Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: UI-2022-002774**

EA/14528/2021

THE IMMIGRATION ACTS

Heard at Field House	**Decision and Reasons Promulgated**
On 11 October 2022	**On 21 November 2022**

Before

Upper Tribunal Judge KEBEDE
Deputy Upper Tribunal Judge MANUELL

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

Mr DENIS CERRI
(NO ANONYMITY DIRECTION)

Respondent

Representation:
For the Appellant: Mr T Melvin, Senior Home Office Presenting Officer
For the Respondent: no appearance

DECISION AND REASONS

1. Permission to appeal was granted by First-tier Tribunal Judge Barker on 11 May 2022 against the decision to allow the Respondent's appeal made by First-tier

Tribunal Judge S J Clarke in a decision and reasons promulgated on 15 March 2022. The Respondent had applied under for pre-settled status under Appendix EU claiming to be the durable partner of a relevant EEA citizen. The judge had allowed his appeal under the Withdrawal Agreement.

2. The Respondent is a national of Albania, born on 21 May 1991. He had entered the United Kingdom illegally on 4 July 2014 and has no status. He applied for pre-settled status under the EUSS on the basis that he was the durable partner of Ms Alexandra-Maria Balint ("Ms Balint"), a Romanian national who was granted pre-settled status on 9 August 2021. The Respondent and Ms Balint claimed that had been durable partners since 10 May 2018. They married in the United Kingdom on 6 July 2021. The Respondent's application was made on 26 June 2021 and was refused on 4 October 2021.

3. It was accepted by necessary implication at the First-tier Tribunal appeal hearing on the Respondent's behalf that he was unable to meet Appendix EU of the Immigration Rules, but it was contended that he had rights under the Withdrawal Agreement which took precedence over the Immigration Rules.

4. Permission to appeal was granted because it was considered arguable that the First-tier Tribunal Judge had erred by failing to recognise that to meet the definition of "durable partnership" the Respondent must have held a relevant document issued as a durable partner under the EEA Regulations 2016. There was no suggestion that the Respondent held such a document, so that the conclusion that the Respondent met the requirements of the Immigration Rules was arguably flawed. The judge arguably failed to consider the scope of the Withdrawal Agreement and whether the Respondent was able to benefit from it in the absence of the relevant document. There was arguably no proper consideration of whether the Respondent's residence in the United Kingdom was being facilitated by the United Kingdom under its national legislation, or whether an application had been made before the relevant date. Without first considering whether the Respondent fell within the scope of the Withdrawal Agreement, it was arguable that consideration of the benefits it holds was erroneous.

5. Prior to the hearing, on 7 October 2022 the Respondent's solicitor wrote to the Tribunal as follows:

> "I have read the respondent's [i.e., the Appellant's] skeleton submissions served upon my office earlier today and I am familiar with the decision of the Upper Tribunal in Celik (EU exit; marriage; human rights) [2022] UKUT 00220 (IAC). For the avoidance of doubt no application under Article 8 is being made on 11 October although the appellant reserves such rights as may be available to him whatever the outcome of the hearing on 11 October may be.
>
> On behalf of the appellant Denis Cerri I do not concede that First-tier Tribunal Judge Clarke has materially erred in law in allowing the appeal by concluding that the Withdrawal Agreement being primary legislation outweighs the Immigration Rules set out in Appendix EU. However in the interest in saving the costs of instructing a representative to attend an oral hearing we are content for the hearing to proceed on the basis of the papers before the Upper Tribunal and we await the outcome."

6. Mr Melvin for the Appellant relied on the grounds of appeal submitted, the grant of permission to appeal and his skeleton argument. The Respondent did not hold the required relevant document and there was no facilitation of his presence. The Withdrawal Agreement had no application. Celik (above) applied, as did Batool [2022] UKUT 00219 (IAC). There was a misunderstanding by the judge and the decision should be set aside, remade and dismissed, as it had to be.

7. The Tribunal noted that the Respondent's EUSS application was made after 31 December 2020, but prior to 30 June 2021, i.e., within the grace period. Yet the Respondent was in the United Kingdom without any form of leave to enter or leave to remain, so that did not help him. Because the Respondent's presence in the United Kingdom had not been facilitated by the Appellant under any relevant EU provision, the Respondent had no separate rights accruing under the Withdrawal Agreement, which had no application to him.

8. The Tribunal accordingly ruled that the First-tier Tribunal Judge had misdirected herself. The point on which the Respondent had succeeded was not available to him. The decision was accordingly set aside.

9. As no further findings of fact were required, the decision was remade. Mr Melvin relied on his skeleton argument. The situation was clear in the light of Celik and the appeal must fail.

10. The Tribunal ruled that the decision and reasons was subject to material error of law, for the reasons given above. Celik applied:

    (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) 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.

11. It follows that the Respondent, who could not meet Appendix EU of the Immigration Rules, had no rights under the Withdrawal Agreement. His appeal must be dismissed.

DECISION

The Secretary of State's appeal to the Upper Tribunal is allowed.

There were material errors of law in the First-tier Tribunal's decision and reasons, which is accordingly set aside.

Following a summary rehearing, the original decision was remade.

The original appeal is dismissed. There can be no fee award.

Signed R J Manuell **Dated** 12 October 2022

Deputy Upper Tribunal Judge Manuell