IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2022-002349

First-tier Tribunal No: EA/00305/2022

THE IMMIGRATION ACTS

Decision & Reasons Issued:

On 1st October 2024

Before

UPPER TRIBUNAL JUDGE REEDS

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

NDUE NIKOLLI
(NO ANONYMITY ORDER MADE)

Respondent

Representation:
For the Appellant: No appearance or representation
For the Respondent: Mr Thompson, Senior Presenting Officer

Heard at Phoenix House (Bradford) on 18 September 2024

DECISION AND REASONS

1. The Secretary of State appeals with permission against the decision of the First-tier Tribunal (Judge Dunne) (hereinafter referred to as the "FtTJ") who allowed the appeal against the decision made to refuse his application for an EU family Permit under the EU Settlement Scheme in a decision promulgated on 22 March 2022. .

2. The First-tier Tribunal did not make an anonymity order, and no grounds have been advanced on behalf of the appellant to make such an order.

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3. Although the appellant in these proceedings is the Secretary of State, for convenience I will refer to the Secretary of State for the Home Department as the respondent and to the appellant before the FtT as “the appellant,” thus reflecting their positions before the First-tier Tribunal.

Preliminary issue:

4. There was no appearance at the hearing by the appellant or any representation on his behalf. In the circumstances I have considered Rule 38 of The Tribunal Procedure (Upper Tribunal) Rules 2008 to proceed with the hearing if the Tribunal
"(a) is satisfied that the party has been notified of the hearing or that reasonable steps have been taken to notify the party of the hearing; and (b) considers that it is in the interests of justice to proceed with the hearing".

5. The notice of hearing was served upon the appellant’s representative who was on file as acting. They later provided a letter dated 5 September 2024 confirming that they were withdrawing their representation and did not represent the appellant for the hearing. They provided a telephone number and later an email address. When looking at the history of the proceedings, there has been no contact from the appellant’s solicitors or the appellant himself following their application for a stay in February 2023. There was no response to the directions sent nor any reply to the consent order. There is no reference made to the information subsequently provided to the Tribunal by Mr Bates that the appellant had been granted leave, and this was confirmed by Mr Thompson whose system stated that he had been granted leave to remain on 29 November 2022 and a family/private life valid until 2025 and that BRP was successfully produced in December 2022. The appellant was represented by his legal representatives at the time of service of the hearing notice. In the circumstances I am satisfied that he has been notified of the hearing or in the alternative reasonable steps have been taken to notify him and also consider that it is in the interest of justice to proceed with the hearing.

6. Furthermore, and in the alternative, the tribunal staff have written to the email address provided by his former representatives asking him to confirm that email address, to provide any current residential address and to confirm whether he seeks to defend the appeal. No reply has been received by the tribunal staff who have considered the relevant inboxes. The tribunal staff have also attempted to telephone the appellant at the number given by his former representatives and have not been able to speak to the appellant. In those circumstances, and in the alternative, pursuant to Rule 34 (1) of the Upper Tribunal Rules, the Tribunal has power to make a decision without a hearing. Pursuant to Rule 34 (2) the

tribunal must have regard to any view expressed by a party however is set out above the tribunal has contacted the appellant to seek his view and no view has been expressed.

7. In light of the lack of engagement with the directions sent by the tribunal (as set out in the procedural background summarised below) and for the reasons set out above I proceed to consider the appeal on the material available.

The background:

8. The background to the appeal is set out in the evidence and in the decision of the FtTJ. The appellant is a citizen of Albania born on 1 May 1990. He appealed against the respondent's decision, dated 11 October 2021, to refuse his application under the EU Settlement Scheme (EUSS) under the right of appeal granted by the Immigration (Citizens' Rights Appeal) (EU Exit) Regulations 2020 on the ground that the decision breaches a relevant right under the Withdrawal Agreement between the European Union and the United Kingdom.

9. In April 2017 he met and began a relationship with a Romanian national. They lived together in Albania, in Italy and in Romania before deciding in September 2019 to make a new life in the UK. The appellant arrived in the UK on 24 September 2019. He travelled clandestinely in a lorry. It is accepted he entered the UK unlawfully. His partner came to the UK in October 2019. They lived together at the house of a friend for 6 months, before moving. At the end of 2019 it was discovered that she was pregnant. Sadly, she suffered a miscarriage in February 2020. The appellant's mother died shortly afterwards. Those events, combined with the effects of the Covid pandemic, delayed the couple's plans to get married. They eventually gave notice of intention to marry in October 2020 and were married on 31 March 2021. The appellant made his application for settled status as his partner's spouse on 5 May 2021. The appellant had not made any previous application to regularise his status in the UK.

10. The reasons for refusal letter dated 11 October 2021 was summarised by the FtTJ as follows. The appellant does not qualify for settled (or pre-settled) status as the family member of a relevant EEA citizen under the EUSS because he was not married to his partner prior to the specified date under the scheme (31 December 2020). The respondent considered whether the appellant qualifies under the scheme as the durable partner of an EEA citizen. However, the definition of "durable partner" set out in Annex 1 of Appendix EU of the Immigration Rules requires that the applicant have held a valid family permit or residence card issues under the EEA Regulations as of 31 December 2020. The appellant did not and does not hold such a document, and therefore cannot meet the definition of durable partner under the EUSS.

11. The FtTJ noted that "No challenge is made to the facts asserted by the appellant or his partner in the application, in their witness statements or in their oral evidence at the hearing of the appeal. It is accepted that their relationship and their marriage is genuine and subsisting".

12. The FtTJ allowed the appeal as set out between paragraphs 26-33 of his decision. He found that the appellant had established the primary facts which he relies on in this appeal, as set out in his decision.

13. In respect of the issue of whether the appellant was the "durable partner" of his partner at the end of the transition period, leaving aside for the moment the requirement in Annex A to hold a relevant document to establish that status, the FtTJ found that the appellant was her "durable partner" at the end of the transition period. The appellant and his partner did co-habit in Italy and in Albania from September 2017. There was an interruption in their co-habitation when they came to the UK, in that the appellant came first in September 2019 and was followed by his partner the following month. Since October 2019 they have lived together continuously in the UK. They had therefore lived together in a relationship akin to marriage for at least two years by the time the transition period ended on 31 December 2020, albeit with some interruption. The FtTJ also took into account other evidence he found to be significant that the relationship was durable, including expecting to have a child together and the fact that they gave notice of intention to marry and their subsequent marriage on 31 March 2021 and they continued to cohabit.

14. When considering the requirement in the Rules for the appellant to have held a "relevant document" the respondent argued that Article 10(1)(e)(i) did not apply to the appellant because his residence in the UK before the end of the transition period was not "in accordance with Union law".

15. The FtTJ rejected the argument that the appellant held a right of residence under Article 7(1)(d). but considered that durable partners are listed as beneficiaries of Article 3 of the Directive and that the appellant did have the benefit of the "right of facilitation" under Article 3 of the Directive, because to deny him entry or residence in the UK might have had the effect of inhibiting his wife (a Union citizen) from exercising her right of free movement from Romania to the UK. The FtTJ did however note that the appellant did not seek to formalise his residence in the UK prior to the end of the transition period. He relies on the effect of his wife's miscarriage, the loss of his mother, and the effect of the Covid pandemic in explaining why he did not do so. The FtTJ found that as he had he applied for a residence card there is no reason to think that it would have been refused, assuming that the respondent accepted that the appellant was a durable partner, which (on his findings) they would be wrong not to do. The respondent has not suggested any other reason that would have justified denying residence to the appellant after the

extensive examination of his personal circumstances as required by Article 3(2).

16. For those reasons, the FtTJ found that the appellant's residence in the UK prior to the end of the transition period was in accordance with EU law as he was a person falling within article 10(1)(e)(i) of the Withdrawal Agreement, and that therefore the refusal of his application on the basis that he did not hold a "relevant document" was contrary to article 18(1)(l) of the Agreement. The appeal was allowed.

<u>The Procedural history of the appeal:</u>

17. The respondent sought permission to appeal and permission to appeal was granted by FtTJ Haria on 27 April 2022.

18. The grounds stated that the Judge allowed the appeal as he accepted that Article 10 (1)(e)(i) of the withdrawal agreement applied to the Appellant and that he was residing 'in accordance with Union law' before the end of the transition period, therefore the requirement to hold a relevant document was contrary to Article 10(1)(e)(i) of the withdrawal agreement [29] – [33]. The reason underpinning this was that the Judge concluded that the appellant had a right of facilitation under Article 3 of the directive (2004/38/EC) because to deny him entry or residence in the UK might have inhibited his wife (sic) from exercising her free movement from Romania to the UK [31 – 32]. The grounds submitted that is incorrect in saying the appellant had a right of facilitation under Article 3 of the Directive. Further, in light of the above the Judge has materially erred in law in holding that the Appellant's residence was in accordance with EU law [at any time] at [33] and allowing the appeal on the basis that the requirement to hold a relevant document was therefore contradictory to the Withdrawal Agreement.

19. The appellant provided a Rule 24 response dated 14 May 2022, seeking to uphold the decision of the FtT. In essence, it sought to argue that the respondent conflated the concept of a right of facilitation Under Article 3(2) and the right to a Residence card under Regulation 17(4) of the EEA Regulations 2016 and that the unmarried partner of an EEA national is a beneficiary under Article 3(2) and has a right of facilitation, whether or not they have been issued with a Residence Permit (Macastena did not apply). Furthermore, Article 18(1)(a) makes plain that a successful applicant shall have a right to be granted the residence status and the document evidencing that status. The Applicant has a right to a document.

20. Following this the appeal was listed for a hearing on 10 February 2023. On 7 February 2023, the appellant's solicitors applied for a stay to await the decision of the Court of Appeal against the decision of the Upper Tribunal in <u>Celik.</u> It was stated that the decision would have a

"direct bearing" on the appeal. The appeal was therefore adjourned to await the outcome of Celik.

21. Following the decision of *Celik v SSHD Secretary of State for the Home Department* [2023] EWCA Civ 921 (31 July 2023), Upper Tribunal Judge Rimmington issued the following directions on 5 June 2024:

(1) Following a grant of permission to appeal to the Upper Tribunal, this appeal was stayed awaiting the judgement of the Court of appeal in Celik v Secretary of State for the Home Department [2023] EWCA Civ 921. Judgement was given on 31 July 2023. Mr Celik's appeal against the decision of the Upper Tribunal was dismissed
(2) It is my provisional view that the grounds of appeal in this case asserting an error of law by the First-tier Tribunal are bound to succeed.
(3) The parties are now required to reconsider their respective positions in light of the Court of Appeal's judgement.
(4) If, having properly considered the judgement in Celik, Mr Nikolli cannot resist the Secretary of State's appeal and the only possible outcome would be a finding of a material error of law and the outright dismissal of Mr Nikolli's original appeal, the parties are invited to agree a consent order that is to be made by the Upper Tribunal pursuant to rule 39 of the Tribunal Procedure (Upper Tribunal) Rules 2008 disposing of the proceedings. The request to make a consent order must be received by the Upper Tribunal within 21 days of the date these directions are sent.
(5) If the parties cannot agree to request an agreed consent order they must inform the Upper Tribunal in writing Tribunal within 21 days of the date these directions are sent. Thereafter the appeal will be listed for hearing.
(6) In the absence of a substantive response to these directions within 21 days of the date they are sent, or if for any other reason the Tribunal considers it appropriate, the appeal will be listed for disposal on notice to the parties shortly after the expiry of the 21 days.

22. A reply was received from the respondent attaching a consent order however that order was not signed by the appellant or his solicitors.

23. As a result of there being no reply to the directions on behalf of the appellant it was listed for hearing with a cluse setting out a reference to wasted costs (see decision of UTJ Blundell dated 31st of July 2024).

24. There was no appearance at the hearing by the appellant or any representation on his behalf as set out in the "preliminary issue ".

<u>Decision on error of law:</u>

25. The original grounds challenged the assessment made of the law relevant to whether the appellant fell within the scope of the Withdrawal Agreement. The author of the grounds did not have the advantage of the decision in *Celik* heard by the Upper Tribunal and subsequently upheld by the Court of Appeal (see *Celik v SSHD Secretary of State for the Home Department*[2023] EWCA Civ 921). It was anticipated by the appellant's former solicitors that this decision would have a direct bearing on the appeal.

26. In the light of the decision in *Celik,* the respondent's grounds are established and demonstrate that the decision of the FtTJ involved the making of an error on a point of law. Whilst the factual history as not in dispute, it appears to have been accepted by the FtTJ that there was no record of the appellant having been issued with a valid family permit or residence card under the EEA Regulations and they married after the specified date.

27. The UK exited the EU on 31 January 2020. The appellant was not a spouse before the specified date. Furthermore, the respondent concluded that the appellant 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.

28. The decision in *Celik v SSHD Secretary of State for the Home Department*[2023] EWCA Civ 921 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. 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 ."

29. Applying the decision in *Celik* to the facts of the present the appellant did not have rights of residence as a family member before the end of the transition period as he had not married his EU partner before 11pm on 31 December 2020. Nor was he a durable partner within the meaning of Annex 1 to Appendix EU despite the finding that the appellant was in a durable relationship before the end of the transition period. His entry had not been facilitated by the issuing of a residence card, nor had he made an application for facilitation of residence before the end of the transition period on 31 December 2020.

30. The FtTJ allowed the appeal on the basis that he was satisfied that the FtTJ found that the appellant's residence in the UK prior to the end of

the transition period was in accordance with EU law as he was a person falling within article 10(1)(e)(i) of the Withdrawal Agreement, and that therefore the refusal of his application on the basis that he did not hold a "relevant document" was contrary to article 18(1)(l) of the Agreement.

31. As to any argument of proportionality, this issue was raised before the Upper Tribunal in the decision of *Celik* as set out in the head note as follows:

"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 11 PM GMT on 31 December 2020 and P had applied for such facilitation before that time".

32. That has been upheld by the Court of Appeal subsequently in *Celik* where the same argument as in the present appeal was argued namely it was submitted that the appellant would have married an EU national before the end of the transition period but for the restrictions and delays resulting from the Covid-19 pandemic and that Article 10(1)(e)(i) of the Withdrawal Agreement should be interpreted as meaning that the appellant fell within, or should be treated as falling within, the definition of a family member. Reliance was also placed upon Article 18(1)(r) of the Withdrawal Agreement where it was argued that required that any decision refusing residence status "is not disproportionate". The COA in Celik rejected that argument for the reasons set out between paragraphs 53-57.

33. Applying the decision in *Celik*, the FtTJ erred in law in its analysis of the issue of the Withdrawal Agreement. The appellant could not rely upon the Withdrawal Agreement as the appellant did not have any such rights under Article 10 (1) (e) (i).

34. Whilst the respondent did not dispute the circumstances of the appellant and whether and how the relationship was in fact "durable" at any relevant date, did not meet the requirements. The requirements of Appendix EU cannot be met by a durable partner whose residence had not been facilitated. This is reflected in Article 10(2) of the Withdrawal Agreement permitting the continued residence of a former documented Extended Family Member, with an additional transitional provision in Article 10(3) for those who had applied for such facilitation before 31 December 2020. The Appellant had not made any such application and therefore could not satisfy the requirements of Appendix EU.

35. The FTTJ has materially erred in law by failing to properly consider the provisions of the Withdrawal Agreement, when allowing the Appellant's appeal on that basis. The Withdrawal Agreement provides no applicable rights to a person in the appellant's circumstances. Article 10(1)(e) of the Withdrawal Agreement confirms that beneficiaries of the Agreement are those who were residing in accordance with EU law as of the specified date. The Appellant was not residing in accordance with EU law as of the

specified date, as he had not had his residence facilitated in accordance with national legislation (The Immigration (European Economic Area) Regulations 2016). This is in accordance with Article 3.2(b) of Directive 2004/38/EC. Article 10(2) of the Withdrawal Agreement permits the continued residence of a former documented Extended Family Member, with an additional transitional provision in Article 10(3) for those who had applied for such facilitation before 31 December 2020. He was also not married to his spouse prior to the specified date and was therefore not a direct family member. Therefore, the appellant does not come within the personal scope of the Withdrawal Agreement.

36. In summary, the appellant 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 having re-entered the UK unlawfully in 2019). Therefore, the appellant did not qualify for leave to remain under Appendix EU. The COA decision in *Celik* upheld the decision of the Upper Tribunal finding that an extended family member of an EEA citizen in the United Kingdom has no substantive rights under the EU Withdrawal Agreement, unless his or her entry and residence were being facilitated before 11pm GMT on 31 December 2020 or he or she had applied for such facilitation before that time. Further where he or she has no such substantive right he/she 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").

37. For those reasons, the respondent’s grounds are made out and therefore the decision of the FtTJ was wrong in law. The decision is set aside. It is not necessary to remit the appeal as no other basis has been identified on behalf of the appellant to demonstrate that he can meet the requirements of Appendix EU and on the proper construction of the law the appeal could not succeed. The decision is remade as follows; the appeal is dismissed.

Notice of Decision

The decision of the First-tier Tribunal involved the making of an error on a point of law; the decision is set aside. The appeal is remade as follows: the appeal is dismissed.

Upper Tribunal Judge Reeds
Upper Tribunal Judge Reeds

26 September 2024