



**Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: UI-2022-002552
EA/13239/2021**

THE IMMIGRATION ACTS

**Heard at Field House
On the 17th October 2022**

**Decision & Reasons Promulgated
On the 19th January 2023**

Before

**UPPER TRIBUNAL JUDGE PERKINS
DEPUTY UPPER TRIBUNAL JUDGE MAILER**

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

AGRON GJONI

(anonymity direction not made)

Respondent

Representation:

For the Appellant: Mrs A Nolan, Senior Home Office Presenting Officer

For the Respondent: Ms S Sierra Panagiotopolou, Counsel instructed by
Mayfairs Law, Solicitors

DECISION AND REASONS

1. This is an appeal brought by the Secretary of State against the decision of the First-tier Tribunal allowing the appeal of the respondent, hereinafter “the claimant”, against a decision of the Secretary of State refusing his application

for permission to remain in the United Kingdom as the husband of a Romanian citizen who has had the benefit of “pre-settled status” since 19 February 2020.

2. The Secretary of State’s decision was made with reference to the EU Settlement Scheme and particularly EU6, EU11 and EU14 of Appendix EU to the Immigration Rules.
3. The First-tier Tribunal heard the appeal on 14 February 2022 at a time when many judges had little experience of the relevant area of law and almost nothing to guide them from this Tribunal or above. The judge began with conspicuous care by setting out the nature of the application, the permissible grounds of appeal and the substance of the refusal decision; these were not simply copied out but set in a context which showed they had been considered carefully.
4. Notwithstanding the novelty of the appeal and the obvious potential difficulty in this area of law and the Secretary of State did not find it convenient to attend the First-tier Tribunal and present her case to assist the judge. Further, the reasons in the “Reasons for Refusal letter” are, we find, typical of the kind then issued and irritating because they tend to obscure rather than underline the point of contention. They are, with respect, correct but read as if they are intended to embrace a range of problems rather than identify a particular difficulty.
5. For example, the letter states:

“Further consideration has been given as to whether you qualify as the durable partner of [name]. However, there is not sufficient evidence to confirm this. The reasons for this are explained below.

The required evidence of family relationship for a durable partner of a relevant EEA citizen is a valid family permit or residence card issued under the EEA Regulations (...) as the durable partner of that EEA citizen and, where the applicant does not have a documented right of permanent residence, evidence which satisfies the Secretary of State that the durable partnership continues to subsist.

Home Office records do not show that you have been issued with a family permit or residence card under the EEA Regulations as the durable partner of the EEA national (...)

Therefore, you do not meet the requirements for settled status as a family member of a relevant EEA citizen.”
6. It might have written more clearly and helpfully if it had said something like:

“You do not qualify as the partner of an EEA national because you do not have the prescribed document.”
7. The First-tier Tribunal Judge was satisfied that the appellant and sponsor started living together in a joint household from 1 December 2018. They also gave notice of their intention to marry on 12 October 2020 and wished to marry before the end of 2020 but they could not marry until May 2021, that being the first available date at the Register Office because of difficulties arising from the well-known pandemic attributable to COVID-19. The crucial date was 31 December 2020. A marriage after then would not satisfy the rules.

8. It was never argued before the judge that Regulation 8(3) of the 2020 Regulations was satisfied because the marriage was not before the crucial date. Similarly it was not argued that the appellant was a durable partner because he *did* have the relevant document.
9. However, the judge was impressed with submissions made under Article 18 of the Withdrawal Agreement. The judge was particularly concerned with Article 18(r) of the Withdrawal Agreement. The judge summaries it at paragraph 94 and says it states that an applicant shall:

“have access to judicial and, where appropriate, administrative redress procedures in the [UK] against any decision refusing to grant the residence status. The redress procedures shall allow for an examination of the legality of the decision, as well as of the facts and circumstances on which the proposed decision is based. Such redress procedures shall ensure that the decision is not disproportionate”.
10. The judge decided that the failure of the United Kingdom authorities to make provision for those EU citizens who attempted to marry within the prescribed time periods, but could not marry because of reasons beyond their control, was a disproportionate failing. The judge decided to allow the appeal.
11. Before us Mrs Nolan relied particularly on the decision of this Tribunal by its then President, Lane J, with Upper Tribunal Judge Hanson and Upper Tribunal Judge McWilliam in **Celik v SSHD [2022] UKUT 220 (IAC)** promulgated on 19 July 2022. Plainly this was not available to the First-tier Tribunal and it post-dates the detailed Rule 24 notice that the claimant’s solicitors had sent to the Tribunal. Whilst there might be room to say the decision does not strictly bind us it is a decision that we have every intention of following and respectfully adopt its reasons. We set out below the first two paragraphs of the judicial headnote:

“(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 is probably not necessary to say anything further but we do draw attention particularly to paragraph 56 where the Tribunal said:

“56. The above analysis is destructive of the appellant’s ability to rely on the substance of Article 18.1. He has no right to call upon the respondent to provide him with a document evidencing his ‘new residence status’ arising from the Withdrawal Agreement because that Agreement gives him no such status. He is not within the terms of Article 10 and so cannot show that he is a family member for the purposes of Article 18 or some other person

residing in the United Kingdom in accordance with the conditions set out in Title II of Part 2.”

13. We find that the judge’s consideration of Article 18 was entirely misconceived. The claimant does not come within its scope because he had not obtained the necessary status at the required time. He may feel a sense of grievance because he was overtaken by events not within his control but very much within the control of the government in the sense that the government determined the policy in response to COVID-19. That does not help him. There is not sufficient elasticity in the Withdrawal Agreement for judges to take it on themselves to read into it things that are not there.
14. Ms Panagiotopolou was right to point out that the First-tier Tribunal did not have the benefit of the decision in **Celik** but it is also right to remember that the decisions of authoritative courts are declaratory. They state the law as it was. Whilst we have every sympathy for the First-tier Tribunal Judge, who was conspicuously trying to get it right and taking care, we are satisfied that the First-tier Tribunal materially erred in law.
15. We also toyed with the idea of there being other possible routes. We reject the suggestion that the claimant’s partner’s rights somehow impact on the interpretation of the Withdrawal Agreement. They do not; the agreement concerned the rights of the then applicant and, although we did air a possible alternative route in the hearing room, we find no basis for saying that there is another way in which the claimant can come within the scope of Article 18.
16. Neither can we see any merit in redetermining the case at a further hearing. We are satisfied that not only did the First-tier Tribunal Judge err in law but that the appeal could not have succeeded on the findings that were made. We wish to emphasis that this is not a case where the claimant has behaved in any way disreputably but he has made an application that cannot succeed because he does not come within the scope of the relevant Rule.

Notice of Decision

17. We therefore find the First-tier Tribunal erred in law. We set aside its decision and we 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 14 November 2022