



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

Appeal Number: UI-2022-003273
EA/01266/2022

THE IMMIGRATION ACTS

**Heard at Field House
On 9 November 2022**

**Decision & Reasons Promulgated
On 19 March 2023**

Before

UPPER TRIBUNAL JUDGE PITT

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

**MR ELIDON PECI
(ANONYMITY DIRECTION NOT MADE)**

Respondent

Representation:

For the Appellant: Mr Tufan, Senior Home Office Presenting Officer

For the Respondent: Mr Wilford, Counsel instructed on Direct Access

DECISION AND REASONS

1. This is an appeal against the decision issued on 7 June 2022 of First-tier Tribunal G D Davison which allowed the appellant's appeal against a decision of the respondent refusing his application for a family permit made under the European Union Settlement Scheme (EUSS).
2. For the purposes of this decision, I refer to the Secretary of State for the Home Department as the respondent and to Mr Peci as the appellant, reflecting their positions before the First-tier Tribunal.

3. Mr Peci is a citizen of Albania, born on 10 April 1993.
4. Mr Tufan confirmed at the hearing that on 18 September 2020 the appellant applied under the Immigration (European Economic Area) Regulations 2016 (the EEA Regulations) for a residence card showing him to be in a durable relationship with his Italian partner, Ms Pelaia. That application was refused on 17 November 2020. The appellant appealed to the First-tier Tribunal. Mr Tufan also confirmed that the appeal under the EEA Regulations has been given reference number EA/50761/2020 and is to be heard by the First-tier Tribunal on 9 March 2023.
5. It is also undisputed that the appellant married Ms Pelaia on 9 April 2021. The appellant then applied on 11 May 2021 for a family permit under the EU Settlement Scheme as set out in Appendix EU of the Immigration Rules. The respondent refused that application on 28 January 2022. The respondent maintained that the appellant had not shown that he was a family member or durable partner as defined in Appendix EU.
6. The appellant appealed against the refusal of 28 January 2022. The appeal was brought under The Immigration (Citizens' Rights Appeal) (EU Exit) Regulations 2020 on the basis that the decision was not in accordance with Appendix EU and breached the appellant's rights under the Withdrawal Agreement.
7. The appeal came before First-tier Tribunal Judge Davison on 19 May 2022. The decision shows in paragraph 2 that "there were no factual disputes". Further, in paragraph 14 the Judge made a finding that the appellant was a durable relationship with Ms Pelaia as of 31 December 2020.

"14. I find, despite the lack of two years cohabitation that the couple were in a 'durable' relationship as at 31 December 2020. I accept at this date that they were engaged and co habiting. The fact they went on to marry shows the enduring and 'durable' nature of their relationship. I did not therefore find the lack of two years cohabitation to be relevant, the definition in the Annex allows for a finding of durability of relationship on the individual facts of the claim. Having considered the same I find they were in a durable relationship. This was not dispute (sic) by the Respondent as the facts of the appeal were unchallenged."

8. The judge considered the respondent's guidance on Appendix EU, various provisions of the Withdrawal Agreement and the question of proportionality thereunder. The judge allowed the appeal as he found that "the EUSS is met" and because the decision was not in accordance with the Withdrawal Agreement and was "disproportionate".
9. The respondent's challenge to that decision maintained that the First-tier Tribunal misapplied the law when finding that the appellant was a durable partner as defined under Appendix EU and misapplied the provisions of the Withdrawal Agreement, including the approach to proportionality.

10. By the time of the error of law hearing, the issues arising in appeals of this kind had been considered by a Presidential panel of the Upper Tribunal in Celik (EU exit; marriage; human rights) [2022] UKUT 00220 (IAC). Neither the First-tier Tribunal when making its decision nor the respondent when drafting the grounds of challenge had the benefit of that learning.
11. Further, although there is a reference in the decision of the First-tier Tribunal in paragraphs 1 and 28 to the appellant having made an earlier application as a durable partner neither party appears to have considered this to be a material factor and this part of the appellant's history was not clarified by the respondent as it was before me; see paragraph 4 above.
12. The combination of the learning in Celik and a proper understanding of the appellant's immigration history is central to the correct approach to this appeal. The headnote of Celik states:

“(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. (my emphasis)”
13. The Upper Tribunal set out in paragraph 53 a more detailed explanation of why Mr Celik could not succeed:

“53. If the appellant had applied for facilitation of entry and residence before the end of the transition period, Article 10.3 would have brought him within the scope of that Article, provided that such residence was being facilitated by the respondent 'in accordance with ... national legislation thereafter'. This is not, however, the position. For an application to have been validly made in this regard, it needed to have been made in accordance with regulation 21 of the 2016 Regulations. That required an application to be submitted online, using the relevant pages of www.gov.uk, by post or in person, using the relevant application form specified by the respondent; and accompanied by the applicable fee.”
14. It is now undisputed that this appellant did apply for facilitation as a durable partner under domestic legislation prior to 31 December 2020; see paragraph 4 above. He has an outstanding appeal against the subsequent refusal. Following Celik, unlike the appellant in that case, having applied for facilitation prior to the end of the transition period, this appellant comes within Article 10.3 of the Withdrawal Agreement.
15. Further, the First-tier Tribunal found that the appellant was a durable partner as of 31 December 2020. The respondent's grounds do not agree with that finding, notwithstanding the concession before the First-tier Tribunal that this matter not disputed; see paragraph 7 above. In any event, the reasoning in paragraph 14 of the First-tier Tribunal decision (set out in paragraph 7 above) did not show that the judge took an irrational approach in that assessment. The judge considered the relevant evidence

and heard from the appellant and his wife. He was entitled to find that there was “significant evidence of the durable relationship” as required by Appendix EU and provided rational reasons for so finding.

16. I accept that the First-tier Tribunal, without the guidance provided by Celik, reached its decision on an incorrect legal basis and without a proper understanding of the materiality of the outstanding application for “facilitation” made prior to 31 December 2020. I therefore set it aside to be remade. The discussion set out above shows that the appeal must be remade as allowed given the extant factual finding of the existence of a durable relationship at all material times, the appellant being a durable partner under Appendix EU where he had made an application for facilitation as of 31 December 2020.
17. The extant judicial finding that the appellant was in a durable relationship as of 31 December 2020 is also material to the outstanding appeal under the EEA Regulations listed for March 2023. It may be that correspondence between the parties can settle that matter without the need for a hearing.

Notice of Decision

18. The decision of the First-tier Tribunal discloses an error on a point of law and is set aside to be remade.
19. The appeal is remade as allowed as the respondent’s decision is not in accordance with Appendix EU and breached the appellant’s rights under the Withdrawal Agreement.

Signed: S Pitt
Upper Tribunal Judge Pitt

Date: 9 January 2023