



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

Appeal Number: UI-2022-003405
EA/16394/2021

THE IMMIGRATION ACTS

**Heard at Field House
On 16 September 2022**

**Decision & Reasons Promulgated
On 11 November 2022**

Before

UPPER TRIBUNAL JUDGE RINTOUL

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

**MR ARBER BUBA
(NO ANONYMITY ORDER IN PLACE)**

Respondent

Representation:

For the Appellant: Mrs Nolan, Senior Home Office Presenting Officer
For the Respondent: Mr Aslam, instructed by Direct Access

DECISION AND REASONS

1. The Secretary of State appeals with permission against a decision of First-tier Tribunal Judge Aldridge, promulgated on 31 May 2022. In that decision the judge allowed the respondent's appeal against a decision of the Secretary of State made on 21 November 2021 to refuse him leave to remain under the EU Settlement Scheme ("EUSS").
2. The respondent is married to an Italian national ("the sponsor") whom he met on 3 April 2020. Their relationship began from 17 May 2020 and they began living together on 25 October 2020. They were married on 30

March 2021. The respondent's case is that the couple were in a genuine relationship and their plans to marry prior to 31 December 2020 (the specified date) were disrupted as a result of the COVID-19 pandemic. He submits that he is entitled to leave to remain under EUSS as a durable partner and/or spouse of a relevant EEA National.

3. The Secretary of State rejected the application on the basis that the respondent had not provided sufficient evidence to confirm that he was the family member of a relevant EEA national prior to the specified date, that is 23:00 on 31 December 2020. She considered also that the appellant had not provided sufficient evidence to confirm that he was the durable partner of a relevant EEA citizen as he had not been issued with a family permit or residence card under the EEA Regulations and thus he did not hold a "relevant document" and thus he did not meet the definition of durable partner as set out in Annex 1 of Appendix EU to the Immigration Rules.

The Judge's Decision

4. The judge heard evidence from the appellant and submissions from his representative. The judge heard evidence from the respondent and his wife; the Secretary of State was not represented. The judge found that:-
 - (i) the respondent and sponsor were in a durable relationship on the specified date but cannot comply with the requirement to provide a relevant document as defined in Appendix EU [17] (that is, a residence document issued under the Immigration (EEA) Regulations 2016);
 - (ii) the appellant was resident in the United Kingdom but not on a basis within the meaning of a "family member of a relevant EEA citizen" [18] because he did not have the relevant documents and had no lawful basis of stay in the United Kingdom;
 - (iii) the effect of the Withdrawal Agreement is that he must consider the proportionality of the refusal to grant leave and the effect of such denial where he is the family an EEA citizen [21], finding that denial of the application would be disproportionate, given the barriers they faced as a result of the COVID restrictions when attempting to fix a marriage date, the difficulty manoeuvring through the Rules, the apparent Home Office guidance that appears to be at odds with the Rules and the fact that there were before the specified date and continue to be in a genuine durable relationship that is now a formal marriage.
5. The Secretary of State sought permission to appeal on the ground that the judge had erred:
 - (i) in concluding that the appellant fell within the provisions of the Withdrawal Agreement as the appellant had not been documented nor made a successful application under the EEA Regulations and thus could not benefit from the Withdrawal Agreement;

- (ii) that the appellant did not meet the definition of durable partner or family member prior to the expiry or the transition period on 31 December 2020;
 - (iii) in wrongly applying EU law relating to proportionality as general principles of EU law did not apply nor was it clear if proportionality applied.
6. On 28 June 2022 First-tier Tribunal Judge Handler granted permission.
 7. Since that grant the Upper Tribunal has handed down its decisions in Celik (EU exit, marriage, human rights) [2022] UKUT 220 and Batool & Ors (other family members: EU exit) [2022] UKUT 219.
 8. Mr Aslam fairly accepted that in the light of these cases there was little he could add or say in resisting the Secretary of State's application. Having taken instructions, he indicated that he would be content for the decision to be remade without further submissions.

Decision

9. The headnote in **Celik** provides as follows:

(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.

10. In light of that decision and as the instant case is on all fours with Celik, I am satisfied that that the First-tier Tribunal erred in seeking to allow the appeal on the basis of proportionality.
11. In terms of remaking, in the absence of any submissions that the respondent otherwise meets the requirements of the Immigration Rules or has rights under the Withdrawal Agreement, I remake the decision by dismissing the appeal on the basis that, as the First-tier Tribunal found, the respondent could not meet the requirements of Appendix EUSS.

Notice of Decision

- (1) The decision of the First-tier Tribunal involved the making of an error of law and I set it aside.
- (2) I remake the decision by dismissing the appeal on all grounds.

No anonymity direction is made.

Signed

Date 28 September 2022

Jeremy K H Rintoul
Upper Tribunal Judge Rintoul