



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

Case No: UI-2024-000187

First-tier Tribunal No: EA/51609/23

**THE IMMIGRATION ACTS**

**Decision & Reasons Issued:**

7<sup>th</sup> March 2024

**Before**

**DEPUTY UPPER TRIBUNAL JUDGE BEN KEITH**

**Between**

**SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Appellant

**and**

**ABK**  
**(ANONYMITY ORDER MADE)**

Respondent

**Representation:**

For the Appellant SSHD: Ms Ishiwood

For the Respondent: Mr Stedman, Counsel.

**Heard at Field House on 27 February 2024**

**Order Regarding Anonymity**

**Pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008, the appellant and any member of his family is granted anonymity.**

**No-one shall publish or reveal any information, including the name or address of the appellant, likely to lead members of the public to identify the appellant or his family. Failure to comply with this order could amount to a contempt of court.**

**DECISION AND REASONS**

1. This is an appeal against the decision of First-tier Tribunal Judge Kempton (“the Judge”) dated 4 December 2023 in which the Judge allowed the Respondent ABK’s appeal under the EUSS scheme.

2. The judge sets out the relevant facts. ABK is an national of Guinea born in 1980. He came to the UK as a student in 2003 and has not left the UK since that date. His named partner FS and the appellant entered into a relationship in 1998. The relationship ended. FS had another relationship and a son from that relationship. Her son is a Belgian national with settled status in the UK. She became a Belgian national. She and the appellant lost contact. In 2012, they re-established contact and rekindled their relationship. FS came to the UK and she was granted settled status in the UK on 20 November 2019. They have been in a relationship since 2012 and lived together since 2014. The appellant applied for pre-settled status in terms of the European Union Settlement Scheme (EUSS) on 21 Jun 2021.

3. The Secretary of State appealed on the following grounds:

“The Judge of the First-tier Tribunal has made a material error of law in the Determination. Judge Kempton has focussed entirely on whether a durable relationship had been established by 31 December and fails to determine an equally significant question. The basis of the refusal was that the definition of durable partner was not met as the appellant did not hold a “relevant document” indicating that his residence as an Extended Family Member had been facilitated in accordance with Article 3.2 of the 2004 Directive. Although tentative submissions were advanced that ABK’s circumstances meant that no relevant document was required, these were not determined and in any event made no difference. ABK could not benefit from sub-definition b(ii)(bb)(aaa) of “durable partner” as he had no alternative lawful status as at 31/12/20 such that he would not have needed a residence card. Neither does the fact of the application being made before the end of the Grace Period make any difference to the EUSS rules which had to be met.”

4. Dealing very briefly with the law, this case is governed by the case of **Celik (EU exit, marriage, human rights) [2022] UKUT 00220 (IAC)** and the Court of Appeal in **Celik v Secretary of State for the Home Department [2023] EWCA Civ 921** confirmed that that judgment was correct. The headnote from Celik states:

“(1) 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 11pm GMT on 31 December 2020 or P had applied for such facilitation before that time.

(2) Where P has no such substantive right, P 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’). That includes the situation where it is likely that P would have been able to secure a date to marry the EU citizen before the time mentioned in paragraph (1) above, but for the Covid-19 pandemic.

(3) Regulation 9(4) of the 2020 Regulations confers a power on the First-tier Tribunal to consider a human rights ground of appeal, subject to the prohibition imposed by regulation 9(5) upon the Tribunal considering a new matter without the consent of the Secretary of State”.

5. The decision of the Judge does not refer to the decision in **Celik**. The evidence is accepted that the appellant has no document which shows that he had a right to reside in the United Kingdom before the date of the withdrawal agreement and therefore under **Celik** and the EUSS Scheme cannot qualify as a durable partner under that Scheme. I therefore agree with the SSHD's submissions. As a result there is a material error of law.
6. I therefore go on to remake the appeal. Given this is a pure error of law matter and the facts are accepted I dismiss the ABK's appeal as he does not have a relevant document to show that he had entitlement to be in the United Kingdom prior to the date of the withdrawal agreement and therefore in accordance with **Celik** and the EUSS Scheme I find an error of law and I remake the appeal dismissing the Appellant's appeal against the Secretary of State's decision.

### **Notice of Decision**

1. There is a material error of law and the decision of the First Tier Tribunal is set aside.
2. Upon remaking the appeal it is dismissed.

**Ben Keith**

Judge of the Upper Tribunal  
Immigration and Asylum Chamber

27 February 2024