Upper Tribunal
(Immigration and Asylum Chamber)   Appeal Number: UI-2022-002778
EA/12542/2021

THE IMMIGRATION ACTS

Heard at Field House   **Decision & Reasons Promulgated**
On 11ᵗʰ October 2022   **On 20ᵗʰ November 2022**

Before

UPPER TRIBUNAL JUDGE LINDSLEY

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

<u>Appellant</u>

and

ABDYL CELIKU
(ANONYMITY ORDER NOT MADE)

<u>Respondent</u>

Representation:
For the Appellant: Ms A Ahmed, Senior Home Office Presenting Officer
For the Respondent: Ms O Waddell, of Counsel, instructed by AA Immigration
                     Lawyers

DECISION AND REASONS

Introduction

1.   The claimant is a citizen of Albania born on 9ᵗʰ April 1996. He is in the UK without leave to remain. On 6ᵗʰ April 2021 he applied for pre-settled status as the durable partner of Ms Lavinia Stanescu, a citizen of Romania with pre-settled status in the UK. He married Ms Stanescu on 10ᵗʰ August 2021. His application was refused on 15ᵗʰ August 2021 on the

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basis he did not meet the requirements of the Immigration Rules. His appeal against the decision was allowed by First-tier Tribunal Judge Phull after a hearing on the 2nd February 2022.

2.   Permission to appeal was granted by Judge of the First-tier Tribunal Parkes on 6th May 2022 on the basis that it was arguable that the First-tier judge had erred in law in failing to apply the relevant Immigration Rules with reference to the definition of a durable partner for this scheme at Appendix EU Annex 1(b) when making the decision, in circumstances where it was arguable that the claimant could not meet these Immigration Rules.

3.   The matter came before me to determine whether the First-tier Tribunal had erred in law, and if so to determine whether any error was material and the decision should be set aside.

Submissions – Error of Law & Remaking

4.   In the grounds of appeal and in submissions for the Secretary of State by Ms Ahmed it is argued, in short summary, as follows. The First-tier Tribunal misdirected itself in law because it failed to reference the requirements of the Immigration Rules at Appendix EU Annex 1 which is the definition of a durable partner. The claimant did not hold a relevant document prior to the specified date so could not fulfil the definition at Annex 1(b)(i); and was not lawfully present so could not fulfil the definition at Annex 1(b)(ii). The grace period for applications was not something that could create rights for persons who had not acquired them before the specified date of 31st December 2020, and the First-tier Tribunal also misdirects itself on this point.

5.   In oral submissions for the claimant Ms Waddell submitted as follows. She offered no submissions in response to the Secretary of State's challenge but asked that the finding that the claimant was in a genuine relationship with his durable partner and now spouse should be preserved.

Conclusions – Error of Law & Remaking

6.   The First-tier Tribunal errs in law by misdirecting itself at paragraph 9 of the decision that the grace period for applications (which ended on 1st July 2021) altered the Immigration Rules with respect to the ability to acquire rights under Appendix EU and the Withdrawal Agreement. It did not do this, as it did not create rights, but merely provided a further period in which people who acquired rights prior to the specified date of 31st December 2020 were able to make applications based on those rights, this is clear from, inter alia, paragraph 57 of Celik (EU exit; marriage; human rights) [2022] UKUT 220 (IAC).

7.   The First-tier Tribunal then compounds this legal misdirection by failing to look at the requirements of Appendix EU Annex 1 and the definition of

a durable partner, and simply treating this as a factual matter as to whether the claimant and his partner were in a genuine relationship at paragraphs 15 to 20 of the decision. The findings that they are in a genuine relationship were open to the First-tier Tribunal and properly reasoned but were not the ones need to find that the claimant was entitled to succeed in the appeal.

8.   I therefore find that the First-tier Tribunal has relied upon misdirections of law when allowing the appeal, and set aside the decision.

9.   If the requirements of Annex 1 of Appendix EU are examined then it is clear that the claimant cannot succeed in his appeal as he does not meet the requirements to show that he is a durable partner. He cannot meet the requirements of Annex 1(b)(i) as he did not hold a relevant document showing that his durable relationship had been facilitated under EU law, or that he had applied for such a document, prior to the 31st December 2020. He clearly could not have done this as he only met his partner and now wife in January 2021. He cannot meet the requirements of Annex 1 (b)(ii) because whilst he does not hold a relevant document and made his application after the specified date he was unlawfully present prior to the specified date which the respondent has submitted must not have been the case under this provision at b(ii)(bb)(aaa) and which the appellant has not argued is wrongly interpreted in this way. It is clear that the claimant was unlawfully present prior to the specified date because he states that he entered the UK unlawfully on 14th June 2018 in his application to the Secretary of State.

10. I therefore find that the errors of law by the First-tier Tribunal were therefore material and remake the appeal dismissing is under the Immigration Rules and Withdrawal Agreement.

11. The finding that the claimant's marriage is genuine and subsisting is not challenged by the Secretary of State. If he wishes to remain in the UK he should now take specialist legal advice on other ways to regularise his stay on the basis of his marriage using domestic law immigration provisions.

Decision:

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

2. I set aside the decision of the First-tier Tribunal allowing the appeal.

3. I re-make the decision in the appeal by dismissing it.

Signed: Fiona Lindsley   Date: 11th October 2022

Upper Tribunal Judge Lindsley