



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

**Appeal Number: EA/14983/2021  
UI-2022-003745**

**THE IMMIGRATION ACTS**

**Heard at Field House IAC  
On the 28 November 2022**

**Decision & Reasons Promulgated  
On the 07 February 2023**

**Before**

**UPPER TRIBUNAL JUDGE FRANCES**

**Between**

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

Appellant

**and**

**BABOUARR LOUM  
(ANONYMITY DIRECTION NOT MADE)**

Respondent

**Representation:**

For the Appellant: Ms Nolan, Home Office Presenting Officer

For the Respondent: Ms Srintran, instructed by JT Solicitors

**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 Gambia born on 3 October 1977. His appeal against the refusal of pre-settled status as a family member under the EU Settlement Scheme ('EUSS') was allowed by First-tier Tribunal Judge Cameron ('the judge') on 11 July 2022.

2. The appellant came to the UK as a student in 1998 and overstayed. He met the sponsor, a Romanian national, in 2014 and their daughter was born on 10 August 2016. The sponsor was granted pre-settled status under the EUSS on 26 August 2019. The appellant applied for pre-settled status as a family member under the EUSS on 30 June 2021. The application was refused on 18 October 2021.
3. The judge found the appellant and sponsor were in a durable relationship prior to 31 December 2020 ('the specified date') which was genuine and subsisting at the date of hearing. He concluded the appellant "met the requirements of the regulations."
4. Permission to appeal was granted by First-tier Tribunal Judge Karbani on 4 August 2022 on the grounds that it was arguable the judge had failed to consider whether the appellant's residence was facilitated before the specified date. It was a material and arguable error the judge had failed to consider, or failed to provide adequate reasons, by allowing the appeal without a full consideration of the applicable rules.

### **Relevant law**

5. 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."
6. 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.”

## **Conclusions and reasons**

9. The appellant made an application under the EUSS not under the Immigration (EEA) Regulations 2016 ('the 2016 EEA Regulations'). The application was refused on the grounds the appellant did not have a relevant document and did not meet the requirements of the EUSS immigration rules ('Appendix EU'). There was no dispute the appellant did not have a family permit or residence card issued under the 2016 EEA Regulations as a durable partner.
10. The grounds submit the judge failed to properly consider the provisions of Appendix EU. The appellant did not have a relevant document as evidence that his residence was facilitated under the 2016 EEA Regulations as of 31 December 2020. The requirements of Appendix EU could not be met by a durable partner whose residence had not been facilitated. The judge erred in law in failing to give reasons for why the decision refusing the application under the EUSS was not in accordance with Appendix EU.
11. There was no challenge to the judge's finding that the appellant was in a durable relationship with the sponsor. However, this was not sufficient to satisfy the definition of 'durable partner' in Appendix EU. The appellant's residence in the UK was not facilitated by the respondent prior to the specified date and the appellant did not have a relevant document. The appellant cannot satisfy the requirements of Appendix EU or Article 10(2) or 10(3) of the Withdrawal Agreement.
12. I find the judge materially erred in law in allowing the appeal. I set aside the decision dated 11 July 2022 and remake it. The appellant cannot satisfy the requirements of Appendix EU and he has no substantive right under the Withdrawal Agreement. I dismiss the appeal under the Immigration (Citizens' Rights Appeals) (EU Exit) Regulations 2020.

## **Notice of Decision**

**The respondent's appeal is allowed.**

**The decision of the First-tier Tribunal dated 11 July 2022 is set aside.**

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

**J Frances**

Signed  
Upper Tribunal Judge Frances

Date: 30 November 2022

**TO THE RESPONDENT**  
**FEE AWARD**

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

**J Frances**

Signed  
Upper Tribunal Judge Frances

Date: 30 November 2022

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**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.