IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2022-003419

First-tier Tribunal No: EA/13442/2021

THE IMMIGRATION ACTS

Decision & Reasons Issued
5 September 2024

Before

UPPER TRIBUNAL JUDGE CANAVAN
DEPUTY UPPER TRIBUNAL JUDGE KELLY

Between

ENTRY CLEARANCE OFFICER

Appellant

and

SRISALINI SACHCHITHANANTHAM
(NO ANONYMITY ORDER MADE)

Respondent

Representation:
For the Appellant: Mr E. Tufan, Senior Home Office Presenting Officer
For the Respondent: No appearance

Heard at Field House on 27 November 2023

DECISION AND REASONS

1. For the sake of continuity, we will refer to the parties as they were before the First-tier Tribunal although technically the Entry Clearance Officer (represented by the Secretary of State) is the appellant in the appeal before the Upper Tribunal.

2. The Upper Tribunal has been conscious of, and apologises for, the lengthy delay in promulgating this decision. The delay was in large part caused by an unavoidable and fairly lengthy period of fitness absence of one of the panel members, which was followed by a phased return to work.

3. The original appellant (Ms Sachchinthanantham) appealed the respondent's (ECO) decision dated 16 July 2021 to refuse entry clearance under the immigration rules relating to the EU Settlement Scheme (Appendix EU (Family Permit)) (an application made under the domestic immigration rules put in place

to regularise the status of those entering or remaining in the UK under EU law post-EU exit).

4. The appeal was brought under The Immigration Citizens' Rights Appeals (EU Exit) Regulations 2020 ('the CRA Regulations 2020'). The available grounds of appeal are:

   (i) that the decision breaches any right which the appellant has by virtue of the Withdrawal Agreement ('WA'), EEA EFTA Separation Agreement or the Swiss Citizens' Rights Agreement;

   (ii) the decision is not in accordance with the provision of the immigration rules by virtue of which it was made, is not in accordance with the residence scheme immigration rules, is not in accordance with section 76(1) or (2) of the 2002 Act (revocation of ILR) or is not in accordance with section 3(5) or (6) of the 1971 Act (deportation).

5. First-tier Tribunal Judge Cameron ('the judge') allowed the appeal. The judge noted the factual circumstances. The appellant and the EU citizen sponsor said that their marriage was arranged by their families. The proposal was completed on 01 July 2020 but due to Covid-19 restrictions they were not able to marry until 21 June 2021. Following the proposal, they kept in contact by Whatsapp and Viber. They lived as man and wife after the wedding until the sponsor returned to the UK on 24 July 2021. The judge heard evidence from the sponsor and accepted that he was a credible witness. The judge concluded that he was satisfied that the appellant was in a 'durable relationship' with the EU national sponsor before 31 December 2020, and without much further reasoning, concluded that the appellant 'met the requirements of the regulations'.

6. The respondent applied for permission to appeal to the Upper Tribunal. The grounds make a series of submissions that are not clearly particularised. However, the central argument appears to be that the First-tier Tribunal erred in apparently finding that the appellant met the definition of 'durable partner' in Appendix EU (Family Permit) given that the couple had not lived together in a relationship akin to marriage before the specified date of 31 December 2020. The judge conflated the question of whether the couple were in a subsisting relationship with the definition of a 'durable partner' under Appendix EU (Family Permit).

7. The case was first listed for hearing in the Upper Tribunal on 03 August 2023. The hearing was adjourned with directions. There was no appearance by or on behalf of the appellant. The respondent's representative noted that the appellant had been granted entry clearance as a spouse under Appendix FM since the decision that is the subject of this appeal. It was reasonable to infer from this that she might have joined her husband in the UK. Nevertheless, the Upper Tribunal considered that it was in the interests of justice for both parties to be given an opportunity to consider what the implications of this appeal might be i.e. whether there might be any advantages to pursuing it for the appellant or whether it might have become academic from the respondent's point of view.

8. The case was relisted on 27 November 2023, but there was still no appearance or on behalf of the appellant. We were satisfied that she was notified of the hearing date and that we could proceed to determine the appeal. We proceeded to hear submissions from Mr Tufan and reserved our decision.

9. We have considered the First-tier Tribunal decision, the evidence that was before the First-tier Tribunal, the grounds of appeal, and the submissions made at the hearing, before coming to a decision in this appeal. It is not necessary to summarise the oral submissions because they are a matter of record, but we will refer to any relevant arguments in our decision.

Decision and reasons

10. The United Kingdom exited from the European Union at 23.00hrs on 31 December 2020.

11. Before that date, a Union citizen and their family members could exercise rights of free movement in the UK under EU law. An EU citizen who was exercising rights of free movement in the UK was known as 'a qualified person'. The spouse of a qualified person was a 'family member' who could apply for a 'family permit' from abroad to join the EU citizen sponsor in the UK. The unmarried partner of a qualified person was an 'extended family member' who needed to show that they were in a 'durable relationship' with the EU citizen. Unlike family members, extended family members did not have an automatic right of entry under EU law. Their entry or residence needed to be 'facilitated' by the Member State following an extensive examination of their personal circumstances and any denial of entry needed to be justified. In contrast to 'family members' the rights of 'extended family members' only crystalised under EU law when they were granted entry clearance or leave to remain by the respondent.

12. In preparation for EU exit, the United Kingdom negotiated an agreement with the European Union, which set out the arrangements for its withdrawal. The Withdrawal Agreement (2019/C 384 I/01) ('the WA') recognised that it was necessary to protect the rights of Union Citizens and United Kingdom nationals and their respective family members where they had exercised free movement rights before the end of the transition period, which ended on 31 December 2020.

13. The EU Settlement Scheme was designed as a mechanism to grant leave to enter or remain under the domestic immigration rules to those who could establish that they had engaged rights under EU law before the end of the transition period. The domestic immigration rules also made provision for other categories of people, including those applying to join a relevant EU citizen in the UK.

14. However, some provision was made for flexibility after that date so that a person could still apply to regularise their status. The Citizens' Rights (Application Deadline and Temporary Protection) (EU Exit) Regulations 2020 9SI 2020/1209) ('the Grace Period Regulations 2020') specified the 30 June 2021 as the deadline by which applications for residence status must be made under the EUSS immigration rules. This was an extension of time to make an application for leave to enter or remain and not an extension of time to establish EU law rights of residence. Rights of residence under EU law still came to an end on 31 December 2020.

15. The immigration rules relating to the EU Settlement Scheme use some of the phraseology of EU law, which appears to be an attempt to create some parity. However, it can at times cause confusion because some of the provision contained in the immigration rules depart from EU law principles or have a different meaning within the immigration rules. The structure and drafting of the

rules relating to the EU Settlement Scheme is complex and is often difficult to follow.

16. Appendix EU largely relates to applications from those who were seeking leave to enter or remain under the immigration rules as the 'family member' (within the meaning of the immigration rules) of a 'relevant EEA citizen'. The Appendix makes provision for those who are in the UK but also for 'joining family members' who have applied from outside the UK. Confusingly, the separate Appendix EU (Family Permit), also relates to applications for entry clearance made from outside the UK. It is said that it: 'has effect in connection with the granting of entry clearance for the purposes of acquiring leave to enter or remain in the UK by virtue of Appendix EU to these Rules.' Appendix EU (Family Permit) appears to be tied to the underlying provisions contained in Appendix EU itself.

17. The appellant's EEA citizen sponsor is an Italian citizen. The sponsor told Judge Cameron that they had known each other since childhood. The evidence was that their marriage was arranged by their parents in accordance with Sri Lankan cultural traditions. The proposal was completed on 01 July 2020 (before EU exit). However, the couple were not able to get married until 21 June 2021 (after EU exit) because of travel restrictions imposed during the Covid-19 pandemic. Their evidence was that, after their engagement, they kept in touch by modern methods of communication until the sponsor was able to travel to Sri Lanka for the wedding. They lived together for around one and a half months after the wedding before the sponsor had to return to the UK. The appellant applied for entry clearance under Appendix EU (Family Permit) on 25 June 2021, shortly before the end of the grace period allowed for such applications.

18. The Court of Appeal in *Celik v Secretary of State for the Home Department* [2023] EWCA Civ 921 considered the position of an appellant who had begun a relationship in the UK before EU-exit, but could not get married before the end of the transition period because of restrictions imposed during the Covid-19 pandemic. In that case, the appellant could only be treated as an 'extended family member' before 31 December 2020. Although it had been found that the couple were in a 'durable relationship' prior to EU exit, within the ordinary meaning of the phrase, the court found that this was insufficient to engage rights under EU law or to come within the personal scope of the WA. This was because entry had not been facilitated by the granting of an EEA Residence Card prior to 31 December 2020. Appendix FM only recognised unmarried partners in so far as it defined a 'family member' as a person who had been issued with a 'relevant document' under The Immigration (European Economic Area) Regulations 2016 ('the EEA Regulations 2016') before 31 December 2020. This was broadly consistent with the principles of EU law, which only recognised rights of residence for 'extended family members' if their entry or residence had been facilitated by the host Member State.

19. The situation in this case is somewhat different. The appellant was in a long-distance relationship with her partner, and had never lived in the UK, nor been facilitated entry to the UK, before 31 December 2020. Nevertheless, the immigration rules relating to the EU Settlement Scheme appeared to make provision for people who had been in a durable relationship with a relevant EEA citizen before 31 December 2020 to still apply for entry clearance under Appendix EU (Family Permit). It was open to the respondent to make provision for entry to any category of person under the domestic immigration rules.

20. At the date of the respondent's decision, the appellant did not meet the requirements of Appendix EU (Family Permit) as the spouse of a relevant EEA citizen because the marriage took place after 31 December 2020. Appendix EU (Family Permit) required the appellant to show that she was a 'family member of a relevant EEA citizen'. Annex 1 defined a 'family member' (within the meaning of the immigration rules as opposed to EU law) as follows:

> '**family member of a relevant EEA citizen**
>
> a person who has satisfied the entry clearance officer, including by the required evidence of family relationship, 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; [our emphasis]

21. However, Annex 1 of Appendix EU (Family Permit) defined a 'durable partner' differently to the definition contained in Appendix EU. It did not contain the additional requirement to hold a 'relevant document' as a durable partner:

> '**durable partner**
>
> 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 marriage or civil partnership for at least two years (unless there is other significant evidence of the durable relationship)…' [our emphasis]

22. It is likely that the definition did not include the requirement to have been issued with a 'relevant document' under the EEA Regulations 2016 because Appendix EU (Family Permit) related to applications for entry clearance from outside the UK rather than applications from people who were in the UK before 31 December 2020. As extended family members, those who were in durable relationships with EU citizens in the UK before 31 December 2020 only had rights protected by the WA if their residence had been facilitated by the issuing of an EEA Residence Card. In contrast, durable partners applying for entry clearance were unlikely to have already had entry or residence facilitated under EU law. The act of applying for an EEA Family Permit from abroad was the application for entry to be facilitated.

23. At the date when the appellant applied for entry clearance on 21 June 2021, she could not apply for a Family Permit under the EEA Regulations 2016, because the United Kingdom had already exited from the EU. However, under domestic law, the Grace Period Regulations 2020 still appeared to make provision for a person who could show that they were in a durable partnership (as defined) before 31

December 2020 to apply for entry clearance under Appendix EU (Family Permit) until 30 June 2021. Nothing in the decision letter suggested that the application was not valid.

24. The respondent refused the application on the ground that the marriage did not take place before the specified date of 31 December 2020. The respondent was not satisfied that the appellant had produced sufficient evidence to show that she was in a durable relationship with the relevant EEA citizen as defined in Appendix EU (Family Permit) before 31 December 2020.

25. It is in this context that the judge considered the appeal. There is nothing to suggest that an appeal under the CRA Regulations 2020 is anything other than a merits-based appeal. It was open to the judge to hear evidence from the EEA sponsor and to evaluate what weight to place on that evidence. The judge found the sponsor to be an 'entirely credible witness'.

26. The judge accepted the sponsor's evidence that the couple had known one another since childhood. He accepted that it was consistent with Tamil culture for the families to arrange the marriage. But for the travel restrictions imposed in the unusual circumstances arising from the pandemic, the couple had planned to get married in September 2020. The judge placed weight on the fact that they married as soon as reasonably practicable thereafter as an indication of the strength of the relationship as it stood before 31 December 2020. He accepted that the couple kept in contact on a regular basis even if they could not live together at the time.

27. Earlier in the decision the judge had set out the definition of a durable partner contained in Appendix EU (Family Permit). It is clear that he had the relevant provision in mind. The judge did not make a specific finding in relation to the requirement that a couple should have lived together in a relationship akin to marriage for at least two years. It seems clear from the evidence that the appellant could not meet that element of the definition. However, the definition left some flexibility by providing an alternative i.e. 'unless there is other significant evidence of a durable relationship'. It is this aspect of the definition that the judge focussed on [19]-[20].

28. The respondent argues that there was no 'significant evidence' to show a durable relationship given that they had not lived together in a relationship akin to marriage for a period of two years. However, we find that this amounts to nothing more than a disagreement with the judge's findings. It was open to the judge to place weight on the sponsor's evidence, which he accepted in its entirety.

29. The immigration rules relating to the EU Settlement Scheme at times seem to provide hybrid provisions relating to EU law and domestic law. Under EU law, it was not strictly necessary for a couple to show co-habitation in order to demonstrate that they were in a durable relationship for the purpose of the Citizens Directive. The requirement contained in Appendix EU (Family Permit) for a couple to have lived together in a relationship akin to marriage for a period of two years does not reflect the position under EU law as it stood before 31 December 2020. It is drawn from the wording usually used in Appendix FM of the domestic immigration rules. If the EU Settlement Scheme was designed to give effect to the WA, it must have been open to the judge to consider the strength and durability of the relationship for himself, and if necessary, without reference

to co-habitation. The final phrase of the definition of a durable partner contained in Appendix EU (Family Permit) allowed him flexibility to do so.

30. Although the judge referred to meeting the requirements of 'the regulations' rather than the immigration rules at the end of the decision (this might be a reference to the CRA Regulations 2020, which only set out the right of appeal), it is clear from an overall reading of the decision that he had applied the relevant section of the immigration rules. In our assessment, the judge's findings do not disclose an error of law and were within a range of reasonable responses to the evidence before him.

31. For the reasons given above, we conclude that the First-tier Tribunal decision did not involve the making of an error of law.

32. We note that the appellant's previous representatives sent an email on 13 October 2023 applying to withdraw the appeal. However, the appeal lodged under the CRA Regulations 2020 had already been determined by the First-tier Tribunal. The appeal before the Upper Tribunal was brought by the respondent. Only the respondent could withdraw it. Having determined that appeal, the First-tier Tribunal decision shall stand.

Notice of Decision

The First-tier Tribunal decision did not involve the making of an error on a point of law

M.Canavan
Judge of the Upper Tribunal
Immigration and Asylum Chamber

05 September 2024