



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

Case Nos.: UI-2022-002368

First-tier Tribunal Nos:  
EA/12438/2021

**THE IMMIGRATION ACTS**

**Decision & Reasons Issued:  
On 5<sup>th</sup> March 2024**

**Before**

**UPPER TRIBUNAL JUDGE L SMITH**

**Between**

**SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Appellant

**And**

**PATRICK McASHIETEY-ZIGAH**

Respondent

**DECISION AND REASONS**  
**[MADE WITHOUT A HEARING PURSUANT TO**  
**RULE 39 OF THE TRIBUNAL PROCEDURE (UPPER TRIBUNAL) RULES**  
**2008]**

1. This is an appeal by the Secretary of State. For ease of reference, I refer to the parties as they were before the First-tier Tribunal. The Respondent appeals against the decision of First-tier Tribunal Judge Feeney promulgated on 14 February 2022 (“the Decision”) allowing the Appellant’s appeal against the Respondent’s decision dated 5 August 2021 refusing him status under the EU Settlement Scheme (“EUSS”) as the spouse of an EEA national.
2. The Respondent refused the Appellant’s application on the basis that his marriage was not contracted until after 31 December 2020. Accordingly, the Appellant was not a family member prior to the date of the UK’s departure from the EU and could not benefit as such under either the rules relating to EUSS (Appendix EU) or the withdrawal agreement between the UK and the EU on the UK’s departure from the EU (“the Withdrawal Agreement”).

3. It was accepted that the Appellant could not establish his case as a family member. It was however argued on his behalf that he was a durable partner prior to 31 December 2020 and could succeed on that basis. Judge Feeney accepted that argument and determined the Appellant's appeal in his favour on that basis.
4. The Respondent appealed the Decision on the basis that the Judge had failed to have regard to Appendix EU. Had she done so, she would have appreciated that, in order to succeed under Appendix EU (or the Withdrawal Agreement) as a durable partner, the Appellant's residence would have to be facilitated by the Respondent prior to 31 December 2020. There had been no such facilitation.
5. Permission to appeal was granted by First-tier Tribunal Judge Dempster on 25 April 2022 in the following terms:
  - “1. The in time grounds assert that the judge made a material misdirection on law by finding that the appellant met the definition of a ‘durable partner’ in allowing the appeal against the refusal to grant an application under the EU Settlement Scheme.
  2. At paragraph 11 of the decision, the judge provided their reasons for finding that the appellant satisfied the definition of a durable partner in allowing the appeal.
  3. It appears that the judge failed to have regard to the definition of a ‘durable’ partner in Annex 1 of Appendix EU of the Immigration Rules which require, in addition to being in a durable relationship, that the applicant holds a ‘relevant document’.
  4. There was no evidence that the appellant was in possession of a ‘relevant document’ and there is an arguable error of law.”
6. The argument on which the Respondent relies was accepted by this Tribunal in Celik (EU exit; marriage; human rights [2022] UKUT 00220 (IAC) (“Celik”). The Tribunal's guidance in Celik was subsequently upheld by the Court of Appeal ([2023] EWCA Civ 921). This appeal was in the meanwhile stayed by UTJ McWilliam following a hearing on 13 June 2023 pending the outcome of the appeal in Celik. Judge McWilliam gave directions for written submissions and relisting following the Court of Appeal's judgment.
7. The Appellant made written submissions following the Court of Appeal's judgment accepting that he could not succeed based on the argument rejected in Celik but seeking to distinguish his case because there are two children of the marriage.
8. It appears that the Appellant's submissions did not reach the Respondent until 21 December 2023. The Respondent made written submissions on 22 January 2024 continuing to rely on the grounds of appeal and inviting the Tribunal to find an error of law in the Decision and to go on to re-make the decision by dismissing the Appellant's appeal.

9. The appeal was listed at error of law stage before me on Thursday 7 March 2024. However, on 4 March 2024, the Tribunal was informed that the parties had agreed to dispose of the appeal by consent and without a hearing under rule 39 of the Tribunal Procedure (Upper Tribunal) Rules 2008. The consent order agreed by the parties reads as follows:

“**UPON** the Respondent [Mr Zigah] confirming on 27 February 2024, that they no longer wish to resist the appeal brought by the SSHD, challenging the decision of First-tier Tribunal Judge Feeney, on the basis that he has made an alternative and fresh application to the Home Office.

**AND UPON** the parties consenting to the disposal of the above appeal pursuant to **Rule 39(1) of the Tribunal Procedure (Upper Tribunal) Rules 2008** on the agreed basis set out below:

**IT IS AGREED:**

1. The Upper Tribunal summarily set aside the decision of the First-tier Tribunal on the grounds raised by the SSHD; and
2. The Upper Tribunal remake the decision summarily, by dismissing the appeal of Mr Zigah.”

10. I am satisfied that it is appropriate to make a decision without a hearing and in accordance with the terms of the consent order. I therefore make that decision below.

**NOTICE OF DECISION**

**The Decision of Judge Feeney promulgated on 14 February 2022 involved the making of an error of law. I therefore set aside that Decision. I re-make the decision by dismissing the Appellant’s (Mr Zigah’s) appeal.**

L K Smith  
Judge of the Upper Tribunal  
Immigration and Asylum Chamber  
5 March 2024