IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2022-003698
First-tier Tribunal No:
EA/11033/2021

THE IMMIGRATION ACTS

Heard at Bradford IAC
On the 28 November 2022

Decision & Reasons Promulgated
On the 08 February 2023

Before

UPPER TRIBUNAL JUDGE HANSON

Between

KOZMA PRIFTI
(Anonymity direction not made)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Ms C Grubb instructed by Qualified Legal Solicitors.
For the Respondent: Mr Diwnycz, a Senior Home Office Presenting Officer.

DECISION AND REASONS

1. The appellant, a citizen of Albania, appeals with permission a decision of First-tier Tribunal Judge Heaven ('the Judge'), promulgated on 30 June 2022, in which the Judge dismissed the appellant's appeal

against the refusal of his application for settled status under the EU Settlement Scheme ('EUSS').

2. The application made on 26 December 2020 is based on his relationship with his partner, a Romanian national, who he later married on 27 July 2021. The Judge records they intended to marry much earlier but that was delayed due to the Covid-19 pandemic and that the couple met in May 2020 and moved in together in August 2020.

3. It is also not disputed that the appellant was not living with his EEA partner for two years prior to the application. The Secretary of State's position was that there was insufficient to evidence of a durable relationship with the EEA partner prior to 31 December 2020 and that the applicant did not have a valid family permit or residence card such that he did not satisfy the requirements of EU 11 of Appendix EU of the Immigration Rules.

4. It was submitted before the Judge that the case succeeded or failed on whether it was found the appellant and his wife are in a durable relationship [8].

5. Having considered the written and oral evidence and submissions the Judge sets out findings of fact from [14] of the decision under challenge.

6. The core finding of the Judge at [14] is that having considered all the evidence the Judge was not satisfied that the appellant and his partner were in a genuine and subsisting durable relationship at the time the application was made, and the subsequent period of residence relied upon, and that the appellant could not meet the requirements of Appendix EU.

7. The Judge notes that the evidence of the appellant and his partner was not without inconsistencies, stated as crucially being in relation to when marriage was discussed which negatively affected the appellant's credibility [15].

8. The Judge finds of significance the failure of the appellant to provide all the documentary evidence that would support his account of cohabitation at the date of the application and beyond. The Judge finds that given the length of time of the alleged cohabitation and marriage it was reasonable to expect significant further documentary proof and corroborative evidence of a durable relationship being placed before the Tribunal especially when the Judge was told such documents exist. The Judge finds that they had not been provided and in the absence of a satisfactory explanation this was a significant and weighty factor affecting the appellant's credibility [16].

9. The appellant sought permission to appeal asserting, inter alia, the Judge failed to properly direct her mind the appropriate test for a durable relationship and failed to apply the correct test. The grounds also assert Judge should not have made findings in relation to the genuineness of the relationship as it had not been raised as being a sham marriage in the refusal or suggested the relationship was not genuine.

10. The grounds also assert the Judge erred when finding the appellant did not have a relevant document as it was submitted that the application made on 26 December 2020 was sufficient. The grounds plead the requirement for the appellant have a residence document issued under the EEA Regulations is a breach of the Withdrawal Agreement and that those who were in a durable relationship with a qualifying EU citizen prior to the end of the transition period and had either had their residence facilitated in accordance with national legislation or who had applied for facilitation of entry prior to 31 December 2020 are entitled to a right of residence in the UK subject to Article 18 of the Withdrawal Agreement.

11. At [17] of the ground seeking permission to appeal it is written:

> 17. The basis for refusing the Appellant's application on this ground is solely because the Appellant use the wrong form which is clearly imposing an unnecessary administrative burden and expanding the purpose of the application procedure beyond simply verifying whether the applicant is entitled to the residents rights contrary to Article 18 (a) and (e) of the Withdrawal Agreement respectively. The Application under Appendix EU made before 31 December 2020 should suffice and the requirement for a separate application under the EEA Regulations should be supplied in accordance with section 7A of the European Union (Withdrawal Agreement) Act 2018 in conjunction with Article 4 of the Withdrawal Agreement.

12. Permission to appeal was granted by another judge of the First-tier Tribunal on 27 July 2022.

Discussion

13. It soon became clear following the publication of the Withdrawal Agreement, made as a result of the withdrawal of the UK from the European Union, that the route available for extended family members of an EEA national exercising treaty rights in the UK to apply for and obtain a residence card on that basis had been withdrawn. This is not surprising as whether a person was so entitled was a matter of domestic law and not a matter of EU law.

14. It also became clear following the publication of Appendix EU of the Immigration Rules that a number decision makers were having difficulty in understanding and properly applying the principles underpinning the Withdrawal Agreement.

15. The underlying philosophy of the Withdrawal Agreement is that it froze in time rights and remedies available to EU citizens and their family members that existed at 11 PM on the 31 December 2020 under EU law. It created no new remedies, and it is not permissible to interpret the provisions of the Withdrawal Agreement so as to create any new rights.

16. To provide guidance to decision-makers the Upper Tribunal handed down two reported decisions. The first of these is Celik v Secretary of State for the Home Department [2022] UKUT 220 (IAC) the headnote of which reads:

> *(1) A person (P) in a durable relationship in the United Kingdom with an EU citizen has as such no substantive rights under the EU Withdrawal Agreement, unless P's entry and residence were being facilitated before 11pm GMT on 31 December 2020 or P had applied for such facilitation before that time.*
>
> *(2) Where P has no such substantive right, P cannot invoke the concept of proportionality in Article 18.1(r) of the Withdrawal Agreement or the principle of fairness, in order to succeed in an appeal under the Immigration (Citizens' Rights) (EU Exit) Regulations 2020 ("the 2020 Regulations"). That includes the situation where it is likely that P would have been able to secure a date to marry the EU citizen before the time mentioned in paragraph (1) above, but for the Covid-19 pandemic.*
>
> *(3) Regulation 9(4) of the 2020 Regulations confers a power on the First-tier Tribunal to consider a human rights ground of appeal, subject to the prohibition imposed by regulation 9(5) upon the Tribunal considering a new matter without the consent of the Secretary of State.*

17. The first two points of the headnote are particularly clear and entirely unhelpful to the appellant. They say that a person in a durable relationship cannot succeed under the Withdrawal Agreement unless an application was made before the specified time and where it has not been done in that way the concept of proportionality under Article 18(1) of the Withdrawal Agreement is of no assistance and cannot be considered.

18. It is not enough therefore for an individual to say they are in a durable relationship with an EU national and therefore should be granted the right to reside in the United Kingdom. That was never the position under the Immigration (EEA) Regulations 2016 (as amended) ('the 2016 Regulations') which required an individual who applied for a Residence Card in such capacity to establish not only their relationship with the EEA national, but also that they could satisfy the requirement for dependency to meet their essential needs and/or membership of the EEA nationals household, and, even if they established those, that the Secretary of State having exercised her discretionary power to grant or refuse such an application, had exercised discretion in the applicant's favour.

19. A number of arguments made where an individual applied for a family permit under the EUSS to which they were not legally entitled, as they were not family members, that the use of the wrong application form should make no difference is an argument was considered by the Upper Tribunal in the other reported determination of Batool and Others (other family members: EU exit) [2022] UKUT 00219, the head note of which reads:

> *(1) An extended (oka other) family member whose entry and residence was not being facilitated by the United Kingdom before 11pm GMT on 31 December 2020 and who had not applied for facilitation of entry and residence before that time, cannot rely upon the Withdrawal Agreement or the immigration rules in order to succeed in an appeal under the Immigration (Citizens' Rights Appeals) (EU Exit) Regulations 2020.*

(2) Such a person has no right to have any application they have made for settlement as a family member treated as an application for facilitation and residence as an extended/other family member.

20. The refusal, against which the appellant appealed in the current case, dated 27 January 2021, acknowledged the application under the EU Settlement Scheme but refused the same for the following reason:

> You have applied with your partner Raluca Andreea Ilie as your sponsor. Ms Ilie is a Rumania national.
>
> Careful consideration has been given as to whether you meet the eligibility requirements for settled status under the EU Settlement Scheme. The relevant requirements set out in rule EU 11 of Appendix EU to the Immigration Rules.
>
> You state that you are a durable partner of a relevant EEA citizen. However, you have not provided any evidence to confirm this. The reasons for this are explained below.
>
> The required evidence of family relationship for a durable partner of a relevant EEA citizen is a valid family permit or residence card issued under the EEA Regulations (or by the Bailiwick of Jersey, the Bailiwick of Guernsey or the Isle of Man) as the durable partner of that EEA citizen and, where the applicant does not have a documented right of permanent residence, evidence which satisfies the Secretary of State that the durable partnership continues to subsist.
>
> Home Office records do not show that you have been issued with a family permit or residence card under the EEA Regulations as a durable partner of the EEA national and you have not provided a relevant document issued on this basis by any of the Islands.
>
> In order to meet the definition of a durable partner set out in Appendix 1 of Appendix EU to the Immigration Rules, you need to demonstrate that you are a relative of your sponsor as claimed and that you hold a valid relevant document.
>
> Until you hold such a document you cannot be granted leave under the EU Settlement Scheme as the durable partner of a relevant EEA citizen.
>
> Therefore, you do not meet the requirements for settled status as a family member of a relevant EEA citizen..
>
> It is considered that the information available does not show that you meet the eligibility requirements for settled status set out in rule EU 11 of Appendix EU to the Immigration Rules. This is for the reasons explained above. Therefore, in line with rule EU6, we are unable to grant you settled status.
>
> Careful consideration has been given as to whether you meet the eligibility requirements for free settled status under the EU Settlement Scheme. The relevant requirements as set out in rule EU 14 of Appendix EU to the Immigration Rules.
>
> However, for the reasons already explained above, you have not provided any evidence to confirm that you are a durable partner of a relevant EEA citizen.
>
> Therefore, you do not meet the requirements for free settled status on this basis.

> It is considered that the information available does not show that you meet the eligibility requirements for settled status set out in rule EU 11 or pre-settled status set out in rule EU 14 of Appendix EU to the Immigration Rules. This is for the reasons explained above. Therefore, your application has been refused under rule EU6.

21. At [61] of Batool there is confirmation of the parallel schemes that existed between 30 March 2019 and 31 December 2020 which meant that EU citizens and their family members could apply either under the 2016 Regulations or the EUSS, and reference to publicly available guidance which clearly specified a person would have to be a close family member to enable them to qualify under the EUSS family permit scheme until 31 December 2020.

22. I accept, as found in Batool at [63], that there is evidence from the guidance on the website that persons were told in plain terms that family members could apply and that extended family members, such as the appellant could apply for an EEA family permit but not under the EUSS.

23. What is clear is that to fall within the scope of Article 10 of the Withdrawal Agreement a person asserting a claim to be an extended family member must have applied for facilitation of entry and residence before the end of the transition period, meaning they must have made a valid application for leave in such capacity before 11 PM 31 December 2020. A reading of the application form made, considered, and refused in this case shows it is clear that the application was made in the capacity of a family member. It was not a valid application for facilitation of entry and residence as an extended family members of the EEA national pursuant to the 2016 Regulations.

24. The suggestion that although the application was on the wrong form it should have been treated as being an application under the 2016 Regulations was a matter specifically considered by the Tribunal in Batool from [69] where specific consideration was given to the argument relating to Article 18 of the Withdrawal Agreement. At [71] of Batool the Upper Tribunal found that the Secretary of State had provided applicants with relevant information in a simple form including highlighting the crucial distinction between close family members and extended family members, a distinction that is enshrined in EU law and not as a consequence of the United Kingdom leaving the EU, and that Article 18 was no authority for the proposition that the decision-maker should have treated one kind of application as an entirely different kind of application.

25. In anticipation of there being consideration of Batool, Ms Grubb submitted by reference to the Upper Tribunal Immigration and Asylum Chamber Guidance Note 2011 No 2, that the Upper Tribunal is not bound by its previous decisions. This is the avenue by which a number of representatives are seeking to circumvent the guidance provided in both Celik and Batool. Paragraph 10 of the guidance note reads:

> 10. In the event of diverging jurisprudence on an important question of law, a decision of a panel of the Chamber may be reported as a starred

> case, when it will become binding2. In the absence of a starred case the common law doctrine of judicial precedent shall not apply and decisions of the AIT and one constitution of the Chamber do not as a matter of law bind later constitutions. Judges of the First-tier Tribunal Immigration and Asylum Chamber are, however, expected to follow the law set out in reported cases, unless persuaded that the decision failed to take into account an applicable legislative provision or a binding decision of a superior court. Where there is reasonable doubt about whether a decision of the AIT or the Chamber should continue to be followed permission to appeal to the Chamber may well be granted in appropriate cases. Further guidance on permission to appeal to the Chamber is given in the Presidential Guidance Note 2011 No 1 Permission to Appeal.

26. It is therefore not enough to claim that the guidance is authority for a later constituted panel of the Upper Tribunal ignoring its previous decisions per se, although it is accepted that the common law doctrine of judicial precedent does not apply. Legal certainty requires a system that is both predictable and transparent. A reported decision of a Presidential panel of the Upper Tribunal, even if not starred, warrants considerable weight being attached to its findings unless there is good reason for not doing so. In this case no such reason has been made out.

27. It was also submitted by Ms Grubb that Batool is distinguishable as that concerned other family members such as grandchildren whereas this case concerned a durable partner, but if one looks at the decision so far as it relates to the use of the incorrect application form, that is not guidance specific to an individuals standings such as being another family member or a durable partner per se. Regulation 8 of the 2016 Regulations defined an extended family member as a person who is not a family member of an EEA national under regulation 7(1) (a), (b) or (c) and who satisfies the condition in paragraphs (2), (3), (4) or (5). If grandchildren and a durable partner of an EU national fall within that definition they are both extended family members. I find it has not been made out there is any basis for distinguishing the guidance provided in either Celik or Batool on the facts of this appeal.

28. The submission a purposive approach should be taken to the interpretation of the Withdrawal Agreement was specifically considered and rejected in Celik. The Withdrawal Agreement is an international treaty the terms of which should be interpreted accordingly.

29. The argument that if Batool is correct it would lead to an erroneous result as a durable partner in the UK before 1 January 2021 who made an application under the EUSS rather than the EEA Regulations would lose their rights forever is noted but it is an argument without merit. Unless such a person has made a valid application and their request for a residence card has been granted and their entry or right to remain in the UK facilitated by the UK Government, they will never have acquired any rights recognised in European law. Whether an extended family member, such as a durable partner, is able to enter or remain in the UK in such capacity was a matter of domestic law.

The argument at [24] of the skeleton argument suggests that an extended family members such as a durable partner has rights recognised in EU law which is conflating the position of family members, whose rights had direct effect granting them the ability to join the EU national in the Member State, with extended family members/durable partners who have no such right arising from EU law until their entry is facilitated.

30. Similarly a submission that general principles of EU law and the Court of Justice of the European Union's assertion a purposive approach to interpretation should be taken has no merit as EU law does not apply.

31. Reference to the case of Surinder Singh at [26] of the skeleton argument does not assist the appellant for although those with such rights were not included in the Withdrawal Agreement they are provided for by Appendix EU of the Immigration Rules.

32. The submission at [27] in relation to the Withdrawal Agreement having a dual purpose does not assist the appellant in this appeal. The purpose of the Withdrawal Agreement was to preserve those rights that existed at 11 PM on 31 December 2020. Suggesting that an individual who had not made an application under the 2016 Regulations by that time, when they were clearly legally required to do so if they wished to have their residence facilitated by the UK government, could somehow succeed by making a later application that should be treated as them having made an application when no such in time application was made, is effectively rewriting the Withdrawal Agreement.

33. It is recognised that extended family members did not have an automatic right of residence which is the position of this appellant. It is claimed, however that they did have certain free movement rights under EU law referring to the fact that such a person has a right to have their entry or residence facilitated in accordance with national legislation. They do not have a right to have their entry facilitated per se as the 'right' was that if a valid application is made it will be properly considered by the relevant member state, in this case the UK, with an effective right of remedy to challenge any adverse decision made. There is no right to have an application granted under EU law for an extended family members/durable partner, unless they were able to satisfy the UK government of their entitlement to the same. The difficulty for this appellant is that a valid application for entry to be facilitated under the 2016 Regulations was never made.

34. The challenge in Ground 1 and 2 in relation to the Judge's decision the appellant had not satisfied the Judge he was in a durable relationship is a challenge to a factual finding made by the Judge on the evidence. Whilst the term 'durable relationship' is not defined, it is has been accepted when considering appeals under the 2016 Regulations, and before, as a term which has a number of potential meanings. The dictionary definition suggests that if something is durable it has the ability to withstand pressure and the wear of time and that it is long lasting and enduring. In essence this mirrors the general requirements to be found in Immigration Rules that relationships

should be subsisting, that they should in a sense have acquired a sense of permanency either through marriage, civil partnership or by virtue of length of time and that the parties should intend that the relationship will continue on a permanent basis. I find no error made out in the Judge's assessment of whether the relationship satisfied this 'definition' which is a fact specific issue. The Judge cannot be criticised for considering the specific point in light of submission made on the appellant's behalf that this was the core issue upon which the appeal would either succeed or fail.

35. In any event, even if the appellant had established he was in a durable relationship that would not assist him in relation to his challenge to the impugned decision. The appellant applied on the basis of being a family member when he was not a family member as that term is defined within Appendix EU and as was defined in the 2016 Regulations.

36. The claim the appellant should somehow be able to benefit from Article 18 of the Withdrawal Agreement is without merit. I find that the appellant did not come within the personal scope of the Withdrawal Agreement as outlined in Article 10(3) as his residence had not been facilitated by the UK in accordance with its national legislation. Accordingly he is unable to rely upon Article 18.

37. Had a valid application been made under the 2016 Regulations prior to 31 December 2020 which had not been properly considered by the respondent there may have been an argument that the Judge had erred in law. It is accepted an application was made on 26 December 2020 but that was for a different remedy under a different scheme. Had a valid application been made it was also highly likely it would have been refused, even if the claimed cohabitation had been supported by proper evidence. I do not find legal error made out in the Judge's assessment and the adverse credibility findings based upon the lack of evidence in relation to matters which it was claimed exist and which the appellant could reasonably be expected to have provided evidence of at the hearing. In any event, if the cohabitation only commenced from September 2020, three months before the application, it is unlikely it would have been accepted that a durable relationship existed on the basis of the evidence that was provided to the Judge; meaning the appellant's entry to and right to remain in the UK would not have been facilitated by the UK government. I note submission by Ms Grubb that whether a relationship is durable depends on more than the time a couple have spent living together but there was insufficient evidence before the Judge to support a finding other than that made on this point.

38. In light of the correct interpretation of the law as it is now understood and the proper application of that law, the appellant could not succeed under the EUSS as he was not a close family member. There is no legal basis for arguing the decision-maker should have treated an application made under one scheme as an application made under another unrelated scheme. I find there was ample publicity advising individuals of the difference in status and separate routes of

application, and a clear stated alternative means for making an application under the 2016 Regulations. The reality is that the appellant chose instead to make an application under the EUSS which was bound to fail as he cannot satisfy the eligibility requirement.

39. The fact the appellant married after 11pm 31 December 2020 does not assist him as any right of free movement ended at that date.

40. I find the appellant has failed to establish arguable legal error material to the decision of the Judge to dismiss the appeal sufficient to warrant the Upper Tribunal interfering any further in this matter.

Decision

41. There is no material error of law in the Immigration Judge's decision. The determination shall stand.

Anonymity.

42. The First-tier Tribunal made no order pursuant to rule 45(4)(i) of the Asylum and Immigration Tribunal (Procedure) Rules 2005.

I make no such order pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008.

Signed……
Upper Tribunal Judge Hanson
Dated 1 December 2022