Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: UI-2022-003617**
EA/00711/2022

THE IMMIGRATION ACTS

Heard at Field House IAC
On the 30 November 2022

Decision & Reasons Promulgated
On the 07 February 2023

Before

UPPER TRIBUNAL JUDGE NORTON-TAYLOR

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

BESAR ALIJAJ
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:
For the appellant: Ms J Isherwood, Senior Home Office Presenting Officer
For the respondent: In person

DECISION AND REASONS

Introduction

1. For ease of reference, I shall refer to the parties as they were before the First-tier Tribunal: the Secretary of State is once more "the respondent" and Mr Alijaj is "the appellant".

2. The respondent appeals against the decision of First-tier Tribunal Judge Manuell ("the judge"), promulgated on 13 June 2022 following a hearing on 1 June 2022. By that decision, the judge allowed the appellant's appeal against the respondent's decision, dated 7 January 2022, refusing his the EUSS.

3. The appellant is a citizen of Albania, born in 1998. He arrived in the United Kingdom on an unknown date and has resided in this country unlawfully ever since. In July 2018 the appellant formed a relationship with Ms Wojcik, a Polish national ("the sponsor"). They began cohabiting in December 2019 and got married on 7 July 2021. Their child was born in February 2022 and he is a British citizen because the sponsor had indefinite leave to remain at the time of his birth (this was granted to her under the EUSS in June 2020).

4. The appellant's EUSS application was made on 6 October 2021 and was predicated on him being a "family member" of the sponsor. The respondent refused the application on the ground that he had not demonstrated that he was either the spouse or a durable partner of the relevant EEA citizen prior to the "specified date" (that being 31 December 2020). The appellant had neither applied for, nor been issued with, a residence card under the Immigration (European Economic Area) Regulations 2016.

The decision of the First-tier Tribunal

5. The appellant was not legally represented before the judge. Unfortunately (and, it seems, rather too commonly in EUSS cases), there was no Presenting Officer.

6. The judge noted that the respondent had not challenged the genuineness of the appellant's relationship with the sponsor. The judge was more than satisfied that the relationship was genuine and subsisting and that, as a matter of fact, it became durable in November 2020 at the latest: [12]-[15].

7. The judge concluded that the appellant satisfied the definition of a "family member of a relevant EEA citizen" by virtue of meeting the definition of "durable partner" set out in Annex 1 of Appendix EU to the Immigration Rules ("Annex 1"). The judge found that the appellant did not hold a "relevant document" but did meet the definition in Annex 1(b)(ii)(bb)(aaa): [16]-[18]. I will set out and discuss the relevant provisions, below.

8. The judge concluded that the appellant satisfied the relevant Immigration Rules and was therefore entitled to succeed in his appeal, which had been brought under the Immigration (Citizens' Rights Appeals)(EU Exit) Regulations 2020.

The grounds of appeal and grant of permission

9. The respondent's grounds of appeal essentially asserted (in somewhat formulaic terms) that the judge had not been entitled to conclude that the appellant satisfied the Immigration Rules contained within the EUSS.

10. References were also made to the Withdrawal Agreement, but the judge had not based his decision on this and so the points taken in the grounds are irrelevant at the error of law stage.

11. Permission to appeal was granted by the First-tier Tribunal.

Procedural history

12. The error of law hearing was originally listed before me in October 2022. The appellant and his wife attended. When I asked the Senior Presenting Officer to explain to me why the judge erred in law in his interpretation of Annex 1 it is fair to say that they struggled to provide a comprehensible response. That is not to criticise the particular individual: Annex 1 is, to say the very least, difficult to navigate. In the event, I adjourned the hearing in order for the respondent to provide written submissions on what she regards as a proper interpretation of the definition of "durable partner" under Annex 1(b)(ii)(bb)(aaa).

13. Rather belatedly, written submissions were provided.

The hearing on 30 November 2022

14. The appellant and his wife attended again. They were still unrepresented. I endeavoured to explain the essential nature of the case, the complexity of the law, and the fact that neither the judge nor I could consider the family unit's human rights in respect of Article 8 ECHR.

15. Ms Isherwood relied on the written submissions and sought to explain that the exception in Annex 1(b)(ii)(bb)(aaa) related to persons who had been granted leave to remain in the United Kingdom (but not a residence card) and so had not applied for a residence card before the specified date.

16. I referred Ms Isherwood to the respondent's guidance, "EU Settlement Scheme: EU, other EEA and Swiss citizens and their family members",

version 18.0, published on 9 November 2022. Clearly, this guidance document had not been before the judge. However, I am satisfied that the version of the EUSS (including Annex 1) considered by the judge was the same as that referred to in the current guidance.

17. At the end of the hearing I reserved my decision.

18. I took additional time to explain to the appellant that whatever my decision was in respect of the judge's decision, there would be no consideration of human rights. I explained that it was possible for him to make a separate application to the respondent based on human rights (any family life he enjoys with his wife and the couple's child).

Discussion and conclusions

19. Before turning to my analysis of this case I remind myself of the need to show appropriate restraint before interfering with a decision of the First-tier Tribunal, having regard to numerous exhortations to this effect emanating from the Court of Appeal in recent years: see, for example, Lowe [2021] EWCA Civ 62, at paragraphs 29-31, AA (Nigeria) [2020] EWCA Civ 1296; [2020] 4 WLR 145, at paragraph 41, and UT (Sri Lanka) [2019] EWCA Civ 1095.

20. I am satisfied that the respondent grounds of appeal properly encompass a challenge to the judge' but also attending the s conclusions on the EUSS and, in particular, his interpretation of Annex 1(b)(ii)(bb)(aaa), albeit that this particular provision is not stated therein.

21. Under Appendix EU14, a person is eligible for limited leave to enter or remain in the United Kingdom if they can meet Condition 1(a)(ii) by showing that they are a "family member" of a relevant EEA citizen.

22. Under Appendix EU14A, a person is eligible for limited leave to enter or remain in the United Kingdom as a "joining family member of a relevant sponsor" if they can meet Condition (a)(i) by showing that they are a "joining family member of a relevant sponsor".

23. There is no doubt that the sponsor was a "relevant EEA citizen". The question for the judge was whether the appellant was her "family member" or "joining family member".

24. A "family member of a relevant EEA citizen" can include a "durable partner" if they do not meet the definition of "joining family member of a relevant sponsor", but they are (for the relevant period), or have been (for the relevant period), the spouse of a relevant EEA citizen if the marriage was contracted before 31 December 2020 or the applicant was the durable partner of the relevant EEA citizen before the specified date and that relationship remained durable at the specified date.

25. The relevant parts of the definition of "durable partner" set out in Annex 1 are as follows:

> "(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
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> (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; for the purposes of this provision, where the person applies for a relevant document (as described in sub-paragraph (a)(i)(aa) or (a)(ii) of that entry in this table) as the durable partner of the relevant EEA citizen or, as the case may be, of the qualifying British citizen before the specified date and their relevant document is issued on that basis after the specified date, they are deemed to have held the relevant document since immediately before the specified date; **or**
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> (ii) where the person is applying as the durable partner of a relevant sponsor (or, as the case may be, of a qualifying British citizen), or as the spouse or civil partner of a relevant sponsor (as described in sub-paragraph (a)(i)(bb) of the entry for **'joining family member of a relevant sponsor'** in this table), and does not hold a document of the type to which sub-paragraph (b)(i) above applies, and where:
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> (aa) the date of application is after the specified date; and
>
> (bb) the person:
>
> (aaa) was not resident in the UK and Islands as the durable partner of a relevant EEA citizen (where that relevant EEA citizen is their relevant sponsor) on a basis which met the definition of 'family member of a relevant EEA citizen' in this table, or, as the case may be, as the durable partner of the qualifying British citizen, at (in either case) any time before the specified date, **unless** the reason why, in the former case, they were not so resident is that they did not hold a relevant document as the durable partner of a relevant EEA citizen for that period (where their relevant sponsor is that relevant EEA citizen) and they did not otherwise have a lawful basis of stay in the UK and Islands for that period
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> …"
>
> [Emphasis added]

26. In this case, the appellant could not have satisfied the definition in (a), read together with(b)(i) because he did not have a relevant document (i.e. a residence card).

27. What about (a), read together with (b)(ii)? The appellant applied (for the sake of argument, given that the respondent considered his application on this alternative basis) as the "durable partner" of the sponsor.

28. The central problem in the appellant's way was the need for him to show that he was a "joining family member of a relevant sponsor": see Annex 1(b)(ii). That phrase is defined in Annex 1. The appellant was never a "joining family member of a relevant sponsor" because he had always been in the United Kingdom: in other words, he was not "joining" the sponsor.

29. Further, or alternatively (i.e. if my conclusion in the preceding paragraph is wrong), the appellant had been in this country unlawfully, never having been issued with a residence card or granted leave to remain. I am satisfied that the part of the definition following on from the word "unless" in Annex 1(b)(ii)(bb)(aaa) means that a person cannot say that they were not resident in the United Kingdom at any time before the specified date as a durable partner simply because they were in this country unlawfully and without a residence card as a durable partner. To put it in a different way, the exception to the requirement to have had a residence card as a "durable partner" applies only to those people who applied under the EUSS after 31 December 2020 and had had leave to remain, but were not here with a residence card as a "durable partner".

30. I fully appreciate that the preceding paragraphs are difficult to understand. I would say that this is because the definition of "durable partner" in Annex 1 is itself extremely difficult to untangle.

31. My conclusions on the interpretation of the EUSS and Annex 1 in particular, are consistent with the decision of the Upper Tribunal in Celik (EU exit; marriage; human rights) [2022] UKUT 00220 (IAC), the head note of which states:

> "(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."

32. The basic underlying point is that "durable partners" had no substantive rights under EU law unless they applied for and were granted residence cards. They were in a different category to "family members", who automatically had rights.

33. Having looked at the law, I turn to the judge's decision. I conclude that he got the law wrong by concluding that the appellant could win his appeal because he had been in the United Kingdom before 31 December 2020, was in a durable relationship with the sponsor, did not have a residence card, and was in this country unlawfully. That is not a proper interpretation of the definition of "durable partner" in Annex 1. Having said that, one really cannot blame the judge for the error. The legal position was close to being impenetrable.

34. The judge did not address the Withdrawal Agreement. Given the appellant's circumstances, he could not benefit from any of its provisions in any event.

35. As mentioned earlier, Article 8 was not considered by the judge.

36. This means that the judge's decision is erroneous and should be set aside (in other words, it no longer has any effect).

What happens next?

37. I now have to make a new decision in the appellant's case. I had considered whether there should be another hearing in the Upper Tribunal. The appellant expressed a desire to come to another hearing if one were to take place.

38. Ms Isherwood said that I should go on and re-make the decision in this case without a further hearing. She submitted that the appellant simply could not win his appeal and there was no point in prolonging these proceedings.

39. I have decided that there should not be another hearing in this case. My reasons for this are as follows.

40. First, as I told the appellant at the hearing, in this appeal I am only able to look at the law which relates to the EUSS and the Withdrawal Agreement. I cannot look at human rights.

41. Second, there can be no new evidence which would relate to the EUSS and/or the Withdrawal Agreement. New evidence would almost certainly relate to the family unit's current circumstances and those are not something that I am able to consider.

42. Third, I appreciate that attending another hearing would involve travel, bringing along the baby or arranging childcare. In addition, because the law is so difficult to explain and understand, I cannot see any possibility of the appellant been able to make any relevant submissions (arguments) which relate to his appeal.

43. Therefore, I am going to go on and make my own decision in the case based on the evidence I already have.

Re-making the decision

44. I find as a fact that the appellant's relationship with the sponsor and his child is entirely genuine. I find that he has been in a durable relationship

with the sponsor since, at the latest, November 2020. I find that the couple's child is a British citizen.

45. I do not propose to repeat everything I have said about the EUSS and Annex 1. Relying on what I have already set out in this decision, I conclude that the appellant cannot meet the definition of "durable partner" and therefore "family member" under the EUSS, specifically Appendix EU. This means that his appeal must fail in respect of the Immigration Rules.

46. The Withdrawal Agreement cannot help the appellant either. On the basis of the decision in Celik, he cannot rely on proportionality to succeed in his appeal. He has had the opportunity of independent judges considering his case. This means that the appeal must fail in respect of the Withdrawal Agreement.

47. Again, I emphasise that I am unable to look at the appellant's human rights. If the appellant wants to have his human rights considered, he must make an application to the respondent, supported by evidence.

Anonymity

48. There is no need for an anonymity direction in this case.

Notice of Decision

49. The making of the decision of the First-tier Tribunal did involve the making of an error on a point of law.

50. I exercise my discretion under section 12(2)(a) of the Tribunals, Courts and Enforcement Act 2007 and set aside the decision of the First-tier Tribunal.

51. I re-make the decision by dismissing the appeal on all grounds under the Immigration (Citizens' Rights Appeals)(EU Exit) Regulations 2020.

Signed: H Norton-Taylor Date: 30 November 2022

Upper Tribunal Judge Norton-Taylor