



**Upper Tribunal  
(Immigration and Asylum Chamber)**

Appeal Number: UI-2022-001927  
EA/15062/2021

**THE IMMIGRATION ACTS**

**Heard at Field House  
On 31<sup>st</sup> August 2022**

**Decision & Reasons Promulgated  
On 6<sup>th</sup> October 2022**

**Before**

**UPPER TRIBUNAL JUDGE LINDSLEY**

**Between**

**THE SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Appellant

**and**

**ENEO RECI  
(ANONYMITY ORDER NOT MADE)**

Respondent

**Representation:**

For the Appellant: Mr S Whitwell, Senior Home Office Presenting Officer  
For the Respondent: Mr C Rahman, of Counsel, instructed by Graceland Solicitors

**DECISION AND REASONS**

*Introduction*

1. The claimant is a citizen of Albania born on 3<sup>rd</sup> May 1998. He was refused status under the EU settlement scheme as the durable partner of Ainara Milagrosa Delgado Navarrete, a citizen of Spain, by the Secretary of State on 19<sup>th</sup> October 2021. His appeal against the decision

was allowed by First-tier Tribunal Judge Sweet in a determination promulgated on the 11<sup>th</sup> February 2022.

2. Permission to appeal was granted to the Secretary of State by First-tier Tribunal Judge Thaper on 25<sup>th</sup> April 2022 on the basis that it was arguable that the First-tier judge had erred in law in failing to provide sufficient reasoning to explain how the claimant met the requirements of pre-settled status under the EU Settlement Scheme.
3. The matter comes before me to determine whether the First-tier Tribunal erred in law, and if so whether the error was material and the decision should be set aside and the appeal remade. At the start of the hearing Mr Whitwell said that he would place reliance on the recently reported decisions of the Upper Tribunal in Batool & others (other family members: EU exit) [2022] UKUT 00219 and Celik (EU exit; marriage; human rights) [2022] UKUT 00220. He provided copies to Mr Rahman who was unaware of these decisions, and Mr Rahman was given time to read them before the start of the hearing.

#### *Submissions – Error of Law & Remaking*

4. In the grounds of appeal and in oral submissions from Mr Whitwell it is submitted for the Secretary of State, in summary as follows. He relied upon Batool and Celik in support of the grounds. The First-tier Tribunal Judge failed to consider the provisions of Appendix EU of the Immigration Rules. The claimant could not succeed as a spouse under the EU Settlement Scheme as his marriage took place after 31<sup>st</sup> December 2020, and he could not succeed as a durable partner as he lacked a “relevant document” demonstrating that his residence had been facilitated under the EEA Regulations as he had never made an application for one at any point. As a result the finding of the First-tier Tribunal that the claimant’s relationship was durable was unchallenged but irrelevant and the finding that he was lawfully resident was erroneous. The reference to the policy document “EU Settlement Scheme: EU, other EEA and Swiss citizens and their family members Version 15” is also ill-founded: this document only creates a grace period in which people who satisfied the requirements of the EEA Regulations as of 31<sup>st</sup> December 2020 could make applications, it did not extend the period of time in which a claimant could acquire EU residence rights. There was no principle of disproportionality or fairness that could assist the claimant because he had no EU right for this to be applied to, and so the finding at paragraph 10 of the decision of the First-tier Tribunal also erred in law.
5. In the circumstances Mr Whitwell submitted that the decision of the First-tier Tribunal should be set aside for materially erring in law as it was based on a material misdirection of law and was insufficiently reasoned. The decision should be remade dismissing the appeal as whilst it was accepted by the Secretary of State that the claimant was in a genuine and subsisting relationship, and now marriage, it was not

the case that his circumstances were covered by EEA law given the UK's withdrawal from the EU, and so the claimant should now consult with his legal representatives and make a new application under domestic law. Mr Whitwell confirmed that there were no current removal directions in relation to the claimant.

6. Mr Rahman accepted that the decision of the First-tier Tribunal lacked reasoning, and whilst he made a number of submissions about discretion and the genuine nature of the claimant's relationship he could not explain why I should not follow the decisions of the Presidential panel in Batool and Celik, and thus why the submissions of Mr Whitwell were not correct.

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

7. The reasoning of the First-tier Tribunal at paragraphs 8 to 11, the findings and decision paragraphs of the decision, fails to explain how the claimant had a relevant document to show that his residence had been facilitated under the EEA Regulations, and thus how he could fulfil the provisions of Appendix EU of the Immigration Rules, and therefore errs in law. From paragraph 7 of the decision it is clear that the claimant married on 30<sup>th</sup> April 2021 and there is no finding that a relevant document existed relating to their durable relationship or had been applied for prior to 31<sup>st</sup> December 2020. Applying the decisions in Batool and Celik it is clear that this document needed to have been acquired, or an application made to acquire it, prior to 31<sup>st</sup> December 2020 or the claimant needed to have been married at this time. The reliance on Article 8(1)(r) of the Withdrawal Agreement at paragraph 10 of the decision of the First-tier Tribunal to find that the decision was disproportionate is also clearly erroneous applying the second point of the guidance of the Upper Tribunal Celik: the claimant's situation engages no EU rights so it is not possible for him to invoke the principle of fairness or disproportionality to succeed in his appeal. I therefore set aside the decision of the First-tier Tribunal
8. As per Celik as the claimant had neither applied for nor obtained a document relating to his durable relationship, and was also not married to Ms Ainara Milagrosa Delgado Navarrete, on the 31<sup>st</sup> December 2020 he cannot succeed in this appeal as he has no substantive rights under the EU Withdrawal Agreement, and further he cannot therefore invoke the concept of proportionality. His appeal must therefore be dismissed.
9. I have not set aside the finding of the First-tier Tribunal that the claimant and his wife are in a genuine and subsisting relationship, and Mr Whitwell was clear at the hearing before me that this is not disputed by the Secretary of State. Mr Whitwell informed the Tribunal that there are no current removal directions for this claimant. If the claimant wishes to remain in the UK he should therefore promptly seek expert immigration advice with a view to making an application under the domestic immigration law.

Decision:

1. The making of the decision of the First-tier Tribunal involved the making of an error on a point of law.
2. I set aside the decision of the First-tier Tribunal.
3. I re-make the decision in the appeal by dismissing it.

Signed: Fiona Lindsley  
Upper Tribunal Judge Lindsley

Date: 31<sup>st</sup> August 2022