IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2022-002827

First-tier Tribunal No:
EA/13270/2021

THE IMMIGRATION ACTS

Decision & Reasons Issued:

22nd January 2024

Before

UPPER TRIBUNAL JUDGE BRUCE
DEPUTY UPPER TRIBUNAL JUDGE SAFFER

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

PAVLIN ZEFI

Respondent

Representation:
For the Appellant: Mr Diwnycz a Senior Home Office Presenting Officer
For the Respondent: Ms Coen of Counsel

Heard at Phoenix House (Bradford) on 17 January 2024

DECISION AND REASONS

1. For consistency with the First-tier Tribunal we shall refer to Mr Zefi as the Appellant and the Secretary of State as the Respondent.

2. The Appellant was born on 6 February 1998. He is a citizen of Albania. He appealed against the decision of the Respondent dated 6 August 2021, refusing his application for Pre-Settled Status under the EU Settlement Scheme (EUSS) as the family member of an EEA national in the United Kingdom.

3. The Respondent appeals against the decision of First-tier Tribunal Judge Bashir, promulgated on 30 March 2022, allowing the appeal.

Permission to appeal

4. Permission was granted by Upper Tribunal Judge Macleman on 25 October 2022 who stated:

> "2. Judge Bashir allowed the appeal, explaining at [33] that the appellant showed that he was "… in a durable relationship and as such a family member of a relevant EEA national by the specified date"; ...
> 3. The grounds contend that the finding was irrelevant because the appellant's residence had not been "facilitated", no such application having been made before 31 December 2020. That qualifies for debate."

The Appellant's grounds seeking permission to appeal

5. The grounds asserted that:

> "…b) The Appellant's application for status under Appendix EU was as the family member of a relevant EEA national. It Is submitted that the Appellant could not succeed as a spouse, as the marriage took place after the specified date (31 December 2020). The application was additionally considered under the durable partner route where it was also bound to fail. Appendix EU requires a "relevant document" as evidence that residence as a 'durable partner' had been facilitated under the EEA regulations. This stipulation transposed the requirements of Article 3.2(b) of Directive 2004/38/EC. No such document was held as no application for facilitation as a 'durable partner' had ever been made by the Appellant, prior to the specified date.
> c) It is submitted that the question of whether and how the relationship was in fact "durable" at any relevant date, as is found by the FTTJ at [32] and [33] of the determination, is of no consequence. The scheme rules could simply not be met by a durable partner whose residence had not been facilitated. This is reflected in Article 10(2) of the Withdrawal Agreement permitting the continued residence of a former documented Extended Family Member, with an additional transitional provision in Article 10(3) for those who had applied for such facilitation before 31 December 2020. This Appellant had not made any such application and therefore could not satisfy the requirements of Appendix EU."

The First-tier Tribunal decision

6. Judge Bashir made the following findings relevant to the issues before us:

> "26. … the Appellant is required to demonstrate that his partnership with his sponsor i.e. the relevant EEA citizen, was formed and was durable before 11:00pm on 31 December 2020, and that their partnership remained durable at the date of application i.e. on April 2021…
> 30. ... I find that they are in a genuine and subsisting relationship...
> 31. I now proceed to consider whether the Appellant and Sponsor were in a durable relationship. I have already found that they have not lived together in a relationship akin to marriage for at least two years. The dictionary definition of durable is that it has the ability to withstand pressure and the wear of time and that it is long-standing an enduring. The relationship should have a sense of permanency either through marriage or by virtue of the length of time and the parties should intend that the relationship will continue on a permanent basis.

32. …I find that the definition of a durable marriage in Annex 1 allows for relationships which have existed akin to marriage for less than two years. Consequently, in light of all the evidence before me I find that the appellant has demonstrated on a balance of probabilities that his relationship with the sponsor was durable by the specified date and continues to subsist as such which has also been demonstrated by their subsequent marriage.
33. In summary I find the appellant does not meet the requirements of a family member as a spouse by the specified date of 31 December 2020. However, I find that he was in a durable relationship having lived together akin to marriage since September 2020, … I find the Appellant has discharged the burden upon him to demonstrate he was in a durable relationship and as such was a family member of a relevant EEA national by the specified date."

Rule 24 notice

7. There was no Rule 24 notice. The Appellant's representatives filed a skeleton argument on 16 January 2024 which Ms Coen asked to deem a Rule 24 notice. The relevant parts are as follows:

"6. … The appellant maintains that he met the definition as a durable partner under Appendix EU, Annex 1 part (b)(ii)(bb)(aaa) of the immigration rules…
10. The issue before the UT is in what circumstances does an applicant, who does not have a residence card required, qualify under the Appendix EU, Annex 1 (b)(ii)(bb)(aaa). The appellant submits an alternative argument to the (aaa) submission, that the Tribunal should not follow the case of *Celik (EU exit; marriage; human rights) [2022] UKUT 00220 (IAC)*.
11. The Tribunal is not obliged to follow Celik, given that Celik is not a starred decision and as such it is not and was not binding on the FTT. The appellant's 4 arguments remain unresolved on matters which were not, it appears, argued before the UT in *Celik*.
12. The application is made under EU14 of appendix EU as the family member of a relevant EEA citizen. Family member is defined (n.b. only the relevant provisions have been quoted, <u>emphasis added</u>):
Family member of a relevant EEA citizen
A person who does not meet the definition of 'joining family member of a relevant sponsor' in this table, and who has satisfied the Secretary of State, including by the required evidence of family relationship, that they are (and for the relevant period have been), or (as the case may be) for the relevant period (or at the relevant time) they were:
…(ii) the applicant was the <u>durable partner</u> of the relevant EEA citizen before the specified date (the definition of 'durable partner' in this table being met before that date rather than at the date of application), and the partnership remained durable at the specified date; or
Durable partner is defined:
(a) the person is, or (as the case may be) for the relevant period was, in a durable relationship with a relevant EEA citizen, with the couple having lived together in a relationship akin to a marriage or civil partnership for at least two years (unless there is other significant evidence of the durable relationship); and
(b)…(ii) where the person is applying as the durable partner of a relevant sponsor… and does not hold a document of the type to which sub-paragraph (b)(i) above applies, and where:
(aa) the date of application is after the specified date; and
(bb) the person: (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…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; …

the Secretary of State is satisfied by evidence provided by the person that the partnership was formed and was durable before (in the case of a family member of a qualifying British citizen as described in sub-paragraph (a)(i)(bb) or (a)(iii) of that entry in this table) the date and time of withdrawal and otherwise before the specified date…;

13. The above is fiendish to follow. It is impenetrable. The rules are unclear as to what the requirements are. The appellant submits that it is permissible to read the rules so as to mean that an EEA document is not required in order to meet the requirement of the rules. That the rules are so unclear raises significant access to justice issues...

15. The appellant submits that the provisions of (aaa) are met in this case:

The person was not resident in the UK and Islands as the durable partner of a relevant EEA citizen on a basis which met the definition of 'family member of a relevant EEA citizen' unless the reason why, 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.

It is asserted the criteria are positive ones, i.e. if a person meets this criteria, then they do satisfy the definition.

The person was not resident in the UK as the durable partner of a relevant EEA citizen

The appellant argues that he was a durable partner, so on this plain phrase, she would not meet the rule. However:

unless the reason why 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

16. This qualification necessarily means that **if** a person **was** in a durable relationship as at 31/12/20, and they **did not** have a residence card, then the "unless" clause bites, with the consequence that they positively meet the criteria in (aaa). The final part of the definition is plainly met. The appellant had no other lawful basis of stay.

and they did not otherwise have a lawful basis of stay in the UK and Islands for that period

17. The appellant was only not resident as the durable partner pre-31/12/20 because of a lack of a document. The architecture of the rule broken down shows that the someone satisfies the provisions of (aaa) if the only reason why they were not resident as a durable partner was because they did not have the relevant document. The appellant submits that to interpret it in any different way renders the entire section of the rules redundant given the requirement for a document in (b)(i). It makes no sense for a document to be required in (b)(i) and (b)(ii), given the criteria are either (i) or (ii).

18. The rules in (b)(i) merely require a "relevant document", they say nothing as to the relationship being ongoing. However (b)(ii) does require [definition of joining family of sponsor]:

the Secretary of State is satisfied by evidence provided by the person that the partnership was formed and was durable before (in the case of a family member of a qualifying British citizen as described in sub-paragraph (a)(i)(bb) or (a)(iii) of that entry in this table) the date and time of withdrawal and otherwise before the specified date; and

19. This provision therefore requires someone to be in a durable relationship prior to the 31/12/20, the appellant submits therefore that when read as a whole, (b)(ii)(aaa) means:

a. Where someone was in a durable relationship pre-31/12/20;
b. Did not have a document showing as much;
c. Had no other lawful basis to stay
d. And that the relationship was durable prior to 31/12/20

20. It is submitted that the requirements of the rules are met.

21. In support of this understanding of the rules is that one of the requirements of a family member of an EEA national include being a durable partner at the specified date, and a spouse at the date of the application. This necessarily envisages a situation of a durable partnership converting into marriage. In such a particular

situation the appellant argues it is inconsistent to then also require a document as a durable partner to have been granted pre 31/12/20.
22. Further, and perhaps of more significance is that the respondent's own guidance for applicants, found at EU Settlement Scheme: evidence of relationship, plainly outlines the rules as not requiring a document when someone was in a durable relationship at the specified date (emphasis added):

If you're their unmarried (durable) partner

You must hold a relevant document issued to you under the EEA Regulations on the basis that you're the durable partner of an EEA or Swiss citizen or person of Northern Ireland.

A relevant document here includes:

a family permit

a residence card…

If you do not have a relevant document, you'll need to show evidence:

- of your relationship to your unmarried (durable) partner

- that your relationship existed by 31 December 2020

– that your relationship continues to exist on the date you apply

The above exert from this guidance shows that the requirement to have a document is not fatal to any application, provided that the evidence of the relationship can be shown to have existed as of 25 February 2020 and that it continues to exist. In other words, the Respondent tells applicants that they do not necessarily need a document under the EEA Regulations 2016 in order to qualify for status as a durable partner. This guidance is entirely consistent with the appellant's interpretation of the rules and is contrary to the respondent's.
23. … The respondent's only reason for refusal is that the appellant did not have a document before end of 31/12/20, however on their own guidance for applicants this is not necessary.
24. The appellant therefore submits that his interpretation of the requirements of Appendix EU is consistent with the respondent's own guidance to applicants. There is still no authority as to what Appendix EU, Annex 1 part (b)(ii)(bb)(aaa) means, it is therefore incumbent on the Tribunal to determine:

a. What it means; and

b. Whether the appellant meets those requirements.

Conclusion

25. It is submitted the correct interpretation of Appendix EU, Annex 1 part (b)(ii)(bb)(aaa) is as set out in the above submissions and that the appellant does indeed meet the requirements. It is submitted the finding of IJ Bashir was entirely relevant to the appellants case and did not err in law."

Oral submissions

8. Ms Coen sought to amend the skeleton argument in that the definition of durable partner contained within Appendix EU, Annex 1 part (b)(ii)(bb)(aaa) states (our emphasis added);

"(bb) The person

(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 entry for '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 (in the former case):

- the reason why they were not so resident is that they did not hold a relevant document as the durable partner of that relevant EEA citizen for that period; and

- they otherwise had a lawful basis of stay in the UK and Islands for that period"

9. Mr Diwnycz submitted that the rules are not met. The Appellant does not meet the description of a durable partner. The appeal is on all fours with the timetable as explained in *Celik*.

10. Ms Coen relied upon the skeleton argument as amended. The Respondent had not challenged the finding that the Appellant was a durable partner. The issue is the relevance of documentation. The findings were open to the Judge as summarised in the decision at [33] (see our [6] above). It is accepted that the Appellant is undocumented. The immigration rules changed in April 2023. The Respondent's EU Settlement guidance was last updated in September 2022

Discussion

11. It is trite law that we are bound by Court of Appeal decisions. Whether *Celik (EU exit; marriage; human rights) [2022] UKUT 00220 (IAC)* is starred or not is irrelevant as the decision was appealed. In *Celik v Secretary of State for the Home Department [2023] EWCA Civ 921* the Court stated at [68] (our emphasis):

> *"The Upper Tribunal was correct in deciding that the decision of 23 June 2021 was in accordance with the requirements of the rules in Appendix EU and rule EU11 and EU14 in particular. The fact is that the appellant was not a family member at the material time. He had not married an EU national before 11 p.m. on 31 December 2020.* ***He was not a durable partner within the meaning of Annex 1 to Appendix EU as he did not have a residence card as required and he did not have a lawful basis of stay in the United Kingdom (he was in the United Kingdom unlawfully)****. The appellant did not qualify for leave to remain under Appendix EU. There is no obligation to interpret or "read down" the relevant rules to reach a different result.*

12. It is clear from Appendix EU, Annex 1 part (b)(ii)(bb)(aaa) that in order to succeed under the rules, the Appellant had to have "*a lawful basis of stay in the UK and Islands for that period".*

13. The submission that the Appellant had a lawful basis of stay as he was a durable partner is unarguable as to be a durable partner there was a requirement that he had "*a lawful basis stay*" which it is conceded that he did not. The Respondent's guidance in the EU Settlement Scheme: evidence of relationship does not have the force of law. Contrary to that which is asserted in the skeleton argument at [13] the rules are not impenetrable. They are clear. The Appellant had no lawful basis to be in the United Kingdom at any relevant time and could not meet the immigration rules.

14. There was accordingly a material error of law.

15. Both representatives submitted that if we found that there was a material error of law, the appeal did not require remittal to the First-tier

Tribunal, as on the proper construction of the law, the appeal could not have succeeded.

Notice of Decision

16. The Judge did make a material error of law. We set aside that decision. We remake the decision and dismiss Mr Zefi's appeal.

Laurence Saffer

Deputy Judge of the Upper Tribunal
Immigration and Asylum Chamber
17 January 2024

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.