



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

Appeal Number: UI-2022-003084
on appeal from EA/15130/2021

THE IMMIGRATION ACTS

**Heard at Field House
On 7 November 2022**

**Decision & Reasons Promulgated
On 11 December 2022**

Before

UPPER TRIBUNAL JUDGE GLEESON

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

**EKREM DULI
[NO ANONYMITY ORDER]**

Respondent

Representation:

For the appellant: Mr Esen Tufan, a Senior Home Office Presenting Officer

For the respondent: Mr Stuart Kerr of Counsel, with Karis Solicitors Limited

DECISION AND REASONS

1. The Secretary of State appeals with permission from the decision of the First-tier Tribunal allowing his appeal against her decision on 4 November 2021 to refuse his application under the Immigration (Citizens' Rights Appeals) (EU Exit) Regulations 2020) and the EU Settlement Scheme (EUSS). The claimant is a citizen of Albania.
2. **Mode of hearing.** The hearing today took place face to face.

Background

3. The background to this appeal is uncontentious. The claimant married his Italian-Chilean (and therefore EEA citizen) wife on 12 June 2021, almost 6 months after the end of the transition period on 31 December 2020. She has pre-settled status in the UK.
4. On 28 June 2021, the claimant applied under the EUSS, based on that relationship. The Secretary of State does not dispute the genuineness of the relationship nor that the parties were legally married at the date of application. There were no concerns about the claimant's conduct in the UK.
5. On 27 October 2021, the Secretary of State refused his application because he did not meet the eligibility requirements under Appendix EU as the spouse of a relevant EEA citizen. The Secretary of State also considered that the claimant did not meet the 'durable partner of an EEA citizen' definition because he lacked a relevant document, in context a valid family permit or residence card issued under the Immigration (European Economic Area) Regulations 2016.

First-tier Tribunal decision

6. The First-tier Judge considered that applying Regulation 19(1)(r) of the Withdrawal Agreement, Article 52 of the EU Charter and the approach of the Supreme Court in *R (Lumsdon and others) v Legal Services Board* [2015] UKSC 41, it was not open to the Secretary of State to refuse the claimant because he lacked a specified document. The judge did not explain exactly how *R (Lumsdon)* assisted him in reaching that conclusion.
7. The First-tier Tribunal considered the Secretary of State's decision to be disproportionate. Had the claimant applied for a relevant document before the end of the transition period on 31 December 2020, the First-tier Judge found that it would have been granted.
8. The First-tier Tribunal allowed the claimant's appeal.
9. The Secretary of State appealed to the Upper Tribunal.

Permission to appeal

10. Permission to appeal was granted to the Secretary of State on the basis that it was arguable that the First-tier Judge erred in law in finding that a durable partner of an EEA national was within scope of Appendix EU or the Withdrawal Agreement, in circumstances where the residence of that person had not been facilitated by the UK before the transition date of 31 December 2020.

Rule 24 Reply

11. There was no Rule 24 Reply on behalf of the claimant.

12. That is the basis on which this appeal came before the Upper Tribunal.

Upper Tribunal hearing

13. For the respondent, Mr Tufan relied on his grounds of appeal.
14. For the claimant, Mr Kerr acknowledged that the decision of the Upper Tribunal in *Celik (EU exit, marriage, human rights)* [2022] UKUT 220 (IAC), promulgated on 19 July 2022, placed him in some difficulty. He relied on his skeleton argument and did not wish to add to it.
15. In his skeleton argument for today's hearing, Mr Kerr acknowledged that the decision in *Celik* dealt with the same issues as those in this appeal and was supportive of the Secretary of State's position. He understood that the legal team who represent Mr Celik had a pending application before the Court of Appeal for permission to appeal.
16. The claimant wished to preserve his position by relying on the arguments in his First-tier Tribunal skeleton argument, but noted that *Celik* did not assist him. In the First-tier Tribunal skeleton argument, the claimant had accepted that neither the requirement as a spouse nor the requirement as a durable partner under Appendix EU were met, because he could not meet the documentary requirements for durable partner status before 31 December 2020 and he did not marry his partner until June 2021.
17. He relied on Article 18(1)(r) of the Withdrawal Agreement and argued that the respondent's decision was disproportionate. Had it not been for the restrictions imposed during the Covid-19 pandemic, the parties would have married before 31 December 2020. She would be unable to exercise her own right to remain in the UK after the EU Exit if he were unable to remain with her.

Analysis

18. When deciding this appeal, the First-tier Tribunal did not have the benefit of the guidance given by the Upper Tribunal in *Celik*:

"(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.

(3) Regulation 9(4) of the 2020 Regulations confers a power on the First-tier Tribunal to consider a human rights ground of appeal, subject to the prohibition imposed by regulation 9(5) upon the Tribunal considering a new matter without the consent of the Secretary of State. "

19. The facts in this appeal are on all fours with those in *Celik*, which is fatal to the contentions advanced by Mr Kerr on behalf of the claimant. The question of proportionality is not reached, although it remains open to the claimant to make an ordinary Article 8 ECHR claim if so advised.
20. The decision of the First-tier Tribunal is wrong in law and cannot stand. We set it aside and remake the decision in this appeal by dismissing it.

DECISION

21. For the foregoing reasons, our decision is as follows:

The making of the previous decision involved the making of an error on a point of law.

We set aside the previous decision.

We remake the decision by dismissing the appeal.

Signed [Judith AJC Gleeson](#)
2022

Date: 7 November

Upper Tribunal Judge Gleeson