



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

**Case No: UI-2022-003560**  
On appeal from: EA/03495/2022

**THE IMMIGRATION ACTS**

**Decision & Reasons Issued:**  
**On 17 December 2023**

**Before**

**UPPER TRIBUNAL JUDGE GLEESON**

**Between**

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

Appellant

**and**

**POLLYANNA DE LIMA SOUZA**  
**(NO ANONYMITY ORDER)**

Respondent

**Representation:**

For the Appellant: Mr Chris Avery, a Senior Home Office Presenting Officer  
For the Respondent: In person, assisted by a Portuguese interpreter

**Heard at Field House on 7 December 2023**

**DECISION AND REASONS**

**Introduction**

1. The Secretary of State has permission to challenge the decision of the First-tier Tribunal allowing the claimant's appeal against his decision on 11 March 2022 to refuse her settled or pre-settled status under the EU Settlement Scheme and Appendix EU of the Immigration Rules HC 395 (as amended).
2. The claimant is a citizen of Brazil, and her husband is a Portuguese citizen and thus an EEA national. The claimant's husband has pre-settled status, granted on 8 September 2021, which will expire on 8 September 2026, at

which time (if not sooner) he can apply for settled status. He does not yet have a documented permanent right of residence.

3. For the reasons set out in this decision, and as explained to the claimant at the hearing I have come to the conclusion that following the Court of Appeal's decision in *Celik v Secretary of State for the Home Department* [2023] EWCA Civ 921 (31 July 2023), the claimant's challenge to the Secretary of State's decision cannot succeed, and that her appeal must be dismissed.
4. **Mode of hearing.** The hearing today took place on a hybrid basis, with Mr Avery appearing by video link and all other parties and the interpreter appearing face to face. The Upper Tribunal provided a Portuguese interpreter for the claimant. Her husband accompanied her to the hearing.

### **Background**

5. The main basis of the appellant's case is that she is married to her husband, whom she met in 2009 when she was 14 years old and he was 17. The claimant is 29 now, and her husband is 31 years old.
6. The parties married on 18 June 2021, almost six months after the EU Exit specified date of 11 p.m. on 31 December 2020. The claimant cannot demonstrate that she was a family member of a relevant EEA citizen before the specified date. Her appeal stands or falls on the definition of 'durable partner' in Annex 1 to Appendix EU.

### **Refusal letter**

7. The Secretary of State approached this application on the basis that the claimant was not a spouse before the specified date. That is not disputed.
8. He concluded that the claimant could not meet the definition of 'durable partner' in Annex 1 to Appendix EU, which requires not only proof of the existence of the relationship for at least two years before the specified date, but also that the claimant holds, or had applied for, a 'relevant document' before the specified date for EU Exit.
9. The claimant appealed to the First-tier Tribunal.

### **First-tier Tribunal decision**

10. In the First-tier Tribunal, as before me, the claimant represented herself. The Secretary of State was represented by Ms Jacqueline Victor-Mazeli of Counsel. The First-tier Judge allowed the appeal.
11. Ms Victor-Mazeli made the following submission at the hearing:

"9. [Ms Victor-Mazeli] addressed me about the issues of durable partnership. In particular, she stressed the limited nature of documents available. She also agreed, however, that if I found that there had been a durable partnership over many years and that it continued, the appeal

should be allowed. She had asked me to find that there was not sufficient evidence to reach that conclusion.”

12. The First-tier Judge found as a fact that the relationship between the claimant and her husband was genuine and of long standing. He found them to be credible witnesses and concluded as follows:

“20. In my judgement, they are a genuine couple. They informed me that marriage in Brazil was very expensive and they had not seen marriage as a necessary step to cement their relationship. Rather, they informed me, that they had seen their relationship as being that of husband-and-wife, in fact if not law, for many years. I accept this. I find that the Appellant has been the partner of her husband since 2013 at least, when she was then aged 18 or 19, and has remained his partner since that date. I also find the fact that the husband has regarded their relationship in entirely the same way as his wife. They have been durable partners for many years, both in Brazil and here.

21. As was confirmed on behalf of the Respondent at the beginning of the hearing, the husband’s nationality and his status in the UK are not in dispute. I conclude, therefore, that the decision taken by the Respondent may now be seen not to have been in accordance with the Rules and I allow the appeal on that basis.”

The judge’s reasoning did not engage with the definition of ‘durable partner’ in Annex 1 of Appendix EU.

13. The Secretary of State appealed to the Upper Tribunal.

### **Permission to appeal**

14. Permission to appeal to the Upper Tribunal was granted on the following basis:

“3. The Judge’s approach to the assessment of the requirements of the immigration rules under the EUSS in relation to durable partners does not recognise that to meet the definition of a ‘durable partnership’ the appellant must hold a relevant document issued as a durable partner under the EEA Regulations. There is no suggestion that the appellant holds such a document, and therefore the conclusion that the appellant meets the requirements of the rules is arguably flawed.

4. Whilst it is clear from paragraph 9 of the Judge’s decision and reasons, that the representative for the Respondent invited the Judge to proceed on the basis that he did, consideration of the nature of the relationship between the appellant and sponsor was irrelevant given the definition provided by the rules, and the issue relating to the absence of a relevant document.”

15. There was no Rule 24 Reply. The appeal was then stayed pending the outcome of the Court of Appeal’s decision in *Celik*.

16. That is the basis on which this appeal came before the Upper Tribunal.

## **Appendix EU - 'durable partner' definition**

17. In order to qualify for settled or pre-settled status under the EUSS, the claimant needs to show that she was a 'durable partner' of a relevant EEA citizen at the specified date, as defined in Annex 1 to Appendix EU of the Immigration Rules. The definition of 'durable partner' requires not only proof of the existence of a relationship akin to marriage for at least two years before the specified date, but also that the claimant held, or had applied for, a 'relevant document' before the specified date for EU Exit.
18. A relevant document is defined in Annex A:

### **"Relevant document**

(a)(i)(aa) a family permit, registration certificate, residence card, document certifying permanent residence, permanent residence card or derivative residence card issued by the UK under the EEA Regulations on the basis of an application made under the EEA Regulations before (in the case, where the applicant is not a dependent relative, of a family permit) 1 July 2021 and otherwise before the specified date (or, in any case, a letter from the Secretary of State, issued after 30 June 2021, confirming their qualification for such a document, had the route not closed after 30 June 2021)"

The evidence of the claimant and her husband is quite clear: she did not have, and had not applied before the specified date, for any of those documents.

## **Celik decisions**

19. At the date of the First-tier Tribunal decision, First-tier Judge Eldridge did not have the benefit either of the Upper Tribunal guidance in *Celik (EU Exit, marriage, human rights)* [2022] UKUT 220 (IAC) which was promulgated on 19 July 2022, or of the judgment in the Court of Appeal which upheld the Upper Tribunal's analysis.
20. The judicial headnote in the Upper Tribunal decision gave the following guidance:

*"(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 11 pm 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. ..."*

21. The Court of Appeal upheld that reasoning in a judgment handed down on 31 July 2023, with interventions from The Aire Centre, Here for Good, and the Independent Monitoring Authority for the Citizens' Rights Agreements.
22. Lord Justice Lewis gave the judgment of the Court, Lord Justices Singh and Moylan agreeing with him. The court considered a range of submissions regarding the correct application of Appendix EU, and at [68] upheld the Upper Tribunal's analysis:

"The Upper Tribunal was correct in deciding that the decision of 23 June 2021 was in accordance with the requirements of the rules in Appendix EU and rule EU11 and EU14 in particular. The fact is that the appellant was not a family member at the material time. He had not married an EU national before 11 p.m. on 31 December 2020. He was not a durable partner within the meaning of Annex 1 to Appendix EU as he did not have a residence card as required and he did not have a lawful basis of stay in the United Kingdom (he was in the United Kingdom unlawfully). The appellant did not qualify for leave to remain under Appendix EU. There is no obligation to interpret or "read down" the relevant rules to reach a different result."

### **Upper Tribunal hearing**

23. The oral submissions at the hearing are a matter of record and need not be set out here. I had access to all of the documents before the First-tier Tribunal. I confirmed the factual matrix with the claimant through the Portuguese interpreter.
24. The claimant and her husband have been together in a relationship akin to marriage for a number of years, at least since 2013. They have lived together, in Brazil and in the UK, and their account of their relationship and their commitment to each other is accepted. However, they were not married before the specified date. She did not have, and before the specified date had never applied, for a 'relevant document'.
25. It was not necessary to call on Mr Avery for submissions on behalf of the Secretary of State.

### **Discussion**

26. The First-tier Judge erred in not applying the provisions of Appendix EU to this claimant's circumstances and in substituting his own definition of 'durable partner' for the applicable definition in Annex 1 to Appendix EU. The decision must be set aside for that reason.
27. The factual matrix is not disputed, and I consider that it is appropriate to remake the decision by applying the *Celik* guidance to the accepted facts. The question for this Tribunal is whether the special arrangements made for EEA citizens and their partners in Appendix EU and the Withdrawal Agreement avail this claimant. Although the relationship between these parties is of long standing and has endured, in the absence of a 'relevant document' as defined in Annex 1, it is not a 'durable relationship' for the

purposes of the arrangements made for EEA citizens and their partners in Appendix EU and she cannot benefit from those arrangements.

28. The claimant's appeal must be dismissed.
29. It remains open to the claimant and her husband to make an spouse application under Appendix FM, or any other application under the Immigration Rules which may be appropriate to their circumstances. They are strongly encouraged to seek legal advice and representation.

### **Notice of Decision**

30. For the foregoing reasons, my decision is as follows:

The making of the previous decision involved the making of an error on a point of law.

I set aside the previous decision. I remake the decision by dismissing the claimant's appeal.

**Judith A J C Gleeson**  
Judge of the Upper Tribunal  
Immigration and Asylum Chamber

**Dated: 8 December 2023**