IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case Nos: UI-2022-002037 &
UI-2022-002038
First-tier Tribunal Nos:
EA/11607/2021 & EA/11645/2021

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On 6 August 2023

Before

UPPER TRIBUNAL JUDGE GLEESON
UPPER TRIBUNAL JUDGE RINTOUL

Between

ENTRY CLEARANCE OFFICER

Appellant

and

RIAZ MAHMOOD
SHAHNAZ KOUSAR
(NO ANONYMITY ORDER MADE)

Respondent

Representation:
For the Appellant: Mr P Deller, Senior Home Office Presenting Officer
For the Respondents: Mr A Badar, instructed by Buckingham Legal Associates

Heard at Field House on 28 March 2023

DECISION AND REASONS

1. The Secretary of State appeal with permission against the decision of First-tier Tribunal Judge S Aziz promulgated on 24 January 2022 in which he allowed the appeal of Mr Mahmood and Ms Kousar against a decision of the Secretary of State to refuse them EU Settlement Scheme Family Permits.

Background

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2. On 1 April 2021, Ms Shahnaz Kousar applied for an EU Settlement Scheme Family Permit. On 16 April 2021, Mr Riaz Mahmood also applied for an EU Settlement Scheme Family Permit. Both applications were made on the basis that they were the dependent parents-in-law of Ms Stase Peciukonyte (a Lithuanian national) who is the wife of their son, Mr Zohaib Riaz. The applications were refused by the respondent on 29 June 2021 and 5 July 2021 respectively.

3. The refusals were made on the basis that the respondents were not the family members of a relevant EEA citizen because:

   (a) their son was not the spouse of a relevant EEA citizen as defined in Annex 1 of Appendix EU (Family Permit) of the Immigration Rules as the marriage had taken place after the “specified date” (11 pm GMT on 31 December 2021); and

   (b) their son was not a durable partner of a relevant EEA citizen as defined, prior to the specified date.

4. The respondents challenged that decision on the basis, inter alia, that a marriage had been due to take place prior to the specified date but had not taken place due to COVID restrictions. It was also argued in the Appeal Skeleton Argument submitted to the FtT that the respondents were entitled to rely on a published policy relating to the EU Settlement Scheme [21] to [25]; and, that the respondent’s son was in a durable partnership as defined, relying on article 10 (4) of the Withdrawal Agreement.

The hearing before the First-tier Tribunal

5. As noted in the decision at [10], the respondent’s son and daughter in law did not attend the hearing which proceeded on the basis of submissions from both representatives.

6. Having directed himself as to the law [30] to [34], the judge found that:

   (a) Although the son and daughter-in-law were married [37], that marriage was contracted after the specified date and therefore it did not meet the requirements of the Immigration Rules [39];

   (b) There was insufficient evidence to demonstrate that the son and daughter-in -law had been in a durable relationship [38]; but,

   (c) Discretion available to the decision-maker by the relevant policy (see [4] above) should have been applied [44] such that [45] the specified date can be extended to include the marriage, so that, applying the policy, the requirements of the rules were met; and

   (d) The marriage was subsisting, as was also a requirement.

7. The judge then allowed the appeals on the grounds that the decision was not in accordance with the Immigration Rules.

Grounds of appeal & further submissions

8. The Secretary of State sought permission to appeal on the grounds that the judge had erred:

   (a) In incorrectly applying guidance relevant to the "grace period" which extended the time period in which an applicant is able to become lawfully resident under the Immigration (European Economic Area) Regulations 2016 ("the EEA Regulations") to the facts of this appeal; all the "grace period" did was extend the period in which those who satisfied the requirements of the EEA Regulations as at the specified date could make an application; and,

   (b) As the respondents' son had never held a residence card issued under the EEA Regulations which confirmed he was an extended family member of an EEA national, he had not acquired residence rights protected under appendix EU of the Immigration Rules

   (c) Accordingly, as the respondents could not meet the requirements of Appendix EU (FP), the appeals should have been dismissed.

9. On 14 April 2022, First-tier Tribunal Judge Rodger granted permission.

10. On 1 September 2022, the respondents served a response pursuant to Rule 24 of the Tribunal Procedure (Upper Tribunal) Rules 2008 ("the Procedural Rules), submitting that the decision was sustainable, and [6] that the relationship was durable as demonstrated by their subsequent marriage at the first opportunity.

11. On 9 September 2022, UTJ Rintoul gave the following directions:

    > 1. Having read the correspondence submitted and the Rule 24 Response the Upper Tribunal is of the view that the parties may need to address the following recent decisions of the Upper Tribunal:
    >
    > > Batool and others (other family members: EU exit) [2022] UKUT 219 (IAC) Celik (EU exit; marriage; human rights) [2022] UKUT 220 (IAC)
    >
    > 2. Accordingly, the parties are directed to exchange skeleton arguments addressing these cases and the issues identified in the grounds of appeal and rule 24 response at least 3 days before the hearing.
    >
    > 3. The parties are also directed to agree and serve a bundle of authorities to be served electronically on the Upper Tribunal at least 3 days before the hearing.

12. In response to those directions, the Secretary of State served a skeleton argument, authored by Mr Deller, and dated 20 September 2022. In that document, it was restated that the judge had erred in applying a policy which was not relevant to the facts of the appeals. It was also submitted that, following Batool and Celik, as the respondents did not have rights

under the Withdrawal Agreement, arguments based on the applicability of policy fell out with the scope of the right of appeal.

13. In response, the respondents served a skeleton drafted by Mr Badar in which it is submitted that they do fall within the definition of family member of the relevant EEA national as, on a proper construction of the EUSS FP scheme, unlike the EUSS scheme, it was not necessary requirement for a durable partner (in this case the respondents' son) to hold a "relevant document" at the relevant time. Attention was also drawn to the fact that the son had indefinite leave to remain under the EUSS from 23 July 2019.

14. The Secretary of State replied on 13 January 2023, accepting that provision was made in the definition of "dependent parent" for "spouse" to extend to marriages after 31 December 2020 where the definition of "durable partner" had been met as that date. It was, however, submitted that this did not necessarily assist the respondents as the definition of durable partner required the holding of a relevant document as evidence of residence having been facilitated pursuant to article 3.2 of Directive 2004/38. The position regarding policy is maintained.

15. In a further skeleton in response, dated 8 February 2023, Mr Badar submitted that while the relevant definition of "durable partner" does require the holding of a residence card, it provides for there to be an alternative to that which requires the decision maker to assess the evidence.

16. On 9 February 2023 the respondents sought permission to adduce a supplementary bundle of 66 pages pursuant to rule 15 (2A) of the Procedural Rules.

<u>The hearing on 28 March 2023</u>

17. We are indebted to both Mr Deller and Mr Badar for the great assistance they were able to provide to the panel, and in their narrowing of the issues. Understandably, and given the manner in which the appeals had progressed, the focus of the hearing was on whether, if their son were a durable partner of an EEA national at the specified date, the respondents came within the definition of family member of a relevant EEA National; there was no proper focus on whether, if it were found that the decision were to be set aside, how the issue of durable partnership was to be addressed, given the additional material now available. In the light of that, the Upper Tribunal issued directions to the parties which provided:

> 1 It is observed that had the decision of the FtT been set aside – it being based on an incorrect approach to policy – then it would have had to be remade. In that case, and bearing in mind the rule 15 (2A) application and material, it is our preliminary view that we would have come to the conclusion that, in the light of the later evidence showing the strength of the relationship, taken together with the commitment shown by the

intention to marry before 31 December 2020, that a durable partnership had indeed existed as at that date. It would therefore follow that, applying a proper construction of the Immigration Rules, the appeal would be allowed, albeit for different reasons. That the finding with respect to a durable partnership was flawed is pre-figured in the Rule 24 correspondence.

2 Given the overriding objective and the difficulties that would flow from relisting the appeal on a date when both representatives and the Tribunal would be available, it is our preliminary view that the Tribunal should formally set aside the decision of the FtT, including the finding that a durable relationship had not been shown, and proceed to make a fresh finding on that issue, taking into account the new material, and remake the decision by allowing it under the Immigration Rules. It is also the preliminary view of the Upper Tribunal that this can be done without a further hearing.

18. The respondent agreed to that approach being taken; the Secretary of State did not object, stating:

> The individual circumstances point to the appellant's son and daughter-in-law having established a durable partnership akin to a marriage by the provision of other significant evidence, despite the somewhat unusual circumstances of the case and with other criteria apparently met as discussed at the hearing the Tribunal's proposed course seems sensible.

The law

Right of appeal

19. The Immigration (Citizens Rights Appeals) (EU Exit) Regulations ("the Citizens Rights Appeals Regulations") 2020 (SI 2020/61) grant a right of appeal to those refused a permit under Appendix EU (FP). The permissible grounds of appeal are set out in reg. 8 and provide, so far as is relevant:

> **Reg. 8 - Grounds of appeal**
>
> (1) An appeal under these Regulations must be brought on one or both of the following two grounds.
>
> (2) The first ground of appeal is that the decision breaches any right which the appellant has by virtue of-"
>
> (a) [Chapter 1, or Article 24(2), 24(3), 25(2) or 25(3) of Chapter 2] , of Title II [, or Article 32(1)(b) of Title III,] of Part 2 of the withdrawal Agreement,
>
> (3) The second ground of appeal is that-
>
> (a) where the decision is mentioned in regulation 3(1)(a) or (b) or 5, it is not in accordance with the provision of the immigration rules by virtue of which it was made;
> …

20. It is for the appellant, in this case the Secretary of State, to demonstrate to us that the decision of the First-tier Tribunal involved the making of an error of law which affected the outcome.

Did the judge err in his application of policy?

21. Mr Badar quite properly did not seek to persuade us that the judge had not erred in his application of the December 2021 Home Office policy, 'EU Settlement Scheme: EU, other EEA and Swiss citizens and their family members'. We are satisfied that policy applied to applications under Appendix EUSS, not under Appendix EU (FP). Further, even if there were an applicable policy, a failure to apply a policy is not an arguable ground of appeal under reg 8 (2). It follows, therefore, that the judge did err in applying a policy to the Immigration Rules, thereby impermissibly rewriting them. Was that then a material error?

22. In these appeals, that is a complex issue, given that if, as they submit, the respondents did in fact come within the terms of the relevant Immigration Rules, the error would not be material. That, in turn, requires a detailed analysis of the rules.

Analysis of the Immigration Rules

23. On any view, the proper construction of the definitions within Schedule 1 to Appendix EU (FP) is a far from straightforward exercise, and we have considerable sympathy with the judge who was faced with having to do so nearly 2 years ago without the assistance of any relevant case law or the detailed exegesis of the rules provided to us.

24. The question then arises whether, on a proper construction of the relevant Immigration Rules, the respondents did come within the definition of "family member of a relevant EEA national". We put to one side, for now, the question of whether the respondents had any rights under the Withdrawal Agreement. We do, however, observe that it is possible that the rights conferred by Appendix EU (FP) go beyond those conferred by the Withdrawal Agreement.

25. Appendix EU (FP) materially provided at the relevant time:

FP6. (1) The applicant meets the eligibility requirements for an entry clearance to be granted under this Appendix in the form of an EU Settlement Scheme Family Permit, where the entry clearance officer is satisfied that at the date of application:

(a) The applicant is a specified EEA citizen or a non-EEA citizen;

(b) The applicant is a family member of a relevant EEA citizen;

(c) The relevant EEA citizen is resident in the UK or will be travelling to the UK with the applicant within six months of the date of application;

(d) The applicant will be accompanying the relevant EEA citizen to the UK (or joining them in the UK) within six months of the date of application; and

(e) The applicant (”A”) is not the spouse, civil partner or durable partner of a relevant EEA citizen (”B”) where a spouse, civil partner or durable partner of A or B has been granted an entry clearance under this Appendix, holds a valid EEA family permit issued under regulation 12 of the EEA Regulations or has been granted leave to enter or remain in the UK in that capacity under or outside the Immigration Rules.

Annex 1: Definitions

family member of a relevant EEA citizen

a person who has satisfied the entry clearance office, including by the required evidence of family relationship

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

…

(e) the child or dependent parent of the spouse or civil partner of a relevant EEA citizen, **as described in subparagraph (a) above**, and:

(i) the family relationship of the child or dependent parent to the spouse or civil partner existed before the specified date (unless, in the case of a child, the person was born after that date, was adopted after that date in accordance with a relevant adoption decision or after that date became a child within the meaning of that entry in this table on the basis of one of sub-paragraphs (a)(iii) to (a)(xi) of that entry); and

(ii) all the family relationships continue to exist at the date of application; or

…

As a general observation, we note that Appendix EU and the Withdrawal Agreement seek to confine the rights of spouses to situations where that legal relationship existed as at the specified date. In Appendix EU (FP) there is no general restriction on spouse by any temporal requirement; rather, as can be seen by looking at the rules as a whole, a requirement for a particular relationship to exist as at the “specified date” is achieved by writing that requirement into the definitions.

26. In order to come within FP 6 (1), the respondents must be family members of their daughter-in-law, that is, they must be the dependent parents of the “spouse of a relevant EEA citizen”. That, in turn, requires

them to come within the ambit of the definition of family member of a relevant EEA citizen, in this case, under (e).

27. It is not in dispute that, at the date of application (which is when the requirement is to be met - see FP 6 (1)), the respondents' son was the spouse of a relevant EEA national, and so, at first glance, they would appear to come within sub-para (e) of the definition.

28. That, however, is not the end of the matter, as "spouse" is qualified by the phrase "as described in sub-paragraph (a) above". We are not persuaded that "described" can in this context mean anything other than "defined". We then turn next to what "spouse" means in this context.

29. Properly understood, the definition of "spouse" requires a person to be:

(a) a spouse of the relevant EEA national at the time of application (a combination of FP 6(1) and the first clause of paragraph (a) of the definition) and have been married to the relevant EEA prior to the specified date (see (i)(aa) <u>or</u>

(b) a spouse of the relevant EEA national at the time of application and to have been in a durable relationship with that person prior to the specified date and for that durable relationship to be subsisting at the specified date.

30. This is, perhaps, broader than the terms of the Withdrawal Agreement but it sensibly allows for the nature of durable relationships to change over time.

31. We must next consider what is meant by "durable partner" which was defined in the appendix at the material time, so far as is relevant, as follows:

> (a) the person 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 person 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** [our emphasis] (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. ...

32. There are two principal requirements to be met. The first is as to the quality of the durable relationship, shown either by its length or by other significant evidence; the second is for the applicant to hold a relevant document (usually a residence card confirming residence in that status), subject to three exceptions, one of which is where the applicant was lawfully resident in the United Kingdom. That exception makes sense, as it would otherwise have required someone lawfully here (such as the respondents' son) to have made a pointless application as a durable partner under regulations which were shortly to be revoked.

33. We note also that as regards the exception within which the respondent's son appears to fall requires it to be shown that he was lawfully resident for the "relevant period" prior to the specified date. In the case where what is relied upon is a durable relationship of two years length prior to that date, the length of that period is evident. It is less so where, as is the case here, the relationship was not of two years' length. The definition of durable relationship does permit that, as can be seen in how the nature of the relationship is defined. The common-sense approach would be to construe "relevant period" in such a case as a reference to the period starting when the relationship became a durable one.

34. We note that that the definition of durable partner here refers to an applicant. We consider, however, that applying a common-sense approach to the construction of the Immigration Rules, that must, when tracking through who is a family member, to be understood as the spouse of the relevant EEA national, that according also with the respondents' written submissions of 13 January 2023.

35. Pausing there to reflect, it flows from our analysis that the respondents may fall within the definition of family member of a relevant EEA national, subject to showing (a) that their son was in a durable relationship with his now wife and that they otherwise meet the definition of "dependent parent". The respondents contend that these requirements were met.

36. We remind ourselves, however, that the First-tier Tribunal Judge was not satisfied that the respondents' son and daughter-in -law were in a durable relationship. Thus, on the facts as found, it cannot be said that the judge would, had he properly applied the rules, have allowed the appeal. We therefore, as proposed above, formally set aside the decision of the First-tier Tribunal and proceed to remake it. In doing so, and in applying the principles set out in EG and NG (UT rule 17: withdrawal; rule 24: scope) Ethiopia [2013] UKUT 143 and Smith (appealable decisions; PTA requirements; anonymity) [2019] UKUT 216, we have proceeded on the basis that the respondents should, in the interests of justice, be permitted to challenge the judge's findings with respect to whether their son was in a durable relationship.

37. Applying the principles set out in Elais (fairness and extended family members) [2022] UKUT 300, and given the post-hearing submissions from

the Secretary of State we are satisfied that the judge's approach to the issue involved the making of an error of law and we set it aside.

Remaking the appeal

38. We are satisfied that it is in the interests of fairness and justice to admit the respondents' additional bundle pursuant to rule 15 (2A) of the Procedural Rules.

39. Having considered all of the material, and the continued subsistence of the marriage, we are satisfied, on the balance of probabilities, that the respondents' son was in a durable relationship with his now wife as at the specified date, and that having held ILR for well before it started, that it met the requirements of the Immigration Rules.

40. The sole remaining issue for us to consider is whether the respondents are "dependent parents" as defined. We are satisfied from the material before us relating to money transfers that, insofar as it is necessary to demonstrate it, the respondents have shown that they are dependent on their son.

41. Accordingly, for these reasons, we are satisfied that the respondents meet the requirements of Appendix EU(FP) of the Immigration Rules, and we remake their appeals by allowing them on that basis.

Notice of Decision

The decision of the First-tier Tribunal involved the making of an error of law and we set it aside.

We remake the decision by allowing it on the basis that the decision was in accordance with the Immigration Rules

Signed Date: 25 July 2023

Jeremy K H Rintoul

Judge of the Upper Tribunal