IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2022-002445

On appeal from: EA/11747/2021

THE IMMIGRATION ACTS

Decision & Reasons Promulgated
On 19 March 2023

Before

UPPER TRIBUNAL JUDGE GLEESON

Between

NEVILA DAUTI
(NO ANONYMITY ORDER)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Written submissions
For the Respondent: Ms Susana Cunha, a Senior Home Office Presenting Officer

Heard at Field House on 12 January 2023

DECISION AND REASONS

1. The appellant is a citizen of Albania who challenges the decision of the First-tier Tribunal dismissing her appeal against the respondent's decision on 20 July 2021 to refuse her application under the Immigration (Citizens' Rights Appeals) (EU Exit) Regulations 2020 (EUSS).

2. The appellant entered the UK on 14 July 2018 and met and married her husband, a Greek citizen. The appellant and her EEA sponsor cohabited from 23 March 2020.

3. The couple became engaged to be married on 9 August 2020 but did not marry until 1 April 2021. They have a child born on 13 January 2022.

4. On 8 April 2021, just a week after her wedding, the appellant applied for pre-settled status under the EUSS, on the basis that prior to the transition date (31 December 2020) she was in a durable relationship with an EEA citizen and that she had now married him.

Refusal letter

5. The respondent refused the application on the basis that on 31 December 2020, she was not a family member of her EEA sponsor, nor could she bring herself within the durable partner requirements of Appendix EU as she had not been issued either with an EEA family permit or a residence card.

6. The appellant appealed to the First-tier Tribunal, arguing that her Article 8 ECHR rights were being breached as the appellant and sponsor were being prevented from residing together in the UK.

First-tier Tribunal decision

7. The First-tier Judge accepted that the couple were in a genuine and subsisting relationship, but found that they could not bring themselves within the durable partner requirements of Appendix EU.

8. The First-tier Judge rejected the argument made on the appellant's behalf that the national requirement to hold either a family permit or residence card was a breach of her rights under the Withdrawal Agreement and placed an unreasonable burden on her, given her circumstances.

9. The First-tier Tribunal dismissed the appeal.

10. The appellant appealed to the Upper Tribunal.

Procedural history

11. The Upper Tribunal appeal was listed for hearing on 20 September 2022. The appellant did not attend or arrange representation. Following the hearing date, on 3 October 2022, Mr Stuart Kerr of Karis solicitors sent several emails confirming that the hearing had been missed due to 'human error on my part'. He made the following application by email to the Upper Tribunal:

> "I wish to apply for the appeal previously listed on 20th September 2022 to be relisted, and if any decision has already been made, for the matter to be set aside under rule 43 of the Procedure Rules.
>
> The issue is completely down to me. I have been suffering from a health issue and have had difficulty keeping on top of administrative matters. Our support staff were furloughed and then made redundant. The combination has resulted in me missing this date for the hearing.
>
> I am truly sorry that this has resulted in the court being inconvenienced and of course meant to disrespect by not attending.
>
> I would therefore be extremely grateful if the matter can be relisted."

12. The Tribunal relisted the hearing for 12 January 2023. At 14:21 on 10 January 2023, Mr Kerr wrote again to the Upper Tribunal:

> "We continue to act for the appellant in this matter. We write in order to apply for an adjournment of the hearing listed on Thursday 12th January 2023.
>
> The appellant has contacted us this morning to request that the appeal be adjourned on the basis that she has contracted COVID and is unwell. She has sent a text message with a photograph of her COVID test and a thermometer showing that she has a very high temperature. Please find attached the screenshot from my mobile phone which has been saved as a word document.
>
> The appellant has instructed us that she wishes to attend her hearing at a future date if this hearing is adjourned.
>
> We look forward to receiving a decision on the application to adjourn as soon as practicably possible, but if we can be of any further assistance, please do not hesitate in contacting us at your earliest convenience."

13. He attached a screenshot of a message from his client stating,

> "Hi sir, it's any chance we can ask the court to change the date because I want to continue but I am very ill high temperature think I got Covid."

The message also included a photograph of an electronic thermometer reading 40.1°C and of a Covid test with a red line.

14. The message was forwarded to me at 14.34 on 11 January 2023, the day before the hearing. I instructed the clerk to respond, indicating that the appellant's attendance was not necessary at the hearing as she would not be giving oral evidence: the hearing was to determine whether there was a material error of law in the First-tier Judge's decision.

15. Mr Kerr then responded, enclosing a skeleton argument dated 6 November 2022, and saying this:

> "Thank you for your email. I can confirm that the appellant was not due to give evidence at the hearing tomorrow.
>
> I have taken instructions from the appellant in the light of the UTJ's comments. I have been instructed not to attend the hearing and am not in funds to do so. The appellant is aware that the appeal can, pursuant to §38 of the Procedure Rules, proceed in the absence of a party.
>
> I invite the Tribunal to consider the written argument previously submitted and which I attach here for convenience.
>
> Given that the Upper Tribunal has been flexible enough to relist this appeal (after a previous hearing date was missed), I am conscious that it is unsatisfactory to be in a position where Tribunal time is now not utilised efficiently. If the Tribunal Judge would like me to attend tomorrow morning to provide any further explanation, please do let me know.

> In the alternative, please accept my apologies for the inconvenience caused. If I can be of any further assistance, please do not hesitate in contacting me."

16. The Tribunal informed Mr Kerr that the hearing would proceed and his attendance was not required.

17. The hearing today took place on that basis. I asked Ms Cunha whether she had anything to add to the respondent's pleaded case. She confirmed that she had not.

18. I reserved my decision, which I now give.

Basis of appeal

19. The grounds of appeal were based on Article 8 ECHR: the appellant argued that the respondent's decision prevented her and her husband from living together in the UK. She relied on Appendix EU at EU14, arguing that in relation to pre-settled status, that was the applicable rule and not EU11 , which the First-tier Tribunal applied.

20. The appellant contended that the parties' marriage on 1 April 2021 'constitutes evidence that they were in a durable relationship prior to their marriage and prior to 31 December 2020. This evidence should satisfy the respondent that the durable partnership continues to exist'. They had tried repeatedly to arrange a date for their marriage before 31 December 2020 but had been prevented from doing so by Covid-19 restrictions.

21. Permission to appeal was granted on the basis that it was arguable that the First-tier Judge had failed to engage adequately with the detailed arguments made in the appellant's skeleton argument, alternatively that the reasons given for rejecting those arguments were inadequate.

Legal framework

22. 'Family member' is defined in Appendix EU at Annex I, which requires that a person who is a spouse at the date of application demonstrates that they are:

> "… (a) the spouse or civil partner of a relevant EEA citizen, and:
>
> (i) (aa) the marriage was contracted or the civil partnership was formed before the specified date; or
>
> (bb) the applicant was the durable partner 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; and
>
> (ii) the marriage or civil partnership continues to exist at the date of application…"

23. 'Durable partner' is also defined:

> "… (a) the applicant is, or (as the case may be) was, in a durable relationship with the relevant EEA citizen (or, as the case may be, with the qualifying British 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) where the applicant was resident in the UK and Islands as the durable partner of a relevant EEA citizen before the specified date, the applicant held a relevant document as the durable partner of the relevant EEA citizen or, where there is evidence which satisfies the entry clearance officer that the applicant was otherwise lawfully resident in the UK and Islands for the relevant period before the specified date (or where the applicant is a joining family member) or where the applicant relies on the relevant EEA citizen being a relevant person of Northern Ireland, there is evidence which satisfies the entry clearance officer that the durable partnership was formed and was durable before the specified date;…"

24. On 19 July 2022, in *Batool and others (other family members; EU Exit)* [2022] UKUT 219 (IAC), the Upper Tribunal held that:

> "*(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*."

25. On the same date, the Upper Tribunal gave guidance on the applicability of the Withdrawal Agreement in relation to durable partners in *Celik (EU Exit; marriage; human rights)* [2022] UKUT 220 (IAC):

> "*(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."

Analysis

26. There is no dispute about the factual matrix. At the transition date of 31 December 2020, the parties had been living together for eight months and engaged to be married for four months. They were not married. Their subsequent marriage could not bring her within the EUSS scheme as a family member. The appellant had been in the UK without leave since 2018

27. The reference to EU14 does not assist the appellant. She would have to show that at the date of application she was a family member of a relevant EEA citizen. The First-tier Judge in March 2022 did not have the benefit of the guidance given in July 2022 in *Celik* and *Batool,* but the conclusions reached are in line with the Upper Tribunal's later guidance, which was declaratory rather than a change in the underlying legal framework.

28. Having regard to those decisions, and to Appendix EU itself, the appellant cannot show that at the specified date of 31 December 2020 she met the definition of 'durable partner'. At the specified date, she had not been in a relationship akin to marriage with her now husband for even one year, nor did she hold a relevant document.

29. There is no irrationality or want of reasoning in the First-tier Judge's decision. The decision stands.

30. This appeal is dismissed.

Notice of Decision

31. For the foregoing reasons, my decision is as follows:

    The making of the previous decision involved the making of no error on a point of law

    I do not set aside the decision but order that it shall stand.

Judith A J C Gleeson
Judge of the Upper Tribunal
Immigration and Asylum Chamber

Dated: 12 January 2023