IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2022-006129

First-tier Tribunal No: EA/02362/2022

THE IMMIGRATION ACTS

Decision & Reasons Issued:

9th February 2024

Before

UPPER TRIBUNAL JUDGE KEBEDE

Between

DANIELLE CAROLYN LEVY
(no anonymity order made)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: No Appearance
For the Respondent: Mr T Lindsay, Senior Home Office Presenting Officer

Heard at Field House on 7 February 2024

DECISION AND REASONS

1. This is the re-making of the decision in the appellant's appeal, following the setting aside of the decision of the First-tier Tribunal which dismissed her appeal against the respondent's decision to refuse her application under the EU Settlement Scheme (EUSS).

2. The appellant is a national of the USA born on 18 February 1995. She made an application under the EUSS on 19 December 2021 as the durable partner of an EEA national, her partner Jonathan Asher Fischer, a German national who had pre-settled status/ limited leave in the UK under Part 1 of Appendix EU to the immigration rules. Her application was refused on 10 February 2022 on the grounds that she did not meet the eligibility requirements for settled status or pre-settled status under the EUSS as she had not provided sufficient evidence to confirm that she was a durable

partner of a relevant EEA citizen. It was noted that she had not been issued with a registration certificate, a family permit or a residence card under the EEA Regulations as the durable partner of her EEA national sponsor and she had not therefore provided a relevant document. The respondent considered that the requirements in EU11 and EU14 of Appendix EU to the immigration rules had therefore not been met.

3. The appellant appealed against that decision. The appeal was brought under the Immigration (Citizens' Rights Appeals) (EU Exit) Regulations 2020 on three grounds: that the respondent's decision was not in accordance with Appendix EU; that the decision contravened the EU Withdrawal Agreement; and that the decision placed the UK in breach of its obligations under Article 8 of the ECHR.

4. The appellant's appeal was heard by First-tier Tribunal Judge Wyman on 20 June 2022. The appellant's evidence before the judge was that she had first met Mr Fischer in April 2019 in Israel when he was visiting family and she was studying for a master's degree. They kept in touch whilst living in different countries and she then moved to the UK in October 2019, having entered as a visitor, and started living with Mr Fischer at his rented home in London. They travelled to various countries together and each time they returned to the UK she entered lawfully. Mr Fischer then purchased a property and they moved between the two properties together whilst it was being renovated. The appellant was, at the time of the hearing, pregnant with their first child which was due in December 2022.

5. The judge heard from the appellant and the sponsor, Mr Fischer. The appellant, when asked why she had not made her application before December 2021, said that she had received legal advice stating that she had to have evidence of two years' cohabitation prior to making an application. The judge noted that the property in which the appellant and sponsor lived was in Mr Fischer's sole name and that the appellant had entered into a pre-nuptial agreement with Mr Fischer. Mr Fischer's evidence was that he had inherited his family business when his father died and so he wanted to keep certain assets in his sole name. All the utility bills were in Mr Fischer's sole name. The judge noted that there was evidence that the couple had taken a number of trips together and that that was a sign of a relationship, but did not consider it to be evidence of cohabitation. She also took into account the fact that the appellant was pregnant. However she found overall that there was a lack of documentary evidence showing that the couple had been cohabiting for the past two years and she considered that the documents failed to meet the burden of proving the appellant's residency in the UK with Mr Fischer over the past two years. She accordingly dismissed the appeal, in a decision promulgated on 8 July 2022.

6. The appellant sought, and was granted, permission to appeal to the Upper Tribunal and the matter came before the Upper Tribunal at a hearing on 29 March 2023.

7. In a decision promulgated on 31 March 2023, Judge Wyman's decision was set aside on the following basis:

> "9. It was Ms Nolan's submission, in response to the appellant's first two grounds of appeal, that Judge Wyman had considered the oral evidence as well as the documentary evidence and had found that there was only limited documentary evidence linking the appellant to the sponsor's previous and current address. She submitted that the weight to be given to the evidence was a matter for the judge and she was entitled to conclude as she did. However it seems to us that, whilst the judge referred to the oral evidence, the indication at [28] of her decision is that she made her decision solely on the basis of the documentary evidence. There were various documents to which the judge referred, at [25] and [27], which were addressed to the appellant at the sponsor's address, including the landlord's

confirmation of her residing in the sponsor's flat since October 2019 and letters from her dentist, hospital, doctor, fitness centre/gym, sent to both addresses. Those documents were considered by the judge and were found to provide only limited evidence. However, no reasons were given by the judge as to why, when the appellant and sponsor had provided explanations for the other documents in the sponsor's sole name and for their current home being in the sponsor's sole name, and when no adverse credibility findings had been made against them, the weight of the evidence as a whole did not demonstrate that they were living together as a couple. We therefore find ourselves in agreement with Mr Slatter that it is therefore not clear why the judge rejected their claim to have been cohabiting as a couple since October 2019 if she had properly considered the oral evidence as well as the documentary evidence. In so far as the judge appears, at [28], to have required there to have been evidence covering a two year period, we also agree with Mr Slatter that the judge appeared not to have considered the fact that Annex 1 of Appendix EU allowed for the alternative of "other significant evidence of the durable relationship".

10. For all of these reasons we find the first two grounds to be made out and we consider that the judge materially erred in law in her approach to the evidence of cohabitation and durable relationship.

11. It is the respondent's case that the appellant could not succeed in meeting the requirements of Appendix EU in any event since the decision in the case of Celik was fatal to her application and that her appeal was bound to fail, as she did not hold a 'relevant document'. Ms Nolan submitted that, in that case, even if Judge Wyman's decision was set aside, the decision should simply be re-made by dismissing the appeal on that basis. We agree with Ms Nolan that in light of the decision in Celik the appellant could not succeed in her third ground which relies upon Article 18(1)(r) of the Withdrawal Agreement and the question of proportionality in the EU context. We note that the Upper Tribunal made it clear in Celik, at [61] to [66], that Article 18(1)(r) did not apply in such circumstances. We also agreed with Ms Nolan that the appellant could not succeed in her fourth ground which relied upon Article 8 in the absence of evidence to suggest that an Article 8 claim was made by the appellant together with her application under the EUSS, that Article 8 was relied upon in a section 120 notice, or that consent was given by the respondent for it to be argued before the First-tier Tribunal. Mr Slatter did not believe that there had been express consent given at that time but he submitted that it was raised in the skeleton argument before the First-tier Tribunal and that the Presenting Officer had made submissions on the matter and had thus impliedly consented to the matter being raised. We do not accept that that was sufficient to accept that consent had been given and that Article 8 had been properly before the Tribunal if there had been no prior application made on the basis of Article 8. Following the hearing, however, we were provided with a copy of the appellant's solicitor's letter accompanying her application which did indeed raise Article 8 grounds and it is therefore arguable that that was a matter before the Tribunal.

12. In any event, we would not be prepared simply to re-make the decision by dismissing the appeal on the basis suggested by Ms Nolan. We do not agree that the position is necessarily so clear cut. Indeed Ms Nolan accepted that there was arguably scope within Appendix EU for the appellant to meet the definition of a durable partner if she had been lawfully resident in the UK at the relevant time. That in turn led to some discussion about paragraph (b)(ii)(bb)(aaa) of Annex 1 of Appendix EU, to which the skeleton argument before Judge Wyman at [13] may have been referring. Mr Slatter referred to the recent unreported decision of the Upper Tribunal (UI-2022-002538) in that regard. There was also some discussion as to whether the appellant had been lawfully resident in the UK when she made her application, as there was no evidence of her status. Mr Slatter advised us that, as a non-visa national, she did not require a visa to enter the UK and was in the UK lawfully as she had most recently entered as a visitor on 5 December 2021 when she made her application. Clearly there was a question as to whether or not the appellant's presence in the UK as a visitor was sufficient for the purposes of Appendix EU. In addition, we were aware that permission had been granted to appeal the decision in Celik and the case was to be heard in the Court of Appeal shortly. We considered that, in all those circumstances, the most appropriate course would be for the appeal to be adjourned for a resumed hearing in order for the decision to be re-made with the benefit of further skeleton arguments

> addressing the relevant provisions of Appendix EU and the Withdrawal Agreement. Ms Nolan was content with that course, in the event that we found an error of law in Judge Wyman's decision.
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> 13. Accordingly, we set aside the judge's decision on the basis that she made material errors of law in her assessment of the evidence in regard to the question of whether the appellant was in a durable relationship with the sponsor. That assessment needs to be re-made and, if it is found that there was a durable relationship, a decision needs to be made as to whether the appellant can in any event meet the requirements of Appendix EU as the durable partner of her EEA national sponsor or otherwise succeed under the terms of the Withdrawal Agreement without having a 'relevant document'. The case will therefore be listed for a resumed hearing in the Upper Tribunal for the decision to be re-made, on a date after judgment is handed down in the Court of Appeal in Celik.. "

8. Directions were made at the end of that decision for the parties to file and serve skeleton arguments addressing the appellant's ability to meet the requirements of Appendix EU as the durable partner of her EEA national sponsor or otherwise succeed under the terms of the Withdrawal Agreement, and addressing the Article 8 matter.

9. At the same time, in a notice issued on 31 March 2023, the parties were informed that the appeal was stayed awaiting the judgement of the Court of Appeal in Celik v Secretary of State for the Home Department [2023] EWCA Civ 921. Judgement was given in Celik on 31 July 2023.

10. On 27 November 2023 the following direction were issued to the parties:

> "No later than 7 days before the date of the resumed hearing:
> - Both parties are to file with the Upper Tribunal and serve on the other party, a skeleton argument addressing:
> (a) the appellant's ability to meet the requirements of Appendix EU or otherwise succeed under the terms of the Withdrawal Agreement, in light of the judgement of the Court of appeal in Celik v Secretary of State for the Home Department [2023] EWCA Civ 921.
> (b) whether Article 8 was before the Tribunal
> - Both parties are to file with the Upper Tribunal and serve on the other party any further evidence upon which they intend to rely at the hearing."

11. On 18 January 2024 Notice of Hearing was issued to the parties in relation to today's hearing on 7 February 2024.

12. The matter then came before me for a resumed hearing. There was no appearance by or on behalf of the appellant and neither had there been any compliance with the directions issued, either those issued together with the decision of 31 March 2023, those issued on 27 November 2023 or the directions for filing further evidence in the Notice of Hearing sent out on 18 January 2024. I was satisfied that the various directions, as with the Notice of Hearing, had been properly served on the appellant and her legal representatives at the address/ email address provided and there were therefore no grounds for concluding that they were not aware of the hearing date. In the circumstances there was no reason why the appeal should not proceed in the appellant's absence and no unfairness in proceeding on that basis.

13. Mr Lindsay made submissions before me, addressing the Article 8 issue and the applicability of paragraph (b)(ii)(bb)(aaa) of the definition of "durable partner" in Annex 1 of Appendix EU.

Discussion

14.As indicated in the decision of 31 March 2023 setting aside Judge Wyman's decision, and in light of the Court of Appeal judgment in Celik, the appellant cannot succeed in her argument relying upon Article 18(1)(r) of the Withdrawal Agreement and the question of proportionality in the EU context, and cannot demonstrate that the respondent's decision breached any rights under the Withdrawal Agreement.

15.As for the Article 8 issue, Mr Lindsay relied upon the headnote to the decision in Mahmud (S. 85 NIAA 2002 - 'new matters' : Iran) [2017] UKUT 488 (IAC) which made it clear that Article 8 could not be raised as a ground of appeal unless previously considered by the Secretary of State in the context of a decision in section 82(1) of the Nationality, Immigration and Asylum Act 2002 or a statement made by the appellant under section 120, neither of which applied in this case. Indeed that is made clear in regulation 9 of The Immigration (Citizens' Rights Appeals) (EU Exit) Regulations 2020, from which the appellant's right of appeal arises. In such circumstances the appellant required the consent of the Secretary of State to rely upon Article 8 as a 'new matter', which Mr Lindsay confirmed had not been given and would not be given. The appellant would therefore need to make a separate, paid, application in order to be able to rely upon Article 8 grounds.

16.Turning to the issue of whether the appellant could meet the definition of "durable partner" in Annex 1 of Appendix EU, at paragraph (b)(ii)(bb)(aaa), for the purposes of being a "family member of a relevant EEA citizen", the Home Office Presenting Officer at the hearing before Judge Wyman had accepted that there was arguably scope within Appendix EU for the appellant to meet that definition if she had been lawfully resident in the UK at the relevant time. Mr Lindsay accepted that that was indeed the case. He submitted that the Upper Tribunal was considering, in another case, the issue of whether a visit visa counted as 'lawful residence' in the UK, and that the Secretary of State's position was that it did. In the circumstances, since the appellant was a citizen of the USA who, as a non-visa national, did not need to apply for a visitor visa and would have been given leave to enter the UK on arrival for a limited period, she had a lawful basis of stay in the UK and therefore could potentially meet the definition of "durable partner".

17.It was Mr Lindsay's submission, however, that the appellant was not able to demonstrate that she was in a durable relationship with a relevant EEA citizen as she was unable to show that she had been living together with Mr Fischer in a relationship akin to a marriage or civil partnership for at least two years prior to the specified date, 31 December 2020, the evidence being that they had only been living together in the UK since October 2019 and that she had only ever been in the UK as a visitor with no intention of making the UK her permanent home.

18.The appellant's case, as set out in her skeleton argument before the First-tier Tribunal, had been that she met the alternative to the requirement in paragraph (a) of the definition of "durable relationship", of "unless there is other significant evidence of the durable relationship". It was her case that there was evidence of a durable relationship prior to 31 December 2020, owing to the fact that she and Mr Fischer had travelled extensively together, they had purchased a family home together, they had moved home together and she was pregnant and expecting a child in December 2022. However, as Mr Lindsay properly submitted, the evidence was limited. Although the appellant and Mr Fischer had given details of their relationship in their witness statements, the evidence could not be tested under cross-examination given the non-attendance at the hearing, and the statements could therefore only carry limited weight. In the absence of the appellant and Mr Fischer at the hearing it was not known if the couple were still together. There was no evidence of the birth of their child and

no further evidence of the relationship that could potentially attest to the fact that there had been a durable relationship prior to the specified date.

19.As Mr Lindsay submitted, we simply do not know the appellant's case as there has been no response to any directions and no further evidence or information provided. In the absence of the parties, given the lack of information and the lacunae in the evidence to show that the appellant could demonstrate other significant evidence of a relationship that was durable before the specified date, it cannot be said that the appellant has shown that she is the family member, namely the durable partner, of a relevant EEA citizen. Accordingly the appellant has not been able to show that she meets the eligibility requirements for settled or pre-settled status in Appendix EU and has failed to show that the decision was not in accordance with the EUSS rules.

Notice of Decision

20.The Secretary of State's appeal having been allowed and the decision of the First-tier Tribunal having been set aside, the decision is re-made by dismissing the appellant's appeal.

Signed: S Kebede
Upper Tribunal Judge Kebede

Judge of the Upper Tribunal
Immigration and Asylum Chamber

7 February 2024