



**IN THE UPPER TRIBUNAL**  
**IMMIGRATION AND ASYLUM**  
**CHAMBER**

Case No: UI-2022-003196

First-tier Tribunal No:  
EA/51443/2021  
IA/06404/2021

**THE IMMIGRATION ACTS**

**Decision & Reasons Promulgated**  
**On 21 March 2023**

**Before**

**UPPER TRIBUNAL JUDGE RINTOUL**

**Between**

**SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Appellant

**and**

**ERNEST SPAHIU**  
**(ANONYMITY ORDER NOT MADE)**

Respondent

**Representation:**

For the Appellant: Mr T Melvin, Senior Home Office Presenting Office  
For the Respondent: Mr M West, instructed by Toltops solicitors.

**Heard at Field House on 19 December 2022**

**DECISION AND REASONS**

1. The Secretary of State appeals with permission against the decision of First-tier Tribunal Judge Atreya, promulgated on 14 April 2022, allowing Mr Spahiu's appeal against a decision made on 9 March 2021 refusing to issue him with a residence card, pursuant to the Immigration (European Economic Area) Regulations 2016 ("the EEA Regulations").

2. The respondent met his partner, a Romanian national (“the Sponsor”), in April 2020, and they cohabited with her daughter from September 2020. He proposed marriage on 3 November 2020, but they were unable to marry until 9 June 2021. But, prior to that, on 30 December 2020, the respondent applied for a residence card under the EEA Regulations as the durable partner of an EEA national.
3. The Secretary of State refused the application on the basis that insufficient evidence had been provided to demonstrate he was in a relationship with the sponsor which was akin to marriage.
4. The Secretary of State was not represented at the hearing before the First-tier Tribunal.
5. The judge heard evidence from the respondent and the sponsor. She found them to be truthful and their evidence to be reliable [38] and found that there was a durable relationship as at the date of application and the date of decision [40], the respondent and sponsor having provided compelling evidence to that effect, directing herself that 2 years cohabitation is not a mandatory requirement [46]. She concluded also [51]ff that the subsequent marriage was not a “new matter”, having had regard to Geci (EEA Regulations, transitional provisions, appeal rights) [2021] UKUT 00285 (IAC).
6. The Secretary of State sought permission to appeal on renewed grounds which did not adopt the initial grounds. It was argued that the judge erred:
  - (i) In failing properly to identify the correct ground of appeal which did not include a ground that the decision made was not in accordance with the respondent’s rights under the EU Treaties;
  - (ii) In failing to reach findings not materially affected by that error.
7. On 10 October 2022 the First-tier Tribunal granted permission on all grounds.

### **The law**

8. The EEA Regulations were revoked in their entirety on 31 December 2020 by paragraph 2(2) of Schedule 1(1) to the Immigration and Social Security Co-ordination (EU Withdrawal) Act 2020. They are, however, preserved for certain purposes by The Immigration and Social Security Co-ordination (EU Withdrawal) Act 2020 (Consequential, Saving, Transitional and Transitory Provisions) (EU Exit) Regulations (SI 2020 1309), (“the EEA Transitional Regulations”) which sets out those provisions which are preserved for the purposes of applications pending as at 23.00 on 31 December 2020. By operation of reg.3 this includes regs. 12, 17, 18, 19 and 20 of the EEA Regulations for the purposes of considering applications made but still pending at 31 December 2020.
9. Paragraph 4 of Schedule 3 of the EEA Transitional Regulations provides:

#### **4.— Application of EEA Regulations 2016 to pending applications**

(1) Subject to sub-paragraph (2) the provisions of the EEA Regulations 2016 specified in paragraph 6 continue to apply (despite the revocation of those Regulations) with the modifications specified for the purposes of determining whether an application referred to in paragraph 3 should be granted.

(2) The provisions specified in paragraph 6 do not apply to the extent that the provisions of the EEA Regulations 2016 specified in that paragraph continue to apply to an application within paragraph 3(2) by virtue of the Citizens' Rights (Application Deadline and Temporary Protection) (EU Exit) Regulations 2020.

10. Paragraph 5 of Schedule 3 to the EEA Transitional Regulations makes provision for the appeal rights and appeals pending as at the date of revocation of the EEA Regulations as follows:

#### **5.— Existing appeal rights and appeals**

(1) Subject to sub-paragraph (4), the provisions of the EEA Regulations 2016 specified in paragraph 6 continue to apply—

(a) to any appeal which has been brought under the Immigration (European Economic Area) Regulations 2006 and has not been finally determined before commencement day,

(b) to any appeal which has been brought under the EEA Regulations 2016 and has not been finally determined before commencement day,

(c) in respect of an EEA decision, within the meaning of the EEA Regulations 2016, taken before commencement day, or

(d) in respect of an EEA decision, within the meaning of the EEA Regulations 2016 as they continue in effect by virtue of these Regulations or the Citizens' Rights (Application Deadline and Temporary Protection) (EU Exit) Regulations 2020, which is taken on or after commencement day.

(2) For the purposes of paragraph (1)—

(a) an appeal is not to be treated as finally determined while a further appeal may be brought and, if such a further appeal is brought, the original appeal is not to be treated as finally determined until the further appeal is determined, withdrawn or abandoned; and

(b) an appeal is not to be treated as abandoned solely because the appellant leaves the United Kingdom.

(3) The revocation of the EEA Regulations 2016 does not affect the application of the Immigration (European Economic Area) Regulations 2006 to an appeal that falls within paragraph 3(1) of Schedule 4 to the EEA Regulations 2016.

(4) The provisions specified in paragraph 6 do not apply to the extent that the provisions of the EEA Regulations 2016 specified in paragraph 6 continue to apply to an appeal or EEA decision by virtue of the Citizens' Rights (Application Deadline and Temporary Protection) (EU Exit) Regulations 2020.

11. Paragraph 6 of Schedule 3 to the EEA Transitional Regulations sets out those provisions which are preserved and also any amendments made. Those relevant here are as follows:

(1) The specified provisions of the EEA Regulations 2016 are—

(a) regulation 2 (general interpretation) with the following modifications

—

(i) as if all instances of the words "or any other right conferred by the EU Treaties"—

(aa) in so far as they relate to things done on or after exit day but before commencement day, were a reference to a right conferred by the EU Treaties so far as they were applicable to and in the United Kingdom by virtue of Part 4 of the EU withdrawal agreement;

(bb) in so far as they relate to things done on or after commencement day, were omitted;

(ii) as if all instances of the words "or the EU Treaties"—

(aa) in so far as they relate to things done on or after exit day but before commencement day, were a reference to the EU Treaties so far as they were applicable to and in the United Kingdom by virtue of Part 4 of the EU withdrawal agreement;

(bb) in so far as they relate to things done on or after commencement day, were omitted;

...

(g) regulation 8 ("extended family member");

...

(u) regulation 36 (appeal rights);

...

(cc) Schedule 2 (appeals to the First-tier Tribunal) with the modification that—

(aa) in relation to an appeal within paragraph 5(1)(a) to (c), in each of paragraphs 1 and 2(4), the words "under the EU Treaties", in so far as they relate to things done on or after exit day but before commencement day, were a reference to the EU

Treaties so far as they were applicable to and in the United Kingdom by virtue of Part 4 of the EU withdrawal agreement;

(bb) in relation to an appeal within paragraph 5(1)(d), in each of paragraphs 1 and 2(4), the words "under the EU Treaties", were a reference to "under the Immigration (European Economic Area) Regulations 2016 as they are continued in effect by these Regulations or the Citizens' Rights (Restrictions of Rights of Entry and Residence) (EU Exit) Regulations 2020, or by virtue of the EU withdrawal agreement, the EEA EFTA separation agreement (which has the same meaning as in the European Union (Withdrawal Agreement) Act 2020) or the Swiss citizens' rights agreement (which has the same meaning as in that Act)

12. Paragraph 5 (1) draws a distinction between appeals and decisions taken prior to 31 December 2020 on the one hand (1(a) to 1(c)) and those taken after that date (1 (d)). That distinction is maintained in paragraph 6 (1)(cc) which sets out the rights of appeal in each of these different categories.
13. Thus, in an appeal against a decision taken under the EEA Regulations after 31 December 2020, the ground of appeal under section 84 of the Nationality, Immigration and Asylum Act 2002 is whether appellant's rights under the EU Treaties in respect of entry to or residence in the United Kingdom under the Immigration (European Economic Area) Regulations 2016 as they are continued in effect by these Regulations or the Citizens' Rights (Restrictions of Rights of Entry and Residence) (EU Exit) Regulations 2020, or by virtue of the EU withdrawal agreement, the EEA EFTA separation agreement (which has the same meaning as in the European Union (Withdrawal Agreement) Act 2020) or the Swiss citizens' rights agreement (which has the same meaning as in that Act).
14. The judge does not appear to have noted that Geci did not apply to appeals such as this where the date of decision is after 31 December 2020. Thus, as the grounds of challenge argue, the permissible ground of appeal applicable here was whether the decision was in accordance with the EEA Regulations as preserved, not whether they were contrary to the respondent's rights under the EEA Treaties. It appears that, accordingly, the judge proceeded to determine the appeal on an incorrect basis.
15. I am not, however, despite the Secretary of State's submissions, satisfied that this was a material error. That is because the list of provisions preserved by regs. 3 and 6 of the EEA Transitional Regulations included those relating to durable partnerships and the grant of residence cards. The judge clearly directed herself to the relevant regulations at [36] and made findings, on the basis of the evidence before her, that the respondent did meet the requirement of the EEA Regulations as they had in fact been preserved. Thus, had she directed herself properly as to the law, then she would inevitably have come to the same findings of fact, and have concluded that Mr Spahiu met the terms of the EEA Regulations as preserved.

16. Contrary to what is averred in the grounds, the findings on this issue were open to the judge. It is sufficiently clear from the detailed findings at [47] to [49] that the judge was satisfied as at the date of application, the relationship was a durable one, even if there had not been two years' cohabitation, a point she expressly addressed at [41] to [46] and [50].

**Notice of Decision**

- (1) The decision of the First-tier Tribunal did not involve the making of an error of law and I uphold it.

No anonymity direction is made.

Signed

Date 24 January 2023

Jeremy K H Rintoul  
Upper Tribunal Judge Rintoul