IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2022-005512
First-tier Tribunal No: EA/51996/2021
IA/10357/2021

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On the 18 September 2023

Before:

UPPER TRIBUNAL JUDGE GILL

Between

The Secretary of State for the Home Department — Appellant

And

Mr Spiro Gjona — Respondent

(ANONYMITY ORDER NOT MADE)

Representation:

For the Appellant: Ms A Everett, Senior Presenting Officer.
For the Respondent: Mr. S. Kerr, of Counsel, instructed by Karis Solicitors.

Heard at Field House on 7 August 2023

Decision

1. The Secretary of State has been granted permission to appeal the decision of Judge of the First-tier Tribunal G J Ferguson who, in a decision promulgated on 14 June 2022 following a hearing on 8 April 2022, allowed the appeal of Mr Gjona (hereafter the "claimant"), a national of Albania born on 5 August 1974, against a decision of the Secretary of State of 23 June 2021 to refuse his application of 11 December 2020 for a residence card as an extended family member of an EEA National, Ms Esmeralda Ismaili (hereafter the "sponsor").

2. The Secretary of State was not satisfied that the claimant and the sponsor were in a durable relationship for the purposes of regulation 8(5) of the Immigration (European Economic Area) Regulations 2016 (the "EEA Regulations"). The Secretary of State's reasons, in summary, were that, although the claimant claimed to have met the sponsor and begun a relationship with her in Germany in June 2015 and to have been living together with the sponsor in the United Kingdom after he (the claimant) illegally entered the United Kingdom in November 2017 and she (the sponsor) entered the United Kingdom in January 2018, the Secretary of State considered that the claimant had provided very little evidence of cohabitation. The Secretary of State accepted that the claimant and the sponsor were living together in November and December 2018 as evidenced by a Tenancy Agreement with deposit protection scheme notice and a phone bill dated May 2019 that

had been provided. However, the claimant had not provided any evidence that he and the sponsor had resided together since then, nor had he provided any evidence of joint financial commitments.

3. The claimant and the sponsor gave oral evidence before the judge and were cross-examined. The judge summarised their evidence at paras 3-5 of his decision.

4. The judge accepted that the claimant and the sponsor were in a durable relationship and allowed the appeal on that basis.

5. In granting permission to appeal, Upper Tribunal Judge Rimington said:

> "It is arguable that the judge gave inadequate reasoning in the face of such sparse evidence, when finding that the [claimant] and the sponsor were currently in a durable relationship said to date from 2016 and in the light of limited photographic and documentary evidence albeit some oral evidence, and bearing in mind the [claimant] claimed asylum in 2019 rather than claiming he was in a durable relationship".

6. Para 6 of the judge's decision records that Mr Kerr, who represented the claimant before the judge, accepted that the claimant's evidence was "*slight*".

7. There are three grounds, although the headings in the Secretary of State's grounds suggest that there are two grounds. The three grounds, the numbering for which is mine, are as follows:

(i) Ground 1: The judge failed to set out the relevant burden of proof and standard of proof. The judge failed to state on what standard of proof he had considered the evidence relied upon by the claimant. It was unclear from the judge's decision how the limited evidence that was before the judge discharged the required burden of proof.

(ii) Ground 2: The judge failed to give adequate reasons how the claimant had demonstrated to the required standard that he was in a durable relationship with the sponsor, given that:

  (a) The judge acknowledged at para 9 that photographs can be staged and at para 10 that the photographic evidence was limited.

  (b) There was very limited evidence produced in this appeal as was acknowledged by both parties.

  (c) In stating, at para 9, that the lack of documentary evidence in the form of a tenancy agreement was not significant, the judge failed to engage with the fact the claimant did produce a tenancy agreement for Basil Spence House as set out at para 12 of the judge's decision. The judge failed to consider this when assessing the evidence as to why the claimant was not at least named in the tenancy agreement for the accommodation at 10 Hewitt Avenue.

(iii) Ground 3: The judge failed to address the gaps in the evidence which undermine the finding that the claimant and sponsor are in a durable relationship. The claimant had not produced evidence of the text messages to support his evidence to the judge (noted at paras 3 and 4 of the judge's decision) that he had communicated with the sponsor by text since 2017. There was no evidence before the judge from any friends that the claimant and the sponsor may have had in common. None of their alleged friends were called as witnesses to support the appeal. Given the lack of evidence to show the claimant and the sponsor were in a durable relationship, the judge failed to

provide adequate reasons to support his finding that regulation 8 (5) of the EEA Regulations was satisfied.

The judge's decision

8. The judge gave his reasons for his decision at paras 7-15 which read:

> "8. In the refusal letter, the [Secretary of State] accepts that Mr Gjona and Ms Ismaili resided together for two months in 2018, and that there was "a relationship" at that time, concluding that there was "no evidence you have been residing with your EEA national sponsor or remained in a relationship since this date."
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> 9. Evidence of a relationship can be from a variety of different sources, including photographs and official documents, but there is no set list of documents which if provided will establish a "durable" relationship. Photographs can be staged and the ability to provide documentary evidence of for example a tenancy agreement or a bank account will for some migrants depend on their ability to access such resources. Legislation in force during the years in which Mr Gjona says he has been residing in the UK has been designed to make it difficult for those who are in the UK illegally to rent property. Landlords can face significant penalties if immigration checks are not conducted, and a person such as Spiro Gjona who requires permission to be in the UK but does not have permission is not permitted to occupy residential accommodation. Reputable landlords would therefore not offer a tenancy to Spiro Gjona and the absence of his details on the tenancy agreement is not evidence that he does not reside with Esmeralda Ismaila [sic] who provided evidence that she is the tenant of 10 Hewitt Avenue (p12). Lack of proof of address or a bank account also makes it difficult to obtain documents such as a utility bill. In those circumstances, the lack of this type of documentary evidence is not significant.
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> 10. The photographic evidence is very limited. But what it does establish is that Mr Gjona and Ms Ismaili were together in Germany in 2016. There is evidence that Ms Ismaili resided in Germany from 2015 and that Mr Gjona had a visit visa to enter Germany between June and November 2016. The photograph taken at that time shows Mr Gjona with his arm around Ms Ismaili. It is a picture of people who are at least close friends.
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> 11. In the light of the documentary evidence showing that each was in Germany in 2016 and the photograph of them taken together at that time, I accept the evidence that they were in a relationship at that time. Mr Gjona describes it in his statement as a "casual relationship" which perhaps explains why there are not more photographs of them at that time. It is relevant that Mr Gjona was previously married and has teenage children from that relationship. Not all relationships are chronicled on social media.
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> 12. The [Secretary of State] accepts that they were in a relationship in 2018 when there is some evidence that they lived together at Basil Spence House. This confirms that after they both moved to the UK (Mr Gjona illegally) they continued the relationship which had first begun in Germany. The relationship was less causal now because they had moved in to live together. The relationship had existed in some form for at least two years at that date and the tenancy agreement on which both their names appear was valid until 14th May 2019. Two years is the minimum level at which the [Secretary of State] will consider a relationship to be "durable" but their relationship will have endured for about six years at the date of the hearing if Mr Gjona and Ms Ismaili remain partners.
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> 13. The circumstances surrounding the events of 2019 when Mr Gjona was arrested and identified as someone with no permission to reside in the UK is significant to the assessment of the relationship. On one view, if Mr Gjona was still in a relationship with Ms Ismaili at that time he could have made the application as a durable partner and would not have needed to claim asylum (which appears to have been an attempt to frustrate removal rather than a genuine claim).
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> 14. But the evidence of the [claimant] and Ms Ismaili at the hearing established that they were in a relationship at that time he was arrested. Ms Ismaili knew what had happened to Mr Gjona: her evidence was that they had been together earlier in the evening and she had left earlier while he stayed out with other friends before he was arrested. I accept that an application as a durable partner is more difficult to make from detention, not least because of the cost, and it is not an application which was likely to have delayed his removal.

> 15. The application was made in December 2020, at a time when his asylum application was still outstanding. The application was funded by Ms Ismaili. The [claimant] and sponsor attended an appeal hearing sixteen months later. I accept the evidence of Ms Ismaili in particular that they have been in a relationship since at least 2016 and that it has grown in that time to the point where by 2020 there was a level of commitment which led them to consider they were not just partners but durable partners. This is not an application which could have been made much before 2019. They were in a more casual relationship in Germany and a realistic calculation of the durability of their relationship in the UK could not have been made until about 2019. Mr Gjona's arrest resulted in an asylum application but looking back from 2022 at the evidence of their relationship since 2016, it is established that they are in a durable relationship, which has now existed for about six years."

Submissions

9. Ms Everett relied on the grounds. The decision letter challenged the lack of evidence to show that the claimant and the sponsor were in durable partnership. With regard to ground 1, the judge plainly failed to cite the correct standard of proof and burden of proof. She submitted that there was more force to ground 2 than ground 1. The judge had failed to give adequate reasons why he found that the relationship was a durable relationship. The evidence the judge considered was the same evidence that had been considered by the Secretary of State, except that the judge had heard oral evidence. Para 6 of the judge's decision shows that Mr Kerr had accepted before the judge that the claimant's evidence was scant. She submitted that, although the appeal was not bound to fail, the judge should have given more reasons for his finding so that the reader of the determination can understand why the gaps in the claimant's evidence were not a problem.

10. Ms Everett submitted that it was not possible to understand why the judge had found that the claimant and the sponsor were in durable relationship. At para 9, the judge said that evidence of a relationship can be from a variety of sources. He said that photographic evidence can be staged. At para 9, he said that the lack of documentary evidence such as a tenancy agreement was not significant.

11. At para 11, the judge had said, in effect that, although the photographic evidence was limited, it did establish that the claimant and the sponsor were together in Germany in 2016. However, the judge found that the relationship between the claimant and the sponsor at that time was a casual relationship.

12. Ms Everett submitted that it was very difficult in the subsequent paragraphs to find a positive finding where the judge had said that he accepted that the parties were in a durable relationship notwithstanding the lack of evidence for reasons which were explained.

13. At para 15, the judge accepted that the claimant's application for a residence card as an extended family member could not have been made much before 2019 because they were in a casual relationship in Germany but that, but looking back from 2022, they were in a durable relationship which had lasted now for about six years. She submitted that there were no reasons for this finding which, in any event, was inconsistent with his earlier observation that the application could not have been made much before 2019 because the claimant and the sponsor were in a casual relationship then.

14. Although lack of documentary evidence was not fatal, it was difficult to understand how judge reached his finding in the last sentence of para 15.

15. Ms Everett submitted that ground 2 overlapped with ground 3. There were gaps in the evidence that the judge had failed to consider or deal with.

16. Ms Everett drew my attention to the fact that the judge did not state that he had found the claimant and the sponsor credible. To the contrary, he specifically stated, at para 13, that the claimant had claimed asylum in order to frustrate removal. This did not seem to have had any impact upon the judge's positive consideration of the evidence, although she acknowledged that the judge countered the possible adverse credibility inference arising from the fact that the claimant claimed asylum in the last sentence of para 14.

17. I asked Mr Kerr and Ms Everett to address me, in relation to ground 1, whether the evidence was such that the appeal could have been decided either way. Ms Everett submitted that the case was not hopeless. However, it was impossible to know what standard of proof has been applied.

18. Mr Kerr submitted that this was not a case that could have gone either way. However, he agreed that a different judge may have reached a different conclusion on the evidence in this case. He said that he had to accept that the oral evidence significantly bolstered the evidence, bearing in mind that Secretary of State had accepted cohabitation at an earlier address. Given that the Secretary of State had accepted cohabitation for a period of two months, the oral evidence was significant. The judge considered the explanation for the lack of further documentation and accepted the reasons provided.

19. Mr Kerr submitted that the judge's failure to specify the burden of proof and the standard of proof was not material because there is no suggestion in the judge's decision that he had applied a lower standard than the balance of probabilities. There was nothing to suggest that the judge had expected the Secretary of State to discharge the burden of proof. The whole tenor of the judge's decision was about the claimant providing information on which the judge had to make findings of fact.

20. In relation to ground 2, Mr Kerr submitted that the judge had an opportunity to receive oral evidence and to consider the credibility and veracity of information that he was provided with. The starting point was the fact that the Secretary of State had accepted that the claimant and the sponsor had cohabited for a period of two months in the past. The judge heard oral evidence as to why the claimant could not produce more recent documentary evidence in the form of a tenancy agreement at para 9. The judge accepted the explanation that reputable landlords would not offer a tenancy to someone without any immigration status in the United Kingdom.

21. The judge made an assessment of the evidence that was clear, both in terms of the length of the relationship which he considered at para 15 and the seriousness of it. He considered the evidence of the relationship beginning in 2016 in Germany albeit that it was casual then. Furthermore, the judge drew a distinction between the early years of the relationship which the parties themselves had termed as casual and the relationship as it subsequently developed where there was a level of commitment which meant that the claimant and the sponsor were durable partners. In Mr Kerr’s submission, the finding was sustainable.

22. Mr Kerr submitted that there was no inconsistency between the last line of para 15 of the judge’s decision and his earlier finding that the relationship was causal in 2016. Although the last line of para 15 could have been better expressed, Mr Kerr submitted that it was clear that the judge was saying, not that the relationship was a durable relationship for the whole of the last six years but that the relationship has lasted for six years and is now a durable relationship. In his submission, the construction of the last sentence of para 15 depends upon whether the word “*which*” relates to the phrase *“they are in a durable relationship*” or the phrase “*their relationship since 2016*”.

ASSESSMENT

23. I shall first consider whether the judge's finding in the last sentence of para 15 of his decision is consistent with his earlier observation that the claimant's application for a residence card as a durable partner could not have been made much earlier than 2019. If there is such an inconsistency, this would add force to grounds 1, 2 and 3.

24. Ms Everett submitted, in essence, that the judge's finding in the last sentence of para 15 was that the claimant and the sponsor had been in a durable relationship and that that durable relationship had now lasted for six years. I agree with Mr Kerr that this depends upon whether the judge used the word "*which*" in the last line of para 15 intending to refer to the phrase "*their relationship since 2016*" or the phrase "*they are in a durable relationship*". In my view, it is clear that he was referring to "*their relationship since 2016*" because of the comma after 2016 in the penultimate line and the comma after "*durable relationship*" in the last line. In other words, the judge was saying that the relationship has lasted since 2016 and is now durable; he was *not* saying (as Ms Everett submitted) that he found that the claimant and the sponsor have been in a durable relationship for six years.

25. I therefore agree with Mr Kerr that there is no inconsistency.

Ground 1

26. It is not disputed that the judge did not state the burden of proof and the standard of proof.

27. Mr Kerr submitted (para 19 above) that the judge's failure to specify the burden of proof and the standard of proof was not material because there is no suggestion in the judge's decision that he had applied a lower standard than the balance of probabilities; that there was nothing to suggest that the judge had expected the Secretary of State to discharge the burden of proof; and that the whole tenor of the judge's decision was about the claimant providing information on which the judge had to make findings of fact.

28. Mr Kerr's submission that this was not a case that could have gone either way is incompatible with his subsequent acceptance (shortly thereafter) that a different judge may have reached a different conclusion on the evidence in this case (para 18 above). The two positions are incompatible with each other.

29. In my judgment, this is a case that could have gone either way. Two judges, both properly directed as to the applicable burden and standard of proof, may have reached different decisions on the evidence that was before the judge without either judge erring in law.

30. In reaching my decision on ground 1, I take into account the conclusion I have reached in relation to ground 2 (below), i.e. that ground 2 is also established. In my judgment, ground 2 supports ground 1.

31. For the reasons given above, I have concluded that the judge did materially err in law by failing to apply the correct burden and standard of proof, or, in the alternative, by failing to make clear that he was applying the correct burden and standard of proof.

32. Ground 1 is therefore established.

Ground 2

33. In considering the photographic evidence that was before him, the judge specifically stated as follows: firstly, that it can be staged (para 9 of his decision); secondly, that the

photographic evidence before him was "*very limited*" but that it established that the claimant and the sponsor were together in Germany and that they were at the least close friends then (para 10); and thirdly, that on their own evidence, their relationship at that time was casual (para 11).

34. Whilst the judge's acceptance of explanations for the gaps in evidence means that he was entitled to treat such gaps in evidence as of neutral weight, that is to say, as matters that do not weigh against the claimant, and also that he was entitled not to treat the gaps in evidence as matters which count against the credibility of the claimant and/or the sponsor, the fact is that such gaps in the evidence could not, on any reasonable view, weigh *positively* in the claimant's favour in helping him to discharge the burden of proof upon him to show to the standard of the balance of probabilities that he and the sponsor were in a durable relationship.

35. I therefore discount the following reasoning of the judge in order to decide whether or not he gave adequate reasons for his decision:

(i) At para 9 of his decision, that landlords would not offer a tenancy to the claimant; that the absence of his details on the tenancy agreement is not evidence that he did not reside with the sponsor; and that the lack of evidence of proof of address or a bank account was not significant.

(ii) At para 11 of his decision, that the fact that the claimant and the sponsor were in a casual relationship in Germany in 2016 explains why there were not more photographs of them at that time.

(iii) At para 11 of his decision, that *"Not all relationships are chronicled on social media*", from which I infer that he decided that the lack of social media evidence did not go against the claimant.

(iv) At para 14, that "*an application as a durable partner [was] more difficult to make from detention, not least because of the cost, and it is not an application that was likely to have delayed his removal*", from which I infer that he decided, notwithstanding his adverse comment in the final sentence of para 13, that the fact that the claimant did not make an application as a durable partner in 2019 rather than make an asylum claim should not weigh against the claimant.

36. On this analysis, when one considers paras 8-14 of the judge's decision, the only reasons given by the judge for his finding that the claimant and the sponsor were in a durable relationship were as follows:

(i) At para 8 and repeated by the judge at para 12, that the Secretary of State had accepted that the claimant and the sponsor had resided together for two months in 2018. Although the judge stated at para 12 that the relationship was less casual by the time the claimant and the sponsor were living together in 2018 because they had now moved in to live together and that the relationship had existed "*in some form for at least two years*" by the time they started living together, he did not say anything about the nature of their relationship during the two-month period of their cohabitation. To say that their relationship was "*less casual*" is plainly insufficient.

(ii) At para 14, that the evidence of the claimant and the sponsor at the hearing established that they were "*in a relationship at that time he was arrested*". To say that "*they were in a relationship*" does not explain what the judge considered was the nature of their relationship at that time. If, for example, they were then just close friends or in a casual relationship albeit less casual then their relationship when they

were in Germany, that may well still explain the sponsor's ability to give details of the events that led to the claimant being arrested.

Accordingly, para 14 read together with the last three sentences of para 5 (where he summarised the oral evidence of the sponsor in relation to the claimant's arrest), amount to the judge saying, at most, that "*they were in a relationship*" at the time that the claimant was arrested without saying anything about the nature of the relationship then. All we know for certain from his findings is that their relationship had become less casual by the time of the claimant's arrest when compared with their relationship when they were in Germany.

(iii) At para 15, that the application for a residence card was funded by the sponsor.

(iv) At para 15, that the claimant and the sponsor attended an appeal hearing sixteen months later.

(v) At para 15, the judge said: "*I accept the evidence of Ms Ismaili in particular that they have been in a relationship since at least 2016 and that it has grown in that time to the point where by 2020 there was a level of commitment which led them to consider they were not just partners but durable partners"*. He gave no reasons for accepting the evidence of the sponsor.

In my judgment, the remainder of para 15 does not constitute any reasoning for the judge's finding that the claimant had established his case that he was in a durable relationship with the sponsor.

37. It is not possible to say that the judge found the claimant credible, given his adverse comment at para 13 that "*it appears*" that the claimant made his asylum claim as "*an attempt to frustrate removal rather than [it being] a genuine claim"* notwithstanding the fact that he then appeared to row back from that adverse comment in para 14. I take this into account.

38. Mr Kerr said that he had to accept that the oral evidence significantly bolstered the evidence (para 18 above). I agree. However, as I have said above, the judge failed to give reasons for accepting the sponsor's oral evidence. He made an adverse comment at para 13 of his decision on the claimant's credibility and failed to make a clear finding whether the claimant was a credible witness notwithstanding his adverse comment at para 13 of his decision. All of this supports ground 2, that the judge gave inadequate reasons for his finding that the claimant and the sponsor were in a durable relationship.

39. Taking everything into account, I have concluded that the judge did give inadequate reasons for his finding that the claimant and the sponsor had a durable relationship. If he had applied the correct burden and standard of proof, it is simply not possible to understand why he reached that finding.

40. Accordingly, not only is ground 2 established as a material error of law, ground 2 supports ground 1. This is because the lack of adequate reasons calls into question whether the judge had applied the correct burden and standard of proof.

Ground 3

41. As for ground 3, it is evident from what I have said at para 35(i)-(iv) above that the judge did address the gaps in the evidence. However, I am satisfied that he took into account these explanations as positively weighing in the claimant's favour, as opposed to treating

them as neutral. This adds to ground 2, i.e. that the judge gave inadequate reasons for his decision.

42. For all of the reasons given above, I do not accept the submission at para 7 of the claimant's Rule 24 response that the Secretary of State's grounds amount to no more than a disagreement with the judge's findings of fact. There is nothing in the remainder of the Rule 24 response that has not been adequately dealt with above or that requires specific engagement.

Disposal

43. For all of the above reasons, I set aside the decision of the judge in its entirety. None of his findings shall stand. His summary of the evidence he heard, at paras 3-5 of his decision, shall stand as a record of the evidence given to the First-tier Tribunal.

44. In the majority of cases, the Upper Tribunal when setting aside the decision will re-make the relevant decision itself. However, para 7.2 of the Practice Statements for the Immigration and Asylum Chambers of the First-tier Tribunal and the Upper Tribunal (the "Practice Statements") recognises that it may not be possible for the Upper Tribunal to proceed to re-make the decision when it is satisfied that:

> "(a) the effect of the error has been to deprive a party before the First-tier Tribunal of a fair hearing or other opportunity for that party's case to be put to and considered by the First-tier Tribunal; or
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> (b) the nature or extent of any judicial fact finding which is necessary in order for the decision in the appeal to be re-made is such that, having regard to the overriding objective in rule 2, it is appropriate to remit the case to the First-tier Tribunal."

45. In my judgment this case falls within para 7.2 (a) because the Secretary of State has been deprived of a fair hearing by the judge's failure to apply the correct burden and standard of proof. In addition, given that the claimant won his appeal before the First-tier Tribunal and having regard to the Court of Appeal's judgment in JD (Congo) & Others [2012] EWCA Civ 327, I am of the view that a remittal to the First-tier Tribunal is the right course of action.

46. This appeal is therefore remitted to the First-tier Tribunal for a judge of that Tribunal other than Judge of the First-tier Tribunal G J Ferguson to re-make the decision on the claimant's appeal against the Secretary of State's decision on the merits on all issues.

Notice of Decision

The decision of the First-tier Tribunal involved the making of errors on points of law such that the decision to allow the appeal is set aside in its entirety.

This case is remitted to the First-tier Tribunal for a fresh hearing on the merits on all issues of the claimant's appeal against the Secretary of State's decision by a judge other than Judge of the First-tier Tribunal G J Ferguson.

Signed: Upper Tribunal Judge Gill Date: 29 August 2023

NOTIFICATION OF APPEAL RIGHTS

1. A person seeking permission to appeal against this decision must make a written application to the Upper Tribunal. Any such application must be **received** by the Upper Tribunal within the **appropriate period** after this decision was **sent** to the

person making the application. The appropriate period varies, as follows, according to the location of the individual and the way in which the Upper Tribunal's decision was sent:

2. Where the person who appealed to the First-tier Tribunal is **in the United Kingdom** at the time that the application for permission to appeal is made, and is not in detention under the Immigration Acts, the appropriate period is **12 working days (10 working days, if the notice of decision is sent electronically).**
3. Where the person making the application is in detention under the Immigration Acts**, the appropriate period is 7 working days (5 working days, if the notice of decision is sent electronically)**.
4. Where the person who appealed to the First-tier Tribunal is **outside the United Kingdom** at the time that the application for permission to appeal is made, the appropriate period is **38 days (10 working days, if the notice of decision is sent electronically).**
5. **A "working day" means any day except a Saturday or a Sunday, Christmas Day, Good Friday or a bank holiday.**
6. **The date when the decision is "sent' is that appearing on the covering letter or covering email**