IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2022-002854
First-tier Tribunal No:
EA/12758/2021

THE IMMIGRATION ACTS

Heard at Field House IAC
On the 1st November 2022

Decision & Reasons Promulgated
On the 06 February 2023

Before

UPPER TRIBUNAL JUDGE LINDSLEY
DEPURTY UPPER TRIBUNAL JUDGE SYMES

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

ATTAI IPHYOK INUENEKPO
(ANONYMITY ORDER NOT MADE)

Respondent

Representation:
For the Appellant: Mr D Clarke, Senior Home Office Presenting Officer
For the Respondent: No representative

DECISION AND REASONS

Introduction

1. The claimant is a citizen of Nigeria born on 24th April 1990. He entered the UK in January 2019 with entry clearance as a Tier 4 student migrant, and had permission to remain in the UK in this capacity until November 2020. He applied to remain in the UK under the EU settlement scheme as a spouse of an EEA national (Ms Stephanie Jaeckels, a citizen of Germany) on 4th March 2021. He cohabited with Ms Jaeckels in the UK from October 2019 and the couple married on 9th March 2021. His application was refused on 6th May 2021. His appeal against the decision was allowed by First-tier Tribunal Judge Abebrese in a determination promulgated on the 19th April 2022.

2. Permission to appeal was granted by Judge of the First-tier Tribunal Grey on 17th May 2022 on the basis that it was arguable that the First-tier judge had erred in law in failing to apply the Immigration Rules in Annex 1 of Appendix EU and in failing to give proper reasons for his decision.

3. The matter came before us to determine whether the First-tier Tribunal had erred in law, and if so to decide if any such error was material and whether the decision of the First-tier Tribunal should be set aside and remade.

Submissions – Error of Law

4. In the grounds of appeal it is argued that the First-tier Tribunal erred in law because the appeal is allowed, as set out at paragraph 12 of the decision, because the claimant had been unable to marry his spouse prior to the specified date (31st December 2020) because of Covid-19 restrictions, and that this does not explain how the claimant was entitled in law to succeed in his appeal as there is no reference to the Immigration Rules. The error, it is argued, is material because the claimant could not in fact succeed in his appeal because he married after the relevant date and could not claim to be a durable partner with rights preserved under the Immigration Rules due to his relationship with his spouse prior to marriage because he did not have a relevant document, namely a residence card, which had been issued to him by the Secretary of State prior to the 31st December 2020 or had been applied for before this date, and so did not fulfil the conditions to be a durable partner as defined in Appendix EU Annex 1 (b)(i).

5. We asked Mr Clarke to explain why the claimant was unable to fulfil the definition of durable partner as set out at Appendix EU, Annex 1 (b)(ii). We noted that some aspects of this provision appeared to be ones which the claimant could meet. He was able to fulfil the condition that he did not hold a residence card/ relevant document as a durable partner and he had made his application after the specified date of 31st December 2020. Mr Clarke argued that the claimant was not able to fulfil this definition because he was not abroad, and this was a requirement to be a “joining family member of a relevant sponsor”. He also was in the UK as a durable partner before the specified date, and

what is said after the word “unless” in the provision at Annex 1(b)(ii)(bb)(aaa) does not provide for an alternative that he was in the UK illegally without a relevant document. Mr Clarke contended this provision at b(ii) was designed to enable durable partners who were abroad whilst their EEA partners were in the UK prior to the specified date to join them under the process at EU14. This was not the factual matrix of the claimant’s case. Mr Clarke argued that the claimant simply had not acquired any EU right prior to the UK leaving the EU, and so did not had possibility to utilise Appendix EU of the Immigration Rules or the Withdrawal Agreement to succeed in his appeal.

6. Mr Inuenekpo argued that the First-tier Tribunal Judge had been satisfied that he should succeed in his appeal having looked at the facts of his case, and should have discretion to decide to allow his appeal with reference to the Annex 1 b(ii) definition of durable partner so any lack of reasoning was not a material mistake of law. He had been with his EU partner for eight years, and although they had not lived together for all of this period of time, and had delayed getting married as she was studying, this did not mean that he should not succeed in his appeal simply because his marriage date had been delayed twice for reasons beyond his control due to Covid-19 restrictions. He referred to the fact that there was guidance issued on the GOV.UK website regarding the EU Settlement Scheme and the evidence of a durable relationship which includes a section which states that if you are a spouse but had not obtained a residence card as a durable partner then you can provide other evidence to the Secretary of State about your durable relationship existing prior to 31st December 2020 and continuing to exist to date.

Conclusions – Error of Law

7. The appeal is allowed seemingly on the basis that the claimant is entitled to be treated as a spouse under the Appendix EU of the Immigration Rules because although he was not a spouse at the specified date (31st December 2020) he had planned to marry, and make an application to marry prior to the specified date as he booked a marriage ceremony for 10th November 2020, but this was cancelled due to Covid-19 restrictions. Factually it is correct that the claimant had tried to marry prior to the specified date. There is evidence in the claimant’s bundle of the couple having booked a wedding ceremony in Haringey on 10th November 2020. No reasons are however given for this being a valid approach to the law in the Immigration Rules or under the Withdrawal Agreement, and so the decision of the First-tier Tribunal clearly errs in law for want of sufficient reasoning.

8. The question we must now consider is whether this error is material, which in turn means that we must consider whether the claimant is entitled to succeed with reference to the Immigration Rules at Appendix EU.

9. The claimant might potentially be a family member of a relevant EEA citizen because the definition at Annex 1 includes a spouse where the marriage took place after the specified date and before the specified date he was a durable partner and the partnership remained durable at the specified date. He cannot meet the durable partner definition at Annex 1 (b)(i) because he does not have a relevant document/ residence card as a durable partner and he did not apply for one prior to the specified date.

10. The question that then arises is to the definition of durable partner at Annex 1(b)(ii) of Appendix EU. Mr Clarke has argued that it is not possible for the claimant to meet this definition because the claimant is not "applying as the durable partner of a relevant sponsor/ spouse of a relevant sponsor because he cannot meet the definition of being a "joining family member of a relevant sponsor" in the definitions section of Annex 1. The difficulty with this is that when this definition is examined it is circular because it requires (if there was no marriage prior to the specified date) the applicant to be a durable partner of the relevant sponsor, meeting the definition of durable partner in the table before the date specified date, before the date of application and that he remains in a durable partnership. Mr Clarke has argued that "joining family member" can only be someone applying from abroad but that is also not compatible with what is said in EU2A and EU3A which clearly contemplate that indefinite leave to remain and limited leave to remain, as well as indefinite leave to enter and indefinite leave to enter, can be granted to a joining family member of a relevant sponsor. We find that joining family member of a relevant sponsor can potentially be an applicant/appellant who is in the UK, although we suspect that it was potentially meant only to be a person who entered not having needed entry clearance and made an application within a three month post-arrival window.

11. We do agree with Mr Clarke however that b(ii) is a provision which benefits "joining family members" and conclude that the appellant cannot meet the definition of "joining family member" because the definition of "required date" in Annex 1(bb)(ii) of Appendix EU requires that that a "joining family member" arrives in the UK after the 1st April 2021. This claimant arrived in the UK well before this date, in 2019, and so cannot fulfil this condition, and applications made under Appendix EU must all be made by the required date. As the appellant is not therefore able to able to meet the definition of "joining family member" due to his inability to meet the joining family member required date definition then he cannot benefit from the definition of durable partner at b(ii).

12. For completeness we also consider that there is a further problem with the claimant meeting the requirements of the definition of durable partner at Annex 1(b)(ii). When we look at Annex 1 (b)(ii)(bb)(aaa) the initial clause is clear: the claimant should not have been resident in the UK as a durable partner of a relevant EEA citizen at any time

before the specified date. The claimant was resident in the UK as the durable partner of his wife prior to 31st December 2020 so to this point cannot rely upon this provision. The question that then arises is whether this is altered by that is said in the provision from the word "**unless"** onwards**.**

13. What is written is as follows: "**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"**. This drafting is very hard to follow. The "**unless**" provision refers first to this applying to the category of "the former case". This means, we find, durable partners of relevant EEA citizens rather than durable partner of a British citizen. This claimant was a durable partner of an EEA citizen. We conclude, not without some hesitation, that what is ultimately meant is that an applicant cannot say that they were not resident in the UK at any time before the specified date as a durable partner simply because they were in the UK illegally without a residence card as a durable partner. We find that therefore it does not assist the claimant as this was his position. So, for this reason, as well as being unable to meet the requirement of timing to be a "joining family member" we find the claimant does not meet the definition of durable partner at (b)(ii) of Annex 1 of Appendix EU

14. We find that in support of this interpretation that it would be very unlikely that the Immigration Rules would include in the definition of durable partner those like the claimant who had not obtained any rights recognised in EU law prior to the UK departing from the EU. The definition of durable partner at Annex 1 (b)(ii) was not ventilated before the Presidential panel in Celik (EU exit; marriage; human rights) [2022] UKUT 00220 (IAC), and there is no reference to it in the decision however at (1) of the headnote it is set out that: "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 31st December 2020 or P had applied for such facilitation before that time."

15. For completeness, and in light of the fact that the claimant is not represented, we add that the claimant, as an applicant under Article 18 of the Withdrawal Agreement, was entitled to access judicial redress procedures to check that the decision assessing his application for rights under the Withdrawal Act was legal and the facts properly found. We find that he indeed received fairness by way of having an appeal. However, in accordance with Celik, particularly at paragraphs 62 to 65, the claimant's right to be treated fairly and proportionately does not go beyond this, and creates no new substantive rights or basis on which the his appeal can succeed.

Decision:

1. The making of the decision of the First-tier Tribunal involved the making of an error on a point of law.
2. We remake the appeal dismissing it under the Immigration Rules and Withdrawal Agreement.

Signed: Fiona Lindsley Date: 28th November 2022
Upper Tribunal Judge Lindsley