Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: UI-2022-003193**
EA/15774/2021

THE IMMIGRATION ACTS

Heard at Field House IAC
On the 16 November 2022

Decision & Reasons Promulgated
On the 07 February 2023

Before

UPPER TRIBUNAL JUDGE STEPHEN SMITH

Between

MIRJAN QEVANI
(ANONYMITY DIRECTION NOT MADE)
Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT
Respondent

Representation:
For the Appellant: Ms E. Harris, Counsel, instructed by Waterstone Legal
For the Respondent: Ms H. Gilmour, Senior Home Office Presenting Officer

DECISION AND REASONS

1. This is an appeal against a decision of First-tier Tribunal Judge S. Boyes ("the judge") promulgated on 22 April 2022, in which she dismissed the appellant's appeal against a decision of the Secretary of State dated 19 October 2021 to refuse his application for pre-settled status under the EU Settlement Scheme ("the EUSS"). The judge heard the case under the

Immigration (Citizens' Rights Appeals) (EU Exit) Regulations 2020 ("the 2020 Regulations").

Factual background

2. The appellant is a citizen of Albania born on 18 April 1993. On 5 April 2020, he entered the UK clandestinely. He claims to have he met the sponsor in October 2019, in Greece, and started a relationship with her. On 20 August 2020, the sponsor arrived in the UK, and on 1 September 2020, they began to cohabit. The sponsor was granted pre-settled status on 5 January 2021. The appellant proposed to the sponsor in November 2020, and they wanted to get married as soon as possible, but the Covid-19 restrictions then in force meant that it was not possible to give the required notice of the marriage, and secure a date for the ceremony, until after the end of the "implementation period" at 11.00PM on 31 December 2020, at which point the UK's withdrawal from the EU completed. They married on 24 May 2021. On 17 June 2021, the appellant applied for pre-settled status as the spouse of an EU citizen. That application was refused by the Secretary of State on 19 October 2021, and it was that decision that was under appeal before the judge below.

3. The Secretary of State refused the appellant's application on the basis that he had not been issued with a family permit or residence card under the Immigration (European Economic Area) Regulations 2016 ("the 2016 Regulations"), and nor had his marriage to the sponsor taken place before the conclusion of the implementation period.

4. The Secretary of State considered whether the appellant and the sponsor were "durable partners" in the alternative, but concluded that they did not meet the requirements of the Immigration Rules, since the appellant had not been issued with a family permit or residence card in that capacity. The refusal letter noted that even if an applicant had been issued with a family permit or residence card in that capacity, it would be necessary for such persons additionally to satisfy the Secretary of State that the durable partnership continued to subsist. It did not address whether the appellant and the sponsor were, in fact, durable partners. The sole reason given for refusing the application on the alternative basis that the appellant was the durable partner of the sponsor was on account of him not having previously being issued with a family permit or residence card as a durable partner.

The hearing before the First-tier Tribunal

5. Before the First-tier Tribunal, the appellant was represented by Ms Amanda Jones of Counsel. Ms Jones submitted that the decision to refuse the application breached the appellant's rights under the 2020 Regulations, since he and the sponsor were prevented from getting married by the Covid-19 restrictions in force at the time. Alternatively, they were durable partners. Ms Jones' skeleton argument dated 17 February 2022 said:

> "23. The Appellant contends, firstly, that he should be treated as if he married before the cut off date of 31st December 2021. In the alternative, his relationship with his wife should be treated as being a durable relationship, duly attested. By the time of the cut off date, the couple were committed to each other, living together, had moved to the UK together and were planning their marriage as soon as COVID restrictions allowed."

6. At paragraph 7, the judge summarised the second limb of the above submission in these terms:

> "In the alternative, [the appellant submits that] his relationship with his wife should be treated as being a 'durable relationship'. It is submitted that by the time of the cut off date, the couple were committed to each other, living together, had moved to the UK together and planned their marriage as soon as Covid restrictions would allow."

7. The appellant gave evidence, as did the sponsor, and two of their friends, Xhoana Toski and Evelina Kaumani. The judge records in some detail the accounts that witnesses gave relating to matters including the wedding ceremony, the guests, the costs of the reception, how it was paid for, and who paid for it. Ms Toski and Ms Kaumani, both of whom are Greek and know the sponsor and her family in Greece, gave evidence about having attended the ceremony, and addressed matters such as whether the appellant had met the sponsor's parents in Greece.

The decision of the First-tier Tribunal

8. Having set out the essential procedural history and the applicable provisions of Appendix EU of the Immigration Rules (that is paragraph EU14, and the relevant definitions contained in Annex 1), the judge commenced her operative findings at paragraph 23, in these terms:

> "23. The respondent does not dispute that the appellant and sponsor married in the UK on the 24 May 2021. On the basis of the documentary evidence before me I am satisfied that the appellant and sponsor gave notice of the marriage on the 9 December 2020.
>
> 24. The respondent does not, however, concede that the appellant was the 'durable partner' of the sponsor."

9. The judge's operative reasoning commenced with her findings of fact. From paragraphs 25 to 47, the judge analysed the evidence of all four witnesses. Put simply, she concluded that there were major inconsistencies between the oral evidence she had heard (see paragraph 32), and that there were inconsistencies in the documentary evidence the appellant and sponsor have relied upon to demonstrate the durability of their relationship. There were no photographs of the couple together, there is no evidence of any communication between them, and there were no photographs of the wedding reception, noted the judge. The judge

concluded that the appellant and the sponsor had not been "durable partners" before the marriage: see paragraph 46.

10. Applying the law to her findings of fact, the judge held from paragraphs 48 to 54 that since the marriage had taken place after 11PM on 31 December 2020, it was incapable of falling within the terms of the EUSS. At paragraphs 55 to 56, the judge gave two reasons as to why the appeal could not succeed on the durable partner basis in the alternative:

> "55. The Appellant does not meet the definition of a 'durable partner' for two reasons. Firstly, he has never held a 'relevant document' as the durable partner of the EEA national. As per (a)(i)(aa), the definition of a 'relevant document' at Annex 1, is a family permit or residence card.
>
> 56. Secondly, for reasons that I have provided above, I am not satisfied that the Appellant and Sponsor have lived together in a relationship akin to a marriage for at least two years or that there is other significant evidence of a durable relationship prior to the marriage."

11. The judge concluded with findings that the decision was in accordance with the EU Withdrawal Agreement and dismissed the appeal: see paragraphs 57 to 62. She expressly did not address the appellant's submissions under Article 8 ECHR (para. 63), and there has been no challenge to that approach.

Grounds of appeal

12. Ms Jones settled the grounds of appeal. They contend that since the Secretary of State's decision did not challenge the genuineness of the appellant's relationship with the sponsor, it was procedurally unfair for the judge to hold against the appellant their failure to provide photographic or other documentary evidence.

13. Permission to appeal was granted by First-tier Tribunal Judge Mills who observed:

> "It is arguable that procedural unfairness has arisen in the Judge's consideration of this appeal, as it is not apparent that the Respondent had ever expressly asserted that this was a relationship, and later marriage, of convenience."

Submissions

14. Ms Harris, who did not appear below, represented the appellant before me. She accepted that, in relation to the substantive marriage issue, the judge's decision could not be criticised in the light of *Celik (EU exit; marriage; human rights)* [2022] UKUT 220 (IAC), although invited me to stay the proceedings pending an application for permission to appeal to the Court of Appeal in that matter.

15. In relation to the procedural fairness issue, Ms Harris submitted that it was never part of the Secretary of State's case that the relationship between the appellant and the sponsor was one of convenience. She criticised the absence of any findings on the part of the judge addressing whether the appellant's marriage to the sponsor was one of convenience. Moreover, the appellant and his witnesses had not attended the hearing before the judge prepared to address that issue, and the judge's decision to entertain cross-examination by the Secretary of State on those issues would have caught the appellant and his witnesses off-guard, rendering the hearing unfair. The case had been prepared on the basis that only the two issues raised in the refusal letter were in issue. In addition, the judge failed to make an express finding as to whether the marriage was genuine and subsisting.

16. In response, Ms Gilmour submitted that there was a distinction between the durability of a relationship, on the one hand, and whether a marriage was one of convenience on the other, in light of *Elais (fairness and extended family members)* [2022] UKUT 300 (IAC). The judge was entitled to address whether the relationship was, in fact, durable, and reached findings of fact she was entitled to reach on the evidence before her. There had been no procedural unfairness.

THE LAW

The EUSS

17. To be granted pre-settled status as the family member of an EEA national on the facts of his application, the applicant had to demonstrate that he had either married the sponsor before the conclusion of the implementation period. Alternatively, to succeed as the sponsor's "durable partner", the appellant would have to have demonstrated that:

    a. he had been issued with a "relevant document" as her "durable partner" before that date under the Immigration (European Economic Area) Regulations 2016, *and*

    b. that the durable partnership was subsisting at the time of the EUSS application.

    See paragraph EU14 of Appendix EU, read with the definitions of "family member of a relevant EU citizen" and "durable partner" in Annex 1 to the appendix.

18. The headnote to *Celik* provides:

> "(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.

> (2) Where P has no such substantive right, P cannot invoke the concept of proportionality in Article 18.1(r) of the Withdrawal Agreement or the principle of fairness, in order to succeed in an appeal under the Immigration (Citizens' Rights) (EU Exit) Regulations 2020 ("the 2020 Regulations"). That includes the situation where it is likely that P would have been able to secure a date to marry the EU citizen before the time mentioned in paragraph (1) above, but for the Covid-19 pandemic.
>
> (3) Regulation 9(4) of the 2020 Regulations confers a power on the First-tier Tribunal to consider a human rights ground of appeal, subject to the prohibition imposed by regulation 9(5) upon the Tribunal considering a new matter without the consent of the Secretary of State."

Fairness

19. Fairness lies at the heart of the overriding objective of the First-tier Tribunal's rules of procedure, as it does at the heart of this tribunal's rules of procedure: it is to "deal with cases fairly and justly" (the Tribunal Procedure (First-tier Tribunal) (Immigration and Asylum Chamber) Rules 2014, rule 2(1)).

20. The requirements of fairness are multi-faceted and context dependent. In *AM (Fair hearing) Sudan* [2015] UKUT 656 (IAC), this tribunal held at paragraphs (ii) and (v) of the Headnote:

> "(ii) If a judge is cognisant of something conceivably material which does not form part of either party's case, this must be brought to the attention of the parties at the earliest possible stage, which duty could in principle extend beyond the hearing date."
>
> "(v) Fairness may require a Tribunal to canvas an issue which has not been ventilated by the parties or their representatives, in fulfilment of each party's right to a fair hearing."

DISCUSSION

Preliminary observations

21. I commence my analysis with the following preliminary observations.

22. First, the unfairness alleged by the grounds of appeal, and the basis upon which the appellant enjoys permission to appeal, relate to the reasoning adopted by the judge in her reserved decision, in light of the reasons given by the Secretary of State for refusing the application in her decision dated 19 October 2021, rather than her conduct of the hearing. Put simply, the grounds of appeal contend that the Secretary of State had not alleged that the claimed durable partnership was one of convenience, or a sham, and that it was accordingly unfair for the judge to reach findings that it was.

23. The grounds do not allege that the judge's personal conduct of the hearing was such as to render the hearing procedurally unfair, or that the

appellant was deprived of his right to a fair hearing on account of the judge's behaviour at the trial. Had the grounds of appeal sought to raise such allegations, they would have had to have been fully particularised, and supported by evidence, including by a witness statement from counsel: see *BW (witness statements by advocates) Afghanistan* [2014] UKUT 00568 (IAC). The appellant would have been responsible for seeking directions from this tribunal to secure a transcript of the hearing, or to arrange for the judge's observations on the allegations to be provided: see *Elais*, Headnote 2.

24. Secondly, Ms Harris' submissions evolved at the hearing before me into an allegation that, by 'expecting' evidence concerning the durability of the relationship, the judge caught the parties off-guard, thereby rendering the hearing itself unfair. The appellant and his three witnesses were required by the judge to deal with matters for which they were unprepared, Ms Harris submitted.

25. The allegation made by Ms Harris' submissions is, essentially, that the judge descended into the arena by directing and facilitating live witness evidence on an issue that the parties neither wanted or expected to litigate, and in so doing rendered the proceedings unfair.

26. As observed above, the grounds of appeal settled by Ms Jones (who was, of course, counsel before the judge) do not make that allegation, and there is no evidence of the sort one would readily expect in order to advance an allegation of this nature. There is no evidence from the appellant or any of his three witnesses to support Ms Harris' submission that (i) it was the judge who was responsible for the hearing unfolding in this way, and (ii) that they were caught off guard by the judge's approach. There is nothing on the face of the judge's decision, or in Ms Jones' grounds of appeal, to suggest that Ms Jones raised concerns of this nature at the hearing in the First-tier Tribunal, as counsel would have been expected to do had the judge strayed beyond her judicial role in the manner now alleged by Ms Harris.

27. Not only is there no evidence to support Ms Harris' reformulated unfairness-based submissions, but the conduct of the parties before the judge, as revealed by the appellant's skeleton argument, his attendance at the hearing with three witnesses, and the judge's decision, readily demonstrate that it was the parties, in particular the appellant, who were the driving force behind his case being presented in this way.

28. The appellant's skeleton argument, settled by Ms Jones, squarely raises the issue of whether the appellant and the sponsor were in a durable relationship as one of the issues to be resolved by the tribunal: see para. 7(iv). In the section titled 'Submissions', para. 14 states that the sponsor's witness statement "confirms the account of the relationship given in her husband's witness statement", and expressly relies on the evidence of Ms Toski ("She introduced the couple to each other as she is the appellant's cousin and the sponsor's close friend. She was a witness at their

marriage…", paras 15 and 16) and Ms Kaumani, who is said to have attended their marriage. The remainder of the skeleton argument deals with the documentary evidence which was said to go to the couple's cohabitation (para. 20), and submits, at para. 23, that:

> "… [the appellant's] relationship with his wife should be treated as being a durable relationship, duly attested. By the time of the cut off date, the couple were committed to each other, living together, had moved to the UK together and were planning their marriage as soon as COVID restrictions allowed."

29. The judge's note at para. 24 ("The respondent does not, however, concede that the appellant was the 'durable partner' of the sponsor") must be a reference to the respondent's position concerning issues as identified for resolution at the hearing by Ms Jones' skeleton argument.

30. The judge also said, at para. 45:

> "Ms Jones attributed the lack of photographs to the acceptance by the Respondent that the marriage had taken place. However, the nature and extent of any relationship is not conceded in the reasons for refusal letter and the burden of proof falls upon the Appellant to demonstrate that he is a 'durable partner' as claimed. "

31. It would be very surprising if the appellant had arranged for not only the sponsor, but also their two witnesses, to attend the hearing, and tender them for cross-examination, on the basis of a case which, as Ms Harris now submits, was previously understood to be anchored to the two discrete issues raised in the refusal decision, which could be resolved on the basis of submissions alone.

32. I find that there is absolutely no support for Ms Harris' reformulated submissions attacking the judge's personal conduct at the hearing. The appellant and his witnesses attended the hearing on the assumption that they would be required to give evidence concerning the claimed durability of the relationship. The allegation that it was the judge's unfairness, rather than the parties' focus on the disputed issues, is manifestly without foundation. It is surprising that Ms Harris advanced such serious allegations the judge, in these circumstances. In doing so, Ms Harris effectively invited me to reach a finding that the judge's conduct of the trial was unfair towards one of the parties. Such a finding was described by Lord Wilson in *Serafin v Malkiewicz* [2020] UKSC 23 at para. 1 in these terms:

> "When made in respect of the conduct of any judge, however senior or junior, such a finding carries profound sensitivity."

33. While, of course, allegations of this nature should be made where there is evidence to support such a contention, they should not be made lightly, still less in a manner that strays significantly (and inappropriately) beyond the grounds of appeal, and without evidential foundation.

34. Secondly, taken at its highest, the appellant's case before the First-tier Tribunal was unable to succeed under the Immigration Rules. His post-implementation period marriage to the sponsor was too late to render him a "family member" under the EUSS, as the judge identified at paragraph 52. Further, his fall-back position, namely that he was a durable partner, was similarly incapable of succeeding, since he had not been issued with, or applied for, a "relevant document" prior to the conclusion of the implementation period. Even the most enduring of durable partnerships would have been unable to succeed.

35. It follows that whether the appellant was, in fact, in a durable relationship with the sponsor was potentially a non-issue, about which the judge could legitimately have chosen not to reach any findings of fact. But the grounds of appeal do not challenge the judge's decision to entertain live evidence in a case that could have been determined on submissions alone and, as I have identified above, the appellant and his witnesses attended the hearing expecting to give evidence on precisely that issue and were invited by Ms Jones to do so. Rather, they challenge the reasons adopted by the judge in the course of making those findings of fact, in light of the relatively narrow reasons adopted by the Secretary of State in the refusal decision.

36. On one view, my second preliminary observation disposes of the appeal: it could be said that the judge reached findings of fact that were otiose, and of no relevance to disputed issues, since the appeal was incapable of succeeding under the EUSS. However, in principle, whether a claimed durable partner is, in fact, in a durable relationship is an issue which could reasonably form part of a judge's reasoning in an appeal of this nature. Many judgments legitimately give a number of reasons for a conclusion in circumstances where the appeal could have been dismissed at the first hurdle. It is often a question of judgment as to whether to do so; often, a judge will reinforce one limb of his or her reasoning by reference to a number of additional reasons. That is the approach the judge adopted here; she was clearly live to broader issues relating to the interpretation and application of the Withdrawal Agreement and had been invited by Ms Jones to interpret and apply Appendix EU "against the backdrop" of the Withdrawal Agreement (see para. 49), and the appellant specifically advanced detailed Withdrawal Agreement-based arguments: see paras 57 to 62, which is an available ground of appeal under the 2020 Regulations.

37. The judge no doubt had in mind the possibility that she was wrong in relation to her construction of the Withdrawal Agreement, thereby elevating the importance of reaching findings on the secondary and otherwise otiose issue of the durability of the appellant's relationship with the sponsor. Indeed, the very fact that Ms Harris invited me to stay these proceedings behind an application for permission to appeal in *Celik* throws this point into sharp relief: if the judge reached legitimate findings concerning the non-durability of the appellant's relationship with the sponsor, even if the Court of Appeal finds that *Celik* was decided in error, it is difficult to see how the appellant could benefit from the protection of the

Withdrawal Agreement if, on 31 December 2020, he was not a durable partner of the appellant in any event. As it happens, there has been no challenge to the judge's interpretation and application of the Withdrawal Agreement.

38. In addition, the practical the reality is that the judge reached findings of fact that could haunt the appellant in the future and which, if left unchallenged within the confines of these proceedings, could be difficult to challenge elsewhere. If the findings were unfair in the *AM (Sudan)* sense, they should be set aside. It would hardly be consistent with the overriding objective of this tribunal, or that of the First-tier Tribunal, for such adverse findings to be reached, on an unfair basis, with the only solace available to the subject of those findings being the assurance that the judge's findings "beat the air" and were of no practical application. Fairness requires that an appellate tribunal take steps to consider whether such adverse, albeit otiose, findings were reached in a procedurally unfair manner.

No unfairness in the decision of the First-tier Tribunal

39. It is against that rather lengthy background that I turn to the substantive, disputed issues in the case: was it unfair for the judge to engage with the durability of the appellant's claimed relationship with the sponsor, in light of the fact that the Secretary of State had not relied on such reasoning in the refusal letter?

40. In my judgment, it was not unfair for the judge to analyse the claimed durable partnership between the appellant and the sponsor in this way.

41. First, the parameters of proceedings before the First-tier Tribunal are not dictated by the terms of the refusal letter. Appeals under the 2020 Regulations are full merits appeals and are not simply a review of the Secretary of State's decision. While the Secretary of State understandably sought to confine her operative reasoning to the central issues upon which the appellant's application was refused, for the reasons identified above the judge legitimately gave additional reasons for dismissing the appeal. In reality, the judge's broader reasoning reflected the ability of an appellant to pursue two broad grounds of appeal under regulation 8(2) and (3) of the 2020 Regulations, which together have 13 potential sub-grounds.

42. Moreover, the appellant attended the hearing expecting to give evidence on, and be challenged about, the question of the claimed durability of his relationship with the sponsor: see para. 7(iv) of his FTT skeleton argument, and para. 24 of the judge's decision. The judge reached findings on the matters litigated by the appellant.

43. Secondly, the premise of the grounds of appeal, and First-tier Tribunal Judge Mills' grant of permission to appeal, appear to be that in the absence of a specific allegation that a relationship is one of convenience, supported by evidence proffered by the Secretary of State, it is not open to

the Secretary of State or a judge to conclude that a relationship was *not* a durable partnership. That premise is misconceived. In the case of a claimed durable partnership, the burden is on an applicant to demonstrate that a relationship is durable.

44. A similar issue arose in *Elais*, which concerned the extent to which a post-implementation period marriage amounted to evidence of a pre-implementation period durable relationship. In *Elais*, the judge erroneously prevented the Secretary of State from challenging a post-implementation period marriage in an appeal against the refusal of a residence card as a durable partner, on the basis that the Secretary of State had not alleged that the marriage was one of convenience, thereby rendering the hearing unfair. The tribunal held, at para. 54:

> "… we consider that [the judge] fell into error by holding that Mr Fazli [counsel for the Secretary of State] could only question whether the marriage was genuine and subsisting by reference to the established EU law jurisprudence concerning marriages of convenience, or, to use the judge's terminology, 'sham' marriages. This was not a marriage of convenience case, and the burden was on the appellant to establish that (i) the sponsor was his partner; and (ii) their relationship was durable, to the satisfaction of the decision maker. That being so, the mere fact of the marriage between the appellant and the sponsor could not be a development that, without more, would be capable of shedding the determinative light on the issue that the judge announced at the outset of the hearing that it could."

45. At para. 56, *Elais* summarised the task facing a claimed durable partner seeking to establish the durability of his relationship on appeal:

> "The legal burden was on the appellant to establish that he was in a durable relationship with the sponsor at the date of the hearing before the judge. There were two limbs to what had to be proved: that he was the sponsor's 'partner' and that he was in a 'durable relationship' with her. The Secretary of State was entitled to test and challenge the appellant's case that he met both limbs."

46. In my judgment, there was no unfairness in the judge scrutinising the claimed durability of the appellant's relationship with the sponsor. It was a legitimate issue to address, and the judge's consideration of it was consistent with the manner in which the appellant prosecuted his case before the First-tier Tribunal. The EU law jurisprudence relating to marriages of convenience does not apply to such assessments since, even on the pre-implementation period state of the law under the 2016 Regulations, it was for an applicant to demonstrate that their claimed relationship with an EU sponsor was durable.

47. I turn to the final point raised by the grounds of appeal, namely that the judge did not make a finding as to whether the post-implementation period marriage between the appellant and sponsor was genuine and subsisting. In my judgment, since the appellant's marriage to the sponsor

post-dated the conclusion of the implementation period, the judge was entitled to focus her analysis on the claimed durability of the appellant's relationship with the sponsor at the point when the implementation period came to an end, namely 11PM on 31 December 2020. It would have been open to the judge expressly to reach findings concerning whether the marriage was genuine and subsisting at the time it was contracted, but it was not necessary for her to do so. In any event, the judge's findings concerning the status of the claimed durable partnership at the conclusion of the implementation period were based, in part, on her analysis of the witness evidence concerning the wedding: see para. 44.

48. The crucial finding for the judge to reach related to the status of the appellant and sponsor's relationship at the conclusion of the implementation period. The judge did not err by focussing her findings on that issue.

49. There has been no challenge to the substance of the findings of fact reached by the judge, by reference to the established criteria for challenging findings of fact reached by a trial judge.

50. It follows that there is no reason for these proceedings to be stayed pending a possible appeal to the Court of Appeal in *Celik*, even were I minded to do so, which I am not. On the findings reached by the judge, the appellant was not in a durable relationship with the sponsor at the conclusion of the implementation period.

Notice of Decision

The appeal is dismissed.

The decision of Judge S. Boyes did not involve the making of an error of law such that it must be set aside.

No anonymity direction is made.

Signed Stephen H Smith Date 29 November 2022
Upper Tribunal Judge Stephen Smith