



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

Appeal Number: UI-2022-003763  
EA/00755/2022

**THE IMMIGRATION ACTS**

**Heard at Field House  
And by remote CVP hearing  
On 25<sup>th</sup> November 2022**

**Decision & Reasons Promulgated  
On 31 January 2023**

**Before**

**UPPER TRIBUNAL JUDGE KEITH**

**Between**

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

Appellant

**and**

**GAURAVKUMAR KISHORCHANDRA PAREKH  
(ANONYMITY DIRECTION NOT MADE)**

Respondent

**Representation:**

For the appellant: Mr T Melvin, Senior Home Office Presenting Officer  
For the respondent: Mr H Kannangara, Counsel, instructed by direct access.

**DECISION AND REASONS**

**Introduction**

1. These are the approved record of the decision and reasons which I gave orally at the end of the hearing on 25<sup>th</sup> November 2022.
2. To avoid confusion, I refer to the appellant as the Secretary of State, and the respondent as the Claimant.

3. I conducted the hearing from Field House, with Mr Melvin attending in person, while Mr Kannangara attended remotely via CVP, at his request. I was satisfied that I was able to see and hear him and checked with him that he was able to hear us. He indicated that he had some difficulty in seeing all of me on his screen, but indicated that he wished to proceed, as he could hear us very well. The Claimant observed in person. I was satisfied that there was a fair and effective hearing.
4. The appeal is by the Secretary of State against the decision of First-tier Tribunal Judge Moffat (the 'FtT') promulgated on 6<sup>th</sup> July 2022, by which she allowed the Claimant's appeal under the Immigration (Citizens' Rights Appeals) (EU Exit) Regulations 2020. That in turn was an appeal against the Secretary of State's decision, on 16<sup>th</sup> January 2022, to refuse the Claimant's application for EU settled status. In the refusal letter, the Secretary of State noted that her records did not show the Claimant had been issued with a family permit or residence card under the Immigration (EEA) Regulations, as a relative of an EEA national. To meet the requirement of Appendix 1 of Appendix EU, the Secretary of State concluded that the Claimant needed to hold a valid relevant document.
5. The Claimant appealed against that decision, on 26<sup>th</sup> January 2022, on the basis that he and his then partner (now his wife) had been living together in a durable relationship prior to their marriage on 19<sup>th</sup> May 2021. They had applied before 31<sup>st</sup> December 2020 to get married, but they were unable to do so after the local council suspended all marriage ceremonies during Covid. These were matters beyond their control. The Claimant contended that he ought to have been granted pre-settled status, as the genuineness of his relationship with his partner had not been disputed.

### **The FtT's decision**

6. The FtT found that the Claimant had no current status in the UK; nor did he have a relevant document at the date of his application; nor one covering the period of cohabitation prior to the specified date (paragraph [30] of the decision). Without such a document, the Claimant could not succeed under Appendix EU. However, at paragraph [36], the FtT referred to the Claimant's reliance on the Withdrawal Agreement, specifically articles 3 and 10. In that context, at paragraph [43], the FtT considered the proportionality of the Secretary of State's decision. At paragraph [45], she concluded that the Secretary of State's decision was disproportionate. She allowed the Claimant's appeal.

### **The grounds of appeal and grant of permission**

7. The Secretary of State appealed on 18<sup>th</sup> July 2022, on the basis that the Withdrawal Agreement provided no applicable rights to the Claimant and therefore the FtT had erred in law.
8. Designated Judge Shaerf granted permission on 8<sup>th</sup> August 2022. The grant of permission was not limited in its scope.

### **The hearing before me**

9. I explored with Mr Kannangara at the beginning of the hearing the authorities of Batool and others (other family members: EU exit) [2022] UKUT 00219 (IAC) and Celik (EU exit; marriage; human rights [2022] UKUT 220 (IAC). He indicated that while the FtT's decision pre-dated both of these decisions, in light of them, the FtT had 'probably' erred in law. He confirmed that he was not in a position to advance any positive argument in response to the Secretary of State's appeal that in light of Batool and Celik, the FtT had so erred. However, he urged me to preserve relevant findings of fact, which could assist the Claimant in the future.
10. Without any discourtesy to Mr Melvin, I was able to reach a decision on whether the FtT had erred in law, without his needing to make substantive submissions beyond his skeleton argument, which cited Batool and Celik. Whilst these decisions in Batool are not binding on me, there was no argument advanced against, nor any reason to depart from, one of their headnote principles, namely that:

“(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.” (Batool)

...

“(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.”(Celik)

### **Decision on whether the FtT erred in law**

11. There is no suggestion the Claimant had applied for facilitated entry or residence and in the circumstances, the FtT's analysis by reference to the Withdrawal Agreement was an error of law. As a consequence, her decision is unsafe and cannot stand.
12. However, I was also invited to preserve the specific findings that the Claimant and his wife were and are in a genuine relationship, as per

paragraph [45] of the FtT's decision. In setting aside the FtT's decision, I preserve those findings.

13. I canvassed with the respective representatives whether I should retain remaking in the Upper Tribunal or remit back to the First-tier Tribunal. Both were agreed that I should retain remaking. I have considered each of paragraphs 7.2(a) and (b) of the Senior President's Practice Statements. The effect of the FtT's error had not been to deprive a party of a fair hearing nor, as Mr Kannangara confirmed, was there any additional judicial fact-finding necessary. I therefore retained remaking in the Upper Tribunal.

### **Remaking decision on the Claimant's appeal**

14. Mr Kannangara invited me to remake the appeal today. The Claimant relied on no additional written evidence, nor was any oral evidence given. Mr Melvin did not object. I note the preserved findings. Mr Kannangara has not advanced any specific arguments as to why the guidance in Batool and Celik does not apply to the Claimant's case. He accepts that the factual circumstances in Celik are analogous to this case, specifically that there had been no application for a facilitated entry/residence before the relevant time. If Celik is correct, Mr Kannangara accepted that the Claimant is not in scope to rely on the Withdrawal Agreement. There was no separate human rights claim which this Tribunal had any jurisdiction to consider.
15. In the circumstances, I apply the guidance in Batool and Celik and dismiss the Claimant's appeal.

### **Notice of Decision**

**The decision of the First-tier Tribunal contains material errors of law and I set it aside, subject to the preserved findings that the Claimant and his wife were and are in a genuine relationship, as claimed.**

**I remake the appeal by dismissing the Claimant's appeal.**

**No anonymity direction is made.**

Signed J. Keith

Date: 25<sup>th</sup> November 2022

Upper Tribunal Judge Keith