



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

Appeal Number: UI-2022-002136  
EA/13323/2021

**THE IMMIGRATION ACTS**

**Heard at Field House  
On 3 October 2022**

**Decision & Reasons Promulgated  
On 13 November 2022**

**Before**

**DEPUTY UPPER TRIBUNAL JUDGE FROMM**

**Between**

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

Appellant

**and**

**Mr ENDRIT MOLLAJ**  
(ANONYMITY DIRECTION NOT MADE)

Respondent

**Representation:**

For the Appellant: Ms E Harris, Counsel, instructed by Waterstone Legal,  
Solicitors

For the Respondent: Ms S Cunha, Senior Home Office Presenting Officer

**DECISION AND REASONS**

1. This is an appeal brought by the Secretary of State for the Home Department against the decision of the First-tier Tribunal (Immigration and Asylum Chamber) promulgated on 28 March 2022 allowing the appeal of Mr Mollaj against the decision of the Secretary of State which she made on 6 September 2021 to refuse Mr Mollaj's application under the EU Settlement Scheme.

2. It is more convenient to refer to the parties as they were before the First-tier Tribunal. I shall therefore refer to Mr Mollaj as “the appellant” and to the Secretary of State as “the respondent”.
3. No anonymity direction was made by the First-tier Tribunal and no application for anonymity has been made. I see no reason to make an anonymity direction
4. In brief, the factual circumstances are that the appellant entered the United Kingdom illegally in 2017 and has never been granted leave. However, in May 2019, he met Ms Georgiana-Elena Nani, whom I shall refer to as “the sponsor”, and commenced a relationship with her. It is common ground that they moved in together in by March 2020 at the latest and that the appellant proposed to the sponsor on 9 December 2020. They married in a civil ceremony on 9 July 2021 prior to which the appellant had applied for pre-settled status under Appendix EU of the Immigration Rules as the partner of the sponsor. The sponsor is a citizen of Romania.
5. The respondent refused the application on 9 July 2021 under both paragraphs EU 11 and EU 14 of Appendix EU of the rules. The reason for refusal was that the appellant could not be considered to be the spouse of a relevant EEA national because the marriage taken place after the ‘specified date’ of 31 December 2020. Furthermore, he did not qualify as the ‘durable partner’ of the sponsor because he had not been issued with a ‘relevant document’.
6. The appellant argued in his appeal that the decision was not in accordance with the Immigration Rules or, alternatively, the Withdrawal Agreement. He was unable to pursue an additional ground of appeal that the decision breached article 8 of the Human Rights Convention because this was a ‘new matter’ and consent was not given by the respondent for the tribunal to consider it.
7. The appellant and the sponsor attended the hearing in the First-tier Tribunal which was held over the CVP platform. The respondent was unrepresented at the hearing.
8. In a lengthy and detailed decision promulgated on 28 March 2022 Judge of the First-tier Tribunal Abdar allowed the appeal. He noted there was no challenge to the assertion that the sponsor was exercising her Treaty rights at all material times. It was conceded by counsel on behalf of the appellant that the appellant could not succeed on the basis of his marriage, which had taken place after the specified date. Furthermore, irrespective of any disruptions caused by the Covid 19 pandemic, it would not have been possible for the couple to have married before the specified date because 28 days’ notice would be required for a civil registration. The judge therefore concentrated on the rules for durable partners. He noted that the appellant and the sponsor had not lived together for at least two years prior to the specified date but

considered this was never a requirement under European law. He found there was significant other evidence of a durable relationship for the appellant to meet the legal definition of durable partner. He then considered the consequences of the inability of the appellant to show that he met the evidential requirement of having relevant document. He considered the appeal should be dismissed on this ground.

9. However, the judge allowed the appeal under the Withdrawal Agreement. He regarded the appellant as a 'family member' by virtue of being the 'other family member' of the sponsor. As such, the appellant fell within the personal scope of article 10 of the Withdrawal Agreement. The judge also accepted the submission that the decision was disproportionate under the Withdrawal Agreement.
10. The respondent sought permission to appeal on the basis that the judge had mistakenly concluded that the appellant had applied for residence in the United Kingdom to be facilitated prior to the end of the transition period. The application was not made until 14 June 2021. This was a material error.
11. Permission to appeal was refused by the First-tier Tribunal but granted by the Upper Tribunal on the renewed application. Upper Tribunal Judge Gill considered that the decision contained three arguable errors of law. Firstly it was arguable the judge had been mistaken in finding that the appellant had applied for a document before the end of the transition period. Secondly, it was arguable that the judge erred in finding it was not necessary for the appellant to present a relevant document. Thirdly, it was arguable the judge erred in finding that the decision to refuse the application was disproportionate in all the circumstances.
12. The appellant has not submitted a rule 24 response.
13. On 19 July 2022 the Upper Tribunal promulgated its decision in the case of Celik (EU exit; marriage; human rights) [2022] UKUT 00220 (IAC). In that case, a Presidential panel held that a person in a durable relationship with an EU citizen has as such no substantive rights under the Withdrawal Agreement unless his entry and residence were being facilitated before the specified date or he had applied for such facilitation before that time. In the circumstances that the person had no substantive rights, he could not invoke the concept of proportionality in order to succeed in an appeal like this one.
14. At the hearing I heard submissions from the representatives. I shall set them out in brief summary. Ms Harris applied for an adjournment of the appeal on the basis that the Court of Appeal would hear an appeal against Celik or a similar case in due course. She understood that permission to appeal had been refused by the Upper Tribunal but an application would be made to the Court of Appeal. Ms Cunha opposed the application.

15. I considered the overriding objective of the Tribunal Procedure (Upper Tribunal) Rules 2008 and refused Ms Harris's application. I regard the law as settled by the Celik decision and this must be applied until such time as the courts rule otherwise. This is not unfair to the appellant who has other potential remedies under human rights law. Adjourning the case would lead to substantial delay. Even if the Court of Appeal overturned Celik, there would be further appeal rights for the respondent.
16. Ms Harris said she maintained the arguments made by the appellant in the Celik case but acknowledged that, if the law as stated in Celik were applied, then the decision of the First-tier Tribunal must be taken to contain a material error of law.
17. Ms Harris pointed out that the respondent had not refused consent to the tribunal considering human rights. She had not been asked because she was unrepresented at the hearing in the First-tier Tribunal. Ms Cunha responded that consent was refused in line with the respondent's policy. Accordingly, in re-making the decision, I am confined to the points under the Exit Regulations 2020.
18. I find that Judge Abdar's decision must be set aside. He was right to find the appellant could not establish that he should be treated as a spouse because his marriage to the sponsor took place after the specified date. He made a factual error in paragraph [40] where he stated the appellant had applied for residence before the end of the transition period and whose residence was being facilitated. The appellant made no application until 14 June 2021. He could not therefore fall within the personal scope of the Withdrawal Agreement and he could not rely on the principle of proportionality in line with the ruling in Celik. For these reasons I substitute a decision dismissing the appellant's appeal.

### **NOTICE OF DECISION**

The Judge of the First-tier Tribunal made a material error of law and his decision allowing the appeal is set aside.

The following decision is substituted:

The appellant's appeal is dismissed under the Exit Regulations 2020.

No anonymity direction is made.

Signed

Date 3 October 2022

A handwritten signature in black ink, consisting of a stylized 'N' followed by a horizontal line with a small peak in the middle.

**Deputy Upper Tribunal Judge Froom**