IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER **Case No: EA/00545/2021**

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On the 22 May 2023

Before
UPPER TRIBUNAL JUDGE RINTOUL
UPPER TRIBUNAL JUDGE O'CALLAGHAN

Between
SAFIUALLAH SHAAN EMAMBUX
(aka SHAUN BUX)
(NO ANONYMITY ORDER MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

and

THE AIRE CENTRE

Intervenor

Representation:
For the Appellant: In person
For the Respondent: Mr. J Anderson, Counsel, instructed by the Government Legal Department
For the Intervenor: Mr. S Cox, Counsel, instructed by the AIRE Centre.

Heard at Field House on 4 July 2022 and 14 March 2023

DECISION AND REASONS

Introduction

1. Both members of the panel have contributed to this Decision.

2. The panel observes from the outset that ultimately a judge is in charge of their court or hearing room, and a decision to exclude someone from entering a court or hearing room is a judicial decision.

3. The appellant appeals with permission against the decision of Judge of the First-tier Tribunal Rodger dated 18 August 2021. The appellant's underlying appeal is in respect of a decision by the respondent to refuse to grant him leave to remain under the European Union Settlement Scheme (EUSS).

4. At the outset we wish to convey our gratitude to Mr. Anderson and his instructing solicitors, and to Mr. Cox and the AIRE Centre, who acted *pro bono* as intervenors. The quality of their written work and oral submissions was of the expected high standard.

Exclusion of appellant from hearing room: rule 37(4) of the Tribunal Procedure (Upper Tribunal) Rules 2008

5. It is appropriate to provide background to the Tribunal's decision to exclude the appellant from the hearing room on the second day of hearing.

6. The Upper Tribunal is required to deal with cases fairly and justly, ensuring, so far as practicable, that the parties are able to participate fully in the proceedings (see rule 2 of the Tribunal Procedure (Upper Tribunal) Rules 2008). It is also required to give effect to that principle when exercising its powers under those Rules.

7. Rule 37(4) of the 2008 Procedure Rules provides, *inter alia*, that the Upper Tribunal may give a direction excluding from a hearing, or any part of it, (a) any person whose conduct it considers is disrupting or is likely to disrupt the hearing, and (b) any person whose presence it considers is likely to prevent another person from giving evidence or making submissions freely.

8. The First-tier Tribunal enjoys such power by rule 27(4) of the Tribunal Procedure (First-tier Tribunal) (Immigration and Asylum Chamber) Rules 2014.

9. All parties to an appeal are entitled to put their case to a court or tribunal in person and in the absence of intimidation or threats. That is axiomatic and underpins the rule of law and the administration of justice. As with open justice, exceptions to that rule must be justified by important principle, most often where the circumstances are such that permitting a person to attend a hearing would put at risk the achievement of justice to other parties. Placing limits on attendance or the mode of attendance is only to be done where a fair hearing cannot otherwise take place. Judicial discretion in making such a limitation is to be exercised with appropriate caution. Any restriction on attendance must be justified and proportionate; any restriction imposed must be no more extensive that is necessary to protect the interests of justice, bearing in mind that applies to all parties.

10. A judge is, ultimately, in charge of their court or hearing room, and a decision to exclude someone from entering a court or hearing room is a judicial and fact-specific one.

11. A judge is required to retain control of proceedings, to ensure that they remain focussed, effective and efficient. They are required to be vigilant to the risk of disruption. Aggressive, intimidating and threatening conduct may potentially have an adverse impact on the integrity of a hearing and on the ability of others to put forward their case. The safety of participants is important.

12. Whilst not an exhaustive list, and with fairness to both parties to be considered, a judge should properly have regard to all the circumstances, including the nature and circumstances of the relevant behaviour, and the extent of the disadvantage to a party if they, or a witness, are not able to present their evidence or oral submissions.

13. In many cases, it will be appropriate to give a party a warning that the behaviour is inappropriate before imposing any sanction; that may well not be the case where the conduct in question is sustained, or the warning is unlikely to have any effect, or when giving such a warning would risk further, serious misconduct, undermining a fair hearing.

14. If the behaviour arises during a hearing, a judge should additionally consider whether an adjournment would resolve the issue and the likely length of such adjournment.

15. By directions issued on 1 March 2023, the panel directed that the second day of hearing would proceed by all parties attending remotely via video link, and that pursuant to rule 37(4) of the 2008 Procedure Rules the appellant was excluded from attending the hearing in person. He did not object to that. Our reasons are detailed below.

16. On 16 January 2018, a Circuit Judge granted an injunction against the appellant to his then landlord under section 4 of the Anti-social Behaviour Crime and Policing Act 2014 consequent to anti-social behaviour. The appellant's actions left a neighbour feeling extremely threatened and frightened. A Circuit Judge subsequently found the appellant to be in contempt of court for breaking the injunction and made a suspended committal order on 6 September 2018. On 10 September 2018, the original injunction was extended. The appellant's appeal against the suspended committal order and the extension of the injunction was dismissed by the Court of Appeal on 22 November 2019: Emambux v. Innisfree Housing Association Limited [2019] EWCA Civ 2048.

17. During proceedings before both the First-tier Tribunal and this Tribunal, the appellant regularly expressed hostility in his written documents and correspondence to a range of identified and unidentified people, many of whom are not involved in this matter. Examples of the latter are identified below.

18. In addition to the above, the appellant has been engaged in legal proceedings outside of this Chamber's jurisdiction, of which we have very little if any knowledge. Having read the documents in this matter, we are satisfied that the appellant holds an animus towards a Circuit Judge and a District Judge involved in those proceedings. In respect of the Circuit Judge, he identifies her as the "Queen of Corruption" in his first skeleton argument filed with the First-tier Tribunal and identifies himself as experiencing "blackmail" from her in his application for 'an amendment of the Tribunal decision' filed in an earlier, and successful, human rights appeal before the First-tier Tribunal in 2019. In respect of that human rights appeal, the appellant identifies the Judge of the First-tier Tribunal who allowed his appeal as having blackmailed him.

19. Turning to these proceedings, the appellant has made threats towards a Judge of the First-tier Tribunal who for a time was involved in case managing the appeal.

20. As to the appellant's behaviour before this panel, he expressed hostility towards a member of the respondent's team on several occasions during the hearing on 4 July 2022, as well as being verbally aggressive and presenting in an intimidating manner towards Mr. Anderson. We observe that Mr. Anderson remained courteous throughout.

21. In the run-up to the second day of hearing in March 2023, the appellant's behaviour deteriorated further. In an email to several recipients sent at 13.23 on 14 February 2023, the appellant complained as to the approach adopted by the Upper Tribunal to the filing and service of skeleton arguments, asserting that the Tribunal was exhibiting favouritism to the respondent. A named solicitor of the Government Legal Department was referred to in obscene terms and, along with a named member of the respondent's team, was said to be "part of child trafficking". The appellant stated in relation to these two people, "... tell them I have all their information as well, where they live, and where their family is ..." We consider this to be a direct threat to those persons identified.

22. By means of this email, the appellant asserted that he had not secured his biometric residence permit because the panel members "need to cover up" for the respondent. A member of the panel was said to "want to take part in covering up child trafficking". A threat was made to the panel members that the appellant would demonstrate outside their houses: "all your neighbours will know what you really do who you really are, watch me!!!" The panel considers this to be a direct threat.

23. The appellant further wrote in respect of the panel, "there is blood on the hands of people like you, responsible for lots of people committing suicide; when you are too happy bullshitting and bullying people!!!!"

24. In the same email, the AIRE Centre was accused by the appellant of covering up for the respondent, "for them not to look as stupid as their actions".

25. Consequent to the direct threat issued, the Government Legal Department took steps to change the solicitor with conduct of the appeal.

26. In response to the various threats made, HMCTS undertook a risk assessment which recommended that the hearing on 14 March 2023 proceed by way of video link only. The panel was alert to the safety of tribunal staff as a factor to be considered.

27. In deciding to exclude the appellant from attending the hearing in person, the panel was satisfied, having had regard to the threats made, that the appellant's conduct was likely to disrupt the hearing and prevent the respondent from making submissions freely. We concluded that permitting the appellant to attend the hearing in person would put at risk the achievement of justice to the respondent. While excluding the appellant from attending the hearing in person was a serious step, the panel concluded that he would be able to participate remotely via video link in an open hearing, that such step was proportionate and could properly be considered the least restrictive means of doing justice to all parties.

28. When issuing the direction to exclude attendance the panel noted that the appellant had made threats by email to named persons employed by the respondent and the Government Legal Department. He had also made threats to the panel in his email correspondence. We considered this to be wholly unacceptable behaviour. Though not determinative, a HMCTS risk assessment did not recommend an oral hearing with the parties' attendance. The panel observed the significant threats made in the run-up to the hearing, and the increasing personal hostility directed to persons connected with the case. We also noted the disapproving criticisms made as to the conduct of the AIRE Centre and the risk of the appellant's hostility increasing towards Mr. Cox and members of the AIRE Centre team.

29. It is appropriate to record that during the second day of hearing on 14 March 2023, the appellant issued a further threat to a member of the panel, though we record that he later apologised. He continued to be hostile and aggressive towards Mr. Anderson and to members of the respondent's team. He was disruptive on several occasions requiring the panel to rise for breaks during the hearing.

Relevant Facts

30. The appellant is a national of Mauritius and aged 41.

31. He has confirmed in his written evidence that he was married in Mauritius and has adult children in the United Kingdom, with whom he presently has no contact.

32. His partner, Ms. Cynthia Emambux, is a French national. The couple entered an Islamic marriage at I.E.C.C., Islington, London on 28 November 2015. They reside together with one child, who was born shortly after the decision of the First-tier Tribunal was promulgated.

33. The appellant entered the United Kingdom as a visitor in February 2004. He was subsequently granted leave to remain as a student from 26 August 2004 until 31 October 2007, then enjoyed leave to remain as a student/student nurse from 12 November 2007 to 31 August 2008 and from 10 February 2009 to 30 November 2009. Subsequent applications for leave to remain were refused. Two applications for an EEA family permit residence card made on 12 and 29 June 2017 were rejected as invalid.

34. He claimed asylum on 11 October 2017. The respondent refused the application in 2019, and the appellant successfully appealed on article 8 ECHR grounds. Judge of the First-tier Tribunal Greasley concluded by his decision dated 5 December 2019 that the appellant should be permitted a limited period of six months in this country to engage with court proceedings ongoing outside this Chamber's jurisdiction.

35. The respondent granted the appellant leave to remain from 9 January 2020 to 18 June 2020.

EUSS application

36. On 5 November 2020, the appellant made an in-country application under the EUSS, relying upon his relationship with Ms. Emambux.

37. The respondent wrote to the appellant by email on 7 December 2020 requesting evidence of his relationship with Ms. Emambux in the form of a marriage certificate, with evidence that the certificate is a valid record of marriage/civil partnership, such as a letter from a registrar or government authority from the country in which it was contracted confirming that it was registered properly. This step was identified as being required to permit the respondent to confirm that

the appellant met the definition of a family member of a relevant EEA citizen.

38. The appellant responded by means of a 'declaration statement' dated 8 December 2020, accompanied by a letter from Ms. Emambux of the same date. The appellant provided a copy of his Islamic marriage certificate issued by I.E.C.C.

39. The respondent refused the application by a decision dated 11 December 2020, observing that insufficient evidence was provided to establish that the appellant was the spouse of Ms. Emambux.

40. By an undated review the respondent accepted that the appellant and Ms. Emambux were in a relationship but could not find any evidence that the appellant holds, or has held, a relevant document as a non-EEA family member of Ms. Emambux. It was observed that the appellant was granted six-months leave to remain valid from 9 January 2020, but such leave was granted consequent to an appeal concerned with article 8 rights and did not constitute a document recognising the appellant as a durable partner.

First-tier Tribunal

41. The appellant appealed and his appeal initially came before Judge Rodger on 26 July 2021. The appellant did not attend the hearing, detailing his refusal to attend by an email sent on 25 July 2021 in which he complained that he had not received an EUSS review from the respondent, as previously directed. Judge Rodger noted the respondent's EUSS review had been filed with the First-tier Tribunal and so adjourned the hearing with a direction that the document be both emailed and posted to the appellant. The appellant did not attend the re-listed hearing on 8 August 2021, instead forwarding an email with several enclosures.

42. Judge Rodger dismissed the appeal. She found that the appellant and Ms. Emambux have been in a relationship akin to marriage for many years. However, she concluded that the couple were married by means of a religious marriage and not one recognised by United Kingdom law. Accordingly, the appellant was not a 'spouse' for the purpose of Appendix EU of the Immigration Rules.

43. As to whether the appellant met the requirements of Appendix EU as a durable partner, the Judge found at [42]:

> ‘42. Therefore, given that the definition of ‘durable partner’ is made up of four parts of the test, as set out and summarised above, each of which must be satisfied before an applicant is able to meet the requirements of being a ‘durable partner’ under Appendix EU, and given that the appellant is not able to satisfy the second prong of the test, in that he has not held or does not hold a ‘relevant document’ within the meaning of Appendix EU, namely an EEA family permit or entry clearance, the appeal of the appellant is not able to succeed.’

44. Following the grant of permission to appeal, this Tribunal identified that the appeal may raise important questions in relation to Appendix EU and whether it needs to be read purposively in order to be compatible with the Withdrawal Agreement, and following a written application being filed and served on 14 April 2022, permission was granted to the AIRE Centre to intervene by an Order of UTJ O’Callaghan, dated 19 April 2022.

45. The decisions of the Upper Tribunal in Batool and others (other family members: EU exit) [2022] UKUT 00219 (IAC) and Celik (EU exit; marriage; human rights) [2022] UKUT 00220 (IAC) were handed down on 19 July 2022, fifteen days after the first day of hearing in this matter and whilst the panel was awaiting additional written submissions from the parties.

Grounds of Appeal

46. The appellant filed his notice of appeal with the First-tier Tribunal, with attendant grounds and exhibits.

47. Judge of the First-tier Tribunal Ford granted permission to appeal by a decision dated 11 October 2021, reasoning, *inter alia*:

> ‘3. The appellant had married his wife in a religious ceremony and the marriage was not recognised. The Tribunal accepted that the appellant was in a relationship with a French national. The appellant’s difficulty in his appeal before Judge Rodger was that he did not have status under EEA regulations. His last grant of leave was under the Immigration Rules. He did not therefore qualify for the EU Settlement Scheme. The appellant argues that the decision is wrong but has not identified any arguable material errors of law in the decision of Judge Rodger. The respondent’s position is effectively that the appellant should have applied for further leave under the Rules, but this was bound to fail ...

> 4. Given that it is accepted that prior to December 2020 the appellant and his French national wife were resident in the UK and the Withdrawal Treaty makes it clear that the respondent will adopt a facilitative approach to ongoing residence of the EEA nationals and their families who were resident pre-December 2020, it may be arguable that the respondent should have recognised the appellant had some lesser form of EEA status as at the date of decision.
>
> 5. This was not argued but may be seen as Robinson obvious. There is an arguable material error of law.'

48. The respondent filed and served a rule 24 response, dated 15 November 2021, resisting the appeal.

Discussion

49. We are grateful for the erudite legal argument advanced by Mr. Cox and the AIRE Centre. However, over time there has been clarity as to the legal regime applying to the issues arising in this matter and the law as identified requires this appeal to be dismissed.

50. The United Kingdom has left the European Union.

51. The Withdrawal Agreement is a treaty between the United Kingdom and the European Union setting the terms of the withdrawal of the United Kingdom from the European Union and Euratom. It was signed on 17 October 2019. Article 126 of the Withdrawal Agreement provided for a transition period, which came to an end at 23.00 GMT on 31 December 2020. The fourth recital of the Withdrawal Agreement determines intent: subject only to the arrangements laid down within the Withdrawal Agreement, European Union law in its entirety ceased to apply to the United Kingdom from the date of entry into force of the Withdrawal Agreement.

52. Consequently, European Union free movement rights lost both their direct effect and enforceability in the United Kingdom from this time. It continues to exist domestically only to the extent that it is specifically applied by the Withdrawal Agreement, which is given effect in domestic law by section 7A of the European Union (Withdrawal) Act 2018.

53. Upon the formal introduction of the EUSS on 30 March 2019, EEA citizens and their family members could apply for status either under the Immigration (European Economic Area) Regulations 2016

or the EUSS, provided they qualified, until the end of the transition period. An applicant could apply under both routes simultaneously, but the routes are legally distinct. The 2016 Regulations reflect the United Kingdom's obligations under European Union law, whilst the EUSS is a domestic law scheme implementing the United Kingdom's obligations under the Withdrawal Agreement.

54. An application under the 2016 Regulations had to be made under the procedure prescribed by regulation 21, and a failure to comply with the relevant requirements results in an application being invalid and to be rejected. The appellant did not make an application under the 2016 Regulations and so we are not required to address this legal regime, though we return to it in our postscript below.

55. The appellant's EUSS application was made on 5 November 2020, at a time when European Union law continued to apply.

56. Having made an application under the EUSS, and pursuant to regulation 8 of the Immigration (Citizens' Rights Appeals) (EU Exit) Regulations 2020, the appellant was limited to arguing before the First-tier Tribunal:

    i) The decision was in breach of identified rights protected by the Withdrawal Agreement; or

    ii) The respondent's decision was not in accordance with Appendix EU to the Immigration Rules ('EUSS').

Withdrawal Agreement

57. Regulation 8(2)(a) of the 2020 Regulations establishes a ground of appeal that a decision breaches any right which the appellant has by virtue of Chapter 1, or Article 24(2) or 25(2) of Chapter 2, of Title II of Part 2 of the Withdrawal Agreement. The issuance of a residence document falls within Chapter 1, at Article 18.

58. The First-tier Tribunal did not address this ground, considering the appeal through the prism of Appendix EU alone. It may well be that this course was adopted because reliance upon regulation 8(2)(a) was not elucidated by the appellant in his grounds of appeal. We observe that Judge Ford granted permission in respect of this ground.

59. We proceed on the basis that in accordance with its seventh recital the aim of the Withdrawal Agreement is to 'provide legal certainty to citizens and economic operators as well as to judicial and administrative authorities in the Union and in the United Kingdom.'

60. We observe that European Union law distinguishes between two categories of family member: (a) direct family members within Article 2(2) of Directive 2004/38/EC ('the Citizens' Rights Directive'), and (b) extended family members within Article 3(2). The former enjoy automatic rights of residence; the latter do not. The obligation on Member States in Article 3(2) can also be expressed as a right of the extended family member for his or her application to be facilitated by the Member State; but it is a limited procedural right, distinct from the substantive rights of residence conferred by the Directive: Secretary of State for the Home Department v. Aibangbee [2019] EWCA Civ 339, [2019] 1 W.L.R. 4747, *per* Sir Stephen Richards, at [25].

61. Article 10, establishing personal scope in respect of an application for facilitation and entry for the purpose of the Withdrawal Agreement, distinguishes between the two categories consistent with European Union law. In Case C-83/11 Rahman v. Secretary of State for the Home Department EU:C:2012:519, [2013] QB 249, the Grand Chamber of the European Court of Justice confirmed that Member States are under no obligation to accord a right of residence to extended family members. The entry and residence of an extended family member is to be facilitated by a Member State, which is not obliged to grant every application submitted, even if the extended family member established that they were dependent on the EU citizen, or in a durable relationship. Applicants are entitled only to: (a) a decision on their application which is founded on an extensive examination of their personal circumstances, and (b) judicial review of whether national legislation and its application have remained within the limits set by the Directive.

62. An application under the EUSS is not an application for facilitation: Celik, at [53]-[56].

63. The appellant is not a British or Union citizen, nor for the reasons addressed below a family member of a Union citizen, and so cannot rely upon Article 10(1)(a)-(e) of the Withdrawal Agreement. He is therefore required to establish that he falls within the personal scope of Article 10(2) and (3):

> ‘2. Persons falling under points (a) and (b) of Article 3(2) of Directive 2004/38/EC whose residence was facilitated by the host State in accordance with its national legislation before the end of the transition period in accordance with Article 3(2) of that Directive shall retain their right of residence in the host State in accordance with this Part, provided that they continue to reside in the host State thereafter.
>
> 3. Paragraph 2 shall also apply to persons falling under points (a) and (b) of Article 3(2) of Directive 2004/38/EC who have applied for facilitation of entry and residence before the end of the transition period, and whose residence is being facilitated by the host State in accordance with its national legislation thereafter.’

64. A tribunal, or court, cannot disapply the personal scope established by the Withdrawal Agreement.

65. The Intervenor submits that the appellant falls within personal scope because he has an ‘arguable case’ to have fallen under point (b) of Article 3(2) of the Directive before 31 December 2020, concerned with beneficiaries:

> ‘2. Without prejudice to any right to free movement and residence the persons concerned may have in their own right, the host Member State shall, in accordance with its national legislation, facilitate entry and residence for the following persons:
>
> …
>
> (b) the partner with whom the Union citizen has a durable relationship, duly attested.’

66. We are satisfied that the Intervenor’s interpretation as to ‘arguable case’ seeks inappropriately to extend Article 10 of the Withdrawal Agreement to provide rights to persons who are plainly outside its scope. Article 10 clearly specifies the individuals it intends to cover, and the international agreement must properly be read as providing legal certainty, consistent with intent of the signatories identified by the seventh recital. Consequently, Article 10 applies to persons falling under paragraph (b) of Article 3(2) only if – in accordance with Article 10(2) - their residence was facilitated by the host State in accordance with its national legislation before the end of the transition period or – in accordance with Article 10(3) - they had applied for facilitation of entry and residence before the end of the

transition period and their residence is being facilitated by the State in accordance with its national legislation thereafter.

67. The appellant cannot succeed in respect of Article 10(2) as he had not been issued with a family permit or residence card under the 2016 Regulations: Celik, at [52].

68. He cannot succeed in respect of Article 10(3) because he had not made a valid application satisfying the requirements of the 2016 Regulations before the end of the transition period: Batool, at [49]. His application was unambiguously made under the EUSS and not the 2016 Regulations. It was founded upon his assertion that he is the spouse of an EEA citizen. The application failed because he does not meet the spousal requirement.

69. The Intervenor suggests that the applications for family permit residence cards in 2017 constitute applications for facilitation of residence. However, these were from the outset invalid applications and are not live. Article 10(3) is plainly directed to enabling those with live applications pending under the applicable national legislation at the end of the transition period, and subsequently granted, to be within scope of the Withdrawal Agreement.

70. The appellant does not fall within the personal scope of Article 10.

71. In the circumstances, the failure by the First-tier Tribunal to consider the appeal under regulation 8(2)(a) of the 2020 Regulations was not a material error.

EUSS

72. The EUSS, contained in Appendix EU to the Immigration Rules, is the United Kingdom's residence scheme under Article 18 of the Withdrawal Agreement, enabling nationals of EU and EFTA countries who were resident in the United Kingdom prior to the end of the transition period to obtain the necessary immigration status to reside lawfully in this country consequent to the United Kingdom's exit from the European Union.

i) Spouse

73. Included in the definition of 'family member of a relevant EEA citizen' in Annex 1 to Appendix EU is 'spouse'.

74. The appellant contends that he is married to Ms. Emambux and so the First-tier Tribunal materially erred at [34] of its decision when finding that the marriage was a 'religious marriage', 'not a marriage legally recognised by EU law' and so he did not meet the relevant family member requirements of Appendix EU as a spouse.

75. Under the law of England and Wales, the general rule is that the formal validity of a marriage is governed by the law of the country where it was celebrated. That proposition is uncontroversial. Further, in CB (Validity of Marriage: proxy marriage) Brazil [2008] UKAIT 00080, the Upper Tribunal rejected the submission that different rules apply to the legal framework governing validity of marriage when the issue arose in the context of immigration law.

76. As was held in Awuku v. Secretary of State for the Home Department [2017] EWCA Civ 178, [2017] Imm A.R. 1066, the question of whether a marriage is valid for the purpose of the Citizens' Rights Directive (and thus the 2016 Regulations) is a matter for the domestic law of the State in the which recognition of that status is being sought.

77. It follows that the issue here is whether the appellant's Islamic marriage to Ms. Emambux is valid under the law of England and Wales as it took place in London.

78. In submissions, albeit at a late stage in the proceedings, Ms. Emambux drew the attention of the Tribunal to a publication from the House of Commons Library, Briefing Paper No. 08747 '*Islamic marriage and divorce in England and Wales*'. She drew our attention to the proposition contained in the summary that:

> 'To be legally valid, a religious marriage (other than marriage according to the rites and ceremonies of the Church of England and the Church in Wales, and Jewish and Quaker marriage) must generally take place in a registered building. '

79. She also drew our attention to the evidence that the mosque in which the Islamic marriage took place is a registered building and had been at the relevant time.

80. The formal requirements for a valid marriage under the law of England and Wales are, so far as they are relevant here, set out in the Marriage Act 1949. Section 26 of that Act provides for the solemnization of a marriage in a building registered under section 41 of the Act, on the authority of a marriage schedule. Section 27 of the

Act provides for the notice that must be given to a superintendent registrar if such a marriage is to be solemnized. Sections 41 and 42 set out the formalities for the registration of a building and the appointment of an authorised person. Section 44 sets out how a marriage in a registered building is to be solemnized, including section 44(2) the attendance of the authorised person, section 44(3) the declaration to be made.

81. In addition, section 49 of the Act (as amended) provides:

> **49. Void marriages.**
>
> If any persons knowingly and wilfully intermarry under the provisions of this Part of this Act -
>
> (a) without having given due notice of marriage to the superintendent registrar;
>
> (b) without a marriage schedule having been duly issued by the superintendent registrar of the registration district in which the marriage was solemnized;
>
> ...
>
> (d) on the authority of a marriage schedule which is void by virtue of subsection (2) of section thirty-three of this Act;
>
> (e) in any place other than the church, chapel, registered building, office or other place specified in the notices of marriage and (if so specified) in the marriage schedule.
>
> ...
>
> (f) in the case of a marriage in a registered building (not being a marriage in the presence of an authorised person), in the absence of a registrar of the registration district in which the registered building is situated;
>
> ...
>
> (gg) in the case of a marriage on approved premises, in the absence of the superintendent registrar of the registration district in which the premises are situated or in the absence of a registrar of that district; or
>
> (h) in the case of a marriage to which section 45A of this Act applies, in the absence of any superintendent registrar or registrar whose presence at that marriage is required by that

section;

the marriage shall be void.

82. Further, section 11 of the Matrimonial Causes Act 1973 (as amended) provides:

> **11. Grounds on which a marriage is void.**
>
> A marriage celebrated after 31st July 1971, other than a marriage to which section 12A applies, shall be void on the following grounds only, that is to say -
>
> (a) that it is not a valid marriage under the provisions of the Marriage Acts 1949 to 1986 (that is to say where—
>
> (i) the parties are within the prohibited degrees of relationship;
>
> (ii) either party is under the age of eighteen; or
>
> (iii) the parties have intermarried in disregard of certain requirements as to the formation of marriage);

83. The legal effect of Islamic marriages which were carried out other than in accordance with the Marriage Act 1949 was considered by the Court of Appeal in Akhter v. Khan [2020] EWCA Civ 122, [2020] 2 W.L.R. 1183. In summary, the Court held that an Islamic ceremony of marriage which was not performed in accordance with the formalities required by the Marriage Act 1949 for the creation of a valid marriage under English law was a "non-qualifying ceremony" which did not create even a void marriage. It had long been recognised that some ceremonies would not create even a void marriage, and the fundamental rights guaranteed by the ECHR did not alter that conclusion.

84. At [52] the Master of the Rolls held:

> ‘52. The 1949 Act sets out how a valid marriage is contracted. The 1949 Act and the 1973 Act set out when non-compliance with certain of the required formalities will make a marriage void. They do not contain any provisions setting out when a ceremony will not be within the scope of the Act at all. It has long been recognised, however, that there must be some ceremonies or acts which do not create even a void marriage

> and which, therefore, do not entitle a party to a decree of nullity.'

85. He also drew attention, at [57], to cases where manifold failure to comply with the requirements led to the conclusion that what had occurred did not even purport to be a marriage under the provisions of the Marriage Acts. He also, at [62], rejected the submission that all religious ceremonies should be brought within the scope of the 1949 Act.

86. While the family courts draw a distinction between a non-qualifying ceremony and a void marriage, neither are valid. The principal reason for so doing is that in the case of a void marriage, the courts have the power to make orders for financial remedy and other ancillary matters. Another reason for so doing is that "intermarry *under* the provisions of this Part of this Act" must mean more than simply the performance of a ceremony of marriage in England": Akhter v. Khan, at [44].

87. We pause there to reflect that, in this case, the respondent questioned the validity of the Islamic marriage certificate as there was insufficient evidence on its face that the other requirements for it to be valid had been met. In the context of the legal position, it cannot be said that was unfair or unreasonable.

88. The appellant did not provide any further information as to the validity of his marriage, nor did he challenge the respondent's conclusion that it was not a valid marriage in his appeal to the First-tier Tribunal.

89. It was for the appellant to demonstrate that he is lawfully married. Other than a marriage certificate which plainly does not on its face show compliance with the Marriage Act 1949, he provided no evidence to support that contention. Nor was it argued before the First-tier Tribunal that the Islamic ceremony created a valid marriage.

90. Viewing the evidence for ourselves, it is not clear that the place at which the marriage took place was registered pursuant to section 41 of the Marriage Act 1949. While we were taken to the official register of places of worship registered for marriage which shows that Seven Sisters Islamic Centre at 41 Suffield Road is so registered, the seal on the certificate states 'I.E.C.C.', not Seven Sisters Islamic Centre, albeit at the same address. There is, therefore, insufficient evidence to show that the latter was ever registered either under the Marriage

Act or as a place of worship registered under the Places of Worship Registration Act 1855 at the time the marriage took place.

91. In the circumstances, it cannot be argued that the Judge erred in her consideration of the issue. There was simply insufficient evidence before her on which she could have concluded that the marriage was valid even had that point been put to her. Thus, it follows that there is insufficient evidence to demonstrate that the appellant is lawfully married to Ms. Emambux.

ii) Durable partner

92. Annex 1 to appendix EU defines a 'durable partner' and confirms, *inter alia*:

> '(a) the person is, or (as the case may be) for the relevant period was, in a durable relationship with a relevant EEA citizen (or, as the case may be, with a qualifying British citizen or with a relevant sponsor), with the couple having lived together in a relationship akin to a marriage or civil partnership for at least two years (unless there is other significant evidence of the durable relationship); and
>
> (b)(i) the person holds a relevant document as the durable partner of the relevant EEA citizen (or, as the case may be, of the qualifying British citizen or of the relevant sponsor) for the period of residence relied upon …'

93. 'Relevant document' is defined:

> '(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 …'

94. The relevant document establishes that a durable relationship exists, and that discretion has been exercised to facilitate entry and residence.

95. Annex 1 defines the 'required evidence of family relationship in the case of':

‘(e) a durable partner:

(i) a relevant document as the durable partner of the relevant EEA citizen (or, as the case may be, of the qualifying British citizen or of the relevant sponsor) and, unless this confirms the right of permanent residence in the UK under regulation 15 of the EEA Regulations (or the right of permanent residence in the Islands through the application there of section 7(1) of the Immigration Act 1988 or under the Immigration (European Economic Area) Regulations of the Isle of Man), evidence which satisfies the Secretary of State that the partnership remains durable at the date of application (or did so for the period of residence relied upon); or

(ii) (where sub-paragraph (b)(ii) of the entry for ‘durable partner’ in this table applies) the evidence to which that sub-paragraph refers, and evidence which satisfies the Secretary of State that the partnership remains durable at the date of application (or did so for the period of residence relied upon) …’

96. The First-tier Tribunal found that the appellant and Ms. Emambux have been in a relationship akin to marriage for many years, but as the appellant has never been granted a relevant document as defined by Appendix EU, he could not meet the requirements of the relevant Immigration Rule. The appellant does not dispute that he has not been granted a relevant document as defined.

97. As addressed above, European Union law recognised a distinction between two categories of family member under the Citizens’ Rights Directive. Extended family members, including those in a durable relationship, were required to successfully pass through two distinct decision-making stages before securing residence: firstly, extensive consideration of personal circumstances, and if successful at that stage, consideration as to the exercise of discretion. Consequently, an applicant satisfying the first stage was not guaranteed to have discretion exercised in the favour as to residence.

98. In respect of extended family members, including durable partners, the EUSS adopts the lawful approach of identifying the Union free movement right of residence in the host State presupposing that a residence document has been issued by the host State acting in accordance with its national legislation. To do otherwise bypasses the second decision-making stage identified above and the

requirement that discretion have been exercised to permit residence as an extended family member.

99. In such circumstances, we conclude that the First-tier Tribunal did not materially err in concluding that the appellant's EUSS appeal could not succeed as he did not hold a relevant document.

Postscript

100. During the first day of hearing, we were addressed by Mr. Anderson in respect of disclosed 'PEGA' notes relied upon by the appellant. The PEGA Government Platform is a case management service operated by the respondent that manages residency application workflows. The notes placed before us are variously dated from 11 December to 18 December 2020.

101. A note dated 11 December 2020 details, *inter alia*:

> 'Reasons for decision? No sufficient relationship evidence.
>
> Justification for the decision: seeking ILR, no evidence of relationship – Islamic m/cert issued in UK w/ no British m/cert supplied – not recognised under UK law. App has stated that they have supplied sufficient evidence for relationship after requests. Unable to verify applicant qualified for LLR or ILR
>
> OUTCOME: Case falls for refusal.'

102. The appellant's request for guidance as to the remission of the administrative review fee was noted on 15 December 2020. The request was directed internally to a senior case worker, who responded on 14 December 2020 detailing, *inter alia*:

> 'For EUSS decisions, the only exception to the AR fee is when the applicant is a child under 18 under local authority care. There is no fee waiver applicable for an EUSS AR. This is because applications under EUSS are free of charge and so they can make a fresh application instead of an AR. Therefore, we should be advised [sic] the applicant of his options:
>
> i. Pay the £80 fee and submit an AR application against the EUSS refusal decision.
>
> ii. Submit an appeal against the EUSS refusal decision paying any associated fees – decision letter has details on how to do this (can also

appeal after an AR is decided if they put an AR in first).

iii. Submit a fresh EUSS application (outstanding further leave application will be voided) free of charge.

iv. Submit an EEA regs application (not an application for leave so outstanding application would continue)

v. Await outcome of further leave application.'

103. On the first day of the hearing Mr. Anderson accepted that the appellant could have made an application as a durable partner under the 2016 Regulations which was in force on 14 December 2020, as per point (iv) above, but no-one informed him consequent to the provision of the internal caseworkers' advice.

104. We observe that if an application had been made under the 2016 Regulations prior to their repeal by the Immigration and Social Security Co-ordination (EU Withdrawal) Act 2020 at 23.00 GMT on 31 December 2020, the appellant would not have been required to establish that he held 'a relevant document as the durable partner of the relevant EEA citizen' as required under the EUSS. It is surprising that the respondent did not inform the appellant of this.

Decision

105. The decision of the First-tier Tribunal did not involve the making of a material error of law.

106. The decision sent to the parties on 18 August 2021 is upheld, and the appellant's appeal is dismissed.

D O'Callaghan
Judge of the Upper Tribunal
Immigration and Asylum Chamber

22 May 2023