



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

**Appeal Number: UI-2022-003829  
On appeal from EA/00297/2022**

**THE IMMIGRATION ACTS**

**Heard at Field House by MS Teams  
On the 12 December 2022**

**Decision & Reasons Promulgated  
On the 20 December 2022**

**Before**

**UPPER TRIBUNAL JUDGE GLEESON**

**Between**

**THE SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Appellant

**and**

**FATJON OSMRIJA  
[NO ANONYMITY ORDER]**

Respondent

Representation:

For the appellant: Mr Stephen Walker, a Senior Home Office Presenting Officer

For the respondent: Mr Tom Wilding of Counsel, instructed by A J Jones Solicitors

**DECISION AND REASONS**

1. The appellant appeals with permission from the decision of the First-tier Tribunal dismissing his appeal against the respondent's decision on 9 December 2021 to refuse to grant him a permanent right of residence

under the EU Settlement Scheme (EUSS). The appellant is a citizen of Albania.

2. **Mode of hearing.** The hearing today took place remotely by Microsoft Teams. There were no technical difficulties. I am satisfied that all parties were in a quiet and private place and that the hearing was completed fairly, with the cooperation of both representatives.

## **Background**

3. The claimant has been in a relationship with a Greek woman, Konstantina Mito, since 2017. They met in Greece in 2017, and exchanged Instagram details and telephone numbers, meeting 4 or 5 times before the claimant went back to Albania. They then continued to communicate regularly.
4. The claimant visited Ms Mito in Greece on 3 or 4 further occasions, spending one or two months each time, staying at his uncle's house and meeting Ms Mito regularly. She also came to see him in Albania as well, and they met up there. This arrangement continued from October 2017 to March 2019.
5. During a visit to Greece in December 2018, the claimant proposed marriage, and Ms Mito accepted him. They were unable to live together in either Albania or Greece, so they tried to find somewhere they could make a home together. They decided to try to make their home in the UK.
6. In July 2019, the claimant came to the UK unlawfully. His wife arrived in October 2020 and moved in with him on arrival. They have continued to cohabit since then.
7. In November 2020, the couple approached a registry office but were unable to obtain a marriage date until after the transition date of 31 December 2020.
8. Ms Mito was awarded pre-settled status under the EUSS on 17 March 2021. The couple married in the UK on 3 April 2021.
9. On 12 May 2021, the claimant made an application for an EUSS family permit as the spouse of an EEA national in the UK. On 9 December 2021, the respondent refused the application.

## **Refusal letter**

10. The Secretary of State refused the claimant's application both on the basis that by the transition date (31 December 2020) he was not a spouse, which is unarguable, and also on the basis that he was not a documented or undocumented durable partner. The claimant accepts that he was not a spouse or a documented durable partner on 31 December 2020.
11. In her letter, the Secretary of State acknowledged that if the claimant could show that despite being undocumented, he was and remained a

durable partner, then he would be entitled to pre-settled status under rule EU14 of Appendix EU to the Immigration Rules HC 395 (as amended).

12. The claimant appealed to the First-tier Tribunal.

### **First-tier Tribunal decision**

13. The Secretary of State did not arrange representation before the First-tier Tribunal in this appeal. Mr Wilding, who also appears today, represented the claimant. The appeal was heard remotely by video link, and partly by telephone when the video link failed.

14. The First-tier Judge found the claimant and his witnesses to be credible and consistent in their accounts. He said this:

“22. ... In the absence of the respondent there is no challenge to the evidence they have put forward that the [claimant] and sponsor have been in a relationship since 2017 and have been married since 3 April 2021. ...

30. Considering all the evidence, I find they are in a durable relationship and that they were in a durable relationship before either of them arrived in the UK. I find that they remain in a durable relationship.”

15. After setting out the provisions for ‘family member of a relevant EEA citizen’ and ‘durable partner’, the Judge found that the claimant could bring himself within the requirements of the Immigration Rules and that it was not necessary to look to the Withdrawal Agreement itself for status. That was consistent with the Secretary of State’s own guidance as to durable partnerships, set out at [39] in the First-tier Tribunal decision.

16. The Judge went on to consider the facts through the prism of the Withdrawal Agreement, and found the decision to be disproportionate.

17. The Secretary of State appealed to the Upper Tribunal.

### **Grounds of appeal**

18. The Secretary of State’s grounds of appeal assert that the First-tier Judge misinterpreted Annex 1 paragraph (b)(ii)(bb)(aaa) and that his interpretation was not consistent with the requirements of the Withdrawal Agreement which the EUSS was designed to implement.

19. The Secretary of State contended that the paragraph in question was designed only to capture those who were lawfully resident in another capacity, for example as a student.

20. Crucially, the Secretary of State did not challenge in her grounds of appeal the finding made by the First-tier Judge that the claimant when he entered the UK was, and remained, a durable partner of the EEA national who is now his spouse.

### **Permission to appeal**

21. Permission to appeal was granted on 10 August 2022 by First-tier Judge Boyes in the following terms:
- “2. The grounds assert that the Judge erred in the understanding of, interpretation of and application of the Appendix EU and Withdrawal Agreement.
  - 3. The grounds are clearly arguable. There are a large number of these matters which fall for determination by the UT. The point in issue is a valid and arguable point which requires determination.
  - 4. Permission is granted on all matters raised.”
22. I do not gain much assistance from that rather formulaic grant as to precisely which of the points raised by the Secretary of State is considered to be ‘valid and arguable’. All grounds of appeal will be addressed.

### **Rule 24 Reply**

23. In his very helpful Rule 24 Reply, to which he appended his First-tier Tribunal skeleton argument, Mr Wilding made his way through the provisions of Appendix EU, which he described as ‘fiendish to follow’, observing that the lack of clarity in the Rules on this point ‘raises significant access to justice issues’ and might go to proportionality, if that question were reached.
24. As regards the Withdrawal Agreement argument, the First-tier Judge did not have the benefit of the Upper Tribunal’s guidance on Article 18(1)(r) given on 19 July 2022 in *Celik (EU exit, marriage, human rights)* [2022] UKUT 220 (IAC), by which the First-tier Tribunal’s understanding of Article 18(1)(r) would be erroneous. The decision was also not referred to in the grounds of appeal, which were settled on 6 July 2022.
25. Mr Wilding submitted that *Celik* was wrongly decided: the Tribunal was not obliged to follow it and should decline to do so.
26. That is the basis on which this appeal came before the Upper Tribunal.

### **Appendix EU**

27. This case concerns the interpretation of ‘durable partner’ in Appendix EU, Annex 1, at (b)(ii)(bb)(aaa).

“(ii) where the person is applying as the durable partner of a relevant sponsor, or as the spouse or civil partner of a relevant sponsor (as described in subparagraph (a)(i)(bb) of the entry for ‘joining family member of a relevant sponsor’ in this table), and does not hold a document of the type to which subparagraph (b)(i) above applies, and where:

(aa) the date of application is after the specified date; and

(bb) the person:

(aaa) was not resident in the UK and Islands as the durable partner of a relevant EEA citizen (where that relevant EEA citizen is their relevant sponsor) on a basis which met the definition of ‘family member of a relevant EEA citizen’ in this table, or, as the case may be as the durable partner of the qualifying British citizen, at (in either case) any time before the specified date, unless the reason why, in the former case, they were not so resident is that they did not hold a relevant document as the durable partner of a relevant EEA citizen for that period (where their relevant sponsor is that relevant EEA citizen) and they did not otherwise have a lawful basis of stay in the UK and Islands for that period;”

### **Upper Tribunal hearing**

28. The Secretary of State has not challenged the First-tier Judge’s finding that the claimant was a ‘durable partner’ at all material times. She did not arrange representation before the First-tier Tribunal and on the evidence before the First-tier Judge, that was a finding of fact which was open to him to make.
29. After some discussion at the hearing, Mr Walker for the Secretary of State accepted that if the claimant was a ‘durable partner’ as there defined, he is a family member of a relevant EEA national and his claim for EUSS succeeds.
30. No reason is advanced for a proper interference with the First-tier Judge’s finding of fact and on the basis of Mr Walker’s concession, the Secretary of State’s appeal must fail.

### **DECISION**

31. For the foregoing reasons, my decision is as follows:

The making of the previous decision involved the making of no error on a point of law

I do not set aside the decision but order that it shall stand.

Signed [Judith AJC Gleeson](#)  
2022

Date: 12 December

Upper Tribunal Judge Gleeson