Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: UI-2022-002405
EA/14101/2021

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 22 September 2022	**On 27 November 2022**

Before

UPPER TRIBUNAL JUDGE PERKINS

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

YLBER IMERAJ
(anonymity direction not made)

Respondent

Representation:
For the Appellant: Mr D Clarke, Senior Home Office Presenting Officer
For the Respondent: Ms K Tobin, Counsel instructed by Morgan Pearse Solicitors

DECISION AND REASONS

1. This is an appeal brought by the Secretary of State against a decision of the First-tier Tribunal allowing the appeal of the respondent, hereinafter "the claimant", against a decision of the Secretary of State refusing him an EU Family Permit as the family member of a Romanian national living and working in the United Kingdom as an EEA citizen.

2. It is the claimant's case that he began cohabiting with his now wife in about June 2020 and they were married in March 2021. They had planned to marry on 30 December 2020 and the marriage was cancelled because of COVID-19 restrictions. The application was refused because the claimant had not satisfied the Secretary of State that he was the relative of the sponsor on 31 December 2020 as defined in Annex 1 of Appendix

EU of HC 395 or that he holds a relevant document as a durable partner at that date. The Secretary of State's case was simple. The claimant did not meet the eligibility requirements provided by EU11 or EU14 of Appendix EU and the application had to be refused.

3. At paragraph 22 of the Decision and Reasons the judge noted, apparently correctly, that the issue to determine was whether the claimant and his sponsor had evidenced their relationship as durable and, secondly, whether they had provided the correct documentation in relation to the relevant date, that is 31 December 2020.

4. The judge accepted expressly that the claimant and his partner had cohabited for a time and had subsequently, that is after 31 December 2020, married. The judge also found, uncontroversially, that they had given notice of intention to marry in November 2020 and also found that a wedding had been booked for 30 December 2020 but was cancelled because of the national lockdown necessitated by the reaction to the COVID crisis.

5. The judge found that theirs was a durable relationship that had now become a marriage. The judge also found that it would be disproportionate to "refuse the appeal". The requirement in the Regulations for a residence card was regarded as "not proportionate under the Withdrawal Agreement because it refuses an applicant a right under EU law to remain with a family member due to circumstances beyond their control."

6. The judge allowed the appeal.

7. The grounds contend that the judge was wholly wrong. The application was made as a family member and, according to the Secretary of State, the claimant was not a family member as defined. He had not married his sponsor. Neither was he a "durable partner" within the meaning of the rules because there was no relevant document as defined as evidence that his residence had been facilitated under the EEA Regulations.

8. The Secretary of State's grounds assert, I now find correctly, that it is irrelevant that the relationship may have been "durable" in a colloquial sense because the residence had not been facilitated and, appropriately, there was no evidence to show that it had been.

9. The second ground contends that the judge could not have allowed the appeal because the only permissible grounds could not have led to that result. A person in the claimant's circumstances had no applicable rights and therefore there was nothing on which any exercise of proportionality could bite.

10. There was also a third ground complaining the reasoning on proportionality was in any event inadequate. I declined to determine this ground it is complex and unnecessary.

11. The other two grounds are clearly made out. Not only are they set out persuasively in the grounds but they are supported by a decision of this Tribunal in **Celik v SSHD**, **Celik (EU exit - marriage, human rights)**

[2022] UKUT 220 (IAC). This was promulgated on 19 July 2022 and therefore was not available to the First-tier Tribunal. However, it is, obviously, declaratory of the law and shows what the First-tier Tribunal should have done.

12. In the circumstances, there was not much that Ms Tobin could say. She accepted that the facts of this case are "on all fours with **Celik**" and that she had no proper basis for distinguishing the decision from the material facts in the case that she had to argue. She did, however, emphasise that the findings of fact were favourable to the claimant and had not been challenged at every stage and I am happy to agree that that is indeed correct.

13. In the circumstances, I have no hesitation in saying that the First-tier Tribunal erred in law and I set aside its decision. I also find that the law is so clear that on the established facts the claimant's appeal has to be dismissed and so, having set aside the decision of the First-tier Tribunal, I substitute a decision dismissing the appeal against the decision of the Secretary of State.

Notice of Decision

14. The Secretary of State's appeal is allowed. The First-tier Tribunal's decision is set aside and I substitute a decision dismissing the claimant's appeal against the Secretary of State's decision.

Jonathan Perkins

Signed
Jonathan Perkins
Judge of the Upper Tribunal

Dated 20 October 2022