



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

**Case No: UI-2022-003712**  
**First-tier Tribunal No:**  
**EA/02550/2022**

**THE IMMIGRATION ACTS**

**Decision & Reasons Issued:**  
**On the 28 April 2023**

**Before**

**UPPER TRIBUNAL JUDGE KAMARA**

**Between**

Fatoumata Diana Diawara  
**(NO ANONYMITY ORDER MADE)**

Appellant

**and**

**Secretary of State for the Home Department**

Respondent

**Considered on the papers on 13 March 2023**

**DECISION AND REASONS**

1. This is the remaking of an appeal against the decision of the Secretary of State dated 21 February 2022 in which the appellant's application under the European Union Settlement Scheme, based on her relationship with her Italian national partner, was refused.
2. The appellant's appeal was previously considered by First-tier Tribunal Judge Manuell who allowed it in a decision promulgated on 27 June 2022. That decision was set aside following an error of law hearing which took place on 25 November 2022. Findings of fact relating to the genuine nature of the appellant's relationship with her partner were preserved. That decision is annexed hereto.
3. At the hearing of 25 November 2022, the respondent's representative, Mr Avery, indicated that the Secretary of State would review the appellant's case in light of the preserved findings of fact.

4. On 9 March 2009, Mr Avery wrote to the Upper Tribunal to confirm that the case had been reviewed and inviting the Tribunal to allow the appeal on the following basis.

Having regard to the First Tier Tribunal's finding of fact and to the evidence provided, the Secretary of State is satisfied that the appellant has established that there was, at the relevant time, a durable relationship in this case and that the requirements of the EUSS are met.

5. Given the Secretary of State's not entirely unexpected concession, I have no hesitation in allowing this appeal on the basis that the requirements of the EUSS are met.

**Notice of Decision**

The appeal is allowed.

T Kamara

Judge of the Upper Tribunal  
Immigration and Asylum Chamber

**13 March 2023**

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

No fee is paid or payable and therefore there can be no fee award.

T Kamara

Judge of the Upper Tribunal  
Immigration and Asylum Chamber

**13 March 2023**

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**NOTIFICATION OF APPEAL RIGHTS**

1. A person seeking permission to appeal against this decision must make a written application to the Upper Tribunal. Any such application must be **received** by the Upper Tribunal within the **appropriate period** after this decision was **sent** to the person making the application. The appropriate period varies, as follows, according to the location of the individual and the way in which the Upper Tribunal's decision was sent:

2. Where the person who appealed to the First-tier Tribunal is **in the United Kingdom** at the time that the application for permission to appeal is made, and is not in detention under the

Immigration Acts, the appropriate period is **12 working days (10 working days, if the notice of decision is sent electronically).**

3. Where the person making the application is in detention under the Immigration Acts, **the appropriate period is 7 working days (5 working days, if the notice of decision is sent electronically).**

4. Where the person who appealed to the First-tier Tribunal is **outside the United Kingdom** at the time that the application for permission to appeal is made, the appropriate period is **38 days (10 working days, if the notice of decision is sent electronically).**

**5. A “working day” means any day except a Saturday or a Sunday, Christmas Day, Good Friday or a bank holiday.**

**6. The date when the decision is “sent’ is that appearing on the covering letter or covering email**



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

Appeal Number: EA/02550/2022  
CE-File: UI-2022-003712

**THE IMMIGRATION ACTS**

**Heard at Field House  
On 25 November 2022**

**Decision & Reasons Promulgated**  
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**Before**

**UPPER TRIBUNAL JUDGE KAMARA**

**Between**

**SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Appellant

**and**

**FATOUMATA DIANE DIAWARA  
(ANONYMITY DIRECTION NOT MADE)**

Respondent

**Representation:**

For the Appellant: Mr C Avery, Senior Home Office Presenting Officer  
For the Respondent: Mr D A Adams, Tamsons Legal Services

**DECISION AND REASONS**

1. This is an appeal by the Secretary of State against the decision of First-tier Tribunal Judge Manuell promulgated on 27 June 2022. However, for ease of reference I will hereafter refer to the parties as they were before the First-tier Tribunal.
2. The Judge allowed the appellant's appeal against the decision of the respondent to refuse to grant her settled or pre-settled status under the EU Settlement Scheme ("EUSS") in the capacity of a durable partner of a relevant EEA citizen.

### **Relevant Background**

3. On 9 June 2021, the appellant made an application under the EUSS based on her relationship with her partner, an Italian national. That application was refused on 21 February 2022.

### **The Reasons for Refusal**

4. The respondent's reasons for refusing the appellant's application included the following.

You state that you are a durable partner of a relevant sponsor. However, you have not provided sufficient evidence to confirm this. The reasons for this are explained below. The required evidence of family relationship for a durable partner of a relevant sponsor is a valid registration certificate, family permit (or a letter from the Secretary of State, issued after 30 June 2021, confirming their qualification for one) or residence card issued under the EEA Regulations (or an equivalent document or other evidence issued by the Bailiwick of Jersey, the Bailiwick of Guernsey or the Isle of Man), a valid EU Settlement Scheme biometric residence card, or an EU Settlement Scheme Family Permit, as the durable partner of that relevant sponsor and evidence which satisfies the Secretary of State that the partnership remains durable at the date of application (or did so for the 1 of 5 period of residence relied upon).

Home Office records do not show that you have been issued with a registration certificate, family permit (or a letter from the Secretary of State, issued after 30 June 2021, confirming your qualification for one) or residence card under the EEA Regulations as the durable partner of the relevant sponsor and you have not provided an equivalent document or other evidence issued on this basis by any of the Islands. Our records also do not show that you have been granted an EU Settlement Scheme biometric residence card, or an EU Settlement Scheme Family Permit, as the durable partner of the relevant sponsor.

### **The Proceedings in the First-tier Tribunal**

5. The facts found by the Judge are that the appellant is a national of Senegal who entered the UK as a Tier 4 migrant in September 2019. Her sponsor is Ms Bonsu, an Italian national who is exercising Treaty rights in the United Kingdom. The couple met in December 2019 and began living together in August 2020 and as of November 2020 the relationship had become durable and by the time of the hearing had lasted around two years. The judge allowed the appeal for the following reason

20. The tribunal finds that the Appellant was the family member of a relevant EEA citizen by virtue of meeting the definition of durable partner as set out in Annex 1 of Appendix EU. The partnership was formed and was durable before the specified date [i.e., 11.00pm GMT on 31 December 2020]. It follows that the Appellant's appeal succeeds.

## **The Application for Permission to Appeal**

6. Simon Armstrong of the Specialist Appeals Team settled the application for permission to appeal on behalf of the SSHD. He pleaded one ground of appeal, subdivided into four categories, which are set out below:

Making a material misdirection of law on any material matter.

a) It is respectfully submitted that the First Tier Tribunal Judge (FTTJ) has materially erred in law by failing to properly consider the provisions of the Appendix EU contained within the Immigration Rules.

b) The Appellant's application for status under the EU Settlement Scheme was as the family member of a relevant EEA national. The application was considered under the durable partner route. The rule requires a "relevant document" as evidence that residence had been facilitated under the EEA regulations. This requirement transposed the stipulations contained in Article 3.2(b) of Directive 2004/38/EC. No such document was held by the Appellant as no application for facilitation had ever been made under national legislation, prior to the specified date (31 December 2020).

c) It is submitted that the question of whether and how the relationship was in fact "durable" at any relevant date, as is found by the FTTJ at [19] of the determination, is of no consequence. The requirements of Appendix EU of the Immigration rules could simply not be met by a durable partner whose residence had not been facilitated prior to the specified date. This is reflected in Article 10(2) of the Withdrawal Agreement permitting the continued residence of a former documented Extended Family Member, with an additional transitional provision in Article 10(3) for those who had applied for such facilitation before 31 December 2020. The Appellant had not made any such application and therefore could not satisfy the requirements of Appendix EU.

d) It is asserted that the FTTJ has materially erred in law by allowing the Appellant's appeal despite the appellant not having a "relevant document" that confirms her lawful residence under EU Law prior to the UK's exit from the EU. Therefore, the FTTJ has misdirected themselves with regard to the requirements of Appendix EU of the Immigration Rules and has allowed the appeal on an erroneous basis.

## **The Grant of Permission to Appeal**

7. On 29 July 2022 First-tier Tribunal Judge Boyes granted permission to appeal on all grounds raised.

## **The Hearing in the Upper Tribunal**

8. At the hearing to determine whether an error of law was made out, Mr Avery developed the grounds of appeal by reference to the grounds and made the following points. The appellant could not succeed as she did not apply for status under the Immigration (European Economic Area)

Regulations 2016 before the specified date. The judge was side-tracked by the durable relationship issue rather than the technical aspects of the Rules. The judge's finding that the appellant was a durable partner was devoid of any law and failed to engage with the facilitation issue. Following *Celik*, the appellant could not succeed.

9. Mr Adams urged me to dismiss the Secretary of State's appeal. He agreed that there had been no facilitation. Nonetheless, Mr Adams took me to page 2 of the decision in question and referred to the respondent's acceptance that the appellant met the criteria for an exception to the requirement for a relevant document to be shown. The respondent's view is that the appellant's relationship was not durable because she had only been living with the EEA sponsor since August 2020 and there was insufficient significant other evidence that the relationship was durable by 2300 hours on 31 December 2020. Mr Adams asked me to note that the judge accepted that the witnesses were truthful and made a series of positive findings, including that the durable relationship was formed before the relevant date.
10. In reply, Mr Avery argued that even if it was accepted that the appellant met the requirements of the exception, it was for the Secretary of State decide whether to accept that the exception applied and to facilitate. The judge had not grappled with the technical aspects of the law.
11. At the end of the hearing, I announced that the First-tier Tribunal made a material error of law and that the decision was set aside, preserving the findings as to the appellant's relationship with the sponsor.
12. Neither party was in a position to immediately move to the remaking stage because both representatives wished to give some more thought to the exception issue set out in the decision letter.
13. Mr Avery helpfully stated that the respondent would look at the appellant's case again based on the preserved findings and inform the Upper Tribunal if she were to be nonetheless granted leave to remain under the EUSS.

### **Reasons for Finding an Error of Law**

14. The reason for the refusal of the appellant's application under the EUSS was that she had not been issued with a relevant document, showing that her residence was being facilitated under the 2016 Regulations.
15. In *Celik (EU exit: marriage; human rights)* [2022] UKUT 00220 which was promulgated on 19 July 2022 a Presidential panel ruled 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.

16. The judge did not engage with Appendix EU in coming to his decision. While the judge focused on the substance of the appellant's relationship with the EEA sponsor, he did not take into consideration that it was for the respondent to decide whether the appellant could benefit from the exception to the requirement for a relevant document. In any event, the judge did not identify this issue in his decision.
17. The Secretary of State decided that the appellant could not benefit from the exception because at the time of the application under the EUSS, she had been living with her partner for less than a year and no significant other evidence of a durable relationship had been provided.
18. The respondent therefore decided that the exception did not apply, and the appellant would need to show that she had been issued with a relevant document to obtain leave under the EUSS. Therefore, the judge materially erred in law by allowing the appeal despite the appellant not having a "relevant document" that confirms her lawful residence under the 2016 Regulations and in making no reference to the issue which was before him.

### **Conclusion**

For the above reasons, I find that there is a material error of law in the decision of the First-tier Tribunal Judge such that the decision should be set aside, preserving the favourable findings of fact regarding the appellant's relationship with the sponsor.

The decision is to be remade before the Upper Tribunal on a future date.

The appeal is not to be listed earlier than 1 March 2023.

Signed            T Kamara

Date 30 November 2022

Upper Tribunal Judge Kamara