



**Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: UI-2022-002814
EA/14942/2021**

THE IMMIGRATION ACTS

**Heard at Field House
On the 21 October 2022**

**Decision & Reasons Promulgated
On the 30 November 2022**

Before

UPPER TRIBUNAL JUDGE ALLEN

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

**DILUSHA MENDIS WARNAKULAGE
(ANONYMITY DIRECTION NOT MADE)**

Respondent

Representation:

For the Appellant: Mr C Avery, Senior Home Office Presenting Officer
For the Respondent: Ms A Benfield, instructed by MTC Solicitors

DECISION AND REASONS

1. The Secretary of State appeals with permission against the decision of a Judge of the First-tier Tribunal who allowed the appeal of Mr Warnakulage against the Secretary of State's decision of 25 October 2021 refusing his application under the EU settlement scheme for leave as the durable partner of a relevant EEA citizen. The judge allowed the appeal on the basis that it was accepted on behalf of the appellant that he could not

meet the definition of a durable partner under Appendix EU, but the judge considered that the Rules were not determinative of the application and taking into account such matters as the provisions of Article 10.3 of the Withdrawal Agreement, Article 21 of the Withdrawal Agreement together with Article 10 and Article 4, the purpose of that Agreement and Appendix EU of the Immigration Rules and relevant case law and proportionality concluded that the appeal fell to be allowed.

2. The Secretary of State sought and was granted permission to appeal on the basis that the judge had failed properly to apply Article 10 of the Withdrawal Agreement and that the appellant had not been a family member residing in accordance with Union law as of 31 December 2020 as required by Article 10.1(e) and he had not applied for or had had facilitated entry and residence. As a consequence he could not claim to be in scope of the Agreement so as to have rights which could have been breached whether under Article 20 or 18.
3. I shall refer hereafter to Mr Warnakulage as the appellant, as he was before the judge, and to the Secretary of State as the respondent, as she was before the judge.
4. Ms Benfield realistically and appropriately agreed there was an error of law in the judge's factual findings that the application was made before the end of the transition period. The judge had erred in considering that the appellant came within Article 10(3). She did not consider, again I think realistically, that she could argue that it was not material on the basis of the appellant coming within Article 10.4 as that had not been argued at the hearing. She accepted therefore that there was an issue going beyond a technical point and was happy for that right either to be remitted or kept in the Tribunal. The Secretary of State did not challenge the relationship. She would prefer on balance for there to be remittal.
5. Mr Avery did not disagree with the submissions put forward.
6. I am grateful to both representatives. It is clear that the judge erred in law as contended in the grounds and as agreed by Ms Benfield. In the circumstances I consider there needs to be a full rehearing of this appeal and that is most appropriately to be done in the First-tier Tribunal, at Hatton Cross before a different judge. To that extent the appeal is allowed.

No anonymity direction is made.



Signed
Upper Tribunal Judge Allen

Date 16th November 2022