Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: EA/15208/2021**
UI-2022-003678

THE IMMIGRATION ACTS

Heard at Field House
On the 14th November 2022

Decision & Reasons Promulgated
On the 19th January 2023

Before

UPPER TRIBUNAL JUDGE FRANCES

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

ASTRIT MICA
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:
For the Appellant: Ms A Everett, Home Office Presenting Officer
For the Respondent: Mr A Alam, direct access (No 12 Chambers)

DECISION AND REASONS

1. Although this is an appeal by the Secretary of State for the Home Department, I shall refer to the parties as in the First-tier Tribunal. The appellant is a citizen of Albania born on 14 April 1994. His appeal against the refusal of an EU family permit under the EU Settlement Scheme ('EUSS') was allowed by First-tier Tribunal Judge Sweet ('the judge') on 18 March 2022.

2. The appellant met the sponsor, a Romanian Citizen, in 2020 and they started living together in July 2020. The sponsor was granted pre-settled status under the EUSS on 18 December 2020. The appellant and sponsor were married on 16 July 2021. The appellant applied for pre-settled status as a family member under the EUSS on 30 June 2021. The application was refused on 21 October 2021.

3. At [9] of the decision the judge concluded:

> "I am persuaded that while the parties had not been together for two years in respect of a durable relationship as at the time of the application, there is evidence of that relationship being durable beforehand by their subsequent entering into marriage on 16 July 2021. It is not necessary for there to be a requisite document under Annex 1 (b)(i), if (aa) the application was made after the specified date, and (bbb) the person was resident in the UK and the relationship was durable before the specified date. It seems to me also that where an appellant would have succeeded under the 2016 EEA Regulations as being the spouse of an EEA citizen exercising her Treaty Rights, it would be disproportionate for him not to be able to succeed under Appendix EU under EUSS."

4. The respondent appealed on the following grounds:

> "**Ground One**
>
> It is respectfully submitted that FTTJ Sweet errs in allowing the appeal having found the appellant to have satisfied the requirements of the EUSS Scheme. He concludes, that whilst in fact the marriage took place after the UK left the EU and the end of the transition period, which was the 31st of December 2020, the appellant cannot satisfy the requirements as a spouse, however he has demonstrated that prior to that time he was in fact in a durable relationship with the sponsor. In doing so, it is asserted, that he ignores the requirement, that to demonstrate a relationship is durable under the terms of the Regulations, an individual would be expected to show evidence that they had enjoyed that relationship for a period of at least two years. The IJ accepts, that the appellant and his wife moved in together in July 2020, a period of less than six months prior to the end of the transition period. It is respectfully submitted that the appellant at the point he allegedly entered into a durable relationship would have been entitled to apply for a residence card supporting that position, he failed to do so, and as such he cannot now retrospectively claim such status.
>
> **Ground Two**
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> Under the terms of the withdrawal agreement, the appellant is required to show either a family permit or residence card, he has failed to do so. It is respectfully submitted that the FTTJ has materially erred in finding therefore, that the refusal of leave under Appendix EU is not in accordance with the Withdrawal agreement. It is submitted that the Withdrawal Agreement provides no applicable rights to a person in the Appellant's circumstances. Article 10(1)(e) of the Withdrawal Agreement confirms that beneficiaries of the agreement are those who were residing in the UK in accordance with EU law as of 31 December 2020. The appellant was not, and therefore does not come within the scope of that agreement. Accordingly, there was no entitlement to the full range of judicial redress including the Article 18(1)(r)

requirement that the decision was proportionate. As no such right is conveyed by the relevant parts of the Withdrawal Agreement, there can be no conceivable breach of rights in this appellant's case. Therefore it is submitted that the FTTJ has erred in finding that the decision to refuse the appellant claim under Appendix EU is in breach.

Ground Three

It is finally submitted that the FTTJ's finding on proportionality is irrational [9] "It seems to me also that where an appellant would have succeeded under the 2016 EEA Regulations as being the spouse of an EEA citizen exercising her Treaty Rights, it would be disproportionate for him not to be able to succeed under Appendix EU under EUSS."

5. Permission to appeal was granted by First-tier Tribunal Judge Gumsley on 22 July 2022 for the following reasons:

> "3. I am satisfied that it is arguable that the FtT Judge erred in his interpretation and application of the EUSS provisions and their relationship with the terms of the Withdrawal Agreement.
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> 4. In the circumstances leave to appeal is granted. No restriction is placed on what matters as pleaded may be argued."

Relevant law

6. Article 10 of the Withdrawal Agreement ('WA')states:

> "1. Without prejudice to Title III, this Part shall apply to the following persons:
>
> (a) Union citizens who exercised their right to reside in the United Kingdom in accordance with Union law before the end of the transition period and continue to reside there thereafter;
>
> (b) United Kingdom nationals who exercised their right to reside in a Member State in accordance with Union law before the end of the transition period and continue to reside there thereafter;
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> (c) Union citizens who exercised their right as frontier workers in the United Kingdom in accordance with Union law before the end of the transition period and continue to do so thereafter;
>
> (d) United Kingdom nationals who exercised their right as frontier workers in one or more Member States in accordance with Union law before the end of the transition period and continue to do so thereafter;
>
> (e) family members of the persons referred to in points (a) to (d), provided that they fulfil one of the following conditions:
>
> (i) they resided in the host State in accordance with Union law before the end of the transition period and continue to reside there thereafter;
>
> (ii) they were directly related to a person referred to in points (a) to (d) and resided outside the host State before the end of the transition period, provided that they fulfil the conditions

set out in point (2) of Article 2 of Directive 2004/38/EC at the time they seek residence under this Part in order to join the person referred to in points (a) to (d) of this paragraph;

(iii) they were born to, or legally adopted by, persons referred to in points (a) to (d) after the end of the transition period, whether inside or outside the host State, and fulfil the conditions set out in point (2)(c) of Article 2 of Directive 2004/38/EC at the time they seek residence under this Part in order to join the person referred to in points (a) to (d) of this paragraph and fulfil one of the following conditions:

– both parents are persons referred to in points (a) to (d);

– one parent is a person referred to in points (a) to (d) and the other is a national of the host State; or

– one parent is a person referred to in points (a) to (d) and has sole or joint rights of custody of the child, in accordance with the applicable rules of family law of a Member State or of the United Kingdom, including applicable rules of private international law under which rights of custody established under the law of a third State are recognised in the Member State or in the United Kingdom, in particular as regards the best interests of the child, and without prejudice to the normal operation of such applicable rules of private international law;

(f) family members who resided in the host State in accordance with Articles 12 and 13, Article 16(2) and Articles 17 and 18 of Directive 2004/38/EC before the end of the transition period and continue to reside there thereafter.

2. Persons falling under points (a) and (b) of Article 3(2) of Directive 2004/38/EC whose residence was facilitated by the host State in accordance with its national legislation before the end of the transition period in accordance with Article 3(2) of that Directive shall retain their right of residence in the host State in accordance with this Part, provided that they continue to reside in the host State thereafter.

3. Paragraph 2 shall also apply to persons falling under points (a) and (b) of Article 3(2) of Directive 2004/38/EC who have applied for facilitation of entry and residence before the end of the transition period, and whose residence is being facilitated by the host State in accordance with its national legislation thereafter.

4. Without prejudice to any right to residence which the persons concerned may have in their own right, the host State shall, in accordance with its national legislation and in accordance with point (b) of Article 3(2) of Directive 2004/38/EC, facilitate entry and residence for the partner with whom the person referred to in points (a) to (d) of paragraph 1 of this Article has a durable relationship, duly attested, where that partner resided outside the host State before the end of the transition period, provided that the relationship was durable before the end of the transition period and continues at the time the partner seeks residence under this Part.

5. In the cases referred to in paragraphs 3 and 4, the host State shall undertake an extensive examination of the personal circumstances of

the persons concerned and shall justify any denial of entry or residence to such persons.

7. The definition of durable partner in Annex 1 of Appendix EU is as follows:

"(a) the person is, or (as the case may be) for the relevant period was, in a durable relationship with a relevant EEA citizen (or, as the case may be, with a qualifying British citizen or with a relevant sponsor), with the couple having lived together in a relationship akin to a marriage or civil partnership for at least two years (unless there is other significant evidence of the durable relationship); and

(b) (i) the person holds a relevant document as the durable partner of the relevant EEA citizen (or, as the case may be, of the qualifying British citizen or of the relevant sponsor) for the period of residence relied upon; for the purposes of this provision, where the person applies for a relevant document (as described in sub-paragraph (a)(i)(aa) or (a)(ii) of that entry in this table) as the durable partner of the relevant EEA citizen or, as the case may be, of the qualifying British citizen before the specified date and their relevant document is issued on that basis after the specified date, they are deemed to have held the relevant document since immediately before the specified date; or

(ii) where the person is applying as the durable partner of a relevant sponsor (or, as the case may be, of a qualifying British citizen), or as the spouse or civil partner of a relevant sponsor (as described in sub-paragraph (a)(i)(bb) of the entry for 'joining family member of a relevant sponsor' in this table), and does not hold a document of the type to which sub-paragraph (b)(i) above applies, and where:

(aa) the date of application is after the specified date; and

(bb) the person:

(aaa) was not resident in the UK and Islands as the durable partner of a relevant EEA citizen (where that relevant EEA citizen is their relevant sponsor) on a basis which met the definition of 'family member of a relevant EEA citizen' in this table, or, as the case may be, as the durable partner of the qualifying British citizen, at (in either case) any time before the specified date, unless the reason why, in the former case, they were not so resident is that they did not hold a relevant document as the durable partner of a relevant EEA citizen for that period (where their relevant sponsor is that relevant EEA citizen) and they did not otherwise have a lawful basis of stay in the UK and Islands for that period; or

(bbb) was resident in the UK and Islands before the specified date, and one of the events referred to in sub-paragraph (b)(i) or (b)(ii) in the definition of 'continuous qualifying period' in this table has occurred and after that event occurred they were not resident in the UK and Islands again before the specified date; or

(ccc) was resident in the UK and Islands before the specified date, and the event referred to in sub-paragraph (a) in the definition of 'supervening event' in this table has occurred

> and after that event occurred they were not resident in the UK and Islands again before the specified date,
>
> the Secretary of State is satisfied by evidence provided by the person that the partnership was formed and was durable before (in the case of a family member of a qualifying British citizen as described in sub-paragraph (a)(i)(bb) or (a)(iii) of that entry in this table) the date and time of withdrawal and otherwise before the specified date; ….

8. In Batool and others (other family members: EU exit) [2022] UKUT 00219 (IAC), the Upper Tribunal held:

> "(1) An extended (oka other) family member whose entry and residence was not being facilitated by the United Kingdom before 11pm GMT on 31 December 2020 and who had not applied for facilitation of entry and residence before that time, cannot rely upon the Withdrawal Agreement or the immigration rules in order to succeed in an appeal under the Immigration (Citizens' Rights Appeals) (EU Exit) Regulations 2020.
>
> (2) Such a person has no right to have any application they have made for settlement as a family member treated as an application for facilitation and residence as an extended/other family member."

9. In Celik (EU exit; marriage; human rights) [2022] UKUT 00220 (IAC), the Upper Tribunal held:

> "(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."

Submissions

10. Ms Everett relied on the grounds and the decision of Celik. She submitted the judge had misunderstood the function of the WA and only considered whether the appellant was in a durable relationship. The decision should be set aside, remade and dismissed.

11. Mr Alam submitted the decision was in accordance with Appendix EU and the judge was correct to conclude the appellant satisfied the definition of durable partner notwithstanding he did not have a relevant document. The appellant satisfied b(ii)(bb)(aaa) when the definition was read literally. He was not living in the UK as a family member and had no other lawful basis of stay. This argument was made before the judge and he accepted it. The appellant's appeal succeeded under Appendix EU. The respondent's guidance on interpretation should be given due weight and any ambiguity resolved in the appellant's favour.

12. Alternatively, Mr Alam accepted that his argument under the WA was unlikely to succeed following Celik and submitted that Celik was wrongly decided.

13. In response, Ms Everett confirmed there was no challenge to the factual findings. She submitted there was no ambiguity in the respondent's guidance and the appellant was unable to satisfy the definition of durable partner in Appendix EU. The appellant's interpretation of the definition of durable partner made no sense because it was unfair for those who were present in the UK illegally to benefit in the way the appellant suggested.

14. The appellant was an extended family member and had to demonstrate his right to reside in the UK was facilitated before the specified date. He did not have a relevant document and in was insufficient to merely assert the relationship was durable. The appellant was not outside the UK and he had no lawful basis of stay in the UK. He could not satisfy the definition of durable partner in Appendix EU.

Conclusions and reasons

15. The appellant's partner is a Romanian national with pre-settled status under the EUSS. It is accepted the appellant entered the UK illegally and has remained in the UK unlawfully. He does not have leave to enter or remain and he does not hold a relevant document or residence permit.

16. The appellant is not a family member under Article 2(2) of the 2004 Directive and cannot satisfy Article 10(1) WA. It is not in dispute that the appellant did not apply for facilitation of entry or residence before the end of the transition period and his residence in the UK was not facilitated by the respondent prior to 11pm on 31 December 2020. The appellant cannot not satisfy Article 10(2) or 10(3) WA. The appellant entered the UK prior to the end of the transition period and therefore cannot not satisfy Article 10(4). Following Batool and Celik, the appellant cannot rely on the WA.

17. For the reasons given below, the judge erred in law at [9] in finding the appellant met the relevant eligibility requirements for pre-settled status under the EUSS. The appellant is not a family member and cannot satisfy

Appendix EU14. The appellant is not outside the UK and is not a joining family member under EU14A.

18. It is accepted the appellant was unlawfully resident in the UK before the specified date. On the facts asserted, the appellant cannot bring himself within the respondent's guidance: 'EU Settlement Scheme: EU, other EEA and Swiss citizens and their family members' dated 13 April 2022 which states as follows (at page 119):

> "Joining on or after 1 January 2021
>
> Where the applicant is applying after the specified date as a joining family member who is the durable partner of a relevant sponsor (or of a qualifying British citizen), they can provide a relevant document as the durable partner of the relevant sponsor (or qualifying British citizen) for the period of residence relied upon, and evidence which satisfies you that the durable partnership remains durable at the date of application (or did so for the period of residence relied upon). Otherwise, the applicant must either:
>
> - not have been resident in the UK and Islands in any capacity before the specified date
> - not have been resident in the UK and Islands as the durable partner of the relevant EEA citizen (where that relevant EEA citizen is their relevant sponsor) on a basis which met the definition of 'family member of a relevant EEA citizen' in Annex 1 to Appendix EU (or as the durable partner of the qualifying British citizen), at (in either case) any time before the specified date, unless the reason why, in the former case, they were not so resident is that they did not hold a relevant document as the durable partner of a relevant EEA citizen for that period (where their relevant sponsor is that relevant EEA citizen) and they did not otherwise have a lawful basis of stay in the UK and Islands (for example as a student) for that period – this means that a durable partner who did not hold a relevant document as the durable partner of a relevant EEA citizen (where their relevant sponsor is that relevant EEA citizen) for a period of residence in the UK and Islands before the specified date, and who did not otherwise have a lawful basis of stay in the UK and Islands for that period, cannot qualify as a joining family member on this basis
> - have been resident in the UK and Islands before the specified date, but their continuous qualifying period was interrupted by one of the following events, after which they were not resident in the UK and Islands again before the specified date, either:
>   - absence(s) from the UK and Islands which exceeded a total of 6 months in any 12-month period, unless the absence(s) fell within one or more of the specified exceptions or
>   - the applicant served a sentence of imprisonment of any length in the UK and Islands
> - have been resident in the UK and Islands before the specified date, and the applicant has then been absent from the UK and Islands for a period of more than 5 consecutive years (at any point since they last acquired the right of permanent residence in the UK under regulation 15 of the EEA Regulations, or the right of permanent residence in the Islands through the application there of section 7(1) of the Immigration

> Act 1988 or under the Immigration (European Economic Area) Regulations of the Isle of Man, or since they last completed a continuous qualifying period of 5 years) and, after that, they were not resident in the UK and Islands again before the specified date When considering whether a person with another lawful basis of stay in the UK and Islands before the specified date was the durable partner of a relevant EEA citizen before the specified date, only the period for which the person had another lawful basis of stay in the UK and Islands before that date can be considered for the purposes of assessing whether the partnership was durable before that date.

19. I am not persuaded by Mr Alam's interpretation of the definition of durable partner because the appellant cannot rely on b(ii)(bb)(aaa) if he is in the UK unless he has a lawful basis of stay. It is accepted he does not.

20. The judge erred in law in finding at [9] that it was sufficient for the appellant to be in a durable relationship before the specified date and resident in the UK. I find the appellant is not a durable partner under Annex 1 of Appendix EU and he cannot satisfy the requirements of Appendix EU. It is accepted the judge wrongly referred to (bbb) which is not applicable in this case.

21. Further and alternatively, the appellant has not applied under the Immigration (EEA) Regulations 2016. The appellant has not applied for a residence permit prior to 31 December 2020 and is unable to rely on the WA. The judge erred in concluding "it would be disproportionate for him not to be able to succeed under Appendix EU under the EUSS.' The judge erred in law and misapplied Appendix EU and the WA.

22. Following Batool, the appellant cannot rely on Appendix EU or the WA to succeed on an appeal under the Immigration (Citizens' Rights) (EU Exit) Regulations 2020 ('2020 Exit Regulations'). The appellant had no right to have the application treated as an application for facilitation and residence as a durable partner.

23. Accordingly, I find the judge erred in law and I set aside the decision dated 18 March 2022. I remake the decision and dismiss the appellant's appeal under the Immigration (Citizens' Rights) (EU Exit) Regulations 2020 ('2020 Exit Regulations').

Notice of Decision

The respondent's appeal is allowed.

The decision of the First-tier Tribunal dated 18 March 2022 is set aside.

The appellant's appeal is dismissed under the Immigration (Citizens' Rights Appeals) (EU Exit) Regulations 2020.

J Frances

Signed Date: 14 November 2022
Upper Tribunal Judge Frances

TO THE RESPONDENT
FEE AWARD

As I have dismissed the appeal, I make no fee award.

J Frances

Signed Date: 14 November 2022
Upper Tribunal Judge Frances

NOTIFICATION OF APPEAL RIGHTS

1. A person seeking permission to appeal against this decision must make a written application to the Upper Tribunal. Any such application must be **received** by the Upper Tribunal within the **appropriate period** after this decision was **sent** to the person making the application. The appropriate period varies, as follows, according to the location of the individual and the way in which the Upper Tribunal's decision was sent:

2. Where the person who appealed to the First-tier Tribunal is **in the United Kingdom** at the time that the application for permission to appeal is made, and is not in detention under the Immigration Acts, the appropriate period is **12 working days (10 working days, if the notice of decision is sent electronically).**

3. Where the person making the application is in detention under the Immigration Acts**, the appropriate period is 7 working days (5 working days, if the notice of decision is sent electronically)**.

4. Where the person who appealed to the First-tier Tribunal is **outside the United Kingdom** at the time that the application for permission to appeal is made, the appropriate period is **38 days (10 working days, if the notice of decision is sent electronically).**

5. A "working day" means any day except a Saturday or a Sunday, Christmas Day, Good Friday or a bank holiday.

6. The date when the decision is "sent' is that appearing on the covering letter or covering email.