**Upper Tribunal**
**(Immigration and Asylum Chamber)** Appeal Number: UI-2022-002574
EA/14225/2021

**THE IMMIGRATION ACTS**

| **Heard at Field House** | **Decision & Reasons Promulgated** |
|---|---|
| **On 26 September 2022** | **On 6 November 2022** |

**Before**

**UPPER TRIBUNAL JUDGE NORTON-TAYLOR**

**Between**

**SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Appellant

**and**

**ROMINA CACAJ**
**(ANONYMITY DIRECTION NOT MADE)**

Respondent

**Representation:**
For the appellant: Ms N Willocks-Briscoe, Senior Home Office Presenting Officer
For the respondent: Mr R Claire, Counsel, instructed by Osprey Solicitors

**DECISION AND REASONS**

**Introduction**

**1.** I shall refer to the parties as they were before the First-tier Tribunal. Thus, the Secretary of State is once more "the respondent" and Mrs Cacaj is "the appellant".

**2.** The respondent appeals against the decision of First-tier Tribunal Judge Kinch ("the judge"), promulgated on 18 March 2022 following a hearing on

22 February 2022. By that decision, the judge allowed the appellant's appeal against the respondent's decision, dated 15 September 2021, refusing her application under the EU Settlement Scheme ("EUSS"). The appellant had applied as the family member of an EEA citizen ("the sponsor").

**3.** The appellant, a citizen of Albania, met the sponsor in September 2020 and the couple got engaged a month later. They eventually married in April 2021, but had not been able to do this sooner due to a backlog resulting from the Covid-19 pandemic restrictions.

**4.** The respondent refused the EUSS application on the basis that the appellant could not satisfy the relevant Immigration Rules, as set out in Appendix EU. The marriage had taken place after the end of the transition period on 31 December 2020. The appellant had not held a "relevant document".

**5.** The appellant appealed under the Immigration (Citizens' Rights Appeals) (EU Exit) Regulations 2020.

## The decision of the First-tier Tribunal

**6.** The judge found that the appellant did in fact meet the definition of a "durable partner" under Appendix EU. Having considered the evidence, the judge was satisfied that the appellant's relationship with the sponsor was genuine and "durable". On this basis, and this basis alone, the appeal was allowed.

## The grounds of appeal and grant of permission

**7.** The respondent's grounds of appeal were concise. It was said that the judge failed to apply the entirety of the relevant definition under Annex 1 to Appendix EU.

**8.** Permission to appeal was granted by the First-tier Tribunal.

## The hearing

**9.** Ms Willocks-Briscoe relied on the grounds of appeal. The judge had purported to allow the appeal solely on the basis that the appellant met the definition of "durable partner" under the Immigration Rules. The judge placed no reliance on the Withdrawal Agreement. No Article 8 ECHR issues had been raised before the judge.

**10.** Mr Claire initially indicated that he would be arguing that the recent decision of a Presidential panel of the Upper Tribunal in Celik (EU exit; marriage; human rights) [2022] UKUT 00220 (IAC) was wrongly decided. However, during the course of argument, he acknowledged that the real issue in the present case was whether the judge had properly applied the definition of "durable partner" in Annex 1 and this did not involve an analysis of Celik.

**11.** Mr Claire accepted, quite rightly in my view, that the judge had failed to apply the entirety of the relevant definition in Annex 1: there been a failure to consider (b)(i) or (b)(ii) (I do not propose to set out the provisions here: both parties are fully aware of them). However, he suggested that the judge could have allowed the appeal on an alternative basis, namely that the appellant fell within (aaa). He accepted that no rule 24 response have been provided and that no notice of this alternative argument had been given to the respondent. Mr Claire further suggested that the judge could have allowed the appeal on the basis of Article 8 ECHR. He confirmed that there had been no section 120 Notice in this case, nor had there been a cross-appeal, and that the decision in Celik was against him on the point.

**12.** During the course of argument, I asked Mr Claire to clarify his position on the potential application of (aaa). Having considered the provision in more detail, he accepted that the appellant could not in fact have met that particular definition.

**13.** As to the disposal of this appeal if I were to set the judge's decision aside, Ms Willocks-Briscoe urged me to re-make the decision on the evidence before me and dismiss the appeal, whereas Mr Claire suggested that a remittal to the First-tier Tribunal would be appropriate. If I were not minded to take that course of action, and having taken instructions from the appellant, he accepted that I could re-make the decision on the evidence as it stood.

**14.** At the conclusion of the hearing I announced my decision that there was a material error of law in the judge's decision and that it must be set aside. I reserved my decision on the appropriate course of action which would then follow.

## Conclusions on error of law

**15.** I remind myself of the need to show appropriate restraint before interfering with a decision of the First-tier Tribunal, having regard to numerous exhortations to this effect emanating from the Court of Appeal in recent years: see, for example, Lowe [2021] EWCA Civ 62, at paragraphs 29-31, AA (Nigeria) [2020] EWCA Civ 1296; [2020] 4 WLR 145, at paragraph 41, and UT (Sri Lanka) [2019] EWCA Civ 1095.

**16.** In the present case there is an obvious error of law. In concluding that the appellant met the definition of "durable partner" under Annex 1 of Appendix EU, the judge failed to have regard to the entirety of the relevant provisions, including the fact that she did not hold a "relevant document". Mr Claire was right to have adopted the position he did on this particular issue.

**17.** I reject Mr Claire's attempt to put forward an alternative basis for the outcome decision. First, any such argument could and should have been included in a rule 24 response. None was provided and no reason has been put forward for that failure. Procedural rigour is important, particularly when potentially complex matters are being put forward on behalf a party. The other side is entitled to know what is being said against it prior to a hearing. In the circumstances, it is not now open to the appellant to argue for an alternative basis.

**18.** In any event, Mr Claire quite rightly accepted that the alternative basis which he initially put forward, namely that the appellant could satisfy (aaa), was, on reflection, misconceived. The appellant could not bring herself within that definition.

**19.** I reject Mr Claire's argument that the judge could have allowed the appeal under Article 8 ECHR. It is quite clear that, whatever submissions might have been made to her at the hearing, there was no jurisdiction to entertain a human rights claim there is no which the.

**20.** No issue arose under the Withdrawal Agreement.

**21.** It follows that the judge clearly erred in law when allowing the appeal and that her decision must be set aside.

## Re-making the decision

**22.** I have considered what the appropriate course of action is in this appeal. Remittal to the First-tier Tribunal is wholly inappropriate. There is no question of any extensive fact-finding having to be undertaken. The Upper Tribunal can quite properly deal with this appeal.

**23.** In light of the parties' position were to be retained in the Upper Tribunal, I have concluded that I should go on and re-make the decision based on the evidence before me.

**24.** I have considered the evidence before me as a whole and in light of the relevant legal framework. I regard Celik as being correctly decided and I apply its conclusions, where appropriate.

**25.** I accept, as did the judge, that the appellant has been in a genuine and subsisting relationship with the sponsor since September 2020, that they

married in April 2021, and that the relationship remains genuine and subsisting.

**26.** I accept that the couple's plan to get married was met with delays, at least in part, by Covid-19 restrictions.

**27.** It is clear that the appellant was never issued with a residence card, nor applied for one, prior to 31 December 2020.

**28.** The appellant cannot meet the definition of "durable partner" for the purposes of Appendix EU because she did not hold a "relevant document". There is no alternative basis on which the Immigration Rules could be satisfied.

**29.** Therefore, the second ground of appeal available to the appellant under the 2020 Regulations cannot succeed.

**30.** In terms of the Withdrawal Agreement, Celik provides an insurmountable obstacle to success under the first ground of appeal available to the appellant. She cannot, on any view, come within the scope of Article 10, or the substance of Article 18.

**31.** Even if proportionality should be considered, paragraphs 63-66 of Celik make it plain that this could not assist the appellant. There has, for example, never been any suggestion that the respondent imposed "unnecessary administrative burdens" on the appellant.

**32.** The appeal fails on this ground as well.

**33.** It follows from the above that the appellant's appeal as a whole must be dismissed.

## Anonymity

**34.** There is no basis upon which I should make an anonymity direction in this case and I do not do so.

## Notice of Decision

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

**36. I exercise my discretion under section 12(2)(a) of the Tribunals, Courts and Enforcement Act 2007 and set aside the decision of the First-tier Tribunal.**

**37. I re-make the decision by dismissing the appeal on all grounds.**

Signed: H Norton-Taylor Date: 26 September 2022
Upper Tribunal Judge Norton-Taylor

**TO THE RESPONDENT**
**FEE AWARD**

I have dismissed the appeal and therefore there can be no fee award.

Signed: H Norton-Taylor Date: 26 September 2022
Upper Tribunal Judge Norton-Taylor