IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2022-005701

First-tier Tribunal No: EA/00859/2022

THE IMMIGRATION ACTS

Decision & Reasons Issued:

On 17th of September 2024

Before

UPPER TRIBUNAL JUDGE BLUNDELL

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

BRIGHT RANTI ADJEH

Respondent

Representation:
For the Appellant: Mr Badiru, solicitor (acting pro bono)
For the Respondent: Mr Wain, Senor Presenting Officer

Heard at Field House on 5 September 2024

DECISION AND REASONS

1. The Secretary of State appeals with the permission of Upper Tribunal Judge O'Callaghan against the decision of First-tier Tribunal Judge Mulholland ("the judge"). By her decision of 31 May 2022, the judge allowed Mr Adjeh's appeal against the Secretary of State's refusal of his application for leave to remain under Appendix EU of the Immigration Rules.

2. To avoid confusion, I will refer to the parties as they were before the First-tier Tribunal: Mr Adjeh as the appellant and the Secretary of State as the respondent.

Background

3. The appellant is a Nigerian national who was born on 16 June 1983. He entered the United Kingdom holding entry clearance as a student on 18 October 2020. A month later, whilst volunteering at a care home, he met a Dutch national named Daivarina Sofia Saurine Leal. A relationship developed very quickly between

them, and they began cohabiting shortly thereafter. They married by proxy in Nigeria on 15 January 2021.

4. On 14 March 2021, the appellant applied for leave to remain under Appendix EU. His application was made with the assistance of a firm of advisers registered with the OISC, FT Professional Immigration Advisers Ltd. In their covering letter, the firm set out the salient facts and submitted that the marriage was a valid marriage for immigration purposes and that the appellant was entitled to either a residence card under the Immigration (EEA) Regulations 2016 or pre-settled status under Appendix EU. Documents including evidence of Ms Leal's nationality and employment in the UK were submitted with the application.

5. The respondent refused the application on 22 October 2021. She was not satisfied that the appellant could satisfy the Immigration Rules as a spouse because his marriage post-dated 31 December 2020. She considered his application as a durable partner. Whilst he was excused the need to produce a residence card as evidence of facilitation as a result of his leave to remain as a student, it was not accepted that the relationship was durable by the specified date. In so concluding, the respondent observed that the evidence of cohabitation covered less than two years and that there was 'insufficient other significant evidence that the relationship was durable' by the specified date.

The Appeal to the First-tier Tribunal

6. The appellant appealed and his appeal came before the judge, sitting at Taylor House on 27 April 2022. The appellant was represented by Ms Pinder of counsel. The appellant was unrepresented. The judge heard oral evidence from the appellant and the sponsor and a submission from Ms Pinder before reserving her decision.

7. In her reserved decision, the judge found that the relationship was durable and allowed the appeal under the residence scheme Immigration Rules. She gave the following reasons for that conclusion:

> [9] At the specified date the Appellant claims to have been in a durable relationship. He claims have been in a durable relationship with his spouse almost as soon as he met her in November 2020. He has produced a tenancy agreement to show that they were living together from November 2020 and a marriage certificate to show that they were married by proxy on 15 January 2021. He claims that the show was his intention to continue with the relationship which in terms demonstrates that it was durable from the outset.
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> [10] The Appellant does not dispute that the period in which he has been in a relationship with his spouse falls short of the requirement to demonstrate two years of living together. He claims that the fact that he is now married to his spouse demonstrates that he was in a durable relationship before the specified date. I agree. By the time of the hearing the Appellant and his spouse had been together 9 Appeal Number: EA/00859/2022 5 for 18 months. They are now married. This amounts to 'other significant evidence of the durable relationship'. This leads me to conclude that the intention of the Appellant and his spouse was that they were in a durable relationship from the outset and they have maintained that position since.

8. The judge then turned to the Withdrawal Agreement and concluded that the respondent's decision was disproportionate under Article 18(1)(r). The appeal was therefore allowed on both of the grounds of appeal which were available to the appellant.

The Appeal to the Upper Tribunal

9. The respondent advanced two grounds of appeal. The first was that the judge had made irrational and contradictory findings concerning the durability of the relationship before the specified date. The second was that the judge had misdirected herself in law in concluding that the appellant was within the personal scope of the Withdrawal Agreement.

10. Permission was refused at first instance by Judge Hollings-Tennant but granted, on renewal, by Upper Tribunal Judge O'Callaghan, who considered the grounds to be arguable in light of the decisions in *Celik v SSHD* [2022] UKUT 00220 (IAC) and [2023] EWCA Civ 921.

11. By a rule 24 response which was settled by Ms Pinder on 4 March 2024, the appellant tacitly accepted that the judge had misdirected herself in law in relation to the Withdrawal Agreement but submitted that the conclusion which she had reached under the Immigration Rules was rational and sustainable. The Upper Tribunal was therefore invited to dismiss the respondent's appeal.

12. On 20 August 2024, the appellant's solicitors (Messrs Briton) wrote to the Upper Tribunal to state that they were no longer acting for him.

13. Before me, the appellant attended in person. With him was Mr Temitayo Badiru, who stated that he was a qualified solicitor who was a friend of the appellant's brother. He stated that he had attended to represent the appellant on a pro bono basis as a favour to his friend. I ensured that Mr Badiru had sight of the relevant documents, although he had already secured copies of the grounds of appeal, the judge's decision and the response settled by counsel. On resuming, Mr Badiru confirmed that he was ready to proceed and that he had had adequate time to consider the consolidated bundle.

Submissions

14. For the Secretary of State, Mr Wain stated that he would not make any further submissions on the second ground as a result of the appellant's acceptance that the judge had erred in relation to the Withdrawal Agreement. In relation to the first ground, he recalled that the appellant had enjoyed leave as a student when the application was made, as a result of which he was able to meet the Rules by adducing evidence of a durable relationship. That was to be evidence that the couple had 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. The appellant was plainly unable to meet the first of those tests, as a result of which he was to required to produce 'other significant evidence of the durable relationship'. The appellant was also required by the Rules to show that the relationship was formed and durable before the specified date and that it remained durable thereafter.

15. Mr Wain submitted that the judge's conclusion that the relationship was durable at the specified date was irrational. The relationship was said to have begun in November 2020 but the judge had concluded that it had become durable by the following month. There was in fact some suggestion in the appellant's witness statement that the relationship had commenced in December 2020. The evidence before the FtT was confused and contradictory. The tenancy agreement suggested that cohabitation had commenced in November 2020, whereas the letter from the appellant's former advisers suggested that it had commenced in January 2021. There were three photographs and limited information in the witness statements. All hinged, therefore, on the judge's finding that the relationship was durable in December 2020 because the appellant and the sponsor had married the following month but that did not follow, and the fact of the marriage alone did not amount to significant evidence of a durable relationship before the specified date.

16. For the appellant, Mr Badiru accepted that the judge's conclusion in relation to the Withdrawal Agreement was unsustainable in light of the authorities. He submitted that the conclusion she had reached in relation to the Immigration Rules was not marred by legal error, however, and he submitted that it should stand. He noted that the respondent had had an opportunity to attend the hearing but had chosen not to do so. He submitted that the judge had based her decision on the unchallenged evidence of the appellant and the sponsor. He submitted that I should consider the definition of a durable relationship, which was one that was 'akin to marriage'. Given that the appellant and the sponsor had married in January 2021, it was perfectly rational for the judge to conclude that the relationship was akin to marriage shortly beforehand.

17. Mr Badiru submitted that marriage was a significant event. The Secretary of State had not suggested that this marriage was anything other thana a genuine and committed one and the absence of any such suggestion also shed light on the nature of the relationship before the appellant and the sponsor had wed.

18. In reply, Mr Wain accepted that the marriage had not been disputed by the Secretary of State but he recalled what had been said at [54] of *Elais* [2022] UKUT 300 (IAC): that "the mere fact of the marriage between the appellant and the sponsor could not be a development that, without more, would be capable of shedding the determinative light' on the durability of the relationship at the relevant time.

19. I reserved my decision on whether the judge had erred in law. I invited the advocates for submissions on the relief which should follow if I accepted that the judge had erred in law. Mr Wain invited me to retain the case in the Upper Tribunal for remaking. Mr Badiru submitted that it would be difficult for the appellant to come to the Upper Tribunal and that it would be more convenient for him, if there was to be a further hearing, for that to take place in the First-tier Tribunal.

Analysis

20. It is accepted by the appellant that the judge erred in law in relation to the Withdrawal Agreement. The appellant and the sponsor did not marry before the specified date and the appellant's relationship had not been facilitated by the respondent at that date. He was not a person who fell within the personal scope of that agreement, as set out in Article 10 thereof, and the judge erred in law in

concluding otherwise. I therefore set aside her decision to allow the appeal on that basis.

21. I am satisfied that the judge also erred in concluding that there was significant evidence of a durable relationship existing before the specified date, as required by the definitions in Annex 1 to Annex EU of the Immigration Rules. It is clear from the second and third sentences of [10] of the judge's decision that her conclusion was premised entirely on the fact that the appellant and the sponsor married in January 2021. Whilst the judge was entitled to take the marriage into account in considering whether the relationship was durable in December 2020, the mere fact of that marriage did not establish without more that the relationship was durable before the specified date. That was said by the Upper Tribunal in *Elais*, and I agree with their conclusion. The fact that the appellant and the sponsor married in January 2021 shed some light on the state of their relationship in the preceding month but it could not rationally be the sole determinative factor, as it was here.

22. Mr Badiru relied on the fact that the respondent was unrepresented before the FtT and had denied herself the opportunity to cross-examine the appellant and the sponsor. I recognise that point but this is not a case in which the judge based her conclusion about the durability of the relationship on an analysis of the oral evidence given by the appellant and the sponsor. Her conclusion that the relationship was durable followed, as we have seen, from the fact of the subsequent marriage alone. It did not follow from that fact alone that the relationship was akin to marriage in December 2020.

23. Mr Badiru also submitted that the respondent had not suggested that the marriage was a sham, or not a genuine marriage. That is correct but it does not take the appellant very far at all for present purposes, for two reasons. Firstly, the respondent was unarguably correct in concluding that the date of the marriage meant that it could not avail the appellant under the Immigration Rules or the Withdrawal Agreement. For that reason, she was not required to consider whether the marriage might have been a sham; this question simply did not arise in respect of this marriage.

24. Secondly, Mr Badiru's submissions conflate two different questions, since whether a relationship is genuine is a different question from whether it is durable. A couple who have been in a monogamous relationship for a month might well be said to be in a genuine relationship but are unlikely themselves to suggest that the relationship is 'durable', since that requirement connotes a relationship which is able to withstand pressures to which a short relationship is unlikely to have been exposed.

25. There is in my judgment a further point which one can make in answer to Mr Badiru's submissions. He proceeded on the basis that the relationship was necessarily a durable one from January 2021 onwards. His logic was that a marriage is necessarily a durable relationship, but that does not follow. It would be open to a judge to conclude that the parties to a marriage had rushed into it and that it was not a durable relationship despite the certificate of marriage. If that is right, then the fact of the marriage cannot demonstrate that the relationship was durable immediately beforehand.

26. I have reminded myself for the need for restraint on the part of an appellate tribunal before interfering with the conclusions of a trial judge who has seen and

heard live evidence, as underscored by the Supreme Court in *Perry v Raleys Solicitors* [2019] UKSC 5; [2020] AC 352 and the Privy Council in *Ming Siu Hung & Ors v J F Ming Inc & Anor* [2021] UKPC 1. I have also reminded myself that it is for the respondent to establish in this case that the judge's decision was irrational, which is a demanding concept.

27. I am driven to conclude that the respondent has cleared that hurdle in this case, however, because of the way in which [10] of the judge's decision is expressed. It was not rational, in other words, for the judge to conclude that the durability of this short relationship in December 2020 was established by the mere fact that the couple went on to marry in the following month. I therefore set aside the judge's conclusion in that regard.

Relief

28. Mr Wain did not submit that I should proceed to remake the decision on the appeal without a further hearing. He invited me to order that the decision on the appeal would be remade in the Upper Tribunal following a further hearing at which the appellant and his wife would give evidence. For his part, Mr Badiru invited me to remit the appeal to the First-tier Tribunal, as he submitted that it would be easier for the appellant to attend and, if I understood him correctly, to be represented.

29. There is a general principle that cases will be retained in the Upper Tribunal when it is found that the FtT erred materially in law but that principle is subject to the other considerations set out in *Begum (remaking or remittal) Bangladesh* [2023] UKUT 46 (IAC) and *AEB v SSHD* [2022] EWCA Civ 1512. What is required here is a fresh consideration of the state of the appellant's relationship in December 2020, and beyond, and that will require consideration of the oral evidence of the appellant and the sponsor, together with an analysis of any documentary evidence which the appellant might adduce. Considering the extent of the fact-finding which is necessary, therefore, I conclude that the proper course is to remit the appeal to the First-tier Tribunal for consideration afresh, although that Tribunal will note the acceptance on the appellant's part that he cannot succeed on the Withdrawal Agreement ground of appeal as a result of the authorities handed down since Judge Mulholland's decision.

Notice of Decision

The Secretary of State's appeal is allowed. The First-tier Tribunal's decision is set aside. The appeal is remitted to be heard afresh by a judge other than Judge Mulholland.

Mark Blundell

Judge of the Upper Tribunal
Immigration and Asylum Chamber

5 September 2024