IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2022-002894

First-tier Tribunal No: EA/13355/2021

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On 24 January 2025

Before

UPPER TRIBUNAL JUDGE PERKINS
DEPUTY UPPER TRIBUNAL JUDGE LEWIS

Between

The Secretary of State for the Home Department

Appellant

and

Indrit Kupa
(no anonymity order made)

Respondent

Representation:
For the Appellant: Ms A Everett, Senior Home Office Presenting Officer
For the Respondent: Mr N Ahmed, Legal Representative from Evolent Law, OISC

Heard at Field House on 17 November 2023

DECISION AND REASONS

1. This is an appeal by the Secretary of State against the decision of the First-tier Tribunal allowing the appeal of the respondent, hereinafter "the claimant", against the decision of the Secretary of State refusing his application for pre-settled or settled status under the EU Settlement Scheme. The decision of the First-tier Tribunal was promulgated on 20 April 2022 after a hearing on 4 April 2022. The Secretary of State did not attend before the First-tier Tribunal and so the judge was left at an oral hearing to consider a relatively new area of law that required her to construe an elaborately drafted Immigration Rule without any assistance from the Secretary of State. We appreciate that there are many demands on the Secretary of State's resources but we do find it regrettable that the Secretary of State did not instruct someone to assist the judge in an appeal against one of his decisions in an area where the law was novel and potentially complex.

2. We begin by considering the First-tier Tribunal's Decision and Reasons. We consider exactly what the First-tier Tribunal did.

3. The judge recognised that she was hearing an appeal under the Immigration Citizens' Rights Appeals (EU Exit) Regulations 2020 dated 6 September 2021. It was the claimant's case that he was the husband of an EEA citizen but the respondent said he had not provided sufficient evidence to show that he was the husband of an EEA citizen before the EU withdrawal transition period, which ended on 31 December 2020. The appellant married his wife on 30 March 2021. It was the respondent's contention that it did not matter if the appellant and his wife had established a durable relationship before 31 December 2020 because the Rule required not merely the existence of a durable relationship but a family permit or residence card as a durable partner, which this claimant did not have. The judge accepted that the claimant was in a durable relationship with his wife. The judge found that they had not lived together in a relationship akin to marriage for at least two years but although that is one of the ways in which a durable relationship can be proved, perhaps even the preferred or usual way, it can also be proved by "significant evidence". The judge found that there was strong evidence in the form of a tenancy agreement confirming that cohabitation began on 29 June 2020 and the parties to the marriage had given notice of intention to marry on 12 August 2020. They were given permission to marry in October 2020 but could not marry in law because of COVID restrictions.

4. The judge found that by 31 December 2020 the claimant and his wife had been living together for six months and had formed a clear intention to marry._They did in fact marry in March 2021 and were living together when the case came before the First-tier Tribunal Judge.

5. In the circumstances it is unsurprising that the judge found that they were in a durable relationship and this finding has not been challenged.

6. The judge then set out the definition of "durable partner" given in Annex 1 to Appendix EU of HC 395. This part of the Immigration Rules has attracted criticism elsewhere and we understand it has been amended, although that is not relevant to the task before us.

7. At the material time it stated:

> (a) the person is, or (as the case may be) for the relevant period was, in a durable relationship with a relevant EEA citizen (or, as the case may be, with a qualifying British citizen or with a relevant sponsor), 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
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> (b) (i) the person holds a relevant document as the durable partner of the relevant EEA citizen (or, as the case may be, of the qualifying British citizen or of the relevant sponsor) for the period of residence relied upon; for the purposes of this provision, where the person applies for a relevant document (as described in sub-paragraph (a)(i)(aa) or (a)(ii) of that entry in this table) as the durable partner of the relevant EEA citizen or, as the case may be, of the qualifying British citizen before the specified date and their relevant document is issued on that basis after the specified date, they are deemed to have held the relevant document since immediately before the specified date; or
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> (ii) where the person is applying as the durable partner of a relevant sponsor (or, as the case may be, of a qualifying British citizen), or as the

> spouse or civil partner of a relevant sponsor (as described in sub-paragraph (a)(i)(bb) of the entry for 'joining family member of a relevant sponsor' in this table), and does not hold a document of the type to which sub-paragraph (b)(i) above applies, and where:
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> (aa) the date of application is after the specified date; and
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> (bb) the person:
>
> (aaa) was not resident in the UK and Islands as the durable partner of a relevant EEA citizen (where that relevant EEA citizen is their relevant sponsor) on a basis which met the definition of 'family member of a relevant EEA citizen' in this table, or, as the case may be, as the durable partner of the qualifying British citizen, at (in either case) any time before the specified date, unless the reason why, in the former case, they were not so resident is that they did not hold a relevant document as the durable partner of a relevant EEA citizen for that period (where their relevant sponsor is that relevant EEA citizen) and they did not otherwise have a lawful basis of stay in the UK and Islands for that period; or …

8. The judge found, uncontroversially, that the claimant satisfied the relevant date requirements. The judge then said at paragraph 19:

> "I find that the [claimant] meets the requirements of paragraph (bb)(aaa). I find that he was not resident in the United Kingdom as the durable partner of the sponsor but the only reason why he was not so resident is because he did not hold a relevant document as a durable partner. The [claimant] did not otherwise have a lawful basis of stay in the United Kingdom."

9. The judge then allowed the appeal.

10. Before us, Mr Ahmed argued that this was a decision open to the judge. There was no binding case law, or at least none was drawn to her attention, and the finding that the claimant satisfied the requirements of the definition was clearly open to her.

11. We understand this argument. The judge gave reasons that, at least arguably, are consistent with a possible reading of the rules. We have set out the explanation above.

12. Ms Everett argued that this is a case where that approach will not do. The problem with the judge's reasoning is that, if it is correct, a person in the United Kingdom without permission and without a relevant document could come within the definition of "durable partner" but that, attractive as it might be, cannot be correct. The phrase "durable partner" is defined essentially as someone in a "durable relationship" who meets further requirements. The paragraph following the words "durable partner", that is paragraph (a), defines the phrase "durable relationship" with reference to two years' cohabitation and the person holding a relevant document as the durable partner. Paragraph (ii) provides an alternative definition where the person does not have such a document and paragraph (ii)(aaa) extends it further to include a person who does not have the relevant document because they otherwise had a lawful basis of stay in the United Kingdom. This interpretation, we find, gives sense to the definition. A durable partner is a person who is in a qualifying relationship and either has a document confirming that status or does not have a document *because* he was in the United Kingdom lawfully on some other basis. The judge's construction recognises that the definition starts by requiring a person to have a document

and then excuses them for not having the document just because they were in the United Kingdom, regardless of their status. If that were the case there would be no need at all for a document; it would be sufficient to be in a durable relationship and present in the United Kingdom without authority. We find that that is so absurd it cannot be right, although we do find the wording of the Regulation leaves us less confident than we would like to be about its true meaning.

13. Unlike the First-tier Tribunal Judge we had the benefit of the decision of this Tribunal in **Celik (EU exit; marriage; human rights) [2022] UKUT 00220 (IAC)** which was upheld by the Court of Appeal in **Celik v SSHD [2023] EWCA Civ 921**. The first paragraph of the judicial headnote is pertinent. It says:

> "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."

14. That does not assist this applicant. This point was reinforced emphatically by the Court of Appeal in its decision at paragraph 68 where it said:

> "The Upper Tribunal was correct in deciding that the decision of 23 June 2021 was in accordance with the requirements of the Rules in Appendix EU and Rule EU11 and EU14 in particular. The fact is that the appellant was not a family member at the material time. He had not married an EU national before 11pm on 31 December 2020. He was not a durable partner within the meaning of Annex 1 to Appendix EU as he did not have a residence card as required and he did not have a lawful basis of stay in the United Kingdom (he was in the United Kingdom unlawfully). The appellant did not quality for leave to remain under Appendix EU. There is no obligation to interpret or 'read down' the relevant Rules to reach a different result."

15. Mr Ahmed could only repeat that the First-tier Tribunal Judge's decision was open to her. It was in the sense that it was a reasoned decision that did not contradict any authority at the time. However, the decision in Celik declares the law as it was at that time and the simple fact is that the judge, understandably, got it wrong.

16. Both parties agreed that in the event of us deciding that the judge's interpretation of the law was wrong, the only option to us was to set aside the decision and substitute a decision dismissing the appeal.

17. That is what we must, and do, do.

Notice of Decision

18. The First-tier Tribunal erred in law. We allow the Secretary of State's appeal. We set aside its decision and substitute a decision dismissing the claimant's appeal against the decision of the Secretary of State.

Jonathan Perkins

Judge of the Upper Tribunal
Immigration and Asylum Chamber

22 January 2025