Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: UI-2022-001754
EA/11765/2021

THE IMMIGRATION ACTS

Heard at Field House, London	**Decision & Reasons Promulgated**
On Tuesday 13 September 2022	**On Thursday 3 November 2022**

Before

UPPER TRIBUNAL JUDGE RIMINGTON
DEPUTY UPPER TRIBUNAL JUDGE BAGRAL

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

-and-

ADDUKAPU SAMPATH

Respondent

Representation:
For the Appellant: Miss A Ahmed, Senior Home Office Presenting Officer
For the Respondent: No appearance

DECISION AND REASONS

A. BACKGROUND

1. This is an appeal by the Secretary of State. For ease of reference, we refer to the parties as they were before the First-tier Tribunal. The respondent appeals against the decision of First-tier Tribunal Judge Phull promulgated on 5 February 2022 ("the Decision"). By the Decision, the Judge allowed the appellant's appeal against the respondent's decision refusing his application for leave to remain under the EU Settlement Scheme.

2. The appellant is a national of India born on 24 March 1994. He arrived in the United Kingdom on 1 January 2020 with entry clearance conferring leave to enter as a Tier 4 Migrant valid until 31 May 2021.

3. In November 2020, the appellant says that he met a Portuguese national. She was living in the United Kingdom and has settled status. By December 2020 their friendship developed into a relationship and the couple began cohabiting in March 2021.

4. On 9 April 2021, the appellant made an application for leave to remain, as a family member of a relevant EEA citizen under the EU Settlement Scheme. On 19 July 2021 the respondent refused the appellant's application.

5. The respondent considered whether the appellant met the eligibility requirements for settled status under the EU Settlement Scheme as a durable partner. Home Office records did not show that the appellant had been issued with a family permit or residence card as the durable partner of the EEA national. Accordingly, the respondent concluded that the appellant did not meet the requirements for settled status under the EU Settlement Scheme.

6. Consideration was then given as to whether the appellant met the eligibility requirements for pre-settled status, as set out in paragraph EU14 of Appendix EU to the Immigration Rules. Again, however, the respondent concluded that the appellant had not provided sufficient evidence to confirm that he is a durable partner of a relevant EEA citizen as defined in Annex 1 of Appendix EU. As the appellant did not meet the requirements of EU11 or EU14, the application fell to be refused by reason of EU6.

B. THE APPEAL

7. The appellant's appeal against the decision was heard by the First-tier Tribunal on 12 January 2022. The appellant attended with his partner and was legally represented. The respondent did not attend.

8. In the Decision, the First-tier Tribunal Judge summarised the appellant's case in the following terms:

> "11. The Appellant says that he satisfied the requirement of the Immigration Rules Appendix EU, for pre settled status as a family member of a relevant EEA citizen because they have been in a durable relationship, since December 2020. He made his application as a durable partner under the EUSS before the 1 July 2021, thereby satisfying the condition of EU14, 1 (a) (ii) for pre-settled status."

9. The First-tier Tribunal Judge then focused her attention on whether the appellant and his partner were in a durable relationship and observed as follows:

> "13. Home Office Guidance, published on 9 December 2021, EU settlement Scheme: EU, other EEA and Swiss citizens and their family members, Version 15.0, page 117, under the heading Durable Partners states that:
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> > "…The reference to the couple having lived together in a relationship akin to a marriage or civil [partnership for at least 2 years is a rule of thumb, not a requirement. You must consider in each case whether there is significant evidence of a durable relationship. Based on all the information and evidence provided by the applicant. The durable partnership must not be (or have been) one of convenience; and neither durable partner has (or for the relevant period had) another durable partner, as spouse or a civil partner with immigration status in the UK or the Islands based on that person's relationship with that durable partner…"

10. The First-tier Tribunal Judge noted at [14] to [16] of the Decision that whilst the appellant and his partner had not lived together in a relationship akin to a marriage for at least two years, there was documentary evidence supportive of cohabitation. The First-tier Tribunal Judge itemised that evidence at [15] and [16] and then said:

> "17. I accept Elisa's [the relevant EEA citizen] oral evidence that since the relationship started, there has been no period of separation from the Appellant. The Appellant said that Elisa works either 9-5 pm or 9 to 9 pm and she studies accountancy on a part time basis and goes to class on Thursday. I find on balance, that his evidence was corroborated by Elisa of her working pattern and studies in accountancy.
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> 18. Having considered all the evidence in the round and on balance I find the evidence of the Appellant and Elisa is consistent and credible about their relationship and it is supported by documentary evidence. I find on balance they are in a genuine relationship, which is continuing and durable and it is not one of convenience. In summary, I find on balance that the Appellant satisfied the EU requirements for pre-settled status and his appeal succeeds."

11. The First-tier Tribunal Judge thus allowed the appeal.

12. Permission to appeal to the Upper Tribunal was granted by the First-tier Tribunal on 20 April 2022.

13. The appellant has not filed a Rule 24 response opposing the application.

14. The matter comes before us to determine whether the Decision contains an error of law and, if we so conclude, to either re-make the decision or remit the appeal to the First-tier Tribunal to do so.

C. THE HEARING

15. The matter was listed for hearing before the Upper Tribunal and notice of the time date and place of the hearing was sent to the parties on 23

August 2022. We are satisfied there had been valid service of that notice in accordance with the procedure rules. Notwithstanding this fact, both the appellant and his representative failed to attend the hearing to defend the Decision which the respondent is seeking to have set aside and remade, as we consider appropriate. We considered whether it was nonetheless appropriate to adjourn the hearing and concluded that, for the following reasons, it was not.

16. There was no explanation for the appellant's absence and no adjournment request made. No indication was given by the Tribunal that the hearing was not going to proceed or that the attendance of either party was excused. The Tribunal's clerk endeavoured to contact the appellant's representatives by telephone on four occasions during the course of the morning session, but to no avail. In light of the appellant's failure to attend, and the absence of a proper explanation, we considered it to be in the interest of justice, and in accordance with the overriding objective, to proceed to consider this matter in the appellant's absence.

17. We heard submissions from Miss Ahmed who relied on the grounds of appeal. In amplification of those grounds she referred us to the Presidential Panel decisions of the Upper Tribunal in Celik (EU exit; marriage; human rights) [2022] UKUT 00220 (IAC) and Batool and others (other family members: EU exit) [2022] UKUT 00219 (IAC). The observations we make on the grounds reflect Miss Ahmed's submissions before us.

D. DISCUSSION

18. The appellant applied for leave to remain under the EU Settlement Scheme as a family member of a relevant EEA citizen. The relevant provisions are set out in Appendix EU of the Immigration Rules (hereafter "Appendix EU"). The various conditions in Appendix EU must be considered together with the definitions set out in Annex 1 thereof. Annex 1 to Appendix EU defines a "family member" as including a "durable partner". Sub-paragraph (a) of Annex 1 states a "durable relationship" exists where the couple have "… 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) …".

19. It is clear albeit, without expressly stating so, that the First-tier Tribunal Judge was considering this element of the definition of a "durable partner" when she referred to the Home Office Guidance at [13], which we have set out above. However, her consideration ended there, and it is appreciably clear that she failed to consider all of the applicable conjunctive terms of the definition of a "durable partner" in Annex 1. Had she done so, it would have been apparent to the First-tier Tribunal Judge that the definition of a "durable partner" includes a requirement that the person concerned "holds a relevant document as the durable partner of the relevant EEA citizen …" (see sub-paragraphs (b)(i) and (e) (i)).

20. As it was accepted by the appellant before the First-tier Tribunal Judge that he had not been issued with a residence card or family permit as a durable partner under the Immigration (European Economic Area (Regulations) 2016 (see: [11]), he could not then satisfy the definition in Annex 1, and could not therefore qualify for pre-settled status (this is the basis upon which he made his application).

21. The First-tier Tribunal Judge made no reference to Annex 1 of Appendix EU and the applicable terms in her Decision and, in particular, gave no consideration to the requirement for a "relevant document" to be held by the appellant in order to fulfil the definition of a "durable partner". We thus have no hesitation in finding that the First-tier Tribunal Judge materially erred in law.

22. Whilst this was the main ambit of the grounds of appeal, we are satisfied that the First-tier Tribunal Judge further erred in considering the position as regards the durability of the relationship as at the date of the hearing rather than the "specified date" of 31 December 2020. This we consider is evident by the First-tier Tribunal Judge's brief consideration of the documentation said to be supportive of cohabitation at [14] to [16], all of which was post the "specified date". We also agree with the respondent's submission that had the First-tier Tribunal Judge considered the durability of the relationship as required by the specified date, then it would have been a strain to suggest on any sensible view that the relationship attained a level of durability by that date, when according to the appellant's evidence his friendship with the relevant EEA citizen only developed into a relationship "by Christmas 2020" (see: [5]).

23. For these reasons, we are satisfied that the First-tier Tribunal Judge misapplied the applicable terms of Appendix EU, and accordingly the Decision does disclose material errors of law and must therefore be set aside and remade.

Remaking the Decision

24. Remaking in the Upper Tribunal would constitute the usual approach to determining appeals where an error of law is found unless the effect of the error has deprived a party of a fair hearing before the First-tier Tribunal, or the nature or extent of any judicial fact-finding which is necessary for the decision in the appeal to be remade, is such that it is appropriate to remit the case to the First-tier Tribunal. We agree with Miss Ahmed that remittal to the First-tier Tribunal is not necessary in this case. The facts are not in dispute and the appeal turns on whether the appellant is able to satisfy the relevant legislative provisions under Appendix EU.

25. The facts are straightforward and the material events are as follows. The appellant entered the UK as a Tier 4 Migrant on 1 January 2020. He had leave in that capacity until 31 May 2021. During the currency of that leave, in November 2020, he met and established a friendship with an

EEA citizen residing in the UK. Whilst the written testimony of the appellant and partner are silent on the issue of when their relationship commenced, the appellant's evidence to the First-tier Tribunal Judge was that their friendship "developed into a relationship by Christmas 2020". In March 2021 the appellant moved in to live with his partner, and that evidence is supported by a tenancy agreement and various items of correspondence addressed to the couple.

26. Whilst there is no dispute about these background facts, it follows from our analysis above, that the appellant's appeal cannot succeed with reference to the legal provisions under which he made his application. Whilst we do not accept that the appellant's relationship with his partner could be described as durable given its immaturity by the specified date, his application was nonetheless bound to fail because he does not hold a "relevant document" as required under Annex 1, and accordingly he cannot meet the requirements of EU14. We are thus satisfied that the respondent's decision is in accordance with the residence scheme immigration rules.

27. For the sake of completeness, we have considered whether the appellant is able to benefit from the Withdrawal Agreement. The core legal issues arising thereunder have been addressed and settled in the recent decisions of Celik and Batool respectively (supra).

28. In Celik, the headnote reads:

> "(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.
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> (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.
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> (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."

29. And in Batool, a decision concerning the position of extended family members, the headnotes similarly provides:

> "(1) An extended (oka other) family member whose entry and residence was not being facilitated by the United Kingdom before 11pm GMT on 31 December 2020 and who had not applied for facilitation of entry and residence before that time, cannot rely upon

> the Withdrawal Agreement or the immigration rules in order to succeed in an appeal under the Immigration (Citizens' Rights Appeals) (EU Exit) Regulations 2020.
>
> (2) Such a person has no right to have any application they have made for settlement as a family member treated as an application for facilitation and residence as an extended/other family member."

30. It follows from this guidance that the appellant has no substantive rights under the Withdrawal Agreement because it cannot be said that his application under Appendix EU constituted an application "for facilitation of entry and residence" for the purposes of Article 10. It is abundantly clear that the appellant's entry and residence was not being facilitated by the UK before the specified date as he was not, as we have found, in a durable relationship before that date and, in any event, his application was made after that date on 9 April 2021. In the circumstances, as the appellant has no substantive rights under the Withdrawal Agreement it cannot be said that the respondent's decision is disproportionate or otherwise in breach of it: Celik, at paragraphs 52 to 53 and Batool at paragraphs 50 to 58.

31. Article 8 ECHR has not been raised by the appellant and so there is no need for us to address that issue.

Anonymity

32. The First-tier Tribunal made no anonymity direction. In the circumstances of this appeal and having regard to the importance of open justice, there is no proper reason for us to make such a direction.

Notice of Decision

33. The making of the decision of the First-tier Tribunal involved the making of an error on a point of law. The appeal by the Secretary of State is allowed. The Decision is set aside and is remade by dismissing the appellant's appeal.

Signed: R.Bagral
Deputy Upper Tribunal Judge Bagral Dated: 23 September 2022

TO THE RESPONDENT
FEE AWARD

As we have dismissed the appeal we make no fee award.

Signed: R.Bagral
Deputy Upper Tribunal Judge Bagral Dated: 23 September 2022