IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2022-04030

First-tier Tribunal No: EA/11805/2021

THE IMMIGRATION ACTS

Decision & Reasons Promulgated
On 27 January 2023

Before

UPPER TRIBUNAL JUDGE BLUNDELL
DEPUTY UPPER TRIBUNAL JUDGE COTTON

Between

ROBERT NERGUTI
(NO ANONYMITY ORDER MADE)

Appellant

and

SECRETARY OF STATE
FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr B Hawkin, counsel, instructed by Nova Legal Services
For the Respondent: Ms J Isherwood, Senior Home Office Presenting Officer

Heard at Field House on 10 January 2023

DECISION AND REASONS

BACKGROUND

1. The appellant appeals against the decision of First-tier Tribunal (FtT) Judge Khurram ('the judge'). The appellant had married Galina Mincheva (the sponsor, a national of Bulgaria) on 12 April 2021 and applied for leave to remain on 29 March 2021 under the EU Settlement Scheme on the basis that he is the spouse of an EEA national. The respondent refused the application on 10 July 2021. On appeal, the Judge dismissed the appellant's case in a decision promulgated 11

May 2022. The appellant appealed on the 24 May 2022 and permission to appeal was granted by the FtT on 27 June 2022.

2. The respondent refused the application on the basis that the appellant did not meet the requirement of being a family member of the sponsor. They had married after 2300hrs on 31 December 2020 (the specified date) and so the appellant did not meet the definition of a spouse. The appellant had not been issued a family permit or residence card and so did not have a relevant document which could have brought him within the definition of a durable partner of the sponsor in Appendix EU to the Immigration Rules. He therefore did not qualify for leave on the basis of being a durable partner.

3. In his decision, the judge considered the appellant's argument that this refusal was not in accordance with the principle of proportionality in EU law because the relevant rules contained an arbitrary cut-off date and the appellant had been prevented from marrying before that date by COVID restrictions. The judge concluded at [33] that the question of proportionality is 'an irrelevance' and that the appellant only had those rights provided for in the Withdrawal Agreement. The appellant had not pointed to any aspect of the Withdrawal Agreement as being unlawfully interfered with.

4. In dismissing the appeal, the judge said at [35] that:

> *I recognise that the broad thrust of the Withdrawal Agreement is to preserve the rights of those who already exercised EU law rights before 31 December 2020, and the Appellant's spouse potentially would have been put off doing so if her durable partner could not remain with her. However, there is an explicit exclusion of durable partners who have not sought documentation on or before 31 December 2020. Provision is made for both married and non- married partners. The Appellant's relationship was not of sufficient length or properly evidenced by a residence card to qualify under the provision. This does not make the decision itself disproportionate. It simply reflects that the authors of the agreement did not consider the circumstances of his relationship and those like him to merit provision by the agreement.*

5. Since the FtT determination the case of Celik (EU exit; marriage; human rights) [2022] UKUT 00220 (IAC) has been decided by the Upper Tribunal. The judicial headnote of that case is worth repeating here:

> *(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.

THE HEARING

6. At the start of the hearing, the appellant sought an adjournment on the basis that an application for permission to appeal to the Court of Appeal has been made in Celik and a request has been made to expedite the appeal. It has been linked to another case and the respondent has responded to each case, not conceding that permission to appeal should be granted. The appellant submitted that it would be sensible to adjourn this and similar cases pending the outcome of the appeal in Celik. A date for the appeal has not been set. Mr Hawkin submitted that it would save all parties and judicial resources and court time to adjourn this case pending the outcome of that appeal. Counsel for the appellant also understands that there is another case before the Upper Tribunal which will consider the meaning of 'facilitation' under art 10 of the Withdrawal Agreement.

7. The respondent opposed the application to adjourn, saying that we should apply the law as it currently stands in Celik. She submitted that we could not know whether the appellant's arguments in Celik have any strength.

8. We considered the application for an adjournment and took into consideration the overriding objective of dealing with cases justly and fairly, including dealing with the case in a proportionate manner and avoiding delay as far as is compatible with proper consideration of the issues. We noted that there is no date set for the Court of Appeal to consider Celik, and that permission to appeal has not (yet) been granted. It may be that other cases are added to that appeal and we cannot judge with any level of confidence how long it will take for the case to come to a conclusion. We concluded that adjourning this case would create an unjustifiable delay and that the interests of justice and the overriding objective were best served by not granting the application for an adjournment.

9. The appellant addressed us on four of the grounds of appeal outlined in the application for leave. Mr Hawkin did not advance the other grounds detailed in the application to appeal:

a. First, that the judge was wrong to conclude that proportionality was irrelevant to the appeal;

b. Second, the false conclusion that proportionality is irrelevant lead the judge to disregard factual evidence that should have been taken into account;

c. Third, in failing to address proportionality, the judge also failed to take into account the respondent's EU Settlement Scheme policy guidance which required the respondent to make due allowances for the impact of the pandemic on applicants; and

d. Fourth, the judge was wrong to conclude that the appellant did not qualify as a durable partner. It was not necessary for the appellant and sponsor to be in a relationship for a minimum of 2 years in order to qualify through this

route. The same policy guidance suggests that for those applicants who do not have a relevant document prior to the specified date it was sufficient to point to other evidence of the relationship to establish that it is one of durable partnership.

10. In relation to the first ground, it was submitted that reg 8 of the Immigration (Citizens' Rights Appeals) (EU Exit) Regulations 2020 provides a ground of appeal on the basis that the respondent's decision was not in accordance with the Withdrawal Agreement. Art 18(1)(r) of the Withdrawal Agreement requires that procedures for redressing a refusal of leave to enter or remain in accordance with the Withdrawal Agreement:

> *…shall allow for an examination of the legality of the decision, as well as of the facts and circumstances on which the proposed decision is based. Such redress procedures shall ensure that the decision is not disproportionate.*

11. The respondent submitted in response that this appellant has never had any documents showing that his presence in the UK was facilitated, that this case raises the same point as was decided in Celik, and that we should follow the position outlined in the judicial headnote of that case.

12. On the second ground, it was said that the appellant and sponsor had made efforts to marry before the specified date which were scuppered by COVID closures and the time it took the respondent to give clearance to marry.

13. In relation to the third and fourth grounds, the appellant submitted that the respondent's guidance at https://www.gov.uk/guidance/eu-settlement-scheme-evidence-of-relationship-to-an-eu-citizen ('the respondent's guidance') suggests that for those who didn't have a relevant document prior to 31 December 2020 it was sufficient to point to other evidence of the relationship. Via the appellant's written closing submissions in the FtT, we were referred to the following paragraphs of the respondent's guidance (we include a fuller extract than in the written closing submissions and have added emphasis):

> ***If you're their unmarried (durable) partner***
>
> *You must hold a relevant document issued to you on the basis that you're the durable partner of an EEA or Swiss citizen or person of Northern Ireland.*
>
> *A relevant document here includes:*
>
> - *a family permit issued under the EEA Regulations*
> - *an EU Settlement Scheme family permit*
> - *a residence card issued under the EEA Regulations or the EU Settlement Scheme*
> - *a letter from the Secretary of State confirming your qualification for a family permit or residence card under the EEA Regulations, had the route not closed after 30 June 2021*
>
> *If you're the unmarried (durable) partner of a person of Northern Ireland and have yet to apply, you're unlikely to have a relevant document.*
>
> ***If you do not have a relevant document, you'll need to show evidence:***
>
> - ***of your relationship to your unmarried (durable) partner***

- ***that your relationship existed by 31 December 2020***
- ***that your relationship continues to exist on the date you apply, or existed for the period of residence relied upon***

The list below gives some examples of evidence you can provide. This list is not exhaustive and other forms of evidence may be accepted. Each case will be considered on a case by case basis*.*

Evidence that you had lived together for at least 2 years by 31 December 2020:

- *bank statements or utility bills in joint names at the same address*
- *residential mortgage statement or tenancy agreement in joint names*
- *official correspondence that links you at the same address*

Evidence of joint finances, business ventures or commitments for at least 2 years by 31 December 2020:

- *tax returns, business contracts or investments*

Evidence of joint responsibility for a child by 31 December 2020:

- *the child's birth certificate which names both parents*
- *a custody agreement showing that you're living together and sharing parental responsibility*

The evidence will need to show that you're still the unmarried (durable) partner of the EEA or Swiss citizen or the person of Northern Ireland, or that you are now their spouse or civil partner.

14. The definition of durable partner in Annex 1 to Appendix EU, submits the appellant, provides a definition which can be read to include a person who lacks a relevant document. In combination with clear evidence of trying to get married, that definition is met.

15. The appellant referred us to the judicial headnote of SF and others (Guidance, post–2014 Act) [2017] UKUT 120, which re reproduce here, along with [12] of that decision:

> *Even in the absence of a "not in accordance with the law" ground of appeal, the Tribunal ought to take the Secretary of State's guidance into account if it points clearly to a particular outcome in the instant case. Only in that way can consistency be obtained between those cases that do, and those cases that do not, come before the Tribunal.*
>
> *...*
>
> *[12] On occasion, perhaps where it has more information than the Secretary of State had or might have had, or perhaps if a case is exceptional, the Tribunal may find a reason for departing from such guidance. But where there is clear guidance which covers a case where an assessment has to be made, and where the guidance clearly demonstrates what the outcome of the assessment would have been made by the Secretary of State, it would, we think, be the normal practice for the Tribunal to take such guidance into account and to apply it in assessing the same consideration in a case that came before it.*

16. The respondent submitted that there was no getting around the fact that this appellant does not have a relevant document and so his presence in the UK was not being facilitated.

DISCUSSION AND CONCLUSIONS

17. We have considered the oral submissions by both parties in front of us, and also the written closing submission of the appellant in the FtT (which he relied on before us), his grounds of appeal and the guidance at the link above. The parties were content for us to follow that link and it was agreed that the guidance at that link is the guidance that was in place at the relevant time. We have available to us the FtT determination and the bundles that were available to the FtT.

18. Mr Hawkin's oral submissions on the first three grounds were succinct and did not go beyond the outline of them above. They are exposed more fully in the grounds of appeal, but having considered the case in its entirety we do not think that we need to go further than to say that we find this case sits squarely within the circumstances outlined in the judicial headnote of Celik. The judge expressed the same conclusion by saying at [33] that the question of proportionality was an irrelevance and that the appellant only has those rights contained in the Withdrawal Agreement and Appendix EU. Mr Hawkin has provided no persuasive reason for us to depart from the decision of the Presidential panel in Celik and we decline to do so.

19. The third ground states that the judge fell into error in that he should have taken the respondent's guidance into account when considering proportionality. In that submission, the appellant encounters a fundamental difficulty, which we put to Mr Hawkin in the course of argument.

20. The grounds of appeal available to the appellant are limited by the terms of the 2020 Regulations. It may be submitted that the decision is contrary to the Withdrawal Agreement, or to the Immigration Rules, or both. The appellant does not (and did not) have available to him a ground of appeal that the respondent's decision was contrary to published policy or that it was otherwise not in accordance with the law. The Article 8 ECHR mechanism by which the policy was brought to bear in SF (Albania) is not available to the appellant. The only way in which the guidance might be factored into the equation, therefore, is via a proportionality assessment under the terms of the Withdrawal Agreement but, as held in Celik, the appellant cannot rely on Article 18(1)(r) of that agreement because he is not in personal scope of the agreement.

21. Whilst we have found that the judge (in line with Celik) has not erred by not assessing proportionality, we have nevertheless considered whether the respondent's guidance would meet the test in SF.

22. The appellant pleads that the respondent's guidance fortifies the proportionality argument and indicates a policy approach of making allowances for COVID-related issues, both procedurally in terms of lateness but also in respect of substantive and evidential matters as well.

23. The respondent's guidance does seem – on one reading – to indicate that the respondent would consider evidence of a 2-year relationship at the point of application as being akin to a relevant document. This interpretation comes from the excerpt of the respondent's guidance that we have repeated above in bold. However, the respondent's guidance at this point seems to conflate the question

of whether the applicant and sponsor are in a durable relationship, and the question of whether the applicant's presence in the UK has been facilitated. We consider (as will be seen below) that these are separate requirements under the immigration rules.

24. Given the clear distinction in the Immigration Rules between these separate requirements, their conflation in the respondent's guidance to applicants is confusing. This results in the respondent's guidance not 'pointing to a particular outcome in this case', as required by SF (Albania). We therefore find that the guidance could not have swung a proportionality assessment in the appellant's favour, even assuming that Article 18(1)(r) was accessible to him.

25. We turn to the fourth ground. In order to be a durable partner, the appellant has to satisfy the definition of this term in Appendix EU. Paragraph (a) of the definition concerns the first element of the definition of durable partner: That the appellant and sponsor are in a durable relationship. This is satisfied if they have lived together for two years. We agree with the appellant that it is not necessary for an applicant and sponsor to have lived together for two years in order for the relationship to qualify as 'durable'. The definition states that this will be satisfied where the applicant and sponsor have lived together for two years, or where "*there is other significant evidence of the durable relationship*".

26. However, we consider that the definition of a durable partner within Appendix EU does not consist solely of being in a durable relationship with the sponsor. Paragraph (b) deals with further requirements. We find that on a proper reading of the rules, these two requirements (paragraphs (a) and (b) of the definition of durable partner) are separate, cumulative, requirements to prove that an applicant is a durable partner.

27. Sub-para (b)(i) of the definition concerns the requirement to hold a 'relevant document' (a permit, residence card or similar issued by the respondent on the basis of an application under the EEA Regulations).

28. At paragraph (b)(ii) onwards of the definition of durable partner, there is room within Appendix EU for an applicant who does not hold a relevant document to satisfy the second part of the definition of durable partner. The appellant submitted that the relevant part of para (b)(ii) to his case is as follows (emphasis added):

> *(b)*
>
> *(i) the person holds a relevant document … or*
>
> *(ii) where the person … does not hold a document of the type to which sub-paragraph (b)(i) above applies, and where:*
>
> *(aa) the date of application is after the specified date; and*
>
> *(bb) the person:*
>
> *(aaa) was not resident in the UK and Islands as the durable partner of a relevant EEA citizen (where that relevant EEA citizen is their relevant sponsor) on a basis which met the definition of 'family member of a relevant EEA citizen' in this table, or, as the case may be, as the durable partner of the qualifying British citizen, at (in either case) any time before the specified date, **unless** the reason why, in the former case, they were not so resident is that they did*

> *not hold a relevant document as the durable partner of a relevant EEA citizen for that period (where their relevant sponsor is that relevant EEA citizen) and they did not otherwise have a lawful basis of stay in the UK and Islands for that period; or…*

29. The appellant submitted that this means a person who does not hold a relevant document, and who is not resident in the UK with a relevant document nor had another lawful basis of stay in the UK, does satisfy the second element of the definition of durable partner.

30. The complexity of the Immigration Rules has been the subject of adverse judicial observations for some years. McCombe LJ referred to the provisions of Appendix FM as 'labyrinthine' in Mudibo v SSHD [2017] EWCA Civ 1949. Underhill LJ used the same term more recently, in Hoque & Ors v SSHD [2020], in addition to referring to the 'idiosyncratic drafting conventions' and 'confused language' often encountered in the Rules. Dingemans and McCombe LJJ expressly associated themselves with those observations in their own judgments. Hoque & Ors v SSHD was a case concerned with the various iterations of paragraph 276B of the Immigration Rules.

31. The complexity of Appendix FM and paragraph 276B of the Immigration Rules pales into insignificance in the face of provisions such as those which are found in Appendix EU. We should state quite clearly that we have not found the provision above at all easy to understand. The search in any such case is for the plain and ordinary meaning of the provision (Mahad v ECO [2009] UKSC 16; [2010] WLR 48) but we have not found that search straightforward in this case. The drafting of Appendix EU is not merely idiosyncratic; it is at times impenetrable.

32. We agree that this part of the definition of durable partner does provide for applicants who do not have a relevant document as a durable partner. However, we find that the opening phrase of b(ii)(bb)(aaa) requires the applicant to be (or to have been) resident outside the UK at the material time. The phrase '**unless** the reason why, in the former case, they were not so resident' cannot refer to someone who was resident in the UK because 'the former case' apparently refers to an applicant who is not resident in the UK. That reading of the provision is supported by considering the alternatives in the next two provisions ((bbb) and (ccc)), which both refer to individuals who *were* resident in the UK before the specified date. We cannot see how paragraph (aaa) can avail an applicant in the position of this appellant, who was resident in the UK before the specified date.

33. To interpret it in the way the appellant asks us to would mean that the second element of the definition of 'durable partner' boils down to 'someone with a relevant document, or someone who applied after the specified date and does not have a relevant document'. Such an interpretation is not only lacking in logic, but goes against the purpose of the Withdrawal Agreement (stated in its recital) to provide protection for Union citizens and their family members "*where they have exercised free movement rights before a date set in this Agreement*" (the specified date). Paragraph b(ii)(bb)(aaa) of the definition of a durable partner does not apply to the appellant.

34. For the reasons detailed above, we find that the judge was not wrong to conclude that proportionality was irrelevant to the appeal, that the judge did not consequently fail to take relevant evidence into account. The respondent's

guidance does not point clearly to a particular outcome. The judge was not wrong to conclude that the appellant did not satisfy the definition of a durable partner. The appellant has not satisfied us that Judge Khurram erred in law and we uphold the FtT decision.

Postscript

35. The decision which appears above was finalised and sent for promulgation in the afternoon of Monday, 23 January. Before the decision was issued by the administrative staff at Field House, Mr Hawkin filed and served a short Note in which he sought permission to rely on two unreported decisions of this Tribunal, both of which were said to support his argument on Appendix EU of the Immigration Rules. We refuse permission to rely on that Note and the two unreported decisions for the following reasons:

(i) The Note is unsolicited and no attempt has been made to follow the process described at [54] of MH (Eritrea) v SSHD [2022] EWCA Civ 1296. The appellant did not seek permission to file this Note, nor did he alert the SSHD to his intention to do so.

(ii) The Note refers to unreported decisions which were issued *before* the hearing in this matter and there is no explanation for the failure to bring the decisions to the attention of the Tribunal at the hearing. It is unsatisfactory for counsel's post-hearing researches to be introduced in this manner; such pre-existing material should have been adduced at the hearing if it was to be relied upon.

(iii) Were the Note and the decisions to be admitted, the Upper Tribunal would have to give the respondent an opportunity to respond, thereby delaying the resolution of the appeal. That delay is relevant.

(iv) The Upper Tribunal is not, in any event, assisted by either decision. The decision in UI-2022-002538 turned on the inability of the appellant Secretary of State to explain why the judge in that case had erred in his interpretation of the Immigration Rules. The decision in UI-2022-003829 turned on the finding of fact that the appellant was a durable partner, not on the construction of the Immigration Rules for which Mr Nerguti contends.

Notice of Decision

The decision of First-tier Tribunal Judge Khurram promulgated on 11 May 2022 does not involve an error of law. We uphold the decision and the appellant's appeal therefore remains dismissed.

D Cotton

Deputy Judge of the Upper Tribunal
Immigration and Asylum Chamber

23 January 2023
(amended 26 January 2023)