



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

Case No: UI-2023-002329

First-tier Tribunal No: EA/07723/2022

**THE IMMIGRATION ACTS**

**Decision & Reasons Issued:**  
**On 11 September 2024**

**Before**

**UPPER TRIBUNAL JUDGE HOFFMAN**

**Between**

**Secretary of State for the Home Department**

Appellant

**and**

**Wrya Omer Hassan Hassan**  
**(NO ANONYMITY ORDER MADE)**

Respondent

**Representation:**

For the Appellant: Miss S Simbi, Senior Home Office Presenting Officer

For the Respondent: Mr M Maddah, Legal Representative

**Heard at remotely Field House on 2 September 2024**

**DECISION AND REASONS**

1. I will refer to the parties as they were before the First-tier Tribunal even though it is the Secretary of State who is the appellant before the Upper Tribunal. Therefore, Mr Hassan will be referred to as the appellant and the Secretary of State as the respondent.
2. The respondent appeals the decision of First-tier Tribunal Judge Groom (“the judge”) promulgated on 3 April 2023. In that decision, the judge allowed the appellant’s appeal against the respondent’s decision dated 5 August 2022 refusing the appellant’s application for settled status under the EU Settlement Scheme (“EUSS”) and, instead, granting him pre-settled status.

**Background**

3. The appellant is a citizen of Iraq. He claims to have arrived in the UK on 12 December 2007. On 5 December 2019, the respondent issued the appellant with a residence card under the Immigration (European Economic Area) Regulations

2016 (“the EEA Regulations”) as the durable partner of an EEA national. The appellant and his partner married in a civil ceremony in the UK on 10 March 2020. At 2300 GMT on 31 December 2020, the UK exited the European Union.

4. On 22 June 2022, the appellant made an application for settled status under the EUSS. As already explained, the respondent refused to grant the appellant settled status and instead granted him pre-settled status. The basis of the respondent’s decision was that the appellant was unable to demonstrate the required five years’ continuous residence under paragraph EU11 of Appendix EU of the Immigration Rules.
5. The appellant exercised his right of appeal against the respondent’s decision in accordance with the Immigration (Citizens’ Rights Appeals) (EU Exit) Regulations 2020. In her decision allowing the appellant’s appeal, the judge found that the calculation of the five years’ continuous residence period should not, as the respondent argued, begin at the date on which the appellant had been granted the residence card under the EEA Regulations, but that the clock should start on the date that the appellant entered into the durable relationship with his EEA partner. According to the judge, the documentary evidence suggested that the appellant and his partner had been in a durable relationship from at least 5 June 2016 when they participated in an Islamic marriage ceremony. The judge was therefore satisfied that the appellant had accrued at least five years’ continuous residence as a durable partner prior to submitting his EUSS application.

### **The grounds of appeal**

6. The respondent was granted permission to appeal by First-tier Tribunal Judge Roots on 23 May 2023. The grounds of appeal are that the judge made a misdirection of law on a material matter by finding that the appellant could demonstrate continuous residence from the point at which he entered into a durable relationship with his EEA national partner. According to the respondent, the judge had overlooked the requirements of Article 3(2)(b) of Directive 2004/38/EC which only requires Member States to facilitate entry and residence for durable partners; and, in the present case, the appellant’s leave had not been facilitated until he had applied for and received his residence card in December 2019.

### **Findings - Error of Law**

7. A person may apply for indefinite leave to remain as the family member of an EEA citizen under paragraph EU11 of Appendix EU to the Immigration Rules if, at the date of application, they meet one of seven conditions. Condition 3 is relevant to the present appeal. It requires the applicant to demonstrate that they have completed a continuous qualifying period of five years in any (or any combination) of six categories, including as a family member of a relevant EEA citizen, and where no supervening event has occurred. “Family member of a relevant EEA citizen” is defined under Annex 1 of Appendix EU as including “the durable partner of the relevant EEA citizen before the specified date”, i.e. 2300 GMT on 31 December 2020.
8. It is common ground between the parties that, prior to the specified date, the appellant obtained a residence card on 5 December 2019 as the durable partner of his EEA national partner. A durable partner was not a “family member” for the purposes of reg 7 of the EEA Regulations (as, for example, a married spouse was) but an extended family member under reg 8(5).

9. As the Court of Appeal recognised in Celik v Secretary of State for the Home Department [2023] EWCA Civ 921 at [13], Article 3(2) of Directive 2004/38/EC

“did not oblige Member States to grant a right of entry and residence to extended family members, including durable partners, but only to facilitate entry and residence. Rather, Article 3(2) meant that Member States had to confer a certain advantage on applications made by persons who have a relationship with a Union citizen, as compared with applications for entry and residence by nationals of third states. Any right to reside was granted by the Member State in accordance with its national legislation and the Member State had a wide discretion as to the factors to be taken into account in deciding whether to grant a right to reside to an extended family member”.

Therefore, unlike a family member of an EEA national, the Directive does not confer an automatic right of entry or residence on extended family members, including durable partners who, as the Court found in Celik, did not fall within the protection of the EU-UK Withdrawal Agreement: see [29].

10. The Directive was implemented into UK law by the EEA Regulations. As the judge recognised in the present case at [17], when the appellant was granted a residence card in 2019 it was as an extended family member under reg 8(5). While the judge may have been correct that when issuing the appellant with a residence card in December 2019, the respondent must have been satisfied that the appellant and his partner had been in a relationship together for at least two years, that is irrelevant for the purposes of settled status under Appendix EU. As the respondent correctly submits, because EU law only requires Member States to facilitate entry or residence for extended family members, a person claiming to be an extended family would not obtain any status under EU law until they had been recognised as such by a Member State.
11. Furthermore, under Annex 1 of Appendix EU of the Immigration Rules, “durable partner” is defined as in the following way:

“(a) the person is, or (as the case may be) for the relevant period was, in a durable relationship with a relevant EEA citizen (or, as the case may be, with a qualifying British citizen or with a relevant sponsor), 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)(i) the person holds a relevant document as the durable partner of the relevant EEA citizen (or, as the case may be, of the qualifying British citizen or of the relevant sponsor) for the period of residence relied upon; [...] [Underlining added]

“Relevant document” is defined under Annex 1 as including a residence card. Therefore, the reference in the definition of “durable partner” to the person holding the residence card “for the period of residence relied upon” makes clear that the relevant document must have been in the possession of the person throughout the continuous qualification period. Mr Maddah’s submission that Annex 1 did not require the applicant to be in possession of a relevant document throughout the claimed five-year residence period is simply incorrect.

12. Furthermore, I find that there is no merit to Mr Maddah’s submission that had the UK not left the EU, the appellant would have been entitled to permanent residence under the EEA Regulations. Firstly, he cannot escape the fact that the UK did leave the EU before the appellant applied for permanent residence and Appendix EU now applies to him. Secondly, and moreover, Mr Maddah misunderstands how the EEA Regulations operated. Under reg 15(1)(b), the appellant would have been eligible for permanent residence only after he had “resided in the United Kingdom with the EEA national in accordance with these Regulations for a continuous period of five years”. For the reasons already explained above at paragraphs 8 to 10, as the extended family member of an EEA national, the appellant would only have been resident in the UK “in accordance with” the EEA Regulations from 5 December 2019 when he was issued with the residence card.

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

13. For the reasons given, I find that the continuous qualifying period for the purposes of paragraph EU11 of Appendix EU would have begun on the date on which the appellant was issued an EEA residence card conferring status, i.e. 5 December 2019. By the date of his application for EUSS status on 22 June 2022, the appellant had been resident in the UK in with the relevant status for less than five years.
14. The judge therefore made a material error of law in allowing the appellant’s appeal on the basis that the qualifying period of residence commenced prior to the respondent issuing the appellant with a residence card.
15. As the facts in the case are not in dispute and there is a single issue of law to be determined, I find that it is appropriate for me to proceed and remake the decision. Neither party had any objections to such an approach. I find that the appellant cannot succeed with his appeal on the basis that he does not meet the requirements for settled status under paragraph EU11 of Appendix EU because he did not hold a relevant document as the durable partner of the relevant EEA citizen for a continuous period of five years prior to the date of application.

### **Notice of Decision**

**The decision of the First-tier Tribunal involved the making of an error on a point of law.**

**The decision of the First-tier Tribunal is set aside.**

**I remake the decision by dismissing the appellant Mr Hassan’s appeal.**

**M R Hoffman**

Judge of the Upper Tribunal  
Immigration and Asylum Chamber

**2<sup>nd</sup> September 2024**