



**Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: UI-2022-003153
EA/13325/2021**

THE IMMIGRATION ACTS

**Heard at Field House IAC
On the 3rd November 2022**

**Decision & Reasons Promulgated
On the 24th January 2023**

Before

UPPER TRIBUNAL JUDGE RIMINGTON

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

**ELTJON JUKAJ
(ANONYMITY DIRECTION NOT MADE)**

Respondent

Representation:

For the Appellant: Mr D Clarke, Senior Home Office Presenting Officer
For the Respondent: Mr J Gajjar instructed by Law Lane Solicitors

DECISION AND REASONS

1. The application for permission to appeal was made by the Secretary of State but nonetheless I shall refer to the parties as they were described in the First-tier Tribunal, that is Mr Jukaj the appellant, and the Secretary of State the respondent.

2. The Secretary of State appeals against the decision of First-tier Tribunal Judge Mill who allowed the appellant's appeal under the Immigration Citizens' Rights Appeals (EU Exit) Regulations 2020. The appellant, a citizen of Albania born on 7th January 2002, appealed against the decision of the Secretary of State dated 9th September 2021 refusing him settled or pre-settled status under the EU Settlement Scheme as the spouse of an EEA citizen. The appellant made the application on 30th December 2020 under the EU Settlement Scheme ("EUSS") and married his sponsor wife on 2nd April 2021.
3. The grounds for permission to appeal submitted that the judge, in allowing the appeal under the Withdrawal Agreement, had made a material misdirection of law on a material matter.
4. The appellant did not possess a residence card or any form of registration as the durable partner of an EU national at the point of his application under Appendix EU of the immigration rules on 30th December 2020. He could not therefore satisfy the rules as a durable partner which required the possession of such a documents at the point of application. (Annex 1 definitions). Further, to find the refusal to issue the residence card was disproportionate was an irrational finding.

The Hearing

5. Mr Gajjar accepted at the hearing before me that in light of **Celik (EU exit, marriage, human rights) [2022] UKUT 00220**, the appellant could not succeed in his appeal. He requested, however, and Mr Clarke had no objection, that the findings on the 'durable relationship' be preserved.

Analysis

6. The appellant made his application under the EU Settlement Scheme not under the Immigration (European Economic Area) Regulations 2016. The appellant's previous application for a residence card had been refused and was not the subject of this appeal.
7. The Upper Tribunal issued guidance on the application of the EU withdrawal agreement in **Celik (EU exit, marriage, human rights) [2022] UKUT 00220** as follows:
 - (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".

8. On the basis of the above, as Mr Gajjar candidly accepted the appellant could not succeed. I set aside the conclusions of the First-tier Tribunal decision where the judge states that the appellant succeeds under the Withdrawal Agreement because the appellant could not fulfil the relevant criteria and he could not fall within the personal scope (article 10) of the Withdrawal Agreement.
9. The Judge erred materially for the reasons identified. I set aside the decision pursuant to Section 12(2)(a) of the Tribunals Courts and Enforcement Act 2007 (TCE 2007), preserving paragraphs 16-18 of the First-tier Tribunal decision and remake the decision under section 12(2) (b) (ii) of the TCE 2007.
10. For the reasons given above the appeal of Mr Jukaj is dismissed.

Notice of decision

Mr Jukaj's appeal is dismissed.

No anonymity direction is made.

Signed Helen Rimington

Date 17th November 2022

Upper Tribunal Judge Rimington

TO THE RESPONDENT **FEE AWARD**

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

Signed Helen Rimington

Date 17th November 2022

Upper Tribunal Judge Rimington