IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2023-003514
First tier number: EA/50649/2021

THE IMMIGRATION ACTS

Decision & Reasons Issued:

On 24th of September 2024

Before

UPPER TRIBUNAL JUDGE BRUCE
DEPUTY UPPER TRIBUNAL JUDGE SYMES

Between

AQSA AQSA
(no anonymity order made)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr L. Youssefian, Counsel instructed by East London Associates
For the Respondent: Mr P. Deller, Senior Home Office Presenting Officer

Heard at Field House on 1 August 2024

DECISION AND REASONS

1. The Appellant is a Pakistani national born on the 17th November 1995. She appeals with permission against the decision of the First-tier Tribunal (Judge Mulholland) to dismiss her appeal under the Immigration (European Economic Area) Regulations 2016 ('the 2016 Regs').

2. The circumstances giving rise to this appeal are as follows. On the 30th December 2020 the Appellant made an application under the 2016 Regs for permission to reside in the United Kingdom as the extended family member (durable partner) of Mr Claudiu-idan Mosut, a Romanian national with settled status. They had met earlier that year, started living together, and had given notice of their intention to marry. She supplied the Respondent with evidence relating to their cohabitation and relationship including a tenancy agreement, utility bills and photographs.

3. The application was refused on the 9th March 2021. The Respondent did not accept that the evidence supplied was sufficient to establish that the Appellant was in fact the durable partner of Mr Mosut.

4. The couple were married on the 23rd April 2021.

5. On the 12th January 2023 the appeal came before Judge Mulholland. The Appellant and her husband attended and gave oral evidence. There was no presenting officer. They asked the Tribunal to allow the appeal with reference to regulation 7 of the 2016 Regs, since they were now married and therefore 'family members'. In the alternative they asked the Tribunal to treat the marriage as further evidence that they had been in a durable relationship when the application was made. The Tribunal declined to consider the marriage at all, on the grounds that it was a 'new matter' under s85 Nationality, Immigration and Asylum Act 2002; the Tribunal considered that the Respondent had, in his review, refused consent for that matter to be considered. All that was left was for the Tribunal to consider whether the remaining evidence demonstrated that the Appellant had been at the relevant time the durable partner of Mr Mosut. It concluded that there was insufficient evidence before it to prove that matter and the appeal was thereby dismissed.

6. The Appellant appeals to this Tribunal on the following grounds:

    i) The First-tier Tribunal erred in its approach to whether the marriage was a 'new matter'. *In particular*:

        a) As a matter of fact the Respondent had not refused consent;

        b) A marriage such as this, which follows the assertion of a durable relationship, is not capable of constituting a 'new matter': Elais (fairness and extended family members) [2022] UKUT 300 [at §49];

    ii) The Tribunal should have allowed the appeal under Regulation 7. To the extent that this argument is precluded by the headnote in Elais, it is contended that the headnote to Elais is, on this point, wrong and *per incuriam*.

    iii) There was a procedural unfairness in the Tribunal taking points against the Appellant that she had not previously had notice of.

7. This matter first came before us on the 23rd October 2023 when the Appellant was represented by Mr Youssefian, and the Respondent by Senior Presenting Officer Ms C. Isherwood. Having considered the submissions of the parties that day we sought, by way of directions, further submissions on ground (ii). We initially invited the parties to make those submissions in writing, but subsequently acceded to the Appellant's request to reconvene the hearing in order to hear further oral argument from both sides.

8. We are grateful to the parties for their helpful submissions. We take each ground in turn.

Ground (i): New Matter

9. Ground (i) as pleaded was that the First-tier Tribunal had been wrong, as a matter of law, to define the Appellant's marriage as a 'new matter' for the purpose of this appeal. In Elais the Tribunal held as follows :

> *3. Where:*
>
> *a. an application for a residence card as the durable partner of an EEA national under the Immigration (European Economic Area) Regulations 2016 was made or refused before the end of the "implementation period" on 31 December 2020 at 11.00PM, and*
>
> *b. the putative durable partners marry after the end of the implementation period,*
>
> *in any appeal against the refusal of the application, the post-implementation period marriage is not capable of amounting to a "new matter" for the purposes of an appeal under the 2016 Regulations and is, at its highest, simply further evidence as to existence and durability of the claimed relationship between the appellant and the EEA sponsor.*

4. This is precisely the situation here, and so, the Appellant submits in her grounds, the First-tier Tribunal was here wrong to have declined to consider the marriage on the grounds that it was a 'new matter'. At the hearing before us on the 23rd October 2024 Ms Isherwood for the Respondent agreed, and conceded that ground (i) was made out. For the reasons that the Tribunal explains in Elais, a marriage such as this one was properly to be regarded as a continuation and development of existing facts, being "part of the evidential landscape going to whether the appellant and sponsor were in a durable relationship" [Elais §49]. Furthermore the Tribunal was mistaken when it found that consent had been refused by the Secretary of State: on a proper reading of the review, Ms Isherwood agreed, it had not.

5. When this Tribunal sent out Directions to the parties on the 28th December 2023 our clarificatory questions did not in any way concern ground (i), which we regarded as agreed by consent following the initial hearing. Our questions were entirely concerned with the Appellant's ground (ii), as it is framed above.

6. It was therefore with some surprise that we received the written submissions of the Respondent, by way of a 'Skeleton Argument' attributed to Senior Presenting Officer Mr P. Deller and filed on the 31st January 2024. In that document the Respondent submits that a) the marriage was a 'new matter', b) that the Secretary of State had not given consent and c) that the First-tier Tribunal had therefore been quite right in its approach. It should be said that the Respondent's Skeleton Argument does not address the relevant passage in Elais. Nor does it acknowledge the position taken by Ms Isherwood at the first hearing of this appeal.

7. At the hearing before us Mr Deller initially indicated that he was instructed to resist ground (i) in line with the skeleton argument. He had not however been aware of the position adopted by his colleague Ms Isherwood. He candidly acknowledged that much of the Respondent's skeleton had in fact been authored by the relevant policy team within the Home Office, who may not have been made aware of what had happened at that first hearing. We gave Mr Deller some time to consider his position on ground (i), and in particular the relevant passages of Elais. Having done so he accepted that the Respondent's position was as it was articulated by Ms Isherwood, namely that ground (i) is made out.

8. We accept that this concession must be correct, for the reasons explained in Elais. A marriage conducted in March is potentially relevant to whether this was a relationship that could be properly said to be 'durable' the preceding December.

Ground (ii): Elais, extended and family members

Introduction: the issues arising from Elais

9. As we allude to above, the facts in Elais are in many respects the same as those in the present appeal. A non-EEA national formed a relationship with an EEA national and shortly before IP completion day, made an application for recognition as a durable partner. The Respondent refused the application on the grounds that insufficient evidence was supplied. Some months later, and after IP completion day, Mr Elais and his EEA partner married. When his appeal came before the First-tier Tribunal, it treated the marriage as evidence supporting the claimed durability of the relationship. The appeal was allowed. The Secretary of State appealed to the Upper Tribunal.

10. One of the issues that the Tribunal had to grapple with in Elais was the situation arising where events in a claimant's personal life straddle the UK's departure from the EU. The application in Elais (as here) had been made before the 31st December 2020, and so there was no doubt that there was a right of appeal under the 2016 Regs; if Mr Elais could demonstrate that he was a durable partner his claim would succeed with reference to regulation 8 [see Elais §§39-43]. The Tribunal did not accept, however, that it was open to him to argue that he was now a 'family member' under regulation 7, since that fact only arose after the end of the implementation period ('IP completion day'). As it explains at its §50:

> "A "new matter" raising an EU law point must be anchored to the sole permitted ground of appeal under the 2016 Regulations, as modified by the 2020 Regulations, which required the term "the EU Treaties" to be read as though referring to the preserved and modified scope of the EU Treaties in accordance with Part Four of the EU withdrawal agreement. The judge dealt with the limits on the tribunal's jurisdiction correctly. By definition, it could not have been a breach of the EU Treaties, as applied by the EU withdrawal agreement, to refuse to grant an application for a residence card as a family member on the grounds of a marriage that did not take place until after the implementation period came to an end, when Union law no longer applied to the parties to the marriage. The appellant was outside the personal scope of the rights of residence conferred on "family members" by Part 2 of the EU withdrawal agreement, since he had not resided in the UK under Union law prior to the end of the implementation period: see Article 10(1)(e)(i) of the EU withdrawal agreement. The highest quality of residence the appellant can hope to attain under the EU withdrawal agreement is the facilitation of his residence as a durable partner, pursuant to Article 10(2) to (4). This is because he applied for his residence to be facilitated in that capacity before the end of the implementation period: Article 10(3)".

11. These conclusions are reflected in the headnote that we have cited above at our [§3]: the marriage is, "in any appeal", simply part of the "evidential landscape going to whether the appellant and the sponsor were in a durable relationship" [Elais §49].

3. Ground (ii), Mr Youssefian's central challenge, is that this guidance, given in the headnote to Elais, has no application to the Appellant's case. The headnote is

wrong to state that in "*any* appeal" featuring a post-implementation marriage the marriage would, "at its highest, simply be further evidence" of the existing relationship. In fact, says Mr Youssefian, there was a significant chronological difference between this appeal and Elais: here the decision of the Respondent post-dated the 31.12.20, and for reasons that we shall come to below, he says that this changes the entire nature of the case. Insofar as the headnote in Elais refers to "any appeal", Mr Youssefian submits that guidance to be *per incuriam,* since it would appear from the decision that the Tribunal heard no submissions on the legal framework to be applied in cases such as this one. He contends that had submissions been made, the headnote would not be drafted in the way that it is: it is too widely drawn. If Mr Youssefian can make out that case, then the Appellant's appeal would fall to be allowed on the basis that she is the 'family member' –the spouse - of Mr Mosut.

4. A secondary point arising from this submission, and the decision in Elais, is that the Tribunal faces a conundrum in a case like this. The Appellant's right of appeal is against a decision under the 2016 Regs refusing to recognise her as an extended family member. By the time her appeal is heard she has become a family member. If the Secretary of State is correct, and she cannot now benefit from that status, then this would preclude her from advancing an argument that she is an 'extended family member', since the definition of that term in regulation 8 of the 2016 Regs specifically excludes that class. Mr Youssefian submits that it cannot have been the intention of the drafters to offer such an illusory appeal right.

The Appellant's Case

5. The starting point for Mr Youseffian's argument is the 2016 Regs. Under Regulation 12 (1) a family permit must be issued to a person who meets the definition of a 'family member' of a qualified person under Regulation 7. A family permit *may* be issued to a person who is an 'extended family member' under regulation 8, if in all the circumstances it appears appropriate to do so.

6. The 2016 Regs were revoked on the 31st December 2020 by paragraph 2(2) of Schedule 1(1) to the Immigration and Social Security Co-ordination (EU Withdrawal) Act 2020. Certain provisions were however preserved by the Immigration and Social Security Co-ordination (EU Withdrawal) Act 2020 (Consequential, Saving, Transitional and Transitory Provisions) (EU Exit) Regulations 2020 ('the TPs'). In respect of appeals, the relevant part of the TPs is paragraph 5 of Schedule 3:

> 5. Existing appeal rights and appeals
>
> (1) Subject to sub-paragraph (4), the provisions of the EEA Regulations 2016 specified in paragraph 6 continue to apply—
>
> (a) to any appeal which has been brought under the Immigration (European Economic Area) Regulations 2006 and has not been finally determined before commencement day,
>
> (b) to any appeal which has been brought under the EEA Regulations 2016 and has not been finally determined before commencement day,
>
> (c) in respect of an EEA decision, within the meaning of the EEA Regulations 2016, taken before commencement day, or

> (d) in respect of an EEA decision, within the meaning of the EEA Regulations 2016 as they continue in effect by virtue of these Regulations or the Citizens' Rights (Application Deadline and Temporary Protection) (EU Exit) Regulations 2020, which is taken on or after commencement day.
>
> …

7. We pause to note that for the purposes of this appeal, we are concerned with sub-paragraphs (c) and (d). Sub-paragraph (c) was the one that applied in Elais, since the decision in that appeal was taken on the 24th December 2020; this appeal falls under (d), since the Home Office decision was not made until the 9th March 2021.

8. Moving on to paragraph 6 of Schedule 3, this specifies the parts of the Regs that continue to apply today, and in what circumstances. We have abridged it here to focus on those parts relevant to the Appellant's case:

> **6.**—(1) The specified provisions of the EEA Regulations 2016 are—
>
> …
>
> (f) regulation 7 ("family member");
>
> (g) regulation 8 ("extended family member");
>
> …
>
> (cc) Schedule 2 (appeals to the First-tier Tribunal) with the modification that—
>
> (aa) in relation to an appeal within paragraph 5(1)(a) to (c), in each of paragraphs 1 and 2(4), the words "under the EU Treaties", in so far as they relate to things done on or after exit day but before commencement day, were a reference to the EU Treaties so far as they were applicable to and in the United Kingdom by virtue of Part 4 of the EU withdrawal agreement;
>
> (bb) in relation to an appeal within paragraph 5(1)(d), in each of paragraphs 1 and 2(4), the words "under the EU Treaties", were a reference to "under the Immigration (European Economic Area) Regulations 2016 as they are continued in effect by these Regulations or the Citizens' Rights (Restrictions of Rights of Entry and Residence) (EU Exit) Regulations 2020, or by virtue of the EU withdrawal agreement, the EEA EFTA separation agreement (which has the same meaning as in the European Union (Withdrawal Agreement) Act 2020) or the Swiss citizens' rights agreement (which has the same meaning as in that Act)".

9. Sub-paragraph (cc) of paragraph 6 then, preserves the provisions of Schedule 2 to the Immigration (European Economic Area) Regulations 2016, which deals with appeals to the Tribunal. It then introduces some modifications, and in doing so draws the distinction which forms the basis of Mr Youssefian's ground.

10. Sub-paragraph (aa) relates to appeals coming within paragraph 5(1)(a)-(c) of Schedule 3 of the TPs. The effect of this provision is explained by the Tribunal in Elais (emphasis and footnote added, and a typographical error amended for clarity):

> 39. The 2016 Regulations were revoked by paragraph 2(2) of Schedule 1 to the Immigration and Social Security Co-ordination (EU Withdrawal) Act

2020 with effect from 31 December 2020, at the conclusion of the "implementation period" for the UK's withdrawal from the EU. The Immigration and Social Security Co-ordination (EU Withdrawal) Act 2020 (Consequential, Saving, Transitional and Transitory Provisions) (EU Exit) Regulations 2020 ("the 2020 Regulations") **make provision for certain provisions of the 2016 Regulations to continue to apply, notwithstanding their revocation, in relation to appeals against EEA decisions that were taken before "commencement day", that is the day upon which the 2016 Regulations were revoked: see Schedule 3, paragraph 5(1)(c). For such appeals, certain provisions of the 2016 Regulations continue to apply**, with the specified modifications, in accordance with paragraph 6 of Schedule 3. The preserved provisions under paragraph 6 include regulation 8 of the 2016 Regulations (extended family members): see paragraph 6(1)(g).

40. The appeals provisions of the 2016 Regulations are also preserved by paragraph 6(1). Immediately before their revocation, Schedule 2 to the 2016 Regulations made provision for appeals to the First-tier Tribunal to be brought on the basis of an "EU ground of appeal", which was defined as being a contention that the decision under challenge:

    "breaches the appellant's rights *under the EU Treaties* in respect of entry to or residence in the United Kingdom…" (emphasis added)

41. **Under the modifications made by the transitional provisions in the 2020 Regulations, an appeal brought pursuant to the preserved provisions of the 2016 Regulations may only now be brought on the basis that the ground of appeal breaches the rights of the appellant under the EU Treaties as they applied to the United Kingdom pursuant to Part 4 of the EU withdrawal agreement**. **[Paragraph 6(1)(cc)(bb) of Schedule 3] to the 2020 Regulations provides, where relevant, that Schedule 2 to the 2016 Regulations has affect in relation to such preserved appeals as though**:

    "the words '*under the EU Treaties*', in so far as they relate to things done on or after exit day but before commencement day, were a reference to the EU Treaties so far as they were applicable to and in the United Kingdom by virtue of Part 4 of the EU withdrawal agreement."

42. "Commencement day" is the term defined by the 2020 Regulations as the time and date on which the 2016 Regulations are revoked for all purposes[1] It marked the end of the implementation period.

43. "EU withdrawal agreement" is a term defined in Schedule 1 to the Interpretation Act 1978 to mean the definition given section 39(1) of the European Union (Withdrawal Agreement) Act 2020, which is as follows:

    "'withdrawal agreement' means the agreement between the United Kingdom and the EU under Article 50(2) of the Treaty on European Union which sets out the arrangements for the United Kingdom's withdrawal from the EU (as that agreement is modified from time to time in accordance with any provision of it)."

44. Part Four of the EU withdrawal agreement provides, at Article 127(1):

    "Unless otherwise provided in this Agreement, Union law shall be applicable to and in the United Kingdom during the transition period."

[1] Ie the 31st December 2020

11. The upshot of this is that if you fall within group (c), your appeal rights are limited in the way the Elais Tribunal describes at its §50:

> "...By definition, it could not have been a breach of the EU Treaties, as applied by the EU withdrawal agreement, to refuse to grant an application for a residence card as a family member on the grounds of a marriage that did not take place until after the implementation period came to an end, when Union law no longer applied to the parties to the marriage".

12. Mr Youssefian submits that by contrast, for group (d) the modification made to Schedule 2 of the 2016 Regs does not limit the grounds of appeal to lawfulness under the EU Treaties. The modification instead broadens the scope of the appeal to include compliance with the 2016 Regs as they are preserved by the TPs:

> (bb) in relation to an appeal within paragraph 5(1)(d), in each of paragraphs 1 and 2(4), **the words "under the EU Treaties", were a reference to "under the Immigration (European Economic Area) Regulations 2016 as they are continued in effect by these Regulations** or the Citizens' Rights (Restrictions of Rights of Entry and Residence) (EU Exit) Regulations 2020, or by virtue of the EU withdrawal agreement, the EEA EFTA separation agreement (which has the same meaning as in the European Union (Withdrawal Agreement) Act 2020) or the Swiss citizens' rights agreement (which has the same meaning as in that Act)".

13. As we have seen, Regulation 7, relating to family members, is preserved by the TPs. That being the case, then the operative provisions in the Appellant's appeal enable her to argue that at the date of appeal she is a family member. There being no issue that she is validly married, and no allegation that this marriage is a sham, Mr Youssefian submits that the appeal must be allowed on that basis. The headnote to Elais, and the reasoning in paragraph 50 thereof, is too widely drawn.

14. Mr Youssefian takes issue with the decision in Elais in one further respect. At its paragraphs 51-53 the Tribunal said this:

> 51. It follows that the judge correctly recognised that the marriage "route", as he put it, was no longer available to the appellant.
>
> 52. This meant that the judge had to approach the issues before him on the legally correct but somewhat artificial footing that the appellant's marriage to the sponsor was merely evidence of the prior durability of the couple's unmarried relationship, rather than being evidence of a relationship of any greater legal significance.
>
> 53. We do not consider that the definition of "durable partner" in regulation 2(1) of the 2016 Regulations precludes a party to a post-implementation period marriage from being a durable partner. While the definition of the term seeks to exclude a durable partner of a person whose spouse, civil partner or durable partner is already residing in the United Kingdom, that is plainly with a view to prevent an applicant claiming to be in a durable partnership while simultaneously maintaining a durable relationship, marriage or civil partnership with a third person. It does not address the situation where, as here, the application, appeal and marriage straddle the end of the implementation period.

15. Mr Youssefian queries why in these passages the Tribunal seeks to square its conclusions with the definition of 'durable partner' at Reg 2(1), and yet makes no mention of the fact that Reg 8 itself specifically excludes a family member from being an excluded family member:

> "Extended family member"
>
> **8.**—(1) In these Regulations "extended family member" means a person who is not a family member of an EEA national under regulation 7….

16. He submits that again, it can only be because the Tribunal was not addressed on the matter. The express terms of Reg 8(1) go beyond the "somewhat artificial footing" that concerned the Tribunal at its §52.

The Respondent's Reply

17. In brief summary the Respondent's reply is that the Appellant's grounds misrepresent the applicable legal framework. The purpose of Schedule 3 of the TPs is to allow for EEA decisions and appeals to proceed to be considered following the revocation of the 2016 Regs. Its purpose is not to preserve underlying free movement rights indefinitely during an appeal. Instead the appeal serves the purpose of permitting consideration of whether the appellant was an extended family member at the relevant time, by saving that 'descriptor' provision, which can be relevant as to whether a person comes within scope of the WA and consequently the EUSS.

18. The Appellant correctly identifies that paragraph 5(1) of Schedule 3 of the TPs preserves certain provisions of the 2016 Regulations following their general repeal at 11pm on the 31st December 2020. More specifically, in the instant appeal, see paragraph 5(1)(d):

> 5. Existing appeal rights and appeals
>
> (1) Subject to sub-paragraph (4), the provisions of the EEA Regulations 2016 specified in paragraph 6 continue to apply—
>
> …
>
> (d) in respect of an EEA decision, within the meaning of the EEA Regulations 2016 as they continue in effect by virtue of these Regulations or the Citizens' Rights (Application Deadline and Temporary Protection) (EU Exit) Regulations 2020, which is taken on or after commencement day.
>
> …

19. Paragraph 6 of Schedule 3 sets out those provisions preserved by virtue of paragraph 5(1). These 'specified provisions' include, with some modifications, all of the provisions in the 2016 Regs falling under the heading 'Part 1: Preliminary': the definitions section. Thus paragraph 6 preserves definitions from 'worker' under Regulation 4 through to 'family member who has retained a right of residence' under Regulation 10. As the Appellant rightly says, this includes the definition of 'family member' at Regulation 7. What it does not include are most of the Regulations falling under what was Part 2 of the Regs: 'EEA Rights'. Specifically omitted are Regulation 13 (initial right of residence), Regulation 14 (extended right of residence) and Regulation 15 (right of permanent residence).

20. Mr Deller submits that the effect of this selective preservation of the Regs is straightforward. The definitions – or 'descriptors ' - are important, and will continue to be important because of ongoing appeal rights. The substantive rights that those descriptors once gave rise to have now gone. That is why they are not preserved. They have been replaced by a statement of the Secretary of State's policy, as set out in Appendix EU and associated materials. The relevance of the descriptors, and why they have been preserved, is to enable relevant decision makers to determine whether or not the individual had accrued any rights under the EEA Treaties prior to the 31st December 2020, or in the case of extended family members, whether a meritorious application for facilitation had been made prior to that date.

21. Specifically addressing the Appellant's case, it is correct that her case falls to be considered in line with paragraph 6(1)(cc)(bb) of Schedule 3 of the TPs. The keys words are not however "under the Immigration (European Economic Area) Regulations 2016" but "as they are continued in effect by these Regulations…":

> "(bb) in relation to an appeal within paragraph 5(1)(d), in each of paragraphs 1 and 2(4), the words "under the EU Treaties", were a reference to "under the Immigration (European Economic Area) Regulations 2016 as they are continued in effect by these Regulations or the Citizens' Rights (Restrictions of Rights of Entry and Residence) (EU Exit) Regulations 2020, or by virtue of the EU withdrawal agreement, the EEA EFTA separation agreement (which has the same meaning as in the European Union (Withdrawal Agreement) Act 2020) or the Swiss citizens' rights agreement (which has the same meaning as in that Act)".

The true effect of this provision is that for the purpose of her appeal the Appellant is entitled to rely on the preserved descriptors, but not the substantive rights that they once gave rise to. These modifications of the appeal rights under Schedule 2 of the 2016 Regs offers applicants a vehicle to get into the European Union settlement scheme.

22. As to why paragraphs 5 and 6 of Schedule 3 appear to create two classes of appellants, the answer is that the class of appellant in paragraph 5(1)(a) to (c) was able to rely on the EU Treaties, which includes Directive 2004/38/EC ('the Directive') made under Article 21 TFEU, and thus they benefit from Article 2(2) and Article 3(2) of the Directive, which were implemented in Regulation 7 and Regulation 8 of the 2016 Regulations respectively. The SSHD submits that all paragraph 5(1)(d) does is to put the cohort described therein, whose 'EEA decisions' were taken after the EU Treaties ceased to have any legal force in the UK, in the same position as those whose applications and appeals were finally determined before EU law ceased to operate.

Discussion and Findings

23. In our Directions to the parties, inviting further submissions on ground (ii), we observed that one consequence of Mr Youssefian's argument would be that the class of appellant covered by paragraph 5 (d) of Schedule 3 of the TPs would be in a markedly different position from those appellants whose appeals fell to be considered under paragraph 5 (a)-(c). There did not appear to be any justification for that difference in treatment. Why should the former benefit from the preservation of 'rights' that no longer exist, whereas the latter is not? Why should Ms Aqsa be recognised as a family member whilst Mr Elais is denied that advantage?

24. In his response Mr Youseffian quite properly reminds us that our role is not to determine what parliament might have meant to say, but to decipher what it actually said: Clawson International Ltd v. Papierwerke AG [1975] UKHL 2.

25. The real answer to the conundrum, we are satisfied, is that the TPs do not, as Mr Youseffian contends, create a substantive difference in appeal rights between the two classes. Schedule 3 serves simply to create a mechanism by which appellants can – in effect – seek a declaration from the Tribunal about their status prior to 11pm on the 31st December 2020. Such a finding may then be relevant to whether the individual comes within scope of the Withdrawal Agreement and consequently the EUSS. That is the point of the definitions – the 'descriptors' being preserved. What has not been preserved are the substantive rights which once flowed from such a status. Those applicants who received a decision prior to the 31st December 2020 still had direct recourse to the Treaties, whereas those who had to wait until after that date did not: paragraph 6(1)(cc)(bb) refers to the Regs in order that decisions can still be made about which descriptor applies to an applicant in this situation.

26. As to the second fly in the ointment, the fact that Reg 8 specifically excludes someone who is a 'family member' from being an 'extended family member', we are not satisfied that anything turns on that. The Appellant has brought this appeal under the 2016 Regs on the grounds that she was, at the date of both application and decision, an extended family member. She remains entitled to determination of that appeal – albeit on the "somewhat artificial footing" identified in Elais. As we note above, the primary function of this preserved appeal right is to permit the Appellant to argue that she is someone who would be entitled to regularisation of her position post-implementation day, an entitlement arising from her status before 11pm on that date.

27. Accordingly we are satisfied that ground (ii) is not made out.

Ground (iii) and Disposal

28. We have found, in accordance with the Respondent's concession, that the First-tier Tribunal erred in its approach to the evidential significance of the Appellant's marriage. It was not a 'new matter'. It was, at its highest, simply further evidence as to the existence and durability of the claimed relationship between the Appellant and her EEA Sponsor. We are satisfied that this failure to take a material matter into account fatally impacts on the Tribunal's assessment of whether the Appellant was in fact an extended family member prior to the 31st December 2020 and its decision on that matter is set aside. It follows that we need not deal with ground (iii) in any detail save to say that we accept that the Tribunal did, in its analysis, raise a number of negative credibility points which had not been taken by the Respondent, and to which the Appellant was given no opportunity to respond.

29. The Appellant and her husband both attended the hearing before the First-tier Tribunal and gave evidence that was, in the absence of a presenting officer, unchallenged. That evidence is that they have lived together since May 2020. They produced a joint water bill and tenancy agreement as evidence of that matter. They further produced photographs, and bank statement placing them both individually at the same address. Two friends, Muhammad Bilal and Bushra Mumir, wrote letters confirming that they have known the Appellant and her husband to be a couple since 2020. Although it is right to say that the Tribunal identified some deficiencies in this evidence, for instance that the photographs are undated, and that there are no text messages evidencing day to day contact

between the two, we are satisfied that this evidence, taken with the fact that the couple then decided to marry in accordance with UK law, is sufficient to discharge the burden of proof that they were indeed in a durable relationship prior to the 31st December 2020. We note that the bundle further contains more recent evidence of their continued joint residence, for instance polling cards, store loyalty card account details, and bank statements.

30. The Appellant's appeal under the 2016 Regs is therefore allowed to that extent.

31. The Appellant has not advanced any argument that the decision is in breach of the Withdrawal Agreement.

Decisions

The decision of the First-tier Tribunal is set aside to the extent identified above.

The decision in the appeal is remade: the appeal is allowed.

There is no order for anonymity.

Upper Tribunal Judge Bruce
Immigration and Asylum Chamber
18th September 2024