



**IN THE UPPER TRIBUNAL**  
**IMMIGRATION AND ASYLUM CHAMBER**

**Case No: UI-2022-005707**  
**UI-2022-005708**  
**On appeal from:**  
**EA/02969/2022**  
**EA/02970/2022**

**THE IMMIGRATION ACTS**

**Decision & Reasons Issued:**  
**On the 21 August 2023**

**Before**

**THE HON. MR JUSTICE LAVENDER**  
**sitting as a Judge of the Upper Tribunal**  
**UPPER TRIBUNAL JUDGE GLEESON**

**Between**

**THE SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Appellant

**and**

**OLGA ZHUKOVA**  
**VASILISA ZENTISOVA**  
**(NO ANONYMITY ORDER MADE)**

Respondents

**Representation:**

For the Appellant: Mr Esen Tufan, a Senior Home Office Presenting Officer  
For the Respondents: Dr Mikhail Sokolov, sponsor in person

**Heard at Field House on 23 May 2023**

**DECISION AND REASONS**

**Introduction**

1. The Secretary of State challenges the decision of First-tier Judge Scott-Baker allowing the claimants' appeals against her decision on 17 February 2022 to refuse them EEA Family Permits. The claimants are citizens of Russia, a mother and daughter.

2. The case turns on whether the sponsor and the principal claimant were in a durable relationship, as defined in the Immigration Rules Appendix EU (Family Permit) at 11 p.m. on 31 December 2020, the specified date for EU Exit. The appeal of the second claimant stands or falls with that of her mother.
3. **Mode of hearing.** The hearing today took place face to face.
4. The sponsor appeared in person to represent the claimants. He is the first claimant's husband and the stepfather of the second appellant. He is a citizen of Russia and Finland.
5. For the reasons set out in this decision, we have come to the conclusion that the Secretary of State's appeal falls to be dismissed.

## **Background**

6. The factual matrix in these appeals is uncontentious. The sponsor is an engineering research scientist who is presently working in Cambridge UK as Senior Project Leader for TWI in Cambridge, leading research projects for the medical, aerospace and automotive industries. He has lived and worked in Finland and Sweden, as well as Russia and the UK.
7. The sponsor was previously married to Tamara Sokolova but the parties separated on 30 September 2018 and since that time he has lived separately, paying his estranged wife child support.
8. The sponsor and the principal claimant ('the claimant') met in July 2019 and rapidly became more than friends. He visited Russia for Christmas in December 2019, returning in January 2020. They spent a couple of days in a Booking.com rented apartment, then lived with her family until he returned to the UK.
9. The sponsor returned to Russia on 20 March 2020, but was then unable to return to the UK until 11 August 2020, due to the first UK Covid-19 lockdown which was declared on 23 March 2020. During this period, he and the claimants lived together in her family apartment in St Petersburg. In April 2020, he proposed marriage and was accepted.
10. It was difficult for the sponsor to obtain a divorce from his first wife, as all the Russian Courts closed down for the pandemic period.
11. There were further periods of cohabitation in Russia from 21 November 2020-28 December 2020, and 24 March 2021-12 April 2021. The claimants and the sponsor had a three day holiday together during this visit. On 18 August 2021, the claimants and the sponsor went to Turkey for a family holiday for 11 days.
12. On 7 September 2021, the sponsor finally received his divorce certificate. He visited Russia again and the parties married 4 days later. They cohabited for just over a month during this visit, and on 23 September 2021, having all the certificates necessary, translated and legalised, they applied for an EUSS Family Permit for the claimants.

13. On 24 November 2021, the sponsor rented a 2-bedroom apartment for his new family, and on 23 December 2021, he joined the claimants there for a 22 day Christmas visit.
14. On 17 February 2022, the day the Russian invasion of Ukraine began, the claimants received the Secretary of State's letter refusing them an EUSS Family Permit. The isolation of Russia due to the Ukraine war caused yet further difficulties in obtaining supporting documentation for the claimants. The total period of cohabitation was 190 days.

### **First-tier Tribunal decision**

15. The First-tier Judge allowed the appeal. There was only one issue: that of durable relationship. The First-tier Judge was satisfied that the claimants had shown significant evidence of a durable relationship as at the specified date.
16. At [20], she referenced the Secretary of State's guidance to caseworkers on the EU Settlement Scheme: Version 17 dated 13 April 2022 and the definition of durable partner in the Immigration Rules Appendix EU (Family Permit).
17. The First-tier Judge's reasons for finding that a durable partnership existed were at [21]-[26] of her decision:

"21. There was significant evidence of a durable relationship before me. It was evident that the first appellant and the sponsor had been engaged since April 2020 and were in a durable relationship but it was also clear from the evidence that marriage had been discussed since before that date and that the relationship was durable since Christmas 2019. I note that the guidance requires that a durable relationship should have existed for two years or more. The application was made on 23 September 2021 and therefore they had been in a durable relationship for 21 months at the date of application. The guidance however states that the period is a rule of thumb and not a requirement and is therefore not determinative. The rules require that the relationship existed as at 31 December 2020 and I find that the first appellant was in a durable relationship with the sponsor on 31 December 2020.

22. I also find that the sponsor is a relevant EEA citizen and that at the date of application he was employed in the UK.

23. I note that during this period - December 2019 to September 2021- Dr Sokolova was working in the UK and his partner remained living in St Petersburg. I consider that the requirement of living together is but one factor in considering whether the relationship was durable. I am satisfied that in all regards the evidence shows that it was a durable relationship at the relevant time - the sponsor was working as a senior project manager in Cambridge and could not be living with his partner whilst he undertook his contractual responsibilities as the first appellant held no visa to enter the UK. I find however that at all times when he returned to Russia he lived with the first appellant as his partner. I note that there was no evidence of rental agreements or utility bills in joint names in Russia but this is because he was living in the first appellant's family home and he had not been asked to

contribute to the household expenses. The sponsor's home and personal life remains centred in Russia. It was clear that there was an intention to live together since April 2020 when they were engaged, a period now of two years and four months.

24. It is of note that the material period spans the pandemic years and that travel and contact was restricted during that time.

25. I find that at the relevant time that the sponsor's first marriage had broken down and that accordingly neither the first appellant or sponsor had another durable partner and that the marriage was not one of convenience.

26. I find that the first appellant has established that she was a durable partner at the specified date, 31 December 2020, that they married on 11 September 2021 and that the marriage is genuine and subsisting and that they intend to live together in the UK."

18. The Secretary of State appealed to the Upper Tribunal.

### **Permission to appeal**

19. Permission to appeal to the Upper Tribunal was granted by UTJ Jackson for the following reasons:

"The grounds of appeal are that the First-tier Tribunal erred in law in finding that the Appellant was in a durable relationship with the Sponsor in circumstances where they had not cohabited at all (living in different countries) and in a relationship which could not rationally otherwise be described as akin to marriage. The Respondent asserts that the First-tier Tribunal has erred in conflating a subsisting relationship with a durable one and that a long distance relationship with contact and visits can not equate to a durable relationship akin to marriage for the purposes of Appendix EU.

It is arguable that the First-tier Tribunal has erred in its understanding of the meaning of 'durable partner' and conflated this with whether there was a genuine relationship; in circumstances where the Sponsor remained married (albeit the relationship had broken down) for the majority of the period of the relationship and during which the parties lived in different countries other than for relatively short visits.

The First-tier Tribunal's decision does contain an arguable error of law capable of affecting the outcome of the appeal and permission to appeal is therefore granted."

20. The claimant filed a detailed Rule 24 Reply, setting out the factual matrix against which the First-tier Judge had made her decision. His Reply is discursive rather than focusing on the identified error of law, but has been of assistance to the Tribunal in understanding the basis on which the First-tier Judge allowed the appeal.

21. That is the basis on which this appeal came before the Upper Tribunal.

### **Upper Tribunal hearing**

22. The oral and written submissions at the hearing are a matter of record and need not be set out in full here. We had access to all of the documents

before the First-tier Tribunal and in addition heard from Mr Tufan for the Secretary of State and the sponsor for the claimants.

23. For the Secretary of State, Mr Tufan contended that the test in Appendix EU was governed by the phrase 'living together in a relationship akin to marriage' both as to the 2-year cohabitation period, and the alternative 'significant evidence' route. The judge's reasoning was unsound and irrational, and the decision should be set aside. He relied on the decision of the Upper Tribunal in *YB* (EEA reg 17(4), proper approach) Ivory Coast [2008] UKAIT 00062 (11 July 2008) as to the meaning of 'durable relationship' in the Immigration (European Economic Area) Regulations 2006 and on the Secretary of State's caseworker guidance.
24. Mr Tufan acknowledged that the finding of a durable relationship was a finding of fact and that therefore, as an appellate Tribunal, we could not interfere with it save on the limited basis set out by the Court of Appeal in *R (Iran) v Secretary of State for the Home Department* [20015] EWCA Civ 982 and now in *Volpi & Anor v Volpi* [2022] EWCA Civ 464 (05 April 2022). He asked us to allow the Secretary of State's appeal.
25. For the claimants, Dr Sokolov explained the sequence of events at length, as he did in the First-tier Tribunal. He observed that the difficulty for his family has now been compounded because his Finnish nationality, and his UK residence, make him a traitor in the eyes of the Russian government, which puts his wife and stepdaughter at risk. He seeks an urgent resolution of his long outstanding proceedings to enable them to join him here. The sponsor has a good job: there are no financial issues. He has rented a two-bedroom apartment in Cambridge, adjacent to a suitable school for his stepdaughter, which is ready as soon as they are able to join him.
26. We reserved our decision, which we now give.

## Conclusions

27. We examine first the definition of durable partner in Appendix EU (Family Permit) at Annex 1, as it relates to a durable partner living outside the UK and Islands:

“(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  
...

(c) it is, or (as the case may be) was, not a **durable partnership of convenience**;  
and

(d) neither party has, or (as the case may be) had, another durable partner, a spouse or a civil partner with (in any of those circumstances) immigration

status in the UK or the Islands based on that person's relationship with that party."

28. We next considered the Secretary of State's guidance to caseworkers on the interpretation of that definition. Only the April 2023 version is available to us, but it was common ground that there was no relevant difference between this and the April 2022 version which was before the First-tier Tribunal. Under the heading, 'Durable partner', and so far as relevant to the present factual matrix, it says this:

"For a relationship to be akin to a marriage or civil partnership the couple must usually have lived together as a couple (not just as friends) and shown an ongoing commitment to one another. However, in some circumstances there may be evidence of a durable relationship akin to a marriage or civil partnership where the couple have not, or currently do not, live together. ...

A relationship can still be recognised as meeting the requirement for a durable relationship where, for example, there is a good reason the partners were or are living apart which is still consistent with them having a relationship akin to a marriage or civil partnership. *For example, they may have lived apart or currently do so because one party was or is studying or working elsewhere.* In such circumstances you will need to be satisfied the relationship is durable even though they were or are living apart. For example, there may be evidence that although they are currently living apart, they have lived together in a durable relationship in the past and intend to do so again in the future.

However, in some cases the couple may not have lived together and you will need to be satisfied the relationship is akin to a marriage or civil partnership. In some countries, religious or cultural norms may prevent unmarried partners living together and you will need to assess whether the relationship is similar to a marriage or civil partnership, in that it is more than a boyfriend/girlfriend type relationship. *Instead of evidence of cohabitation, you will want to see other evidence of a durable relationship such as evidence of regular communication, visits, holidays, events attended, financial support, joint care of any children the partners have together or any other evidence showing a durable relationship."*

[*Emphasis added*]

29. We remind ourselves that the finding of a durable relationship is a finding of fact, with which we can interfere only on the narrow basis set out in *R (Iran)* and/or *Volpi*. In *R (Iran)* at [90], Lord Justice Brooke, giving the judgment of the Court, stated that an appellate Tribunal could only interfere with a finding of fact by the First-tier Tribunal 'on the grounds of perversity if it was irrational or unreasonable in the *Wednesbury* sense, or one that was wholly unsupported by the evidence'. The Tribunal should not set aside a decision for inadequacy of reasons 'unless the [judge] failed to identify and record the matters that were critical to his decision on material issues, in such a way that the [Tribunal] was unable to understand why he reached that decision'.
30. In *Volpi* at [65]-[66] in the judgment of Lord Justice Lewison, with whom Lord Justices Males and Snowden agreed, he said this:

“65. This appeal demonstrates many features of appeals against findings of fact:

(i) It seeks to retry the case afresh.

(ii) It rests on a selection of evidence rather than the whole of the evidence that the judge heard (what I have elsewhere called "island hopping").

(iii) It seeks to persuade an appeal court to form its own evaluation of the reliability of witness evidence when that is the quintessential function of the trial judge who has seen and heard the witnesses.

(iv) It seeks to persuade the appeal court to reattribute weight to the different strands of evidence.

(v) It concentrates on particular verbal expressions that the judge used rather than engaging with the substance of his findings.

66. I re-emphasise the point that it is not for an appeal court to come to an independent conclusion as a result of its own consideration of the evidence. Whether we would have reached the same conclusion as the judge is not the point; although I am far from saying that I would not have done. The question for us is whether the judge's finding...was rationally insupportable. In my judgment it was not. In my judgment the judge was entitled to reach the conclusion that he did. I would dismiss the appeal.”

31. We have considered whether *YB*'s case assists the Secretary of State. We do not find that it does. The definition of durable partner in Appendix EU (Family Permit) differs from that in the Immigration (European Economic Area) Regulations 2016. *YB* deals with the earlier 2006 Regulations and significantly predates the UK's EU Exit.

32. We consider, therefore, whether the First-tier Judge has reasoned adequately her finding of fact that the sponsor and principal claimant were in a durable relationship at the specified date of 11 p.m. on 31 December 2020. We can interfere with that finding only if it is 'rationally insupportable', *Wednesbury* unreasonable, or wholly unsupported by the evidence.

33. That is a high bar, and it is not reached here. The First-tier Judge gave proper, intelligible and adequate reasons for finding that, despite the difficulties caused by Covid-19, the sponsor and principal claimant were in a durable relationship on the specified date.

34. Accordingly, the Secretary of State's challenge to this decision must fail.

### **Notice of Decision**

35. For the foregoing reasons, our decision is as follows:

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

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

Appeal Number: UI-2022-005707  
UI-2022-005708

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

**Dated: 29 May 2023**