Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: UI-2022-003992
(EA/01627/2022)

THE IMMIGRATION ACTS

Heard at: Field House
On : 11 January 2023

Decision & Reasons Promulgated
On: 21 March 2023

Before

UPPER TRIBUNAL JUDGE KEBEDE

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

AKIL PALUSHI

Respondent

Representation:
For the Appellant: Mr E Tufan, Senior Home Office Presenting Officer
For the Respondent: Mr J Collins, instructed by Sentinel Solicitors

DECISION AND REASONS

1. This is an appeal by the Secretary of State for the Home Department against the decision of the First-tier Tribunal allowing Mr Palushi's appeal against the decision to refuse his application under the EU Settlement Scheme (EUSS) as the spouse/ durable partner of an EEA national.

2. For the purposes of this decision, I shall hereinafter refer to the Secretary of State as the respondent and Mr Palushi as the appellant, reflecting their positions as they were in the appeal before the First-tier Tribunal.

3. The appellant, a national of Albania born on 1 January 1998, claimed to have arrived in the UK in March 2014 and to have been granted leave for 30 months as a victim of trafficking, but to have then been refused further leave and to have been unsuccessful in an appeal against the refusal to grant him leave. He has been without leave since that time. He met his wife, Eleni Dhima, a Greek national, in early January 2020 and commenced a relationship with her and cohabited with her from March 2020. His wife proposed to him on 8 June 2020, and they then tried to book an appointment to give notice of intention to marry on 12 December 2020 but owing to the pandemic were unable to do so until 26 April 2021. They were married on 8 July 2021.

4. On 12 July 2021 the appellant made an application under the EUSS as the spouse of a relevant EEA national. His application was refused by the respondent on 18 November 2021. The respondent considered that the requirements of Appendix EU of the immigration rules were not met as the appellant had not provided sufficient evidence to confirm that he was a family member of a relevant EEA citizen prior to the specified date, 31 December 2020. His marriage took place after the specified date. The required evidence of family relationship as a durable partner was a valid family permit or residence card issued under the EEA Regulations. The respondent had no record of the appellant having been issued with such a document. It was considered by the respondent that the appellant therefore qualified for neither settled nor pre-settled status under the EUSS.

5. The appellant appealed against that decision and his appeal came before First-tier Tribunal Judge Richardson on 20 July 2022. The judge accepted the evidence about the appellant's and his wife's relationship and accepted that at the time of the application they were in a durable partnership. He accepted that, on that basis, the appellant met the requirements of the EUSS and he allowed the appeal "on the EU ground" in a decision promulgated on 25 July 2022.

6. The Secretary of State sought permission to appeal to the Upper Tribunal on grounds which, for a large part, related to a different case and decision, but in so far as they related to this case asserted that the judge had made a material misdirection in law on a material matter and erred in law by allowing the appeal.

7. Permission was granted by the First-tier Tribunal and the matter then came before me.

Hearing and Submissions

8. Mr Tufan agreed that part of the grounds appeared to have been cut and pasted from another case but submitted that there was sufficient in the grounds to show the challenge being made to the First-tier Tribunal's decision. He submitted that the facts of the appellant's case were on all fours with Celik (EU exit, marriage, human rights) [2022] UKUT 220 and the appellant's case therefore failed on that basis. The decision should therefore be set aside and re-made by dismissing the appellant's appeal.

9. Mr Collins agreed that, whilst I was not bound by the decision in Celik, it was persuasive. However, his submission was that the circumstances in the appellant's case did not fall within "Celik territory", since the grounds did not relate to the decision in this appellant's case, they were a mess and they referred to the Withdrawal Agreement which did not form part of, or relate to, the judge's decision. He submitted that the challenge in the grounds was therefore completely misguided. Mr Collins submitted that even if it was found that there was sufficient in the grounds to bring the challenge into Celik territory, the decision should not simply be re-made by dismissing the appeal. He submitted that proportionality had not been addressed by the judge whereas the Tribunal in Celik found that proportionality was in play, and there therefore needed to be a fresh hearing for a proportionality assessment to be made. He submitted that the appellant's case differed to that of Celik since in that case the Tribunal noted that there was a lack of evidence to support the assertion that the appellant and his wife had tried to book their wedding ceremony in 2020, whereas in this case the judge had made a finding of fact that the appellant had tried to do so. That was relevant to a proportionality assessment.

10. Mr Tufan, in response, submitted that the Tribunal's reference to proportionality in Celik at [63] was intended to cover exceptional cases such as, potentially, the case of people who were in the UK lawfully and were therefore not documented under the EEA Regulations, but not people in the appellant's circumstances.

Discussion

11. The Secretary of State's grounds have been carelessly drafted and Ms McNamee, who drafted the grounds, should perhaps be reminded that cutting and pasting from other cases is simply not adequate. That being said, it is clear that Ms McNamee nevertheless was considering the appellant's case and the decision of Judge Richardson, as reflected at the beginning of her grounds, and the grounds do include a properly arguable challenge to the judge's failure to consider the issue of the appellant not holding a 'relevant document' and his decision that the appellant met the relevant requirements as a 'durable partner'. I agree with Mr Tufan that the cut and pasted part of the grounds does not materially impact upon the challenge in the grounds as a whole and I reject Mr Collins' submission to the contrary.

12. Likewise, I reject Mr Collins' submission that the Secretary of State's challenge was outside Celik territory, when the appellant's circumstances are clearly on all fours with those addressed in Celik and when the grounds raise the same challenge as that made in Celik in relation to the requirement to be in possession of a 'relevant document' for the purposes of qualifying under the EUSS as a durable partner. In light of the decision in Celik, it is clear that Judge Richardson was not entitled to find that the appellant could meet the requirements of the EUSS. He could not meet the requirements under Appendix EU as a family member because his marriage took place after 31 December 2020 and he neither held a 'relevant document' as evidence that residence had been facilitated under the EEA Regulations nor had he made such an

application for facilitation prior to that date for the purposes of meeting the requirements as a durable partner. For the same reasons the appellant could not benefit from the Withdrawal Agreement. Judge Richardson clearly misdirected himself in law by allowing the appeal on the basis that he did and accordingly his decision is set aside.

13. Mr Collins submitted that the decision in the appellant's appeal should not simply be re-made by dismissing the appeal, but that there still needed to be a proper proportionality assessment carried out by the Tribunal. However, as Mr Tufan submitted, the appellant's case is on all fours with Celik and cannot succeed. I reject the suggestion made by Mr Collins that Celik provided scope for a proportionality assessment in circumstance such as the appellant's. Whilst the Upper Tribunal, at [62] and [63] of Celik, recognised the scope for a proportionality assessment, that was in specific circumstances such as where an unnecessary administrative burden had been imposed by the host State on an applicant. However, as Mr Tufan submitted, that was not considered to include someone in the appellant's circumstances and I reject the suggestion by Mr Collins that an inability to arrange a marriage ceremony prior to 31 December 2020 owing to the pandemic could amount to such a burden. Although, contrary to the accepted facts of this appellant's case, the Upper Tribunal in Celik noted a lack of evidence to confirm Mr Celik's assertion to have attempted to secure a date for his wedding prior to 31 December 2020, they proceeded on the assumption that that was true and rejected the arguments made in relation to fairness and proportionality.

14. There is accordingly no basis upon which to distinguish this appellant's case from Celik as Mr Collins sought to do. Mr Collins accepted that, whilst I am not bound to follow Celik, it is persuasive, and indeed I do rely on Celik, being a decision of a presidential panel which, although the subject of an application for permission to appeal to the Court of Appeal, remains the relevant authority. In the circumstances, as Mr Tufan submitted, and for the reasons already given above, the appellant cannot succeed under the EUSS and his case, and his appeal, is bound to fail. The decision must therefore be re-made by dismissing the appeal.

DECISION

15. The making of the decision of the First-tier Tribunal involved an error on a point of law. The Secretary of State's appeal is accordingly allowed, and First-tier Tribunal Judge Richardson's decision is set aside.

16. I re-make the decision by dismissing Mr Palushi's appeal.

Signed: S Kebede
Upper Tribunal Judge Kebede Dated: 12 January 2023