



**Upper Tribunal
(Immigration and Asylum
Chamber)**

**Appeal Number: UI-2022-003110
On appeal from EA/14535/2021**

THE IMMIGRATION ACTS

**Heard at Field House IAC
On the 20 December 2022**

**Decision & Reasons Promulgated
On the 27 February 2023**

Before

UPPER TRIBUNAL JUDGE GLEESON

Between

**OLTJON TOSKU
[NO ANONYMITY ORDER]**

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the appellant: Ms Alexandra Everett, a Senior Home Office Presenting Officer

For the respondent: Mr Sajid Mustafa of Counsel, appearing by Direct Access

DECISION AND REASONS

1. The Secretary of State appeals with permission from the decision of the First-tier Tribunal allowing the claimant's appeal against her decision on 28 September 2021 to refuse his application under the EU Settlement Scheme (EUSS). The claimant is a citizen of Albania.
2. **Mode of hearing.** The hearing today took place face to face.

Background

3. The claimant came to the UK from Albania and in September 2020, he contracted an Islamic marriage with Ms Paula Balan-Bauman, an EEA citizen living in the UK.
4. The parties subsequently married in a civil ceremony on 9 April 2021, but that date falls after the EUSS transition date of 11 pm on 31 December 2022.

Refusal letter

5. The Secretary of State's refusal was under rule EU11 of Appendix EU of the Immigration Rules HC 395 (as amended). The claimant could not qualify as a spouse within the scheme.
6. The claimant's application was refused under paragraph EU6 of Appendix EU, pursuant to the Immigration (Citizens' Rights Appeals) (EU Exit) Regulations 2020. He had not been issued with a family permit or residence card under the Immigration (European Economic Area) Regulations 2016 (as saved) as the durable partner of an EEA national, nor had he made any application for such a document before the transition date.
7. The claimant appealed to the First-tier Tribunal.

First-tier Tribunal decision

8. The First-tier Tribunal allowed the appeal. The judge found that the parties were broadly credible witnesses. The claimant had been precluded by the lockdown from entering into a civil marriage before the end of the transition period. He had met his wife in June 2020, and they parties had begun cohabiting in October 2020 after their Islamic wedding in September 2020.
9. The First-tier Judge found the relationship to be genuine, subsisting and durable, based on that period of cohabitation and the April 2021 civil marriage. The decision concluded:

"10. On the particular facts of this appeal, I find that the [Secretary of State's] decision is disproportionate. I find that the couple were in a durable relationship prior to the end of the transition period. The couple are now married. I find that the couple are in a genuine and durable relationship and note that had they applied prior to the end of the transition period, on the basis of their durable relationship, I would have allowed the appeal under the EEA Regulations. This route is no longer open to them, however, it would be disproportionate in my judgment to deny the [claimant] leave under the Withdrawal Agreement because the couple waited until they were married before applying under the Scheme."

10. The Secretary of State appealed to the Upper Tribunal.

Permission to appeal

11. The Secretary of State's grounds of appeal are adequately summarised in the grant of permission to appeal. When granting permission, Judge Morgan considered ground 1 to be unarguable.
12. Permission was granted by reference to ground 2, which complained that the First-tier Judge had failed to give adequate reasons for applying the Withdrawal Agreement rather than Appendix EU, which required the claimant to have pre-transition date documents. The judge granting permission considered that to be arguably material to the outcome of the appeal.

Rule 24 Reply

13. There was no Rule 24 Reply by the claimant.
14. That is the basis on which this appeal came before the Upper Tribunal.

Upper Tribunal hearing

15. At the Upper Tribunal hearing, Ms Everett for the Secretary of State relied on the grounds of appeal and on *Celik (EU Exit, marriage, human rights)* [2022] UKUT 220 (IAC). The facts of this appeal could not be distinguished from the *Celik* guidance, which was determinative of the appeal.
16. It was not in dispute that the claimant lacked the relevant document, or any evidence of facilitation, when the application was made. The First-tier Judge's decision was *ultra vires* and wrongly decided. It remained open to the claimant to seek leave to remain by another, non-EU route.
17. Ms Everett asked the Tribunal to dismiss the appeal.
18. For the claimant, Mr Mustafa relied on the exception in Appendix EU at (b)(ii)(aaa). No document was required and the claimant was entitled to pre-settled status. The EUSS application had been made before the transition date but Mr Mustafa accepted that the claimant did not have any relevant document at that date. The First-tier Judge's decision was in accordance with the Rules.
19. Mr Mustafa asked me to uphold the decision of the First-tier Tribunal.
20. I reserved my decision which I now give.

Appendix EU: durable partner

21. Appendix EU defines 'durable partner' for EUSS pps as flos :

“(a) the applicant is, or (as the case may be) was, in a durable relationship with the relevant EEA citizen (or, as the case may be, with the qualifying

British citizen), with the couple having lived together in a relationship akin to a marriage or civil partnership for at least two years (unless there is other significant evidence of the durable relationship); and

(b) where the applicant was resident in the UK and Islands as the durable partner of a relevant EEA citizen before the specified date, the applicant held a relevant document as the durable partner of the relevant EEA citizen or, where there is evidence which satisfies the entry clearance officer that the applicant was otherwise lawfully resident in the UK and Islands for the relevant period before the specified date (or where the applicant is a joining family member) or where the applicant relies on the relevant EEA citizen being a relevant person of Northern Ireland, there is evidence which satisfies the entry clearance officer that the durable partnership was formed and was durable before the specified date; and

(c) it is, or (as the case may be) was, not a durable partnership of convenience; and

(d) neither party has, or (as the case may be) had, another durable partner, a spouse or a civil partner with (in any of those circumstances) immigration status in the UK or the Islands based on that person's relationship with that party."

22. The claimant cannot bring himself within that definition, which is conjunctive, not disjunctive. The relationship was very new at the 'specified date': the parties met in June, underwent their Islamic marriage in September, and then cohabited for just two months before the 31 December 2021.

Celik guidance

23. As to the Withdrawal Agreement itself, on 19 July 2022, the Upper Tribunal handed down its decision in *Celik*. The judicial headnote gives the following guidance:

"(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."

24. Mr Mustafa conceded that the claimant had made no application before the 'specified date'.

Analysis

25. The Secretary of State's appeal succeeds. I set aside the decision of the First-tier Tribunal, and substitute a decision dismissing the appeal.

DECISION

26. For the foregoing reasons, my decision is as follows:

The making of the previous decision involved the making of an error on a point of law.

I set aside the previous decision. I remake the decision by dismissing the appeal.

Signed [Judith AJC Gleeson](#)
December 2022

Date: 22

Upper Tribunal Judge Gleeson