IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2023-002245

First-tier Tribunal Nos: HU/53558/2022
EA/13884/2021

THE IMMIGRATION ACTS

Decision & Reasons Issued:

On 6th of June 2024

Before

UPPER TRIBUNAL JUDGE KEITH
DEPUTY UPPER TRIBUNAL JUDGE CHANA

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

KRISTJAN BJESHKAJ
(NO ANONYMITY ORDER MADE)

Respondent

Representation:
For the Appellant: Mr S Walker, Senior Home Office Presenting Officer
For the Respondent: Mr G Ó Ceallaigh KC, instructed by Waterstone Legal Solicitors

Heard at Field House on 17th May 2024

DECISION AND REASONS

1. These written reasons reflect the full oral decision which we gave to the parties at the end of the hearing. For the sake of simplicity, we will refer to the parties as they were before the First-tier Tribunal, namely as the claimant and the Secretary of State. We do no more than summarise a procedural history, which is complex in the sense that there have been three decisions issued by the Secretary of State.

2. The first decision was to refuse the claimant's application of 15th September 2021 under Appendix EU. That was on the basis that although the claimant claimed to be the spouse of a relevant EEA national, he had not provided sufficient evidence and crucially the marriage had occurred after the "IP Completion Day" for the UK leaving the EU of 31st December 2020. The decision noted that the application had been considered as a durable partner and there

had not been sufficient evidence of this, principally a relevant document. No challenge against that decision is before us.

3. The second decision was a decision on 7th June 2022 to refuse the claimant's human rights claim. The Judge allowed the claimant's appeal against that decision and the Secretary of State does not appeal that aspect of the Judge's decision. The Claimant has already succeeded on human rights grounds. This is therefore an "upgrade" appeal against the Judge's appeal decision in respect of a third decision by the Secretary of State, to which we now turn.

4. The third and final decision was of 8th June 2022 marked 'Supplementary Refusal Letter', to which this appeal relates. The decision considered the application by reference to the Immigration (EEA) Regulations 2016 and considered the claimant as a partner of an EEA national. The decision noted:

> "We have no record of you ever having made a valid application for a residence card on our systems. It is also noted that you lodged an EU Settlement Scheme application on 13 April 2021, this was refused on 15 September 2021 with a right of appeal as it was found that you did not meet the requirements of the scheme to be granted settled or pre-settled status, due to providing insufficient evidence of your relationship with [the EEA national]. Further, it is noted that your marriage was after the UK having exited the EU on 31 December 2020. Whilst you have now provided sufficient evidence to demonstrate that you are in a genuine and subsisting relationship, indeed marriage, it has been considered that you have not met the requirements of EX.1 as there are considered to be no insurmountable obstacles to your family life continuing with your spouse outside the UK".

We do not recite the remainder of the decision.

The Judge's decision

5. The claimant appealed against that decision, which was considered by Judge Clarke of the First-tier Tribunal on 13th January 2023. Judge Clarke first of all allowed the claimant's appeal on human rights grounds, and as Mr Walker accepted before us there is no challenge to that part of the decision. The second operative part of the decision was in relation to the appeal under the 2016 Regulations. As Judge Clarke recorded at §5 the respondent had issued the summary refusal letter on 8th June 2022 regarding representations made on 28th September 2020. That is important because it was an application made in time before 31st December 2020. The thrust of the Secretary of State's refusal was that the claimant had not made a valid application 'on [their] systems'. The Judge noted it was accepted that the claimant had provided sufficient evidence to demonstrate that he was in a genuine and subsisting relationship. The Judge noted at §§8 to 10:

> "8. The Appellant made a s.120 statement of additional grounds including an application for a residence card. In the very detailed letter by his representatives accompanying it, it is explicitly requested that it contains an application for a residence card, and provided the 2006 Regulations in question, and amongst other things, the Appellant's passport, the sponsor's passport, and evidence to show that their relationship is durable. The 2016 EEA Regulations were in force at the time of the s.120 representations and the application for a residence card. They read how the Respondent must

issue a residence card to a person who is not an EEA national and who is the family member of a qualified person or an EEA national with a right of permanent residence on production of a valid passport and proof that the applicant is such a family member and I find that the Appellant complied with this.

9. The Respondent relies on Regulation 18 of the 2006 Regulations or 21 in the 2016 Regulations which sets out the procedure for online application and asserts that because the application did not follow the prescribed procedure it must fail. The application must be made online is the requirement.

10. The Appellant relies upon the decision of Hydar (s.120 response; s.85 "new matter": Birch) [2021] UKUT 00176 (IAC). This makes it clear that an EEA issue may raised in a s.120 statement of additional grounds and, in particular in paragraph 11, that the Tribunal is required under Section 85(2) to consider whether the Appellant was entitled to a residence card under the EEA Regulations 2016 when the Section 120 response was put it."

6. The Judge concluded that the Section 120 statement was before the Secretary of State in September 2020, before any application under the EUSS was made, and at §12, the Judge concluded that had the Secretary of State following Hydar, rather than following a literal and flawed interpretation of the 2016 Regulations, she would have issued a residence card to the claimant as a durable partner of an EEA national and now spouse. The Judge concluded that it was clear from the history of the relationship that the witnesses were credible, reliable and candid. There was no doubt that they would have entered into marriage before the end of December 2020 if they could after the 70 days' notice period and that the "two years living together" guidance was more flexible, having regard to the very cogent evidence before the Judge on how determined the couple were to get married.

7. As a consequence, the Judge allowed the appeal under the 2016 Regulations.

The Secretary of State's appeal

8. In an appeal of 3rd February 2023, the Secretary of State sought permission to appeal the Judge's conclusion. As Mr Walker accepted, the grounds are something of a diffuse set of arguments referring to in general terms to whether it was appropriate for the Judge to have considered the 2016 Regulations; how they might be in force and preserved after a general repeal; and asserting that the Judge's findings about why the appeal had succeeded under the 2016 Regulations were incomplete. The grounds also suggested that the appeal should be postponed until the outcome of the Court of Appeal's decisions in Celik (Celik (EU exit; marriage; human rights) [2022] UKUT 00220 (IAC)) and Batool (Batool and others (other family members: EU exit) [2022] UKUT 00219 (IAC). We pause to add that before us, Mr Walker accepted that this appeal was not in the scope of either case. The claimant was an extended family member under the 2016 Regulations who had applied for an EEA residence card before the end of the implementation period, which had been refused under the 2016 Regulations. Mr Walker also accepted that the question of whether the relationship had endured for two years did not appear to have been taken by the Secretary of State.

9. Permission was granted on all grounds and the appeal came before us.

Discussion and conclusions

10. Without criticism of Mr Walker, he accepted that the grounds were diffuse, and he was unable to assist beyond reliance upon the lack of an extensive examination and the adequacy of the Judge's finding that there was a durable relationship. In response, Mr Ó Ceallaigh relied on his skeleton argument, which reiterated that as per Hydar, which the Secretary of State did not address at all in the grounds of appeal, the Judge was required to consider any ground raised by the claimant in response to a Section 120 notice, including EEA grounds, which did not therefore require a 'formal application'. The 2016 Regulations were preserved by virtue of the Immigration and Social Security Co-ordination (EU Withdrawal) Act (Consequential, Saving) Regulations 2020, Schedule 3, paragraph 3(4) ("Regulation 18 of the EEA Regulations 2016 (issue of residence card), continues to apply for the purposes of considering and, where appropriate, granting an application for a residence card which was validly made in accordance with the EEA Regulations 2016 before commencement day"), which must be read as applying Hydar in these circumstances. Mr Walker has not suggested that it was impermissible for the Judge to have considered and applied Hydar, so in our view the Judge had jurisdiction to hear the appeal, as it was not a "new matter" requiring consent.

11. The second point was the question of whether the Judge had carried out an "extensive examination" of the circumstances and the Judge's findings on them. Without making any formal concession, Mr Walker indicated that it was difficult for him to point to what was said to be missing in the analysis, particularly in the context of the evidence before the Judge including the tenancy agreement, council tax, water bill and bank statements. We have canvassed the issue of whether there had been a point about the duration of the relationship as at 31st December 2020, but as Mr Ó Ceallaigh points out that was not an issue that was taken in the supplementary refusal letter.

12. In the circumstances, on the limited points as to an extensive examination of the circumstances and adequacy of findings, particularly where Mr Walker was unable to assist with what was said to be missing, and where the Judge plainly considered and referred to the evidence, the Judge cannot be said to have erred in law.

Notice of decision

The Judge's decision did not contain an error of law and stands. The Secretary of State's appeal fails and is dismissed.

J Keith

Judge of the Upper Tribunal
Immigration and Asylum Chamber

29th May 2024