Upper Tribunal
(Immigration and Asylum Chamber) Appeal Numbers: UI-2022-000224
EA/12075/2021

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 6 July 2022	**On 7 September 2022**

Before

UPPER TRIBUNAL JUDGE McWILLIAM

Between

FJORALD MUCAJ
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr M McGarvey, Counsel instructed by Wimbledon Solicitors
For the Respondent: Ms S Nolan, Home Office Presenting Office

DECISION AND REASONS

1. The Appellant is a citizen of Albania. His date of birth is 8 July 1994.

2. The Appellant came to the United Kingdom illegally in November 2018. He remained. He met Sabina Nikaj, a Greek national, in April 2019 whilst she was living in Greece. She came to the UK in March 2020 to meet the Appellant. She returned to Greece. She came back to the UK on 19 September 2020 and the couple started to live together. In October 2020

they decided to get married but they were unable to do so as a result of the global pandemic and Covid regulations. The Appellant's case is that he and his wife were unable to get married before 31 December 2020. They eventually married on 23 April 2021. The Appellant then made an application under the EU Settlement Scheme (EUSS). The SSHD refused the application on the basis that the Appellant did not according to the decision maker meet the requirements of Appendix EU. The decision maker stated that there was insufficient evidence to confirm that the Appellant is the spouse of a relevant EEA citizen during the qualifying period which ended on the specified date of 31 December 2020. The decision maker considered whether the Appellant is a durable partner within Appendix EU and decided that because the Appellant has not been issued with a family permit or residence card under the EEA Regulations as the durable partner of an EEA national he does not meet the requirements for settled status. The decision maker considered whether the Appellant meets the eligibility requirements for pre-settled status under the EUSS, however for the same reasons found that he does not.

3. The matter came before the First-tier Tribunal on 16 December 2021. The hearing proceeded by way of submissions only. The judge did not accept that the Appellant "has provided cogent evidence that his marriage to his Sponsor was delayed because of the Covid-19 lockdown ([19])". The judge took into account that the Appellant and his partner gave notice of their intention to register their marriage on 21 October 2021. The judge said at [21]:-

> "Taking into account the Appellant could not book his marriage ceremony no earlier than 28 days after the notice of marriage appointment, it must have been quite evident to the appellant at that point that he was sailing very close to the specified date when they were given the date for the notice of marriage".

4. The judge found that there was no evidence concerning when the Home Office confirmed that the Appellant could proceed with his marriage to the Sponsor but the judge was aware that the Appellant could not apply for his marriage ceremony without confirmation from the Home Office. The judge said that he was aware that the third national lockdown did not come into place until 6 January 2021. The judge concluded that he was "not persuaded from the evidence before me, that the Appellant and his partner's marriage was delayed by Covid-19 lockdown".

5. The judge said the following at paragraph [24]:-

> "24. It is not in dispute that the Appellant and his partner has not been in a relationship akin to marriage for two years and I find the Appellant have provided no 'significant evidence of the durable relationship'. There is no guidance as to what is meant by 'significant evidence of the durable relationship' but I would expect it to be more than just cohabiting with an intention to marry, as evidence of cohabiting is only one of the elements

which would assist in reaching a finding on the issue of the durability of a relationship. For example, there is no evidence of a joint bank account and there is no evidence that the Appellant's name is on tenancy agreement where they live. Accordingly I am not satisfied that the Appellant meets the requirements for durable relationship".

6. The judge took into account the EU Settlement Scheme: EU, other EEA and Swiss citizens and their family members, version 15.0, 9 December 2021 ("the policy") relied on by the Appellant which reads as follows:-

> "30 June 2021 is the end of the grace period, during which an EEA citizen lawfully resides in the UK by virtue of the EEA Regulations at the end of the transition period at 11 p.m. on 31 December 2020 (or with the right of permanent residence by virtue of them) and their family members could continue to rely on those EU law rights pending the final outcome of an application (and of any appeal) to the EU Settlement Scheme made by them by 30 June 2021. For the time being, following 30 June 2021, you will give applicants the benefit of any doubt in considering whether, in light of information provided with the application, there are reasonable grounds for their failure to meet the deadline applicable to them under the EU Settlement Scheme, unless this would not be reasonable in light of the particular circumstances of the case. Any change in approach will be reflected in a revision of this guidance".

7. In respect of the policy the judge stated as follows:-

> "26. I can see the policy guidance gives the Respondent a discretion in relation to applications made after 30 June 2021, but the Appellant's application was not made after 30 June 2021 deadline, which would have required the Respondent to consider if there were 'reasonable grounds', for the failure to meet the 30 June 2021 deadline".

8. The judge found that the guidance did not assist the Appellant and in any event taking into account Begum v Secretary of State for the Home Department [2021] UKSC 7, the Tribunal cannot generally decide how a statutory discretion conferred upon the primary decision maker ought to have been exercised.

9. The grounds of appeal assert that there was a misapplication of Begum. It is asserted that Appendix EU provides an alternative way to qualify instead of holding a relevant document under the durable partner route. It is also asserted that the policy "is not entirely clear as to whether the reasonable grounds for failure to meet the deadline means the deadline for making the application or continuing to rely on EU right". It is asserted that the Tribunal did not consider the appeal under Article 8 ECHR or Article 10 of the withdrawal agreement (WA).

The Rule 24 Response

10. It is not intended to develop any policy which creates a new category or provisions that may be more favourable than those set out in EUSS and Appendix EU. It was accepted by the Appellant that he has not been in a durable relationship for the requisite period of two years.

11. It was open to the judge to find that the Appellant's marriage was not delayed as a result of Covid-19 regulations.

12. The purpose of the WA with regards to persons within the UK is to preserve and protect the rights of documented EU citizens and their family members who are able to establish their eligibility as set out in the WA which has been implemented under Appendix EU within the Immigration Rules (IR). The WA sets out the circumstances in which a previously recognised right will be facilitated where such rights existed and were recognised by the SSHD prior to the date of withdrawal (31 December 2020). It does not, as argued by the Appellant, generate rights for undocumented persons which only crystallise for the first time after the transition period had passed (see Articles 9 and 10).

13. In order for the Appellant who is present in the UK to be within the remit and the benefits of the WA they need to satisfy one of the following criteria within Article 10, namely:-

- They are persons falling under Article 3(2)(b) of the Free Movement Directive and their residence was facilitated by the UK via the issue of a residence document under the Immigration (European Economic Area) Regulations 2016 before the end of the transition period, provided that they continue to reside in the UK thereafter: Article 10(2);

- They are persons falling under Article 3(2)(b) of the Free Movement Directive and they had applied for facilitation by the UK of entry and residence (i.e. they made a valid application for a family permit or a residence document under the Immigration (European Economic Area) Regulations 2016) before the end of the transition period and either the Home Office decided the application was successful, or the person was successful at appeal, after the end of the transition period: Article 10(3).

14. The Appellant does not come within the scope of the WA. Any reliance on Article 18(1)(r) is misconceived. The Appellant cannot rely upon it to make good any deficiencies in his circumstances given that he has never been previously documented under the EEA Regulations.

15. The Appellant has failed to establish that there was any provision within the guidance which extended the UK's exit from the EU and as such its treaties other than that specified within Appendix EU/withdrawal agreement. The Appellant's application was submitted after the end of

the transition period, therefore he would be subject to the above requirements and those set out within Appendix EU.

16. If the Appellant was seeking to submit an Article 8 claim at the hearing that was not raised previously, then any failure by the judge to address the matter would not be material as consent would have been required from the SSHD before it could be pleaded (Hydar (s.120 response; s.85 "new matter", Birch) [2021] UKUT 00176. There was no representation on behalf of the SSHD at the hearing and it has not been evidenced how such consent was granted.

17. Whilst discretions have previously existed within the EEA Regulations no such discretion is present under Appendix EU or the withdrawal agreement with regard to eligibility at the date of transition. As noted in Secretary of State for the Home Department v Rahman and Others (Directive 2004/38/EC) Case C-83/11 the Grand Chamber opined that a state has a wide margin of discretion in what specific requirements are put in place for an Appellant to meet in order to establish an EU right.

The Appellant's Skeleton Argument 1

18. The Appellant relies on the Respondent's policy, EU Settlement Scheme: EU, other EEA and Swiss citizens and their family members, version 11 published for Home Office staff on 6 April 2021 (archived 19 May 2021). The relevant paragraph is repeated in the current policy version 13 published on 25 July 2021. The policy does not state or clearly state that the family member was also required to be in the UK by 31 December 2020. The policy states that family members could continue to rely on those EU law rights pending the outcome of an application (and any appeal) to the EUSS made by 30 June 2021. The Appellant made his application in reliance on the policy while it is acknowledged that he was not a family member under the WA on the relevant date, he was during the grace period. The policy states that only the EEA national needs to be lawfully resident by virtue of the EEA Regulations on the relevant date. The Appellant was permitted to make the application under the scheme within the grace period. The application was not rejected outright by the Respondent.

19. It is submitted that in this case there were reasonable grounds for failing to meet the deadline. The local register office was closed as a result of the pandemic. As a matter of general principle of law and justice there should be discretion to excuse a person in the situation of the Appellant for shortcomings and delays which are wholly out of his control.

20. Alternatively the Appellant relies on Article 10(3) of the WA agreement.

Findings

21. I have dealt briefly with the arguments raised in skeleton argument 1 because Mr McGarvey did not address me on the issues therein, seeking to

rely on a more recent argument relating to Article 8. The arguments were, in any event, insufficiently developed.

22. EU free movement rights lost both direct effect and enforceability in the United Kingdom from 11 pm on 31 December 2020. The Immigration and Social Security Coordination (EU Withdrawal) Act 2020 ("ISSCA 2000") revokes the EEA Regulations from that point from continuing to have effect as retained EU law pursuant to sections 2 and 4 of the European Union Withdrawal Act 2018 ("the 2018 Act"). The available grounds of appeal against a decision under the EUSS are set out in reg. 8 (subject to reg. 9) of the Immigration (Citizens' Rights Appeals) (EU Exit) Regulations 2020 ("the 2020 Regulations"). There is no right of appeal against an EUSS decision on EU grounds.

23. The judge did not find that the Appellant had established that his marriage was delayed as a result of Covid Regulations. There is no discrete challenge and in respect of the timeline, it was open to the judge to reach this conclusion. In any event, the finding is not material to the outcome of the appeal neither is the finding that the Appellant and his wife were not in a durable relationship at the material time. There is no challenge to this finding. While there is some flexibility in respect of the length of a relationship that can be considered durable, Appendix EU (Annex 1) requires the Appellant to be documented. This Appellant is not documented at the relevant date, 31 December 2020. It was not necessary for the judge to consider durability of the relationship, in the context of whether it is genuine or the reasons for not marrying before the relevant date because the Appellant could not succeed under Appendix EU without being documented. The decision maker can consider whether a relationship is durable if less than two years. However, in respect of documentation, the requirement is mandatory. In so far as the Appellant suggests there was any discretion in respect of this, the argument is misconceived. The Appellant's appeal could not succeed under the IR.

24. The Appellant's reliance on the WA similarly fails. On the face of the WA, the Appellant does not come within its scope because he is not documented (Article 10). In any event, with reference to Article 18 (r), it is difficult to understand how it could be considered disproportionate to refuse the application when it is clear the Appellant cannot succeed under the IR. While the Appellant's case is that the delay in marrying was caused by factors out of his control, even if this had been accepted by the judge, it is not an answer to why the Appellant did not make an application as a durable partner before transition. This was an option open to him. Had he made an application and it had been granted, the Appellant would have been a durable partner at the relevant time and documented for the purposes of Appendix EU. In so far as the Appellant's case presents him as a victim of circumstances out of his control, this mischaracterises his position. There is no properly identified unfairness.

25. In respect of the application of the policy, it does not apply to the Appellant. The policy relied on applies where an individual had lawful

rights by virtue of the EEA Regulations at the end of the transition period at 11 p.m. on 31 December 2020. This Appellant asserts that he was a durable partner, however, the right under the EEA Regulations was not an automatically recognised but subject to discretion by the SSHD. In this case there had been no discretion exercised because there had been no application made under the EEA Regulations. While the judge rejected the argument concerning the policy on the basis of the date of the application and the grace period, the fundamental problem with the application of this policy or any other, is that the Appellant was not a documented durable partner at the end of the transition period and the legislation is not intended to grant rights but to preserve them. The Appellant has not shown that the policy identified by the judge or any other policy would support that his appeal should be allowed.

26. Mr McGarvey relied on his 10 page skeleton argument. The main thrust of which is that the European (Union) Withdrawal Act 2020 and The Immigration (Citizen's Rights Appeals) (EU Exit) Regulations are not compatible with the ECHR. Contrary to Mrs Nolan's submissions, the SSHD has conceded in previous appeals before the UT that the appeal regime under s.8 and s.9 of the Immigration (Citizen's Rights Appeals) (EU Exit) Regulations 2020 enable an appellant to rely on Article 8. However, in the absence of a s120 notice, the Appellant needs the consent of the SSHD to raise a new matter. There was no consent given to this Appellant. Any failure by the judge to address Article 8 is not material because the Appellant had not obtained consent from the SSHD: Hydar (s.120 response; s.85 "new matter", Birch) [2021] UKUT 00176. The judge did not err in respect of Article 8. Should the Appellant wish to make an application on human rights grounds, this is open to him.

27. The judge did not err in law. The decision to dismiss the Appellant's appeal is maintained.

Notice of Decision

The appeal is dismissed.

Signed *Joanna McWilliam* Date 25 July 2022

Upper Tribunal Judge McWilliam