IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2022-003525

First-tier Tribunal No:
EA/12556/2021

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On 25 July 2023

Before

UPPER TRIBUNAL JUDGE FRANCES
DEPUTY UPPER TRIBUNAL JUDGE JARVIS

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

YOUCEF BOUARABA

Respondent

Representation:
For the Appellant: Ms A. Nolan (Senior Home Office Presenting Officer)
For the Respondent: Ms K. Anifowoshe (Counsel instructed by Elkettas & Associates Ltd)

Heard at Field House on 10 July 2023

DECISION AND REASONS

Introduction

1. In this appeal, the Secretary of State is technically the Appellant but to maintain continuity with the decision of the First-tier Tribunal, we refer to the parties as they were at that hearing.

2. The Respondent appeals against the decision of Judge Beg (hereafter "the Judge") promulgated on 25 May 2022 in which she allowed the Appellant's appeal under Appendix EU of the Rules; permission to appeal was granted by First-tier Tribunal Judge Barker on 17 June 2022.

The Judge's decision

3. In brief, the Judge noted that it was common ground between the parties at the First-tier hearing that the Appellant and his Sponsor (Ms Mihaela-Ramona Macovei, a Romanian national) had married on 22 May 2021 (para. 12).

4. The Judge therefore concluded that the Appellant was not a spouse of an EEA national by 31 December 2020 (the specified date for the purposes of Annex 1 to Appendix EU of the Rules) and that he did not have a Family Permit or a Residence Card under the 2016 EEA Regulations (para. 15).

5. At para. 26, the Judge found that the overall evidence was sufficient to establish that the Appellant and the Sponsor were in a "serious relationship" prior to 31 December 2020 and that the fact that the couple did not cohabit until August 2021 did not materially undermine the claim to being in a durable relationship as cohabitation was not a strict requirement of the Rules.

6. At para. 27, the Judge allowed the appeal on the basis of her finding that the Appellant and the Sponsor were in a durable relationship as at 31 December 2020 and that therefore the Appellant had established that he is the *family member of a relevant EEA citizen* thereby meeting the requirements in EU 14 of Appendix EU.

The Respondent's appeal

7. In the Grounds of Appeal, the Respondent made the following key arguments:

   (a) The Appellant could not take the benefit of the Appendix EU spouse rules as the marriage took place after the specified date of 31 December 2020.

   (b) In respect of the durable partner route under the rules, Annex 1 required a relevant document as evidence that the Appellant's residence had been facilitated under the EEA Regulations prior to 31 December 2020 by reference to Article 3(2)(b) of the 2004/38/EC Directive. The Appellant did not have such a document and therefore could not satisfy the requirements of Appendix EU.

   (c) The Judge had otherwise erred in concluding that the parties were in a durable relationship because they had not started to cohabit until August 2021 which was eight months after the specified date and not in accordance with the definition of a durable relationship in Annex 1 to Appendix EU.

The Appellant's r. 24 response

8. In response to the Respondent's Grounds of Appeal, the Appellant provided a r. 24 response dated 29 July 2022 in which the following arguments were made:

   (a) There was no requirement for the Appellant to have received a document under the EEA Regulations prior to the specified date as per the Court of Justice's decision in Blaise Baheten Metock and Others v Minister for Justice, Equality and Law Reform C-127/08 at para. 92.

   (b) As the Appellant submitted his application under Appendix EU before the Grace Period deadline of 30 June 2021 (albeit erroneously stating at paragraph 6 that the application was submitted on 28 May 2022), reg. 3(2) of the Citizens' Rights (Application Deadline and Temporary Protection) (EU Exit) Regulations 2020 preserved the provisions in regs. 5 to 10 of the 2016 EEA Regulations such as to mean that the Respondent should have considered the Appellant's application in accordance with the 2016 EEA Regulations.

   (c) By reference then to the 2016 EEA regulations, the Appellant contended that there was no requirement under those Regulations for the Appellant to have had Leave to Remain in the United Kingdom before he made his application and that the only requirement at reg. 8(5) of the 2016 EEA Regulations was that he should be in a durable relationship with an EEA partner and be able to prove it.

   (d) It was also averred that the wording of the durable partner definition in Annex 1 to Appendix EU of the Rules did not require cohabitation for a two-year period as an absolute requirement but also allowed for *significant* evidence to otherwise prove the durable relationship and that this was in accordance with the Tribunal's earlier decision in YB (EEA reg 17(4) – proper approach) Ivory Coast [2008] UKAIT 00062.

   (e) Confusingly, the Appellant's solicitors also argued that the Respondent had failed to consider the Appellant and Sponsor's right to family life under Article 8 ECHR – we noted that the purpose of the r. 24 response was to respond to the Respondent's Grounds of Appeal. In any event, we find that there is no indication in the Judge's decision that the Appellant sought to raise Article 8 as a ground of appeal.

The Respondent's r. 25 response

9. In response to the Appellant's r. 24 submissions, the Respondent provided a r. 25 response dated 4 August 2022. In short, the Respondent contested the points made by the Appellant in the r. 24 and argued, inter alia, that Article 18 of the Withdrawal Agreement could not apply unless the Appellant could meet the gateway requirement in Article 10 of the same Agreement.

The error of law hearing

10. At the error of law hearing we heard oral submissions from both representatives. In summary, Ms Nolan on behalf of the Respondent argued the following:

    (a) The application had been made under Appendix EU of the Rules and not the 2016 EEA Regulations and she therefore relied upon the Upper Tribunal's decision in Siddiqa (other family members, EU exit) Bangladesh [2023] UKUT 47 (IAC).

    (b) Ms Nolan also contended that the Judge had concluded that the Appellant did not have a relevant document before the specified date and that this was material to the outcome of the case under Appendix EU.

11. In response, Ms Anifowoshe asserted that the Judge did not materially err in concluding that the Appellant and the Sponsor were in a durable relationship prior to the specified date and further argued by reference to Article 25 of the 2004/38/EC Directive that it was not necessary for the Appellant to have a relevant document under EU law.

12. Ms Anifowoshe also asserted that the Upper Tribunal decision in Celik (EU exit, marriage, human rights) [2022] UKUT 220 (IAC) did not apply because the panel had not considered the Citizens' Rights (Application Deadline and Temporary Protection) (EU Exit) Regulations 2020 and referred us to reg. 3(2) of those Regulations; she reiterated the point made in writing that regs. 5 to 10 of the 2016 EEA Regulations were preserved by these provisions.

13. Ms Anifowoshe also emphasised that the effect of the Citizens' Rights (Application Deadline and Temporary Protection) (EU Exit) Regulations 2020 was that the Respondent was obliged to also assess the Appellant's application under the 2016 EEA Regulations.

14. Ms Anifowoshe further contended that if the Appellant had made an application as an extended family member under reg. 8(5) of the 2016 EEA Regulations, he would have been granted a Residence Card; she later changed her submission during discussion, to assert that the Respondent would have had to have carried out an extensive investigation of the Appellant's personal circumstances and make a decision under that regulation.

15. Overall Ms Anifowoshe asserted that the Appellant nonetheless met the requirements of (bbb) of the Durable Partner definition in Annex 1 to Appendix EU.

16. We also heard submissions in response from Ms Nolan who reiterated the Respondent's position that in order for the Appellant to take the benefits of (aaa) and/or (bbb) of the Durable Partner definition in Annex 1 to Appendix EU, the Appellant needed to have been residing in the UK with another form of lawful status in the absence of a relevant EEA document.

Findings and reasons

The Judge's findings on the durability of the relationship

17. Firstly, we note that Ms Nolan did not pursue the point in oral argument that the Judge materially erred in her assessment of the durability of the relationship prior to 31 December 2020. In our judgement the Judge correctly recognised that the nature of the legal test of 'durable relationship' in the definition in Annex 1 to Appendix EU did not strictly require cohabitation – the definition also allowed for *significant evidence* to be produced.

18. The Respondent has not sufficiently particularised why the Judge is said to have materially erred in her conclusion at para. 26 that the parties were in such a relationship prior to 31 December 2020. We therefore find no material error in her conclusion in that respect of the application of Annex 1 to Appendix EU.

The requirement for documentation under the 2016 EEA regulations prior to 31 December 2020

19. In our view, the Appellant's rebuttal arguments against the Respondent's Ground of challenge are misconceived.

20. Firstly, we find that the Appellant's heavy reliance upon the terms of the Citizens' Rights (Application Deadline and Temporary Protection) (EU Exit) Regulations 2020 is without merit.

21. We certainly accept the Appellant's argument that the Citizens' Rights (Application Deadline and Temporary Protection) (EU Exit) Regulations 2020 preserved some parts of the 2016 EEA Regulations during the Grace Period from the specified date until 30 June 2021, but we do not accept that these Regulations can be read as requiring the Respondent to treat an application under Appendix EU as also being an application under the 2016 EEA Regulations.

22. In our view, the Appellant's argument is founded upon a misreading of the scope and application of the Citizens' Rights (Application Deadline and Temporary Protection) (EU Exit) Regulations 2020.

23. The Appellant relies on regs. 3(1) & (2) which state:

> *"Grace period*
>
> *3.—(1) This regulation has effect if the EEA Regulations 2016 are revoked on IP completion day (with or without savings).*
>
> *(2) The provisions of the EEA Regulations 2016 specified in regulations 5 to 10 continue to have effect (despite the revocation of those*

Regulations) with the modifications specified in those regulations in relation to a relevant person during the grace period…

24. In our judgement, it is material to note that the definition of a *relevant person* (as per reg. 3(2)) states:

"relevant person" means a person who does not have (and who has not, during the grace period, had) leave to enter or remain in the United Kingdom by virtue of residence scheme immigration rules and who—

(j)immediately before IP completion day—

(i)was lawfully resident in the United Kingdom by virtue of the EEA Regulations 2016, or
(ii)had a right of permanent residence in the United Kingdom under those Regulations (see regulation 15), or

(k)is not a person who falls within sub-paragraph (a) but is a relevant family member of a person who immediately before IP completion day—

(i)did not have leave to enter or remain in the United Kingdom by virtue of residence scheme immigration rules, and
(ii)either—
(aa)was lawfully resident in the United Kingdom by virtue of the EEA Regulations 2016, or
(bb)had a right of permanent residence in the United Kingdom under those Regulations (see regulation 15)."

25. According to the evidence before us, the Appellant's spouse was granted ILR under Appendix EU on 22 October 2019. The Appellant was therefore not a *relevant family member*, reg. 3(6)(k).

26. The Appellant was also not lawfully resident in the UK by virtue of the 2016 EEA Regulations before 31 December 2020, reg. 3(6)(j)(i).

27. It is therefore clear that the provisions in the Citizens' Rights (Application Deadline and Temporary Protection) (EU Exit) Regulations 2020 cannot apply to the Appellant.

Article 25 of the 2004/38/EC Directive

28. In coming to this conclusion, we have rejected Ms Anifowoshe's further submission that Article 25 of the 2004/38/EC Directive dictated that prior to 31 December 2020 documentation issued under the 2016 EEA Regulations was not required.

29. The first reason for this is that Ms Anifowoshe's submission failed to engage with Article 10 of the Withdrawal Agreement other than to assert

that Celik was decided per incuriam of the Citizens' Rights (Application Deadline and Temporary Protection) (EU Exit) Regulations 2020.

30. As the Presidential panel explained in Celik, the underpinning legal framework is the Withdrawal Agreement:

> *"45. Article 126 provides for a transition period, which started on the day of the entry into force of the Withdrawal Agreement and ended at 23:00 hours GMT on 31 December 2020. During that period, EU law continued to apply in the United Kingdom. Thereafter, Article 4 provides for individuals to rely directly on the provisions of the Withdrawal Agreement, which meet the conditions for direct effect under EU law. In accordance with Article 4, the Withdrawal Agreement is given direct effect in the United Kingdom by section 7A of the European Union (Withdrawal) Act 2018.*
>
> *46. Part 2 of the Withdrawal Agreement makes provision in relation to citizens' rights. Article 10 sets out who is within scope of Part 2. That Part includes Article 18, upon which the appellant seeks to rely. Article 18.1 refers to "Union citizens... their respective family members and other persons, who reside in" the territory of the host State "in accordance with the conditions set out in this Title".*

31. At para. 50 the Upper Tribunal emphasised the requirement in Article 10(2) that those who seek to rely upon Article 3(2) (a) & (b) of the Directive 2004/38/EC should show that they had their residence "facilitated" by the host state.

32. At para. 52, the panel concluded that *facilitation* must mean that the person in question had been issued with a document under reg. 7 of the 2016 EEA Regulations:

> *"...It was not enough that the appellant may, by that time, have been in a durable relationship with the person whom he married in 2021. Unlike spouses of EU citizens, extended family members enjoyed no right, as such, of residence under the EU free movement legislation. The rights of extended family members arose only upon their residence being facilitated by the respondent, as evidenced by the issue of a residence permit, registration certificate or a residence card: regulation 7(3) and regulation 7(5) of the 2016 Regulations."*

33. We have sought to lay out the legal framework because the Appellant has in reality failed to engage with it. As far as we understood Ms Anifowoshe's submission, she argued that in fact facilitation was not required because of Article 25 of the 2004/38/EC Directive. She did not engage with what the term 'facilitation' (as used in Article 10 of the Withdrawal Agreement) would otherwise mean under those circumstances and did not explain how Article 25 could overwrite this requirement of the Withdrawal Agreement.

34. Nonetheless, we also quote Article 25 of the 2004/38/EC Directive:

"General provisions concerning residence documents

1. Possession of a registration certificate as referred to in Article 8, of a document certifying permanent residence, of a certificate attesting submission of an application for a family member residence card, of a residence card or of a permanent residence card, may under no circumstances be made a precondition for the exercise of a right or the completion of an administrative formality, as entitlement to rights may be attested by any other means of proof.

2. All documents mentioned in paragraph 1 shall be issued free of charge or for a charge not exceeding that imposed on nationals for the issuing of similar documents."

35. Article 25 therefore relates to Article 8 of the same Directive; it is not necessary to quote Article 8 other than to refer to its title '*Administrative formalities for Union citizens*' – it is plain that the Appellant was not and never has been a Union citizen and so Article 25 has no application.

36. We also find that Blaise Baheten Metock and Others v Minister for Justice, Equality and Law Reform C-127/08 has no bearing on the issues before us for the same inherent reasons.

37. It is in fact clear from the express wording of the 2016 EEA Regulations that an application for a Residence Card had to be firstly made by an extended family member and then be followed by a discretionary decision by the Respondent to recognise the applicant as a family member under the EEA Regulations, as per regs. 18(4) & (5) of the 2016 EEA Regulations read with reg. 8(5) of the same:

"(4) The Secretary of State may issue a residence card to an extended family member not falling within regulation 7(3) who is not an EEA national on application if—

(a)the application is accompanied or joined by a valid passport;
(b)the relevant EEA national is a qualified person or an EEA national with a right of permanent residence under regulation 15; and
(c)in all the circumstances it appears to the Secretary of State appropriate to issue the residence card.

(5) Where the Secretary of State receives an application under paragraph (4) an extensive examination of the personal circumstances of the applicant must be undertaken by the Secretary of State and if the application is refused, the Secretary of State must give reasons justifying the refusal unless this is contrary to the interests of national security."

38. This was confirmed (in respect of the equivalent provision in the 2006 EEA Regulations (reg. 17)) in Macastena v Secretary of State for the Home Department [2018] EWCA Civ 1558:

> *"17. That cannot be right. An extended family member can only be issued with a residence card on the basis of his durable relationship with an EEA national if the Secretary of State has undertaken "an extensive examination of the personal circumstances of the applicant". That has never happened and can only happen after an application for a residence card is made...."*

39. We therefore conclude that there is there is nothing in the Citizens' Rights (Application Deadline and Temporary Protection) (EU Exit) Regulations 2020 which could cause the Upper Tribunal to depart from the reported decision in Celik (EU exit, marriage, human rights) [2022] UKUT 220 (IAC) which decides, inter alia, that:

> *"(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..."*

40. This was further explained in Batool & Ors (other family members: EU exit) [2022] UKUT 219 (IAC) by reference to the Court of Justice decision in Rahman and Others (C-83/11):

> *"54. As we have seen, however, other family members never enjoyed automatic residence rights under EU law. Not only did an individual have to satisfy the definition of other family member (extended family member under the 2016 Regulations); they also had to be the beneficiary of a positive exercise of discretion, recognised by the grant of residence documentation (albeit that such discretion was not unfettered: see Rahman)."*

41. We therefore find that in order for the Appellant to take the benefit of Article 10 of the Withdrawal Agreement directly he had to have been lawfully in the UK under EU law prior to 31 December 2020. The Appellant has never made an application under the 2016 EEA Regulations and this therefore disposes of the point.

42. For completeness we also apply Siddiqa and find that the Appellant's covering letter (dated 28 May 2021) with his Appendix EU application made no material reference to the provisions in the 2016 EEA Regulations. There was therefore no duty upon the Respondent to consider those provisions in this case.

Appendix EU – Annex 1 (Durable Partner)

43. Finally, we also deal with the reference by the Judge to (bbb) of the definition of Durable Partner in Annex 1 to Appendix EU at para. 18 of her judgment:

> *"Annex 1, paragraph (bbb) states that where the Secretary of State is satisfied by evidence that the partnership was formed and was durable before the date and time of withdrawal and otherwise before the specified date, then Appendix EU is met."*

44. We respectfully note that (bbb) of the definition in the Rules at the time the Judge made her decision did not in fact say this. The (bbb) sub-definition stated:

> *"(bbb) was resident in the UK and Islands before the specified date, and one of the events referred to in sub -paragraph (b)(i) or (b)(ii) in the definition of 'continuous qualifying period' in this table has occurred and after that event occurred they were not resident in the UK and Islands again before the specified date; or..."*

45. The requirement in (aaa) stated:

> *"(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; or..."*

46. The Respondent has argued that the somewhat difficult wording of (aaa) required the Appellant to have had an alternative lawful status in the UK in order (as one potential route) to meet the definition (in the absence of a relevant EEA document). We note that Ms Anifowoshe did not dispute this proposition by reference to the actual wording of (aaa) itself but through the arguments which we have already outlined in this judgment and rejected.

47. On this basis, we conclude that the Judge did materially err in applying the wrong part of the Durable Partner definition in Annex 1 and find that the Appellant has not successfully contested the Respondent's position on the meaning of that provision (as drafted at that time). We therefore conclude that (aaa) of the Durable Partner definition did require an applicant to have some form of lawful residence in the UK in the absence of a document issued under the 2016 EEA Regulations confirming their status as a family member. In this case the Appellant did not have an alternative form of lawful status in the UK and therefore could not take the benefit of (aaa).

Article 8 ECHR

48. As we have already highlighted: the Appellant did not raise an Article 8 ECHR ground of appeal to the Tribunal as he could have done through reg.

9(4) of the Immigration (Citizens' Rights) (EU Exit) Regulations 2020 as confirmed by the Upper Tribunal at headnote (3) of Celik. In that scenario the Respondent would have had the power to refuse to consent to the Tribunal considering the ground but this has no bearing on the appeal before us as the Appellant simply did not raise it.

Notice of Decision

49. We therefore allow the Respondent's appeal on the basis that the Judge materially erred in her application of the Durable Partner definition in Annex 1 of Appendix EU; set aside the Judge's decision and remake the decision by dismissing the appeal under the Immigration (Citizens' Rights) (EU Exit) Regulations 2020.

I. Jarvis

Deputy Judge of the Upper Tribunal
Immigration and Asylum Chamber

18 July 2023