



IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2022-002858
On appeal from: EA/15926/2021

THE IMMIGRATION ACTS

Decision & Reasons Issued:

On 15th of December 2023

Before

UPPER TRIBUNAL JUDGE GLEESON

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

EDISON HOTAJ
(NO ANONYMITY ORDER)

Respondent

Representation:

For the Appellant: Mr Chris Avery, a Senior Home Office Presenting Officer
For the Respondent: Mr Daniel Gillard, legal representative with Metro
Immigration Solicitors

Heard at Field House on 7 December 2023

DECISION AND REASONS

Introduction

1. The Secretary of State appealed the decision of the First-tier Tribunal allowing the claimant's appeal against his decision on 11 April 2022 to refuse him settled or pre-settled status under the EU Settlement Scheme and Appendix EU of the Immigration Rules HC 395 (as amended). The claimant is a citizen of Albania.

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2. The decision of the First-tier Tribunal has been set aside and I am now required to remake the decision in this appeal.
3. For the reasons set out in this decision, I have come to the conclusion that following the Court of Appeal's decision in *Celik v Secretary of State for the Home Department* [2023] EWCA Civ 921 (31 July 2023) (the *Celik* decision), the claimant's challenge to the Secretary of State's decision cannot succeed, and that his appeal must be dismissed.

Procedural matters

4. **Mode of hearing.** The hearing today took place on a hybrid basis, with Mr Avery appearing by video link and all other parties face to face.

Background

5. The main basis of the claimant's case is that he is entitled to be treated as a 'durable partner' under Appendix EU.
6. The claimant was not a spouse at the specified date. He is married to a Romanian national, a relevant EEA citizen, whom he met in August 2019. They moved in together in February 2020, just 10 months before the EU Exit specified date of 11 p.m. on 31 December 2020. They married on 23 April 2021.
7. The claimant cannot demonstrate that he was a spouse, and thus a family member, of a relevant EEA citizen on the specified date.
8. This appeal therefore stands or falls on whether the claimant can bring himself within the definition of 'durable partner' in Annex 1 to Appendix EU.

Refusal letter

9. The Secretary of State approached this application on the basis that the claimant was not a spouse before the specified date. That is not disputed. The parties did not marry until April 2021.
10. The Secretary of State also concluded that the claimant could not meet the definition of 'durable partner' in Annex 1 to Appendix EU, which requires not only proof of the existence of the relationship for at least two years before the specified date, but also that the claimant holds, or had applied for, a 'relevant document' before the specified date for EU Exit.
11. The claimant appealed to the First-tier Tribunal.

First-tier Tribunal decision

12. On 11 April 2022, First-tier Judge Cameron allowed the appeal. He accepted that the marriage was genuine and subsisting, and that the parties were living together before 31 December 2020.

13. The Judge correctly set out the 'durable partner' test in Annex 1 at [27] of his decision. He then considered whether there was 'other significant evidence of the durable relationship'. He concluded that:

"34. Taking account of all the evidence before me I am satisfied on the balance of probabilities that they commenced a relationship in August 2019 and that the relationship has continued since then. I am therefore satisfied on the balance of probabilities that there is significant evidence of the relationship, and I am satisfied on the balance of probabilities that the appellant and his wife meet the requirements to show that they have had a durable relationship existing prior to 31 December 2020."

14. The Secretary of State appealed to the Upper Tribunal.

Error of law decision

15. By a decision sent to the parties on 15 March 2023, Upper Tribunal Judge Frances and Deputy Upper Tribunal Judge Joliffe set aside the First-tier Tribunal decision, with the consent of both representatives:

"5. We find the judge erred in law for the following reasons. The appellant had applied on 27 April 2021 under the EUSS. The 2016 Regulations did not apply. Although the judge set out the definition of 'durable partner' in his decision, he did not properly apply it. The judge's unchallenged finding that the appellant and his partner were in a durable relationship prior to the specified date and they had subsequently married in April 2021 was insufficient to satisfy the definition of 'durable partner' under Appendix EU. We find the judge failed to properly apply Appendix EU.

6. We set aside the decision promulgated on 11 April 2022 and adjourn the appeal to be reheard before the Upper Tribunal. We are satisfied the appeal raises the same issues as in *Celik* and stay the re-hearing pending the decision of the Court of Appeal."

16. By a Transfer Order made on 9 November 2023, Principal Resident Judge Blum directed the remaking hearing to be heard by a differently constituted Tribunal and it was listed before me.

17. That is the basis on which this appeal came before me today.

Upper Tribunal hearing

18. The oral submissions at the hearing are a matter of record and need not be set out here. I had access to all of the documents before the First-tier Tribunal. I confirmed the factual matrix with Mr Gillard for the claimant.

19. It was not necessary to call on Mr Avery for submissions on behalf of the Secretary of State.

‘Durable partner’ definition

20. The definition of ‘durable partner’ in Annex 1 is that:

“(a) the person is, or (as the case may be) was, in a durable relationship with the relevant EEA citizen (or, as the case may be, with the qualifying British citizen), 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) where the applicant was resident in the UK and Islands as the durable partner of a relevant EEA citizen before the specified date, the person held a relevant document as the durable partner of the relevant EEA citizen or, where there is evidence which satisfies the entry clearance officer that the applicant was otherwise lawfully resident in the UK and Islands for the relevant period before the specified date (or where the applicant is a joining family member) or where the applicant relies on the relevant EEA citizen being a relevant person of Northern Ireland, there is evidence which satisfies the entry clearance officer that the durable partnership was formed and was durable before the specified date; and

(c) it is, or (as the case may be) was, not a durable partnership of convenience; and

(d) neither party has, or (as the case may be) had, another durable partner, a spouse or a civil partner with (in any of those circumstances) immigration status in the UK or the Islands based on that person’s relationship with that party.”

21. A relevant document is defined in Annex A:

“Relevant document

(a)(i)(aa) a family permit, registration certificate, residence card, document certifying permanent residence, permanent residence card or derivative residence card issued by the UK under the EEA Regulations on the basis of an application made under the EEA Regulations before (in the case, where the applicant is not a dependent relative, of a family permit) 1 July 2021 and otherwise before the specified date (or, in any case, a letter from the Secretary of State, issued after 30 June 2021, confirming their qualification for such a document, had the route not closed after 30 June 2021)”

The claimant had not applied before the specified date, for any of those documents.

The *Celik* judgment

22. The *Celik* judgment was handed down by the Court of Appeal on 31 July 2023, after interventions from The Aire Centre, Here for Good, and the Independent Monitoring Authority for the Citizens’ Rights Agreements. Lord Justice Lewis gave the judgment of the Court, Lord Justices Singh and Moylan concurring.

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23. The Court of Appeal held that a person who was not a family member as defined, and did not have one of the specified documents, was not a 'durable partner' as defined in Annex 1 to Appendix EU. The Court considered a range of submissions regarding the correct application of Appendix EU, and at [68] found that:

"The Upper Tribunal was correct in deciding that the decision of 23 June 2021 was in accordance with the requirements of the rules in Appendix EU and rule EU11 and EU14 in particular. The fact is that the appellant was not a family member at the material time. He had not married an EU national before 11 p.m. on 31 December 2020. He was not a durable partner within the meaning of Annex 1 to Appendix EU as he did not have a residence card as required and he did not have a lawful basis of stay in the United Kingdom (he was in the United Kingdom unlawfully). The appellant did not qualify for leave to remain under Appendix EU. There is no obligation to interpret or "read down" the relevant rules to reach a different result."

Discussion

24. I consider that it is appropriate to remake the decision by applying the *Celik* guidance to the accepted facts. The question for this Tribunal is whether the special arrangements made for EEA citizens and their partners in Appendix EU and the Withdrawal Agreement avail this claimant.
25. The factual matrix is undisputed. The claimant was not married to the relevant EEA national at the specified date, and can therefore succeed only if he can bring himself within the 'durable partner' provisions in Annex 1 to Appendix EU of the Rules.
26. The claimant's position is on all fours with that considered in the *Celik* judgment. He cannot meet either limb of the 'durable partner' test. He met his now wife in August 2019 and began living with her in February 2020. At 31 December 2020, they had not been living together for two years.
27. He had no 'relevant document' and had not applied for one before the specified date. Accordingly, he is not a 'durable partner' as defined in Annex 1.
28. The claimant's appeal must be dismissed.

Notice of Decision

29. For the foregoing reasons, my decision is as follows:

The making of the previous decision involved the making of an error on a point of law.

I set aside the previous decision. I remake the decision by dismissing the claimant's appeal.

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Judith A J C Gleeson
Judge of the Upper Tribunal
Immigration and Asylum Chamber

Dated: 8 December 2023