



**IN THE UPPER TRIBUNAL**  
**IMMIGRATION AND ASYLUM CHAMBER**

Case No: UI-2022-  
006286

First-tier Tribunal No: EA/02430/2022

**THE IMMIGRATION ACTS**

**Decision & Reasons Issued:**

13<sup>th</sup> November 2023

**Before**

**UPPER TRIBUNAL JUDGE LINDSLEY**

**Between**

**SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Appellant

**and**

**SIFAT ULLAH POPALZAI**  
**(NO ANONYMITY ORDER MADE)**

Respondent

**Representation:**

For the Appellant: Ms J Isherwood, Senior Home Office Presenting Officer

For the Respondent: None

**Heard at Field House on 7 November 2023**

**DECISION AND REASONS**

*Introduction*

1. The claimant is a citizen of Afghanistan born on 28<sup>th</sup> December 1992. He applied for permission to remain under the EUSS on 11<sup>th</sup> May 2021. His application was refused by the Secretary of State on 30<sup>th</sup> July 2021. His appeal against the decision was allowed by First-tier Tribunal Judge Mailer in a determination promulgated on the 10<sup>th</sup> August 2022.

2. Permission to appeal was granted to the Secretary of State by Judge of the First-tier Tribunal Chowdhury on 12<sup>th</sup> January 2023 on the basis that it was arguable that the First-tier judge had erred in law when allowing the appeal in failing to follow the decisions of the Upper Tribunal in Celik and Batool.
3. The matter came before me to determine whether the First-tier Tribunal had erred in law, and if so to decide whether the decision should be set aside and remade. The claimant did not appear, but I found that he had been notified of the hearing and had not requested an adjournment so it was fair and in the interests of justice to proceed in his absence. Ms Isherwood informed me that the claimant had claimed asylum on 22<sup>nd</sup> October 2023, which might of course explain his absence.

#### *Submissions - Error of Law*

4. In the grounds of appeal from the Secretary of State it is argued that the First-tier Tribunal erred in law in allowing the appeal under the EUSS because the claimant had not had his stay in the UK facilitated as a durable partner under the 2016 Immigration (EEA) Regulations prior to the UK leaving the EU on 31<sup>st</sup> December 2020, and thus the claimant could not succeed in an appeal by reference to the Withdrawal Agreement or the Immigration Rules. Reliance was placed on the decision of the Upper Tribunal in Batool & Ors (other family members: EU exit) [2022] UKUT 219 for this proposition.
5. There was no Rule 24 notice submitted by the claimant, or submissions for the claimant as he did not attend or instruct a representative to attend on his behalf.

#### *Conclusions - Error of Law & Remaking*

6. It was accepted in the decision of the First-tier Tribunal that the claimant was factually in a genuine durable relationship with his Italian partner and that they had a baby together. This finding was open to the First-tier Tribunal on the facts of the case, and is sufficiently reasoned, but was not sufficient for the appeal to be allowed.
7. From the decision of the First-tier Tribunal it is clear that the application was refused by the Secretary of State because the claimant had not made an application for a residence card as a durable partner prior to the UK leaving the EU, and so did not meet the requirements of the Immigration Rules at Appendix EU.
8. I find that the First-tier Tribunal erred in law in failing to reason how the Immigration Rules at Appendix EU Annex 1 b included in the definition of durable partner a person who was factually in a durable partnership but who was unlawfully present in the UK and who had not obtained or applied for an EU residence card as a durable partner prior to 31<sup>st</sup> December 2020, as was the position of the claimant. There is no reasoning as to how the claimant was able to meet the requirements of

the Immigration Rules in the decision. I find that the definition of durable partner in the Immigration Rules requires that the appellant had applied for or obtained a residence card as of 31<sup>st</sup> December 2020 or was otherwise lawfully present and in a durable relationship. As this was not the case the appeal of this claimant cannot succeed under the Immigration Rules.

9. It is clear that the decisions of the Upper Tribunal in Batool and the Court of Appeal in Halil Celik v SSHD [2023] EWCA Civ 921 hold that a person in a durable relationship in the United Kingdom with an EU citizen has no substantive rights under the EU Withdrawal Agreement, unless his or her entry and residence had been facilitated before 11pm GMT on 31 December 2020 or he or she had applied for such facilitation before that time. As a result the First-tier Tribunal erred in law in finding that the appeal of this claimant, who had no residence card and who had not so applied for a residence card as a durable partner, could succeed under the EU Withdrawal Agreement. The appeal cannot succeed on this basis either.
10. I therefore find that the First-tier Tribunal materially erred in law and remake the appeal dismissing it under the Immigration Rules and the Withdrawal Agreement.

Decision:

1. The making of the decision of the First-tier Tribunal involved the making of an error on a point of law.
2. I set aside the decision of the First-tier Tribunal
3. I re-make the decision in the appeal by dismissing it.

**Fiona Lindsley**

Judge of the Upper Tribunal  
Immigration and Asylum Chamber

**7<sup>th</sup> November 2023**