



IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2022-006276
(EA/50541/2021); IA/05207/2021

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On 16 May 2023

Before

UPPER TRIBUNAL JUDGE BRUCE

Between

Maksym Panchenko

and

Secretary of State for the Home Department

Appellant

Respondent

Representation:

For the Appellant: Ms Saifolahi, Counsel instructed by Good Advice UK
For the Respondent: Mr Terrell, Senior Home Office Presenting Officer

Heard at Field House on 12 April 2023

DECISION AND REASONS

1. The Appellant is a national of Ukraine born on the 21st March 1987. He appeals with permission against the decision of the First-tier Tribunal (Judge Dyer) to dismiss his appeal under the Immigration (European Economic Area) Regulations 2016.

Background and Matters in Issue

2. The basis of the Appellant's application under the Immigration (European Economic Area) Regulations 2016, made prior to 11pm on the 31st December 2020, was that he was the durable partner of an EEA national exercising treaty rights in the UK. His partner, Ms Monica Siwek, is a Polish national exercising treaty rights here.

3. The application was refused by the Respondent on the 1st March 2021. The Respondent was not satisfied, on the evidence presented with the application, that this was a durable relationship. Although it does not appear to have been doubted that the relationship is genuine, the Respondent noted that the Appellant and Ms Siwek had not been cohabitating at the date of application.
4. By the date of the appeal hearing on the 22nd September 2022, the Appellant and Ms Siwek had moved in together (in February 2021) and got married (on the 27th November 2021). The Respondent accepted that these post decision events were potentially relevant to the question at the heart of the appeal: was the Appellant a durable partner of an EEA national prior to completion day?
5. The evidence presented by the Appellant at the hearing was all unchallenged by the Respondent. Judge Dyer summarises it as follows:

“In summary the documentary evidence shows that the appellant met the sponsor in February 2019 in a nightclub called Slimelight. They had various mutual friends or friends in common who wrote letters of support with regards to the relationship in December 2020. Thereafter his parents and another friend made witness statements in support of the appeal proceedings. There is evidence in these witness statements that the appellant and the sponsor were in a relationship from 2019 and that some time in 2020 the appellant told his parents he was committed to Monika and wished to marry her. Thereafter the evidence of tenancy agreements and council tax bills and other utilities confirms that they moved in together in February 2021 and were married on 27th November 2021”.

6. As to the applicable law Judge Dyer directs himself as follows:

“Therefore, the context of the rights under the EU treaties as they applied to the appellant’s circumstances on 31st December 2020 are that he does not have an automatic right of residence because he is not a family member under Article 2 of the Directive and therefore the Secretary of State has a discretion as to whether to grant residence. In the UK a durable relationship is defined as a relationship akin to marriage or one that has features of permanence, including cohabitation for a period of two years or raising a family together”.

7. Having rejected an alternative argument advanced by the Appellant (which does not now feature in this appeal) Judge Dyer proceeds to consider the evidence about the relationship prior to completion day. It is convenient to set out his reasoning in full:

“28. The question of whether a relationship is durable or not is not to be conflated with whether the relationship is genuine. The benefit extended to durable partners under the EEA Regulations (as a result of Article 3(2)(b) of the Directive) is a benefit that was and is intended to apply in circumstances beyond casual, albeit equally genuine relationships. The appellant must show that he was in a durable relationship. At the time of making his application on 31st December 2020 the appellant and his

girlfriend were not cohabiting and had no children although they had been in a relationship for almost 18 months at this time. It was not until February 2021 that the appellant and his girlfriend began cohabiting and in November 2021 they got married.

29. The durability of their relationship on 31st December 2020 is not, in my opinion made any stronger by their subsequent cohabitation and marriage, these events taking place after the application date. Whilst it is not in any doubt that they were in a genuine and subsisting relationship on 31st December 2020; I find that at the point in time that the appellant made his application for a residence card, there was and still is insufficient evidence to show on the balance of probabilities that they were in durable relationship. Durable relationships will evolve over time in most cases, and whilst I accept that their relationship has evolved into one that would meet the definition of a durable relationship, that is not the relevant point in time for the purpose of this appeal.

30. Whilst the appellant and his wife will undoubtedly be disappointed at the decision it should be noted that notwithstanding the date on which the marriage or civil partnership was formed, the EUSS permits a person who was living in the UK before the end of the transition period as the durable partner of an EEA citizen resident here by then (and who may now be their spouse or civil partner), but who did not obtain a residence card under the EEA Regulations and had no other lawful basis of stay in the UK, still to bring themselves within the scope of the scheme as a joining family member.

31. The effect of a decision refusing the application would not prohibit the appellant from obtaining residence as the spouse of an EEA national. However, he will, as a person who has no other lawful basis to reside in the UK, need to leave the UK for more than six months. He will then be able to apply to the European Union Settlement Scheme for an EUSS Family Permit which replaces the EEA Family Permit, from overseas or in the UK (by returning here via an EUSS family permit) as a joining family member of his EEA citizen sponsor”.

8. On this basis, the appeal was dismissed.

Error of Law

9. In her grounds Ms Saifolahi submits that Judge Dyer erred in two material respects.
10. The first is that at its paragraph 22 the Tribunal appears to direct itself to the definition of ‘durable partner’ in the Immigration Rules, which require applicants to demonstrate cohabitation for a period of two years or more. As Ms Saifolahi rightly submits, no such definition can be imported into EEA law: YB (EEA Reg 17(4), proper approach) [2008] UKAIT 00062. It might properly be used as a reference point, or benchmark, but the lack of cohabitation cannot, in an EEA case, be treated as determinative. The Secretary of State accepts that this error is made out, and invites me to remake the decision in the appeal.

11. It follows that I need not address the second of Ms Saifolahi's grounds, which is that the decision of the First-tier Tribunal was irrational. Nor need I refer, save to say that I agree with it, to her complaint about the Tribunal's conclusion that it would be open to Mr Panchenko to return to Ukraine for six months and make an application to come back as a spouse.

The Decision Re-made

12. Judge Dyer's findings in terms of the progress of this relationship are all unscathed by this decision. It is accepted that the couple met in February 2019, considered themselves to be in a relationship by July 2019, started living together in February 2021 and were married in November 2021. It is not in issue that this has at all relevant times been a genuine and subsisting relationship. The question is whether, at the date of application on the 31st December 2021, this was a *durable* relationship.
13. The same question arose in the case of Elais (fairness and extended family members) [2022] UKUT 00300 (IAC), where the marriage post-dated the application, and IP completion day. The Tribunal there held that such a marriage could legitimately be treated as evidence of the existence and durability of the claimed relationship before the marriage took place. There is no definition of what a 'durable' relationship might look like in the EU Treaties, or the Immigration (European Economic Area) Regulations 2016. That much is agreed by the parties before me.
14. Here the couple had been in a relationship for a year and half at the date of application. Numerous friends and family members gave evidence (in the form of written witness statements) about their commitment to each other, evidence reinforced, post-application, by their subsequent cohabitation and marriage. Importantly, to my mind, was the fact that by the date of application the two had formed the intention to marry, and indeed had expressed this intention not only in the application form itself but in the covering letter sent to the Home Office that day. The fact that they were engaged was obviously a relevant factor, and it is not one that appears to have attracted any weight in the assessments made by either the Secretary of State or the First-tier Tribunal. I accept Mr Terrell's very well made submissions that the *durability* of a relationship cannot simply be assessed in retrospect. The fact that a relationship proceeds eventually to marriage does not necessarily establish that it could be called 'durable' at all of its earlier stages. I accept however that in this case Mr Panchenko and Ms Siwek had formed, by December 2021 a clear commitment to one another, best evidenced by their mutual declarations to the Home Office that it was their intention to marry and live together for the rest of their lives, an intention subsequently acted upon. On that basis, the appeal is allowed.

Notice of Decision

15. The decision of the First-tier Tribunal is set aside for error of law.
16. The decision in the appeal is remade as follows: the appeal is allowed with reference to the Immigration (European Economic Area) Regulations 2016.
17. There is no order for anonymity.

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Upper Tribunal Judge Bruce
12th April 2023