IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2023-002287
First-tier Tribunal No: EA/10425/2022

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On the 04 December 2023

Before

UPPER TRIBUNAL JUDGE NORTON-TAYLOR
DEPUTY UPPER TRIBUNAL JUDGE JARVIS

Between

THE ENTRY CLEARANCE OFFICER

Appellant

and

DOLAPO SUNDAY KUKUTE
(NO ANONYMITY ORDER MADE)

Respondent

Representation:
For the Appellant: Mr T. Melvin, Senior Home Office Presenting Officer
For the Respondent: Mr A. Ogunfeibo, legal representative from Anthony Ogunfeibo & Co Solicitors

Heard at Field House on 16 November 2023

DECISION AND REASONS

Introduction

1. In this appeal the Entry Clearance Officer is the Appellant but in order to maintain consistency with the decision of the First-tier Tribunal we refer to the parties as they were at that hearing.

2. The Respondent challenges the decision of First-tier Tribunal Judge Bonavero (hereafter "the Judge") who, on 10 May 2023, allowed the Appellant's appeal against the Respondent's decision (dated 6 October 2022) to refuse his application for pre-settled status as a spouse of an EEA citizen under Appendix EU.

3. Permission to appeal was granted by First-tier Tribunal Judge Aziz on 30 May 2023 on the basis that it was arguable that the Judge had erred by misapplying Celik (EU exit, marriage, human rights) [2022] UKUT 220 (IAC), ("Celik").

Relevant background

4. The Appellant is a citizen of Nigeria, born on 15 June 1997. He met his future wife, a Portuguese national (and hereafter "the Sponsor") in December 2019 at the Identity Fashion School in Lagos where she was studying fashion design; the Appellant was undergoing his national youth service program at that time.

5. It was agreed between the parties at the error of law hearing that the Sponsor received Indefinite Leave to Remain under Appendix EU on 16 May 2019 and that she was in the United Kingdom at the time the application was made.

6. Unhappily it is not particularly clear from the papers when it was that the Sponsor then left the United Kingdom in order to take up her fashion design course in Nigeria but again during the hearing, we were told that this occurred sometime in the middle of 2019.

7. The Appellant proposed to the Sponsor at the beginning of May 2020 and they started living together from 1 June 2020 in an apartment in Lagos state.

8. The Appellant and the Sponsor were then married in a traditional marriage ceremony on 11 July 2020 in Nigeria.

9. The parties were due to carry out their formal marriage at the relevant registry office on 16 July 2020 but were informed on 13 July 2020 that this would be postponed due to the Covid-19 restrictions imposed by the Nigerian government and the fact that some of the staff in the registry office had tested positive for the virus.

10. In around November 2020, the Appellant applied for Leave to Enter the United Kingdom as a student to study International Business at Chester University; this Visa was granted in January 2021 and the Appellant entered the UK with the Sponsor on 7 February 2021. The Appellant's Leave to Enter was valid from 28 January 2021 until 18 June 2022; the Sponsor entered using her own Portuguese document.

11. The parties continued to reside in the United Kingdom and in December 2021 were informed by their parents that the relevant marriage registry office had given a new wedding date for 15 December 2021. The Appellant and Sponsor were not able to travel to Nigeria for the ceremony due to the Appellant's studies and they therefore had a proxy marriage with representatives from both families present on 15 December 2021.

12. Then on 31 December 2021, the Appellant made his application under Appendix EU.

The Respondent's refusal letter

13. In the refusal letter, dated 6 October 2022, the Respondent accepted that the parties had provided sufficient evidence to show that the Appellant is a spouse of a *relevant sponsor* (which indicates at this stage that the Respondent's view was that the Appellant was applying as a *joining family member* as defined in Annex 1 to Appendix EU by reference to the overall route described in EU 14A).

14. The sole point of refusal raised by the Respondent was that the Appellant had not provided sufficient evidence to show that he was in a durable relationship with the Sponsor before 23:00 GMT on 31 December 2020 because there was no evidence of cohabitation and no other significant evidence of such a durable relationship.

The decision of the Judge

15. At para. 7 of the decision, the Judge recorded that the Respondent's representative informed him that he did not dispute any of the facts put forward by the Appellant and therefore did not seek to cross-examine him. The Judge therefore proceeded to hear submissions only and then reserved his decision.

16. In coming to his conclusions, the Judge firstly observed that the Respondent's case submission was solely that the appeal had to be dismissed because the Appellant fell foul of the Upper Tribunal's decision in Celik, (para. 8).

17. At para. 10, the Judge found that there was a 'crucial distinction' between the Appellant's position in this case and that in Celik, namely that at the time of the application in this case (31 December 2021) the Appellant was residing in the UK lawfully; whereas the Appellant in Celik was not.

18. The Judge went on to cite (b)(ii)(bb)(aaa) of the definition of *durable partner* in Annex 1 to Appendix EU and found that the Appellant was not excluded from the definition of *durable partner* by virtue of his lawful residence in the UK as a student.

19. In applying that paragraph of the definition, the Judge (at para. 13) concluded that he was satisfied that the Appellant was not resident in the United Kingdom as a family member but instead as a student.

20. Having made that finding, the Judge assessed whether or not the Appellant could also show that he was in a durable relationship with the sponsor as at 31 December 2020. At para. 17, the Judge observed that the

parties had not been cohabiting for at least two years by 31 December 2020 but went on to consider whether there was "significant evidence" of such a relationship.

21. Noting that the Presenting Officer did not dispute the factual matrix put forward by the Appellant and the Sponsor, the Judge found that the Appellant and the Sponsor began to live together in June 2020; they continued to live together and that they have since married. The Judge found the relationship has lasted for 3 ½ years, (para. 18).

22. At para. 19, the Judge focused those findings on the circumstances in December 2020 and concluded that the relationship could be characterised as durable as it had endured for a significant period after 31 December 2020 and that this constituted significant evidence.

23. At para. 20, the Judge set out his conclusion that the Appellant was in an eligible relationship with an EEA national at 23:00 GMT on 31 December 2020 and that this was enough for him to qualify as a family member and that he therefore ought to be entitled to a Family Permit. The Judge therefore allowed the appeal.

The Respondent's grounds of appeal

24. In the grounds of appeal, at ground 1 the Respondent asserts that the Judge materially erred by misapplying Celik. More specifically the Respondent avers that the Appellant had to be resident in the United Kingdom prior to 31 December 2020 but was not, as he entered the UK on 7 February 2021. The Respondent then cited paras. 52 – 57 of Celik and the Upper Tribunal's conclusions about the requirements within the Withdrawal Agreement for those claiming to be durable partners prior to the specified date.

25. In respect of ground 2, the Respondent also asserts that, as a consequence of Celik, the durable partner route within Appendix EU requires a *relevant document* as evidence that the residence was facilitated under the EEA Regulations and that the Appellant did not have such a document. The author of the ground went on to assert that the Judge's conclusions about the durability of the relationship were "*of no consequence*".

The error of law hearing

26. The error of law hearing was initially listed for 26 July 2023; on that occasion a differently constituted panel raised a preliminary issue with the representatives about the circumstances of the Sponsor as at 31 December 2020. In light of this preliminary point, the Respondent requested an adjournment which was granted.

27. The Respondent was given until 9 August 2023 to seek, if he chose to, to apply for permission to amend the grounds of appeal.

28. The Respondent missed this deadline but nonetheless sought permission to amend the grounds by way of a document dated 17 August 2023. In the substantive paragraph of the amendment application, the Respondent argued the following:

> *"…This included that the sponsor be a "relevant EEA national" which by then included a requirement to have commenced a continuous qualifying period before the specified date. Here the couple had only arrived in early 2021.""*

29. Permission to appeal was granted by Upper Tribunal Judge Norton-Taylor on 6 September 2023.

30. On 18 September 2023, the Appellant provided a rule 24 response in which he complained about the Respondent's late application to amend the grounds of appeal and reiterated that the Presenting Officer at the First-tier Tribunal hearing had not challenged the factual matrix of the Appellant's claim.

31. The rule 24 also contended that the Sponsor had resided in the United Kingdom for a continuous qualifying period beginning before 31 December 2020 and that her Indefinite Leave to Remain had not lapsed, been cancelled, revoked or invalidated.

32. The error of law hearing came before us on 16 November 2023. We spent some time with the representatives attempting to identify precisely under which route within Appendix EU (or otherwise) the Appellant claimed to benefit.

33. We noted that there was a significant lack of focus in the Appellant's skeleton argument to the First-tier Tribunal in which it was asserted that Appendix EU (Family Permit) was the operative scheme of rules (at para. 2(i)); whereas later in the same document the Appellant relied on both EU 14 and EU 14A of Appendix EU.

34. Similarly, the panel was not assisted by the relatively incoherent grounds of appeal which conflate matters to do with the precise meaning of the Withdrawal Agreement with the Respondent's Appendix EU rules. We also note that the underlying facts in Celik were materially different: the appellant in that case had been residing in the UK since 2007 and had been cohabiting with his EEA citizen partner in the UK from around February 2020, [para. 2].

35. The Respondent refused that application by reference to EU 11 & EU 14 of Appendix EU and the requirements to be met by a *family member of a relevant EEA citizen* [para. 10]. At para. 74, the panel noted that appellant's counsel in the Upper Tribunal proceedings effectively conceded the appellant's appeal by reference to those rules.

36. We have to say that both representatives were particularly unclear during the hearing as to which Appendix EU route applied. Despite noting the way

that Mr Ogunfeibo put the case in his skeleton argument to the Judge at the First-tier Tribunal hearing, before us, he suggested that the applicable rule was EU 14 and whether the Appellant was the *family member of a relevant EEA citizen* as defined. He later changed his submission to suggest that the *joining family member of a relevant sponsor* route might be applicable.

37. Equally, Mr Melvin was not able to assist in respect of the Respondent's view of the relevant rule despite the refusal letter expressly refusing the application on the basis of the *joining family member* route. Mr Melvin also made the submission that the Appendix EU rules were based on the requirements laid out in the Withdrawal Agreement and both had to be read together; he provided the Tribunal with no basis for this submission in law or in any relevant jurisprudence.

38. In respect of the points raised by Mr Melvin in the amended ground of appeal relating to the Sponsor's residence prior to 31 December 2020 and the *continuous qualifying period* as defined in Annex 1 to Appendix EU, he simply left the matter to the Tribunal but asserted, again without any reference to any part of Appendix EU or elsewhere, that the Sponsor had to be resident in the UK at 31 December 2020 and until the application was made on 31 December 2021.

39. We fully recognise that Appendix EU is unnecessarily complex and difficult to follow and that the Respondent's immigration rules in general have often been severely criticised by the Tribunal and the superior courts, see for instance Wang & Anor, R (On the Application Of) v Secretary of State for the Home Department [2021] EWCA Civ 679 at para. 72. We however remain concerned that, despite the passage of time since the appeal was made and indeed since the Respondent first challenged the decision of the Judge, neither side has properly concentrated its mind on the applicable parts of Appendix EU.

Findings and reasons

40. Turning then to the three grounds of appeal as they were before this Tribunal, we find the following.

Ground 1

41. In respect of ground 1, the Respondent has provided no explanation or argument at all as to why the Upper Tribunal's analysis of the Withdrawal Agreement in Celik is relevant to an appeal made in respect of the Appendix EU rules. It is plain from the Immigration (Citizens' Rights Appeals) (EU Exit) Regulations 2020 that an appellant can appeal both by reference to the Withdrawal Agreement itself (reg. 8(2)) and indeed by reference to the requirements in the relevant rules (reg. 8(3)).

42. We find that, understandably, the decision of the Upper Tribunal in Celik is relatively silent on the provisions within the immigration rules, precisely because the focus of the Upper Tribunal in that appeal centred

predominantly upon the wording and meaning of Article 10 of the Withdrawal Agreement.

43. We therefore find that the Tribunal's conclusions in Celik are simply not applicable in this case when we are tasked with deciding whether the Judge applied the relevant rules correctly.

Ground 2

44. In terms of ground 2, we similarly find that the Respondent's position in law is incoherent. There is simply no basis, at least in the case made before us, to conclude that the Respondent's own immigration rules should be read in accordance with the terms of the Withdrawal Agreement.

45. It is the rules themselves which formulate the way in which the Respondent expects qualifying people to apply for (and evidence) their claim for pre-settled or settled status under Appendix EU.

46. We therefore reject the Respondent's confused argument that the *durable partner* definition within Appendix EU can somehow be constrained by the facilitation requirement in the Withdrawal Agreement.

Ground 3

47. In respect of ground 3, and the Respondent's additional challenge that the Sponsor did not have a *continuous qualifying period* (as defined in Annex 1 to Appendix EU) prior to the 31 December 2020, we of course note that this is not the way the case was put before the First-tier Tribunal.

48. However, the Upper Tribunal considered the issue to be an important one, hence some leeway was given to the Respondent to amend his grounds of appeal.

49. As we have already laid out in some detail, there has been real lack of focus and precision in the arguments put forward by both parties as to the legal issues before the Upper Tribunal and the Judge.

50. On the basis of this confusion, we have reverted to the Respondent's initial case in the refusal letter that the Appellant was in fact applying as a *joining family member of a relevant sponsor* under Appendix EU.

51. Having given this position considerable thought, and on the basis that neither representative provided the Tribunal with detailed argument despite being asked to do so, we think that the Entry Clearance Officer was right to say that the Appellant was applying as a *joining family member of a relevant sponsor*.

52. We have concluded that the Appellant applied (on 31 December 2021) as the *joining family member* (spouse) of a *relevant sponsor* where the marriage (which was not challenged by the Respondent in the refusal decision, and therefore must be taken to comply with the documentary requirements at para. (a)(i) of the definition of *'required evidence of family*

relationship') took place after 31 December 2020 but existed by the date of the application [*joining family member of a relevant sponsor*, para. (a)(ii)(aa)]: the marriage took place on 15 December 2021 and the application was on 31 December 2021.

53. Furthermore, if an applicant is relying upon a durable relationship prior to marriage (as the Appellant does here) then the person must show that:

    a. They were the *durable partner* before 31 December 2020 **and** on that date [*joining family member of a relevant sponsor*, para. (a)(i)(bb)].

    b. In respect of the criteria within the definition of '*durable partner*, the person is required to show that the parties had lived together for at least two years **or** that there is "significant evidence" of the durable relationship [*durable partner*, para. (a)].

    c. And, that the person holds a *relevant document* (in effect a document under the EEA Regulations issued on the basis that the person was the durable partner of the EEA citizen) [*durable partner*, para. (b)(i)] **or** where the person is applying as the spouse of a *relevant sponsor* (as in this case) [*durable partner*, para. (b)(ii)].

    d. **And**, the date of application is after 31 December 2020 [*durable partner*, para. (b)(ii)(aa)] **and** the person was not resident in the UK as the durable partner of a *relevant EEA citizen* <u>before the specified date</u> (plus other exceptions) [*durable partner*, para. (b)(ii)(bb)(aaa)] then the Respondent will accept "evidence provided by the person" that the partnership was formed and was durable before 31 December 2020.

54. We note at this stage that the Respondent has expressly not sought to challenge the Judge's finding that the Appellant had provided sufficient evidence to show that he was in a durable relationship with the Sponsor from at least June 2020.

55. We therefore conclude that the relevant definition for the Sponsor is *relevant sponsor* in Annex 1 rather than *relevant EEA citizen*.

56. Looking at para. (b) of that definition, it governs the requirements for applications made on or after 1 July 2021 (as in this case): *"(b) where the date of application by a joining family member of a relevant sponsor is on or after 1 July 2021"*.

57. The next section of the definition is relevant:

> "(i) an EEA citizen (in accordance with sub-paragraph (a) of that entry in this table) who, having been resident in the UK and Islands for a continuous qualifying period which began before the specified date, has been granted:
>
> (aa) indefinite leave to enter or remain under paragraph EU2 of this Appendix (or under its equivalent in the Islands), which has not lapsed or been cancelled, revoked or 474 Term Definition invalidated; or

(bb) limited leave to enter or remain under paragraph EU3 of this Appendix (or under its equivalent in the Islands), which has not lapsed or been cancelled, curtailed or invalidated; or…"

58. In our view, this part of the definition does not require that the *relevant sponsor* have the relevant EUSS Leave to Enter/Remain at the same time as showing a *continuous qualifying period* in the UK before 31 December 2020. The rule requires that the *relevant sponsor* be someone who had shown the *continuous qualifying period* of residence before 31 December 2020 and then been granted under the EUSS as a consequence.

59. Drawing the threads together, it is our view that the Sponsor was a *relevant sponsor* (despite leaving the UK to reside in Nigeria from May 2019 until February 2021) on the basis that she had achieved the relevant *continuous qualifying period* of residence in the UK **before** obtaining Indefinite Leave to Remain under Appendix EU on 16 May 2019.

60. We therefore reject the Respondent's argument that the Sponsor had to be residing in the UK on 31 December 2020. In coming to that conclusion we also record that there was no suggestion that the Sponsor's Indefinite Leave to Remain has been invalidated, cancelled or has lapsed.

61. In respect of the Sponsor's absence from the UK (mid 2019 until February 2021), we observe that EU 5 of Appendix EU makes reference to the Immigration (Leave to Enter and Remain) Order 2000. In Article 13(4)(za)(ii), the Order provides for a period of absence of up to five years before Indefinite Leave to Remain/Enter under Appendix EU lapses.

62. We therefore reject the Respondent's third ground of challenge.

63. Returning to the decision of the Judge, we find that the Judge was incorrect to say that the Appellant could take the benefit of the *durable partner*, para. (b)(ii)(bb)(aaa) definition on the basis that he had another form of lawful residence in the UK (para. 18) – the Judge has missed the additional requirement that the period of lawful residence be in the UK **before 31 December 2020**; the Appellant in this appeal was residing in Nigeria at that time and did not enter the UK until February 2021.

64. However, nothing turns on the error as we have decided that the Appellant met the *durable partner* definition on the basis that he was not resident in the UK prior to 31 December 2020.

65. In the absence of an EEA document confirming the durable partnership, the Judge was therefore ultimately correct to assess the other evidence of the durable relationship and the position prior to and on 31 December 2020 albeit the application was not one which would lead to the grant of a Family Permit as the Judge mistakenly concluded at para. 20.

66. Thus, whilst the Judge erred in certain respects, in the exercise of our discretion under section 12(2)(a) of the Tribunals, Courts and Enforcement Act 2007 we do not set his decision aside.

Notice of Decision

67. The Respondent's appeal is dismissed, and the decision of the First-tier Tribunal stands.

I P Jarvis

Deputy Judge of the Upper Tribunal
Immigration and Asylum Chamber

29 November 2023