



IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

**Ce-File Number: UI-2022-
003192**
**First-tier Tribunal No:
EA/14826/2021**

THE IMMIGRATION ACTS

**Heard at Field House IAC
On the 21 December 2022**

**Decision & Reasons Promulgated
On the 22 February 2023**

Before

UPPER TRIBUNAL JUDGE PITT

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

**ERION BEQIRAJ
(ANONYMITY DIRECTION NOT MADE)**

Respondent

Representation:

For the Appellant: Ms S Cunha, Senior Home Office Presenting Officer
For the Respondent: Mr J Trussler, Counsel instructed by Turpin Miller LLP

DECISION AND REASONS

1. This is an appeal against the decision issued on 5 April 2022 of First-tier Tribunal Judge Smeaton which allowed the appellant's appeal against the respondent's decision dated 17 October 2021 which refused to find that

the appellant met the requirements of the EU Settlement Scheme (EUSS) as set out in Appendix EU of the Immigration Rules.

2. The appellant is a national of Albania and was born on 22 October 1983. He came to the UK without leave in 2019 and soon after met his Greek partner (now wife). The couple began to live together in 2019 and in 2020 decided to marry but were unable to do so due to the Covid-19 pandemic. They eventually married on 16 March 2021. The appellant applied for leave under the EUSS on 18 March 2021 and, as above, that application was refused on 17 October 2021.
3. The appellant appealed against that decision. The appeal came before First-tier Tribunal Judge Smeaton on 10 March 2022. In her decision dated 5 April 2022 the Judge found that the appellant and his wife had been living together as a couple since November 2019. She accepted that they had tried to marry but had been prevented from doing so prior to 31 December 2020. She found that, nevertheless, the appellant was a durable partner as of 31 December 2020 as defined in Regulation 8 of the Immigration (European Economic Area) Regulations 2016.
4. The Judge found in paragraphs 28 and 29 that the appellant could not show that he had a relevant document showing his status as a durable partner as of 31 December 2022 and recognised that he therefore could not meet the requirements of the EUSS.
5. However, the First-tier Tribunal went on to find the appellant could benefit from aspects of the Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community (“the Withdrawal Agreement”) as a remedy to the absence of a relevant document. In paragraphs 29 to 35 the Judge found that the respondent had acted disproportionately and therefore not in line with the provisions of the Withdrawal Agreement by requiring the appellant to have a specified document. Further, in paragraphs 36 to 37, the Judge found that the respondent’s guidance entitled “EU Settlement Scheme: evidence of relationship” published on 22 March 2019 and updated on 31 December 2020 provided that as someone accepted to be a durable partner as of 31 December 2020, alternative provision was made for establishing the relationship without having to provide a specified document.
6. The respondent appealed against the decision of the First-tier Tribunal and permission was granted on 23 May 2022.
7. By the time of the hearing before me, the case Celik (EU exit; marriage; human rights) [2022] UKUT 00220 (IAC) had been issued by a Presidential panel. The first two paragraphs of the headnote to Celik set out:

“(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."

8. Mr Trussell conceded that the reasoning in Celik provided a significant hurdle for this appellant whose circumstances were, essentially, on all fours with the appellant in Celik. He submitted that the First-tier Tribunal was correct to place reliance on the EUSS guidance, however, which showed that the respondent retained a measure of discretion when requiring a relevant document showing status as the durable partner of an EEA national as of 31 December 2020. The difficulty with that argument is that the definition of a durable partner under the EUSS as set out in Appendix 1 is not the same as that under the EEA Regulations. It is not sufficient for there to be a judicial finding that the provisions of Regulation 8 of the EEA Regulations were met as of 31 December 2020 for an individual to be able to rely on the proportionality provisions of Article 18 of the Withdrawal Agreement. In order to be found to be a "durable partner" under the definition in Annexe 1 to Appendix EU if there is no relevant document, an individual must have been lawfully resident on an alternative basis. It is common ground that the appellant has never been lawfully resident in the UK.
9. For these reasons, I found that the First-tier Tribunal erred in finding that the appellant was entitled to the benefit of the provisions of the EUSS concerning durable partners who lack a relevant document and to the benefit of the proportionality provisions in Article 18 of the Withdrawal Agreement. The decision must be set aside for those reasons and remade. The appellant's circumstances are on all fours with Celik and his appeal must be remade as refused on the basis of the reasoning in that Presidential decision.

Decision

10. The decision of the First-tier Tribunal discloses an error on a point of law and is set aside to be remade.
11. The appeal is remade as refused.

Signed: S Pitt
Upper Tribunal Judge Pitt

Date: 21 December 2022

