



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

Appeal Numbers: EA/15927/2021  
UI-2022-003584

**THE IMMIGRATION ACTS**

**Heard at Field House  
On 4 October 2022**

**Decision & Reasons Promulgated  
On 20 November 2022**

**Before**

**UPPER TRIBUNAL JUDGE McWILLIAM**

**Between**

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

Appellant

**And**

**MR FLORJAN ZEBI  
(ANONYMITY DIRECTION NOT MADE)**

Respondent

**Representation:**

For the Appellant: Ms A Everett, Home Office Presenting Officer  
For the Respondent: Mr N Paramjorthy, Counsel, Direct Access

**DECISION AND REASONS**

1. I shall refer to the Respondent as the Appellant as he was before the First-tier Tribunal. He is a citizen of Albania. His date of birth is 25 August 1993.
2. On 25 June 2021 the Appellant made an application under the EU Settlement Scheme (EUSS) as a family member of a relevant EEA citizen ( his wife, a citizen of France with settled status in the United Kingdom). The application was refused by the SSHD on 9 November 2021.

3. On 20 July 2022 the SSHD was granted permission to appeal against the decision of the First-tier Tribunal (Judge Hawden-Beal) to allow the Appellant's appeal against the decision of the SSHD on 9 November 2021.
4. The SSHD was not satisfied that the Appellant met the requirements for settled or pre-settled status because the marriage certificate submitted in support of his application indicated that he and his wife ( an EEA national) married on 21 June 2021 and therefore after the specified date on 31 December 2020. There was no evidence of a family permit or residence card having been issued to the Appellant under the Immigration (European Economic Area) Regulations 2016 ("the 2016 Regulations") on the basis of a durable relationship prior to that date.
5. There was no representation by the SSHD at the hearing before the First-tier Tribunal. The judge set out the correct law in her decision at paras 8-10. She made findings at paras 11-26. The judge, having set out the provisions of Appendix EU including Annex 1 and the relevant parts of the Withdrawal Agreement, concluded that the Appellant's appeal could not succeed under Appendix EU because the Appellant was not a family member and had not been documented as a durable partner. The judge concluded as follows at paragraphs 20 and 21:
  20. The Appellant does not have the required evidence as specified by Appendix EU to show that he is a family member of the Sponsor in order to qualify for settled or pre-settled status because he does not have the residence card, the right of permanent residence or a family permit issued to him before December 31<sup>st</sup> 2020, either as a spouse or a durable partner as required by Appendix EU and he cannot meet the definition of a durable partner and have his relationship considered under that definition and neither can he meet the requirements of Articles 9 and 10 [the Withdrawal Agreement] as noted above. There is no discretion within Appendix EU and Articles 9 and 10.
  21. Based on the evidence before me and conceded by Mr Paramjorthy, the Appellant cannot meet the requirements of Appendix EU because he married after the specified date and nor can he meet the definition of a durable partner either. I am further satisfied that the Appellant cannot meet the requirements of Article 10 (1)(e)(i) because he was not residing in accordance with EU law before the end of the transition period and under the Withdrawal Agreement, he would have had to apply from outside the UK."
6. Insofar as the dismissal of the appeal under Appendix EU and the Withdrawal Agreement with reference to Article 10 is concerned, there is no issue arising. There is no cross appeal. The decision of the First-tier Tribunal is in accordance with the recent reported decision of the Upper Tribunal in Celik (EU exit; marriage; human rights) [2022] UKUT 00220 (IAC).

### *The Grounds and Submissions*

7. The SSHD's grounds challenge the decision of the judge contained in paras 22 to 25 where she referred to Article 12 of the Withdrawal Agreement (non-discrimination). The judge found that Appendix EU disclosed disparity in the treatment between the partner of an EEA Sponsor and the partner of a British citizen. The judge found that the decision discriminated against the Appellant's wife and that therefore the decision breached the Withdrawal Agreement with reference to Article 12. The SSHD's case is that it has no application because the Immigration (Citizens' Rights Appeals) (EU Exit) Regulations 2020 ("the Exit Regulations") give an appellant a ground of appeal on the basis of the decision breaching their rights and not those of his or her partner.
8. The Upper Tribunal in Celik engaged with the same argument on discrimination grounds and stated as follows:
  - "84. There is, however, no merit in this new ground. Article 12 prohibits discrimination on the grounds of nationality within the meaning of Article 12 of the TFEU 'in respect of the persons referred to in Article 10 of this Agreement'. Since, for the reasons we have given, the appellant is not a person within Article 10, Article 12 cannot assist him.
  85. The appellant's attempt to rely upon the position of his wife, on the basis that she was exercising her right to reside in the United Kingdom in accordance with EU law before 31 December 2020 and continues to do so, cannot enable the appellant to succeed in the appeal. Article 8(2) states in terms that the first ground of appeal is that the decision 'breaches any right which the appellant has ...' not a third party. Likewise, the appellant's wife cannot be invoked in respect of the second ground of appeal in that the respondent's decision was not contrary to the immigration rules, so far as the wife was concerned.
  86. In any event, the appellant's wife is, as Ms Smyth submits, in a better position than British nationals, who do not enjoy automatic rights of entry and residence for their spouses. It appears that the appellant advances his discrimination argument by reference to the discrete category of family members of British citizens who benefit under the EUSS (but not under the Withdrawal Agreement) because of the exercise of EU free movement rights in a different State. This is, as Ms Smyth says, *Surinder Singh* territory. Such persons are not covered by the Withdrawal Agreement but can apply under the EUSS. The appellant's complaint that such persons are not required to produce a document under the 2016 Regulations is incorrect. They are, in fact, required to do so where they were resident in the United Kingdom before the end of the transition period without another lawful basis of stay in the UK: see sub-paragraph (e)(i) of the definition of 'required evidence of family relationship' in Annex 1. The extended family member of a British citizen would also need to have complied with the laws of the State in which their British sponsor had been exercising EU rights to reside."

9. There was no Rule 24 response. Mr Paramjorthy was pragmatic and recognised that as the Appellant had not been issued a residence card he was in a difficult position. He did not ask me to depart from recent jurisprudence of the UT. However, he raised concerns on behalf of the Appellant about inconsistent decision making of the Tribunal and the SSHD.

*Error of law*

10. It was not open to the judge to allow the Appellant's appeal. While the judge properly found that the Appellant could not meet the requirements of Appendix EU, a point which Mr Paramjorthy conceded before the First-tier Tribunal, the judge allowed the appeal on the basis that the decision breached Article 12 of the Withdrawal Agreement. The UT engaged with the same argument in Celik (see para 80-81) and explained why there was no substance in it. In brief the Appellant cannot succeed with reference to Article 12 because he does not come within the scope of Article 10, reg 8(2) of the Exit Regs concerns an appellant's rights and not those of a third parties and, in any event, for the reasons articulated by the UT in Celik at [86] there is no discrimination.

*Re-making*

11. The judge materially erred. I set aside the decision of the First-tier Tribunal to allow the Appellant's appeal. The parties did not have anything further to say in respect of remaking. I dismissed the appeal.

**Notice of Decision**

The appeal is dismissed.

Signed *Joanna McWilliam*

Date 12 October 2022

Upper Tribunal Judge McWilliam