IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2022-002971

First-tier Tribunal No: EA/14959/2021

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On 14th of November 2023

Before

UPPER TRIBUNAL JUDGE STEPHEN SMITH

Between

Marko Micoli
(NO ANONYMITY DIRECTION MADE)

Appellant

and

Secretary of State for the Home Department

Respondent

Representation:
For the Appellant: In person
For the Respondent: Mr M. Parvar, Senior Home Office Presenting Officer

Heard at Field House on 31 October 2023

DECISION AND REASONS

1. By a decision promulgated on 29 April 2022, First-tier Tribunal Judge Nightingale ("the judge") dismissed an appeal brought by the appellant, a citizen of Albania born on 16 April 2000, against a decision of the Secretary of State dated 16 October 2021 to refuse his application for pre-settled status under the EU Settlement Scheme ("the EUSS"). The judge heard the appeal under the Immigration (Citizens' Rights Appeals) (EU Exit) Regulations 2020 ("the 2020 Regulations").

2. The appellant now appeals against the decision of the judge with the permission of Designated Judge Shaerf.

Factual background

3. The appellant arrived in the UK in July 2018. In 2019, he met Diana Adeva Avra ("the sponsor"), a Romanian citizen who had been residing in the UK since 2017. They became engaged in July 2020 and began to cohabit shortly afterwards. They married on 30 June 2021; they had wanted to marry earlier, prior to the conclusion of the "implementation period" under the EU Withdrawal Agreement at 11.00PM on 31 December 2020, but the Covid pandemic prevented them from doing so.

4. The appellant applied for pre-settled status on 21 June 2021. The application was refused because his marriage to the sponsor took place after the conclusion of the implementation period. Nor had he applied for his residence to be facilitated as a "durable partner" under the Immigration (European Economic Area) Regulations 2016 ("the 2016 Regulations") before that date.

5. The appellant appealed to the First-tier Tribunal, represented by counsel. He and the sponsor gave evidence. His case was that the refusal decision was unlawful. Appendix EU of the Immigration Rules was capable of being read in a manner which entitled him to be granted leave to remain. He sought to rely on Article 8 of the European Convention on Human Rights ("the ECHR"), and also submitted that the 2016 Regulations continued to have effect, to his benefit, by virtue of the relevant transitional provisions. Finally, the EU Withdrawal Agreement militated in favour of him being granted leave to remain.

Decision of the First-tier Tribunal

6. In summary, the judge accepted that the appellant and sponsor had cohabited as a couple since October 2020, and said that she was "prepared to accept" that they may have encountered difficulties in securing a booking for a civil marriage ceremony before the end of the implementation period due to the Covid restrictions. However, while the appellant was eventually able to marry the sponsor, and so became the spouse of an EEA national, he did not enjoy that status prior to 11 PM on 31 December 2020. That being so, he did not meet the criteria to be a "family member" for the purposes of Appendix EU.

7. At para 31, the judge addressed the appellant's submissions that the 2016 Regulations had been saved insofar as his appeal was concerned. The appellant submitted that the transitional provisions contained the Citizens' Rights (Application Deadline and Temporary Protection) Regulations 2020 ("the Temporary Protection Regulations") had the effect of preserving the applicability of the 2016 Regulations. At para. 32, the judge concluded that the saving provisions in those Regulations did not benefit the appellant; his appeal had not been brought under the 2016 Regulations.

8. The appellant had submitted that he was entitled to rely on Appendix FM of the Immigration Rules, by virtue of the 2020 Regulations' approach to conferring a ground of appeal by reference to the Immigration Rules. At para. 33, the judge found that that submission was misconceived. Regulation 8 of the 2020 Regulations incorporated the Immigration Rules concerning the EUSS, not the Immigration Rules at large (my paraphrase), the judge found. In any event, the appellant had not applied under Appendix FM or another provision of the Immigration Rules.

9. In relation to the appellant's attempted reliance on Article 8 ECHR, the judge found that he had not been served a notice under section 120 of the Nationality, Immigration and Asylum Act 2002, and the Secretary of State had not provided her consent for the tribunal's jurisdiction to be extended to consider that matter.

10. At para. 36, the judge addressed the impact of her findings that the appellant and the sponsor had been in a "durable relationship" before the conclusion of the implementation period. The judge said that Article 3(2) of Directive 2004/38/EC:

> "…never required member states to grant a right of entry and residence to third country family members such as unregistered durable partners. What it did do was to confer an advantage on applications submitted by such people, as opposed to nationals of other countries, and required that the refusal of residence authorisation to the durable partner of an EU national be founded on an extensive examination of an applicant's personal circumstances and, if refused, be justified by reasons. This appellant has never applied for or been granted a right of entry or residence in the United Kingdom as a durable partner. The 2016 Regulations also drew a distinction between direct family members and extended family members. Direct family members had 'rights' of entry or residence. Extended family members did not have those rights unless or until they were granted a residence card following an extensive examination of their circumstances. It was open to this appellant to make an application under the 2016 regulations as a durable partner before 31 December 2020. He made no such application. He was not there for a 'family member' on the relevant date."

11. At para. 38, the judge addressed an argument that the appellant met the definition of "durable partner" in Annex 1 to Appendix EU, in particular by reference to the wording at para. (b)(ii)(bb)(aaa) of the definition. At the time, that provision provided that a durable partner was a person who:

> "(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…"

12. The appellant had argued that the "unless" meant that those in his position, who were without leave to remain but *were* in a durable relationship, were entitled to have their relationships in that capacity recognised. The judge rejected that submission. She found that, properly understood, para. (aaa) meant that unrecognised durable partners who held leave to remain on a different basis (for example as a student), were capable of meeting the definition of "durable partner", but not those in the position of this appellant.

13. The judge dismissed the appeal.

Issues on appeal to the Upper Tribunal

14. The appellant appeared before me as a litigant in person. He explained that his current solicitors had advised him to attend the hearing on his own. He told me that he was planning to leave the UK shortly, in order to apply for entry clearance as the spouse of the sponsor. He did not want to adjourn the hearing in order to secure legal representation on a future date, and I saw no reason to adjourn the hearing of my own motion. I was satisfied that the appellant would be able to enjoy a fair hearing before me, even without legal representation. I provided the appellant with appropriate assistance as a litigant in person. I explained that I had the benefit of detailed grounds of appeal settled by his former counsel, and that I would address those grounds in my written decision.

15. On a fair reading of the grounds of appeal, the issues on appeal to the Upper Tribunal are as follows:

    a. Issue 1: whether the judge erred at paras 36 and 37 by finding that the appellant and sponsor were "durable partners" (para. 36), on the one hand, but that they were not "family members" under Appendix EU, on the other (para. 37).

    b. Issue 2: whether the judge erred in her approach to para. (b)(ii)(bb)(aaa) of the definition of "durable partner", in particular by reference to the "*unless*".

    c. Issue 3: whether the 2016 Regulations applied to the appeal, and whether the Secretary of State's decision unlawfully failed to engage in an extensive examination of the appellant's personal circumstances.

    d. Issue 4: whether the judge erred in relation to Article 8 ECHR.

    e. Issue 5: whether the decision was contrary to the EU Withdrawal Agreement.

16. Mr Parvar resisted the appeal. He relied on the Secretary of State's rule 24 notice dated 8 July 2022 settled by Mr P. Deller, and on *Celik v Secretary of State for the Home Department* [2023] EWCA Civ 921 at para. 68, in addition to *Batool and others (other family members: EU exit)* [2022] UKUT 219 (IAC).

Impact of *Celik*

17. As Mr Parvar correctly submitted, the Court of Appeal's judgment in *Celik* means that the judge's overall approach was correct. Para. 68 of *Celik* could have been written to describe the circumstances of this appellant:

> "The fact is that the appellant was not a family member at the material time. He had not married an EU national before 11 p.m. on 31 December 2020. He was not a durable partner within the meaning of Annex 1 to Appendix EU as he did not have a residence card as required and he did not have a lawful basis of stay in the United Kingdom (he was in the United Kingdom unlawfully). The appellant did

> not qualify for leave to remain under Appendix EU. There is no obligation to interpret or 'read down' the relevant rules to reach a different result."

Issues (1) and (2): no contradiction in the judge's approach at paras 36 and 37, no error in relation to para. (b)(ii)(bb)(aaa)

18. There is no merit to issue (1). At para. 36, the judge reached findings of fact that the appellant and sponsor were in a relationship of a durable character prior to the conclusion of the implementation period at 11.00PM on 31 December 2020. Such a finding, in isolation, cannot automatically lead to the conclusion that the appellant was a "durable partner" or a "family member" as defined by the EUSS. The definition of "family member of a relevant EEA citizen" includes, at para. (b), a "durable partner of a relevant EEA citizen". The term "durable partner" is a defined term within Appendix FM. It does *not* encompass an otherwise unlawful resident who was simply in a relationship of a durable character with an EEA national prior to the conclusion of the implementation period. At para. 36 the judge made a finding of fact that the quality of the appellant's relationship with the sponsor was "durable"; at para. 37, she found that he was nevertheless not a "family member…" of an EEA national. There was no inconsistency in that approach because the concepts addressed at paras 36 and 37 are different.

19. This leads to the second issue. I have set out part of the definition of "durable partner" in the form it existed at the relevant time at para. 11, above. The judge set out the definition in full at pages 7 and 8 of her decision; it is not necessary for me to do so here.

20. Put simply, although there is no dispute that the appellant and sponsor were in a "durable relationship" before the conclusion of the implementation period, the appellant had not had his residence facilitated by the Secretary of State in that capacity, and nor had he applied for his residence to be facilitated in that capacity before the conclusion of the implementation period. That means he could not meet the definition of "durable partner" at para. (b)(i).

21. An alternative route to qualify as a durable partner is at para. (b)(ii) of the definition. This features a clause of some complexity, namely para. (aaa). It was common ground that the appellant did not enjoy a right to reside or hold leave to remain in any other capacity immediately before the conclusion of the implementation period. On the appellant's submission before the judge (and in his grounds of appeal to the Upper Tribunal), that meant that he satisfied the "unless" requirement at the heart of para. (aaa). The submission before the judge went along the following lines: the reason the appellant was not resident "as a durable partner" was because his residence had not been recognised in that capacity. Moreover, he did not otherwise have a lawful basis of stay in the UK. Accordingly, he met the second limb of para. (aaa) and, in turn, met the definition of "durable partner". On this submission, the appellant's unlawful residence was a positive attribute, and should have led to a grant of leave under the rules (or to his appeal being allowed).

22. The judge rightly rejected that submission.

23. Para. (aaa) is in two halves, separated by the "unless". The first half is relatively self-explanatory. The requirement for an applicant to be "not resident… as" introduces a qualitative requirement for the applicant's residence *not* to have been in a capacity which met the definition of a "family member of a relevant EEA citizen." The "not" means that an applicant's residence must *not* have been in that capacity in order to meet that criterion. It is hardly surprising that such residence must "not" have been on that basis, since paragraph (b)(i) addresses cases where such residence was in that capacity.

24. The appellant in these proceedings plainly met the criteria in the first half of para. (aaa). But he also meets the criteria after the "unless" because he was unlawfully resident at the relevant time. That being so, the "unless" has the effect of depriving a person such as this appellant who had no other lawful basis of stay from being able to satisfy the definition of "durable partner" pursuant to the criteria in the first half of the definition.

25. As the judge found, there is a logic to this construction, which must reflect the intention of the EUSS and the Withdrawal Agreement. Those who enjoyed leave to remain in their own capacity will not be penalised for having failed to obtain a document they didn't need. By contrast, those who did not hold a relevant document (nor apply for the facilitation of their relationship prior to the conclusion of the implementation period) yet were present unlawfully prior to the end of the implementation period and remain so unlawfully resident in the UK cannot regularise their status through the EUSS. That is entirely consistent with the Withdrawal Agreement, and the Immigration Rules drafted to give it effect.

26. The judge did not fall into error on this account.

Issues (3) and (5): no error in relation to the 2016 Regulations, appellant outside the scope of the Withdrawal Agreement

27. The 2016 Regulations were the primary vehicle by which the United Kingdom implemented its EU obligations concerning the free movement of EU citizens and their family members. They have been revoked following the UK's withdrawal from the EU. But they remain in force for certain specified purposes, some of which are set out in the Temporary Protection Regulations. Those Regulations established a "grace period", ending on 30 June 2021, within which the 2016 Regulations continued to apply to certain persons notwithstanding the Regulations' revocation.

28. As the judge correctly identified at para. 3, the beneficiaries of the preserved 2016 Regulations are those who meet the definition of "relevant person". Such persons are, in summary, those who held a right to reside under the 2016 Regulations immediately before the conclusion of the implementation period. The judge correctly held that the preservation of the 2016 Regulations did not apply to the appellant. I find that the judge did not fall into error by declining to extend to the appellant the benefit of revoked Regulations which did not apply to him.

29. As the appellant has never resided in the UK in accordance with EU law, it follows that he is outside the personal scope of the Withdrawal Agreement, and any otherwise applicable preserved principles of EU law.

Issue (4): no error in relation to Article 8

30. This issue has been dealt with by a different constitution of this tribunal in *Batool* in the following terms, at para. 80:

> "Unless the Secretary of State has previously considered the Article 8 ECHR issue in the context of the decision appealed against or in a section 120 statement, we agree with Ms Smyth [for the Secretary of State] that the Secretary of State's consent will be necessary in order for the First-tier Tribunal to consider the Article 8 issue."

31. The Secretary of State had not consented to the First-tier Tribunal considering Article 8 matters. It therefore lacked the jurisdiction to address such matters. The judge did not err by declining to address matters she did not enjoy the jurisdiction to consider.

32. It, of course, remains open to the appellant to make a human rights claim. If he does so, whether from within the UK or in the form of an application for entry clearance to reside with the sponsor, he will benefit from the findings of fact already reached by the judge.

Conclusion

33. The judge's decision was admirably clear, appropriately detailed, and promulgated at pace, despite the novel and complex nature of many of the submissions she had to consider. The decision of the First-tier Tribunal did not involve the making of an error of law.

Notice of Decision

This appeal is dismissed.

The decision of the First-tier Tribunal did not involve the making of an error of law.

Stephen H Smith

Judge of the Upper Tribunal
Immigration and Asylum Chamber

31 October 2023