IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2023-003256

First-tier Tribunal No: HU/57676/2022

THE IMMIGRATION ACTS

Decision & Reasons Issued:

7th November 2023

Before

UPPER TRIBUNAL JUDGE WILDING

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

LULZIM RATA
(ANONYMITY ORDER NOT MADE)

Respondent

Representation:
For the Appellant: Ms A Nolan, Senior Home Office Presenting Officer
For the Respondent: Mr N Ahmed, Legal Representative

Heard at Field House on 11 October 2023

DECISION AND REASONS

1. This is the appeal of the Secretary of State against the decision of First-tier Tribunal Judge Zahed ('the Judge') who allowed the appeal of Mr Rata on Human Rights grounds. To avoid confusion, I refer to the parties as they were before the First-tier Tribunal ('FTT').

Background

2. The appellant is a national of Albania born on 17 June 1996. He entered the UK illegally in June 2018 and has remained here since.

3. On 19 July 2022 he applied for leave to remain as the spouse of Megan Bakiu. This was refused on 17 October 2022. He appealed.

4. The issues before the Judge were whether the decision to remove the appellant would be a proportionate interference with the appellant's Article 8 rights. He and

his wife had met each other in the UK in December 2019, having met briefly in July 2013. They married on 13 April 2021. They had obtained a certificate of approval to get married in September 2020.

5. The appellant had attempted to regularise his stay in the UK by way of an application under appendix EU as the spouse of an EU national. This however was rejected and dismissed on appeal by First-tier Tribunal Judge Herlihy in a decision dated 16 December 2021. The reasons for this were that the appellant and his wife had not married before 31 December 2020. As a consequence of this they had to show they were durable partners at that date. Judge Herlihy found that:

> *'6.1 The Appellant accepted that he could not qualify for indefinite leave to remain/settled status under Rule EU11 of Appendix EU as he does not hold the documented right of permanent residence. However, the Appellant submits that he is eligible for limited leave to remain/pre-settled status under EU14 of Appendix EU.*
>
> *6.2 From the evidence before me I note that the Appellant and the sponsor were due to marry in November 2020 which is prior to specified date of 31 December 2020. The evidence indicates that the wedding was postponed on two occasions due to Covid 19 and for reasons entirely outside their control. The Appellant argues that had their wedding taken place as planned in November 2020 he would meet the definition of 'family member' under Annex 1 of Appendix EU.*
>
> *6.3 In considering the evidence in the round and the evidence of the Appellant and the sponsor I find that their relationship began in February 2020, that the Appellant proposed in June 2020 and they commenced living together in August 2020.I am not satisfied that the Appellant meets the definition of 'durable partner' pursuant to definition in Annex 1 of appendix EU as the Appellant and his wife had not lived together in a relationship akin to marriage for at least 2 years. They only commenced cohabitation in August 2020 a month prior to their application to marry.*
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> *6.4 The Appellant argues that the Respondent has a discretion and that this should have been exercised differently as the Appellant failed to meet the requirements of Appendix EU entirely due to circumstances beyond his control caused by the Covid 19 pandemic and refers to the Respondent's guidance Coronavirus (Covid 19): EU Settlement Scheme Version 1.0. This guidance as submitted by the Appellant's representative focuses on an applicant's failure to meet the requirements under the EUSS, because Covid 19 has led to absences from the United Kingdom which exceed the maximum permitted duration. The Appellant's representative argues that it must follow the Respondent also acknowledges other forms of delay caused by Covid 19 which prevent an applicant meeting the requirements under the EUSS; such as where a marriage was due to take place before the end of the transition period and had to be postponed owing to Covid 19 such that the wedding could not take place until after the end of the transitional period.*
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> *6.5 I am not satisfied that the Appellant has established that the Respondent as decision maker had a statutory discretion which she failed to exercise so that it can be argued that she failed to exercise her discretion or*

that her discretion should have been exercised differently. I was not referred to the existence of any discretion in Appendix EU and the Appellant's representative reference to the Respondent's Covid19 guidance EU Settlement Scheme Version 1.0. does not indicate the existence of any discretion due to failure to marry prior to the end of the transitional period. The Appellant's representative argues that there is a corollary where discretion is afforded due to absences from the United Kingdom caused by Covid 19 and where an applicant is prevented from marrying prior to the end of the transitional period due to the pandemic. I am not satisfied that the decision maker had discretion vested in her pursuant to the Appendix EU of the Immigration Rules. In any event the Appellant cannot succeed as, even if there were a discretion, which I have found there was not, the exercise of that discretion is only appealable before the Tribunal and only arises, once the decision maker has lawfully exercised her discretion in the making of the decision. If the decision maker fails to exercise her discretion, that failure renders her decision 'not in accordance with the law' and, because it is a discretion which is primarily vested in the Secretary of State, the Immigration Officer or the Entry Clearance Officer, the appropriate course is to require the decision maker to complete her task by reaching a lawful decision on the outstanding application.

6.6 I find that the Appellant did not satisfy the requirements for settled status as the family member of an EEA national.

6. The human rights appeal came before the Judge on 11 May 2023. In his decision the Judge found:

'19. It has been accepted that the appellant is in a genuine and subsisting relationship with a settled person as it has been accepted that the appellant meets the relationship eligibility requirement of Appendix FM.

20. The burden is on the appellant to establish on a balance of probabilities that he meets the requirements of EX1(b).

…

25. The appellant applied under the EUSS as the spouse of an EEA national, his wife being Italian. However, the appellant's application was refused as his marriage occurred after the specified date, being 31st December 2020. The appellant appealed the refusal. At the appeal the hearing the presenting officer did not cross examine the appellant or his EEA sponsor simply relying on the case of Celik. The appellant submitted that he would have been married to his EEA sponsor in November 2020 having submitted his application of intention to marry in September 2020, were it not for Covid-19 resulting in the closure and cancellations of marriage ceremonies at registry offices all around the country. The case of Celik stated that such issues could not be taken into account and it was submitted that the appellant could make a paid application under Appendix FM where he could raise such issues.

26. I have seen the documentary evidence that confirms the fact that the appellant and his wife have been living together since August 2020, that the appellant submitted an intention to marry at Hammersmith & Fulham

Council in September 2020 and was given a registry date to marry in November 2020. That registry date was cancelled due to Covid-19 and re booked for January 2021 which again was cancelled until they eventually married on 13 April 2021. I have seen tenancy agreements and council tax statements in both their names and photographs that confirms that they have been living together since July 2020 to the date of hearing.

27. I have also seen an employment contact dated 13th September 2022 for the appellant's wife from Specsavers Opticians confirming her employment where she is earning £23,000 per year. I have seen her payslips and bank statements that correspond to her said employment. I find that the appellant's wife is earning over £18600 per year.

...

32. Adopting the terms defined at paragraph 35 of TZ Pakistan. These are the "cons" – factors that weigh in favour of immigration control:

> *(a) As confirmed by primary legislation at s.117B(1) of the 2002 Act, the maintenance of effective immigration control is considered to be in the public interest. Those controls are implemented by, among other provisions, the Immigration Rules. They are described in R (Agyarko) [2017] UKSC 11 as having been formulated by the respondent, approved by Parliament, and reflecting the respondent's assessment at a general level of the relative weight to be given to individual factors when striking a fair balance under Article 8. The appellant does not meet the Rules, as he had not met EX1.*
>
> *(b) I accept on the evidence provided that the sponsor earns above the financial requirement under Appendix FM, and as such the appellant is financially independent from the state.*
>
> *(c) Section 117B(4) of the 2002 Act states that little weight should be given to a relationship with a qualifying partner that is established by a person at a time when the person is in the United Kingdom unlawfully. The appellant and sponsor formed their relationship in in the UK when the appellant was here unlawfully.*
>
> *(d) Section 117(B)(6) does not apply.*

33. As to the "pros":

> *(a) The appellant would have been able to have lived with his wife in the UK had it not been for Covid-19. The appellant and his wife are in a genuine and subsisting relationship. The appellant's wife has good employment and they both wish to start a family and get on with their lives.*

34. Balancing all the factors for and against the appellant, I conclude that the appellant would have been able to remain in the UK with his wife with whom he has a genuine and subsisting relationship under EUSS were it not for Covid-19. I find that the appellant did all he could to comply with Rules by applying for intention to marry in September 2020 some 4 months before the specified date. I find that this is one of these very rare and exceptional

> *case where the appellant was prevented from a worldwide pandemic that was totally out of his control which caused his marriage to be delayed until after the specified date and thus not allowing him to come within the EUSS.*
>
> *35. Applying the Razgar 5 Stage Test, I find that in such exceptional and rare circumstances as the Covid-19 pandemic locking down the country, I find that Article 8 is engaged and that it is a disproportionate interference in the mainatence* [sic] *of immigration control to remove the appellant from the UK.'*

7. The respondent appealed, and permission to appeal was granted by First-tier Tribunal Judge Kelly:

> *'In holding that the appellant's removal from the UK would be unlawful under section 6 of the Human Rights Act 1998, it is arguable that the Tribunal failed to take account of relevant factors, such as the apparent lack of 'insurmountable obstacles' to family life being enjoyed in Albania, the appellant's lack of facility in the English language, and the fact that family life was established at a time when the appellant was present in the United Kingdom unlawfully, and that it took account of irrelevant factors, such as the possibility of the appellant qualifying for leave to remain under the European Union Settlement Scheme but for the Covid 19 pandemic and his consequent inability to marry his partner prior to the deadline under that scheme.'*

The hearing

8. In her clear and focussed submissions Ms Nolan relied on the grounds of appeal. She submitted that whilst the impact of Covid-19 on the appellant's ability to get married could not be said to be an irrelevant factor, the Judge had materially erred in law because he had attached "irrational weight" to it in his overall balancing exercise.

9. She submitted that as a consequence the Judge's balancing exercise had fallen into error and as such his decision should be set aside. She submitted that as Celik showed, there was a large cohort of people who were caught in the same situation as the appellant and his wife, and so the Judge's description of the case as being exceptional was not accurate.

10. Mr Ahmed resisted the appeal. He submitted that the Judge had take everything into account and had concluded that the appellant's removal would not be disproportionate. The weight to be given to each factor was a matter for the Judge, he had taken everything into account and had not erred in law.

Decision and reasons

11. The way in which the case was advanced before me by Ms Nolan was more succinct and streamlined than the original grounds were presented. I find that the Judge did not materially err.

12. The respondent's complaint, as advanced by Ms Nolan, was that whilst the impact of the pandemic could not be said to be irrelevant, the weight given to it was irrational. That is a high bar for the respondent to overcome. Ms Nolan did not outline why the weight given to it was irrational, or produce any authorities in

support of the proposition. The respondent did not submit that matters had not been taken into account that ought to have been, merely that the 'appropriate weight' had not been given to the factors that weight in the respondent's favour.

13. It is trite that weight is a matter for the Judge of first instance. That being the case once the Judge has taken everything relevant into account, and has put out of his mind anything irrelevant, then the balancing exercise and the weight to be attributed to the competing factors is one which is for him.

14. The difficulty with the proposition advanced by the respondent in this case is that once she accepts the impact of the pandemic is relevant, then that the Judge considers it to tilt the balance is one which was open to him to conclude. There is nothing inherently "irrational" about the weight he has given to that feature.

15. The respondent's challenge ultimately is one of disagreement with the Judge's decision and does not identify a clear or arguable basis for finding that the weight given to the impact of the pandemic was irrational.

16. The written grounds of appeal complain that the Judge failed to undertake a holistic balancing exercise for failing to have a full and proper regard to the s117B public interest factors. However, the Judge has considered the relevant provisions of s117B. The Judge refers to "all the material factors" of s117B at paragraph 31, it cannot sensibly be suggested that the Judge is unaware of what those factors are.

17. He then expressly considers s117B (1) and (4) in the factors weighing in the respondent's favour. It is correct that he did not expressly consider s117B(2), however I find nothing turns on this. Firstly, the appellant does in fact speak English. The matter of dispute in relation to the immigration rules was whether he had passed an English language test at a recognised provider. No issue was taken over his ability to speak English, just the evidence that the immigration rules require. There is no suggestion in the Judge's decision, or for that matter expressed in the grounds of appeal, that the respondent positively advanced a case relying on his lack of English language, this is perhaps indicative of the evidence before the Judge that he could in fact speak English.

18. Secondly, the express provision of s117B(2) does not speak about weight. The provision says:

> *(2) It is in the public interest, and in particular in the interests of the economic well-being of the United Kingdom, that persons who seek to enter or remain in the United Kingdom are able to speak English, because persons who can speak English—*
>
> *(a) are less of a burden on taxpayers, and*
>
> *(b) are better able to integrate into society.*

19. The written grounds of appeal, but not elaborated upon at the hearing, complain that the Judge failed to

    a. "attach any adverse weight" to the appellant's inability to speak English.
    b. "attach correct adverse weight to the fact that the Appellant's family and private life was established at all times with an unlawful immigration status, as required by sections 117B(4) and 117B(5).

c. “failed to attach adverse weight to the Appellant’s inability to satisfy the requirements of the immigration rules”.

20. I have already set out why I consider the submission in relation to the language is misconceived. Secondly in relation to the provisions of s117(4) and (5). The Judge expressly considers (4). Which is that little weight ought to be given to either private life, or a relationship with a qualifying partner where they are in the UK unlawfully. The Judge has considered this.

21. 117B(5) is only in relation to where someone’s private life has been established when their status is precarious. In this case the Judge allowed the appellant’s appeal on family life grounds, factoring in that the starting point is little weight should be given to that relationship when it was established when the appellant was unlawful. There is no error in the Judge applying a provision which was not relevant to the case advanced before him, and where he did in fact apply the mirrored provision for when someone is here unlawfully.

22. Finally, the Judge expressly considered the fact that the appellant could not meet the immigration rules at 32(a). He therefore did factor that into the consideration.

23. The respondent’s challenge is one essentially of disagreement. The decision of the First-tier Tribunal took into account all the relevant factors, I remind myself it is not my role to consider whether I would have made the same decision, but only to consider the grounds of appeal as advanced by the respondent.

24. The First-tier Tribunal’s decision is not infected by an error of law.

Notice of Decision

The Secretary of State’s appeal is dismissed.

Judge T.S. Wilding

Judge of the Upper Tribunal
Immigration and Asylum Chamber

Date: 28th October 2023