Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: UI-2022-003000**

EA/14966/2021

THE IMMIGRATION ACTS

Heard at Field House	**Decision and Reasons Promulgated**
On 11 October 2022	**On 21 November 2022**

Before

Upper Tribunal Judge KEBEDE
Deputy Upper Tribunal Judge MANUELL

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

Mr TAULAND QEVANI
(NO ANONYMITY DIRECTION)

Respondent

Representation:
For the Appellant: Mr T Melvin, Senior Home Office Presenting Officer
For the Respondent: Mr K Jegede, Authorised Representative (Ashton Ross Law)

DECISION AND REASONS

1. Permission to appeal was granted by First-tier Tribunal Judge Parkes on 16 May 2022 against the decision to

allow the Respondent's appeal made by First-tier Tribunal Judge Maka in a decision and reasons promulgated on 10 February 2022. The Respondent had applied under for pre-settled status under Appendix EU claiming to be the durable partner/spouse of a relevant EEA citizen. The judge had allowed the appeal under Appendix EU, finding that although the relationship relied on had not lasted for two years as at the date of the application, there was sufficient evidence to show that there was a durable partnership including the subsequent marraige.

2. The Respondent is a national of Albania, born on 30 June 1987. He had entered the United Kingdom illegally during 2017 and has no status. He applied for pre-settled status under the EUSS on the basis that he was the durable partner/spouse of Ms Catarina Maria Calapez Pinheiro Dos Santos ("Ms Dos Santos"), a Portuguese national who was granted settled status under the EUSS on 30 October 2019. The Respondent and Ms Dos Santos claimed that had been durable partners since 2 August 2020. They subsequently married in the United Kingdom on 11 March 2021. The Respondent's application was refused on 15 October 2021.

3. Permission to appeal was granted because it was considered arguable that the judge had erred in his approach to the facts. The Appellant's marriage took place after the end of 2020 and he could not succeed under the durable partner route as he did not have a relevant document. Having found that the Appellant was not lawfully resident at the end of 2020, the judge should have dismissed the appeal. The grace period applied only to those who were lawfully in the United Kingdom and extended the period in which an application could be made. The judge appeared to have fallen into the same error as a number of other judges. This might not have been surprising given the manner in which the rules are phrased and set out. Nevertheless the rules require an applicant in the UK to hold a relevant document and to be in the United Kingdom lawfully at the end of 2020 as a precondition for making the application and the judge appeared to have misapplied the concession.

4. Mr Melvin for the Appellant relied on the grounds of appeal submitted, the grant of permission to appeal and his skeleton argument. The Respondent did not hold the required relevant document and there had been no

facilitation of his presence. He did not meet the requirements of Appendix EU of the Immigration Rules. The Withdrawal Agreement had no application. Celik (EU exit; marriage, human rights) [2022] UKUT 000220 (IAC) applied, as did Batool [2022] UKUT 00219 (IAC). There was a misunderstanding by the judge and the decision should be set aside, remade and dismissed, as it had to be.

5. Mr Jegede for the Respondent relied on his rule 24 response. He submitted that notwithstanding Celik (above), the Respondent was entitled to succeed under Regulation 3(6) of the Citizens (Application Deadline and Temporary Protection) EU Exit Regulations 2020. The Respondent had attempted marriage and been thwarted because of the Covid-19 lockdown. The Respondent had been within Regulation 8(5) of the EEA Regulations 2016 despite not having a EEA Residence Card in that capacity. Article 8 ECHR consent was sought, in particular because the Respondent's British Citizen son had been born on 8 August 2022.

6. Mr Melvin indicated that consent to raising a new matter, an Article 8 ECHR claim, was not granted. It was up to the Respondent if he wished to make a formal, fee paid application.

7. The new arguments raised by Mr Jegede had not been considered by the First-tier Tribunal judge, and nor had any Article 8 ECHR claim been made. It was too late for these to be raised now. In any event, Celik (above) had addressed all relevant issues for durable partnership or delayed marriage post Brexit, and was binding. It was plain that the Respondent did not hold a relevant document and so did not in fact meet the full definition of durable partner in Appendix EU of the Immigration Rules. Nor had the Respondent's presence in the United Kingdom been facilitated by the Appellant under any relevant EU provision, so the Respondent had no separate rights accruing under the Withdrawal Agreement.

8. The Tribunal accordingly ruled that the First-tier Tribunal Judge had misdirected himself. The point on which the Respondent had succeeded was not available to him. The decision was accordingly set aside.

9. As no further findings of fact were required, the decision was remade. Mr Melvin indicated that he considered that he need not make any additional submissions as

the situation was clear and the appeal must fail. Mr Jegede wished to add nothing to his earlier submissions.

10. As Judge Parkes noted when granting permission to appeal, the new Immigration Rules implementing Brexit are of some complexity and have given rise to differences of interpretation, compounded by the impact of the disruption caused by the Covid 19 pandemic. The law has now been helpfully clarified by the Upper Tribunal, providing guidance which had not previously been available. There was no challenge to the First-tier Tribunal Judge's findings of fact. These included, as was accepted, that the Respondent did not hold a relevant document and was in the United Kingdom illegally. Those findings meant that the judge's finding that there was a durable partnership predating the post Brexit marriage took the Respondent's case no further, because he did not hold a relevant document.

11. Accordingly, the Tribunal ruled that the decision and reasons were subject to material error of law, for the reasons given above. Celik (above) applied:

    (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.

12. It follows that the Respondent's appeal must be dismissed.

DECISION

The appeal to the Upper Tribunal is allowed.

There were material errors of law in the First-tier Tribunal's decision and reasons, which is accordingly set aside.

Following a summary rehearing, the original decision was remade.

The original appeal is dismissed.

Signed **R J Manuell** **Dated** 12 October 2022

Deputy Upper Tribunal Judge Manuell