is an error of law.

11. I therefore go on to remake the appeal. Given this is a pure error of law matter and the facts are accepted I dismiss the Appellant's appeal as he does not have a relevant document to show that he had entitlement to be in the United Kingdom prior to the date of the withdrawal agreement and therefore in accordance with **Celik** and the EUSS Scheme I find an error of law and I remake the appeal dismissing the Appellant's appeal against the Secretary of State's decision.

Notice of Decision

1. There is a material error of law and the decision of the First Tier Tribunal is set aside.
2. Upon remaking the appeal it is dismissed.

Ben Keith

Deputy Judge of the Upper Tribunal
Immigration and Asylum Chamber

30 January 2024