



IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2022-003848

On appeal from: EA/16132/2021

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On 19 September 2023

Before

UPPER TRIBUNAL JUDGE GLEESON
DEPUTY UPPER TRIBUNAL JUDGE JUSS

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MEHDI AHORBI
(NO ANONYMITY ORDER MADE)

Respondent

Representation:

For the Appellant: Ms Julie Isherwood, a Senior Home Office Presenting Officer
For the Respondent: In person

DECISION OF THE UPPER TRIBUNAL
PURSUANT TO RULE 40(3)(a) OF
THE TRIBUNAL PROCEDURE (UPPER TRIBUNAL) RULES 2008

1. The Secretary of State appeals with permission from the decision of the First-tier Tribunal allowing the claimant's appeal against her decision on 15 November 2021 that he did not qualify under the EU Settlement Scheme for either settled or pre-settled status.
2. By a decision promulgated on 19 July 2022, First-tier Judge Rodger found that the claimant had no lawful presence in the UK beyond the expiry of his visit visa in 2019; and that the claimant and sponsor had been in a durable relationship since mid-2019. They married in July 2021, over 6 months after the specified date of 11 pm on 31 December 2020.
3. The claimant did not have a family permit or residence card under the Immigration (European Economic Area) Regulations 2016 (as saved). Judge Rodger found that the claimant could bring himself within the definition of

durable partner at Annex 1 of Appendix EU, at (ii)(aaa) of that definition. In the alternative, he considered that the decision to refuse pre-settled or settled status was disproportionate with reference to Article 81(r) of the Withdrawal Agreement.

4. The First-tier Tribunal allowed the appeal and the Secretary of State appealed to the Upper Tribunal.
5. Permission was granted by First-tier Judge Barker on the basis that the First-tier Judge had arguably misapplied the provisions of Appendix EU and Annex 1 thereto, and that the First-tier Tribunal's consideration of the protection provided by the Withdrawal Agreement was arguably flawed. The terms of the grant of permission are in line with the decision of the Court of Appeal in *Celik v Secretary of State for the Home Department* [2023] EWCA Civ 921 (31 July 2023)
6. It is common ground that the First-tier Tribunal did materially err in law in his interpretation of both Annex 1 and Article 18(r) of the Withdrawal Agreement. Both parties agree that this is a case where the decision of the First-tier Tribunal must be set aside and remade.
7. The claimant confirmed to us that he has been granted limited leave to remain under the Immigration Rules, which triggers the abandonment provisions at Regulation 13(3) of The Immigration (Citizens' Rights Appeals) (EU Exit) Regulations 2020. However, this being a Secretary of State appeal, that is not determinative of her challenge to the First-tier Tribunal decision.
8. During Friday 18 August 2023, there was correspondence between Mr Deller for the Secretary of State and Clyde Solicitors for the claimant, seeking to agree a consent order disposing of these proceedings, so that today's hearing could be vacated. Unfortunately, during that day, the claimant's solicitors terminated their retainer and he appears in person today, unrepresented.
9. The claimant confirmed to us at the hearing that he was aware of the terms of the proposed Consent Order and that he was willing to sign it. He said his solicitors had explained the *Celik* point to him. We amended the proposed Consent Order, with the agreement of the parties, to remove the reference to vacating today's hearing, and to provide for costs. The order was printed and given to the claimant to sign, but he left the Upper Tribunal without signing it. Ms Isherwood signed a copy of the agreed Consent Order.
10. We are satisfied that the decision of the First-tier Tribunal can properly be set aside without a fully reasoned decision notice.
11. Pursuant to rule 40(3) of the Tribunal Procedure (Upper Tribunal) Rules 2008, no further reasons will be provided unless, within 7 days of the sending out of this decision, either party indicates in writing that they do not consent to the appeal being disposed of in the manner set out at (5) above. If in consequence an oral hearing is required, but the outcome is the same, the Upper Tribunal will consider making an order for wasted costs.

Decision

12. We set aside the decision of the First-tier Tribunal and BY CONSENT we substitute a decision as follows:

1. That the parties agree to the Tribunal summarily setting aside the decision of the First-tier Tribunal for error of law as identified in the Appellant's grounds; and
2. That the Tribunal remakes the decision summarily dismissing the appeal; and
3. That this has no effect on the leave to remain now granted to the claimant pursuant to Appendix FM.
4. No order for costs.

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

Dated: 21 August 2023