Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: UI-2022-002206
[EA/10691/2021]

THE IMMIGRATION ACTS

Heard at Field House
Ex tempore judgment
On 12 September 2022

Decision & Reasons Promulgated
On 24 November 2022

Before

UPPER TRIBUNAL JUDGE KOPIECZEK

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MR ANDREW SAM
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:
For the Appellant: Ms A Everett, Home Office Presenting Officer
For the Respondent: No appearance and not represented

DECISION AND REASONS

1. It is convenient to continue to refer to the parties as they were before the First-tier Tribunal ("FtT").

2. There was no appearance on behalf of the appellant who is not in the UK. The sponsor, his wife, did not appear. I am satisfied that notice of the hearing was given to the appellant. I note that the appeal before the FtT was decided 'on the papers'. In the circumstances, I decided to proceed

with the hearing in the absence of the appellant pursuant to rule 39 of the Tribunal Procedure (Upper Tribunal) Rules 2008.

3. The appellant is a citizen of Ghana. He made an application on 10 April 2021 for a family permit under the EU Settlement Scheme ("EUSS"). That application was refused on 23 June 2021 with reference to Annex 1 of Appendix EU of the Immigration Rules.

4. The appellant appealed pursuant to the Immigration (Citizens' Rights Appeals) (EU Exit) Regulations 2020. His appeal came before First-tier Tribunal Judge Cope at a hearing on 20 January 2022 following which the appeal was allowed. The Secretary of State appeals Judge Cope's decision.

5. The grounds of appeal advanced by the Secretary of State, in summary, are that Judge Cope erred in law because on the appellant's own evidence his relationship with his partner did not begin until July 2019 and he did not reside with his partner until 9 April 2021, which was after he had married. Therefore, as of the 'specified date' of 31 December 2020 the relationship had not been of two years' duration as required by the Immigration Rules.

6. It is further argued in the grounds that nothing in Judge Cope's decision could be said to amount to "significant evidence" of the appellant's durable relationship prior to their marriage in April 2021, given that they had never resided together at any point prior to their marriage. It is argued that their relationship up to that point could not be defined as one that is akin to marriage prior to the specified date. Thus, Judge Cope erred in finding that the appellant satisfied the definition of family member of a relevant EU national to be found in paragraph (a)(i)(bb) of Annex 1 of Appendix EU (Family Permit) of the Immigration Rules.

7. I summarise Judge Cope's decision. He identified the relevant legal framework with reference to the Withdrawal Agreement at Article 10 and he set out Annex 1 of Appendix EU (Family Permit). Annex 1 defines 'durable partner'. Judge Cope referred to the specified date by which an appellant or applicant must satisfy the requirement of being a durable partner; 2300 GMT on 31 December 2020.

8. He summarised the evidence and came to detailed findings. He concluded that the sponsor (the appellant's wife) was an EEA citizen (Hungary) and she was exercising Treaty rights in the United Kingdom at the relevant time. It also appears to have been accepted by the Secretary of State that she and the appellant married and that they have a family relationship.

9. With reference to the relevant legislation, Judge Cope concluded at [41] that the appellant does not qualify for an EUSS Family Permit as the spouse of an EEA citizen within the definition of paragraph (a)(i)(aa) of Annex 1. However, he then went on to consider the alternative definition of 'spouse' to be found in subparagraph (a)(i)(bb) of Annex 1. He noted

that that covered the situation where the applicant and the EEA citizen are married but only after the specified date and the marriage is subsisting at the date of application. He also identified the fact that such a spouse could succeed if the applicant was the durable partner of the EEA citizen before and on the specified date.

10. Having considered aspects of the Withdrawal Agreement and the issue arising in relation to when the two year period needs to be referenced by, he concluded at [53] that whenever the two year period runs does not avail the appellant and his spouse because there was no suggestion that they lived together for a two year period before the marriage.

11. He then considered another aspect of the legal framework by which the appellant could succeed in his appeal, commencing at [56], stating that the wording of the Withdrawal Agreement at Article 10(4) provided some element of flexibility. The alternative situation he referred to is of an applicant being able to provide "other significant evidence" of the durable relationship, as an alternative to the two year period to which I have referred.

12. He went on at [59] to point out that he had a considerable amount of documentary evidence provided by the appellant. He found that the appellant had settled in Hungary. He had been provided with certain Hungarian documentation to that effect and the address registration card amongst that documentation showed the appellant living at the same address as his spouse. He concluded that that gave some support for the contention that it was a genuine, and thus durable, relationship with a Hungarian citizen.

13. He referred to travel documentation in the form of airline itineraries relating to visits paid by the appellant's spouse and her mother to Ghana in 2016 and visits by the appellant's spouse herself in 2019. He again concluded that that provided some support as to the substance of the relationship. He referred to a very considerable number of photographs in a variety of situations likely to be, he found, in Hungary or Ghana. He decided that the evidential weight of those photographs was that they showed considerable personal interaction between the appellant and his wife in different situations including in different countries and over a period of time, given the changes shown in clothing, hairstyles and overall context.

14. He then went on to refer to a further set of electronic documents which were screenshots of telephone calls between the parties. He concluded that that showed significant telephone contact between the couple from October 2020 onwards. He noted that there was no challenge by the respondent to the authenticity of that documentation and he, for his part, concluded that there was nothing in it which gave him cause for concern.

15. He also referred in passing to the EUSS Family Permit application form and the grounds of appeal, which, he acknowledged, could be seen as purely

"self-serving statements" but they were nonetheless evidence, he found, which could and should be taken into account and given appropriate weight.

16. He concluded that significant weight should be given to what the appellant himself said about their relationship. He went on to find that there was no reason not to accept the explanation put forward by the appellant, namely that they had wanted to marry in 2020 but were not able to because of issues arising out of the coronavirus pandemic. He noted that in the grounds of appeal letter he said he was unable to travel to Ghana to obtain a statutory declaration concerning his marital status because of the cancellation of flights.

17. He went on to refer to the fact of their marriage as being something that emphasised the quality of their relationship and that it had been a durable relationship before and until the marriage took place and in reflecting on the evidence, Judge Cope reminded himself at [73] of the standard of proof being a balance of probabilities and then at [74] said as follows:

> "On looking at all the documentation as a whole including the photographs and telephone records, and applying this standard of proof, I am satisfied on a balance of probabilities that this documentation amounts to significant evidence of a durable partnership."

He then turned to the Withdrawal Agreement and specifically to Article 10.

18. He concluded at [77] that in relation to Article 10(4) the appellant and his wife were not able to succeed in their application or in the appeal by saying that the adverse decision breached their rights under the Withdrawal Agreement, deciding that the appeal on that ground had to be dismissed.

19. However, he went on to refer to the other ground of appeal, namely the one that permits an appeal to succeed on the basis that the decision is not in accordance with the Immigration Rules. Analysing the position in that context, he found that unlike the definitions in Article 10 of the Withdrawal Agreement, which only cover the situation of a person who is either a spouse or a durable partner before the end of the transition period and at the date of application for entry into the UK, the definition of a family member of the relevant EEA citizen in Annex 1 covers the situation where the applicant was a durable partner before the end of the transition period but has become the spouse of the relevant EEA citizen by the date of the application for entry.

20. At [83] he reflected on his findings, namely that he had found that the appellant and his wife have been durable partners for the purposes of the Withdrawal Agreement and Appendix EU (Family Permit) up until the time that they got married in Hungary in April 2021, the marriage having taken place after the specified date and before the current application for an EUSS Family Permit made on 10 April 2021.

21. In those circumstances, he concluded that he was satisfied that the appellant is a family member of the sponsor as the relevant EEA citizen in accordance with the definition of paragraph (a)(i)(bb) of Annex 1 and thus meets the eligibility requirements of paragraph FP6(1)(b) of Appendix EU (Family Permit) for an EUSS Family Permit to be issued to him, paragraph FP3 of that Appendix making it clear that where the conditions are met, the issue of such a family permit is mandatory. He thus allowed the appeal under the Immigration Rules, although he referred in his concluding paragraph to allowing the appeal on immigration law grounds (presumably a slip of the pen) but he dismissed the appeal on European Union law grounds.

22. So far as the respondent's grounds of appeal are concerned and Ms Everett's reliance on them, the critical thing, it seems to me, is to reflect on paragraph 1(f) of the grounds, which contends that there is nothing referred to by Judge Cope that would amount to "significant evidence of the appellant's durable relationship prior to their marriage". In fact, as it seems to me is clearly demonstrated by my recital of Judge Cope's analysis, there was a comprehensive assessment of the evidence which led to the conclusion that there was significant evidence of the durable relationship. That evidence was analysed in detail and firm conclusions were reached in respect of all of it.

23. It seems to me to be pertinent to question, and Ms Everett I think was right to raise the question rhetorically, whether the grounds amount only to disagreement with Judge Cope's conclusions on the facts. The answer to that rhetorical question is yes. I am satisfied that the grounds are mere disagreement with Judge Cope's conclusions. An analysis of his reasons makes it clear that he did find that there was significant other evidence of the durable relationship and in those circumstances he was bound to allow the appeal. Accordingly, I am not satisfied that there is any error of law in his decision.

24. Accordingly, the Secretary of State's appeal against the First-tier Tribunal's decision must be dismissed and the decision to allow the appeal stands.

A.M. Kopieczek
Upper Tribunal Judge Kopieczek 16/10/2022