Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number:UI-2022-001888**
[EA/15614/2021]

THE IMMIGRATION ACTS

Heard at Field House
On Wednesday 9 November 2022

Decision & Reasons Promulgated
On Thursday 19th January 2023

Before

UPPER TRIBUNAL JUDGE SMITH

Between

ISLAM MOSTEFAOUI

Appellant

-and-

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Ms K Joshi, Legal Representative, Joshi Advocates
For the Respondent: Mr S Kotas, Senior Home Office Presenting Officer

DECISION AND REASONS

BACKGROUND

1. The Appellant appeals against the decision of First-tier Tribunal Judge Mark Eldridge promulgated on 17 March 2022 ("the Decision"). By the Decision, the Judge dismissed the Appellant's appeal against the Respondent's decision dated 18 November 2021, refusing the Appellant's application made on 8 July 2021 for pre-settled status under the EU Settlement Scheme

("EUSS") as the family member (spouse) of a Spanish national, Mr Gloria Santos ("the Sponsor").

2. The Respondent refused the application on the basis that the Appellant had not married by the specified date under EUSS (11pm on 31 December 2020) and could not show that he was in a durable relationship as at that date on the evidence and because he did not hold a family permit or residence card evidencing that he was a durable partner as at date of application. As such, the Respondent was not satisfied that the Appellant met the requirements of Appendix EU to the Immigration Rules ("Appendix EU").

3. At [4] of the Decision, the Judge identified as the issues he had to decide those raised by the Respondent in her decision. Under the Immigration (Citizens' Rights Appeals) (EU Exit) Regulations 2020, the Appellant's right of appeal was confined to the grounds that the Respondent's decision was not in accordance with the EUSS rules or the withdrawal agreement between the UK and EU ("the Withdrawal Agreement").

4. The Judge accepted at [14] of the Decision that the Sponsor had settled status under EUSS and that she and the Appellant had entered into "some form of relationship" in August 2020 and began cohabiting in September 2020. There is a dispute about the Judge's findings in relation to the marriage between the Appellant and Sponsor, but it is common ground that the wedding did not actually take place until July 2021. The Appellant accepted that he could not meet the requirement under Appendix EU to hold a family permit or residence document by 31 December 2020. However, he relied upon the EU (Withdrawal Agreement) Act 2020 and the Citizens' Rights (Application Deadline and Temporary Protection) (EU Exit) Regulations 2020 ("the 2020 Regulations") as a legal basis upon which it was said that the Appellant could succeed. The Judge found that the Appellant and Sponsor were not in a durable relationship. He also rejected the legal arguments and concluded that the Appellant could not succeed. He therefore dismissed the appeal.

5. The Appellant appeals on four grounds which can be summarised as follows:

   Ground 1: The Judge made an error in relation to a material fact at [15] of the Decision in relation to the Appellant's and Sponsor's marriage.

   Ground 2: The Judge materially misdirected himself in relation to the 2020 Regulations.

   Ground 3: Allied to that argument, the Appellant says that, if the Judge had not materially misdirected himself in relation to the 2020 Regulations, the Appellant would have succeeded.

   Ground 4: The Judge acted in a manner which was procedurally unfair in relation to the issue whether the Appellant and Sponsor were in a durable relationship.

6. Permission to appeal was refused by First-tier Tribunal Judge Cruthers on 4 May 2022 in the following terms so far as relevant:

> "... 3. Whatever flaws in the decision under consideration may or may not be identified in the amended grounds, the simple fact is that this is an appellant who does not have claim to have made a durable partner-related application pursuant to the Immigration (European Economic Area) Regulations 2016 ("the EEA Regulations"). Far less is this an appellant who has ever been issued with a relevant residence card pursuant to the 2016 EEA Regulations (see paragraph 10 of the decision under consideration).
>
> 4. It follows – as the judge pointed out through his paragraph 18 – that this is an appellant who could not meet the definition of *'durable partner'* set out in Appendix EU (cf paragraph 10 of the amended grounds). Whatever flaws in the decision under consideration may or may not be identified in the amended grounds, the appeal against the respondent's decision of 18 November 2021 was bound to fail on that basis. And, as Brooke LJ put it in paragraph 10 of **R (Iran) [2005] EWCA Civ 982, 27 July 2005:** *'Errors of law of which it can be said that they would have made no difference to the outcome do not matter'.*
>
> 5. The grounds do not identify any arguably material error of law. There is no basis upon which to interfere with the decisions of the First-tier Tribunal Judge."

7. On renewal of the application for permission to appeal to this Tribunal (on the same grounds), permission to appeal was granted by Upper Tribunal Judge Jackson on 8 August 2022 in the following terms so far as relevant:

> "... The grounds are all arguable, in particular there appears to be a factual error as to the date of the notice of marriage and initial booking for the ceremony and arguably the First-tier Tribunal failed to consider the legal framework beyond Appendix EU.
>
> The First-tier Tribunal's decision does contain any arguable error of law capable of affecting the outcome of the appeal and permission to appeal is therefore granted."

8. The Respondent filed a Rule 24 Reply dated 12 October 2022 seeking to uphold the Decision and making the following points:

> "... 3. Any suggestion that the appellant had Withdrawal Agreement rights capable of being infringed or that delays due to Covid restrictions had any material impact is comprehensively rebutted by the reported decision in Celik. The only other ground – the provision of Appendix EU that did not require a relevant document – does not apply to the appellant as he was not applying as a family member of a relevant sponsor, had no other lawful basis of residence as at 31/12/20 and was not resident as a durable partner solely for lack of a relevant document."

9. The matter comes before me to determine whether the Decision contains a material error of law. If I consider that it does, I then need to consider whether to set aside the Decision for that reason. If I set aside the Decision, it is then necessary for me either to re-determine the appeal or remit the

appeal to the First-tier Tribunal to do so. Having heard submissions from Ms Joshi and Mr Whitwell, I reserved my decision and indicated that I would provide that in writing which I now turn to do.

DISCUSSION AND CONCLUSION

10. Given the way in which the grounds are framed, it is appropriate to take together grounds one and four, and two and three respectively.

Grounds One and Four

11. The Judge considered the factual background to this appeal at [14] and [15] of the Decision as follows:

> "14. There was very little that was factually in dispute in this appeal. On that basis I find as a fact that the sponsor, now the Appellant's wife, Ms Santos is a Spanish national who has indefinite leave to remain in the United Kingdom and that this was granted to her in November 2019. I am satisfied that [at] all material times she has been living in the United Kingdom. I accept that they met in early August 2020 and some form of relationship started soon after that and they began cohabiting in September 2020.
>
> 15. I also find as a fact that they were given an appointment with Waltham Forest Council for 29 October 2020 in connection with a notice of marriage but it was not until 23 December 2020 that the Council received authority to book the marriage. This is somewhat at odds with the statements and brief oral evidence but I prefer the documents that may be seen from page 13 of the Appellant's bundle. They would never have been in a position to marry before the end of December 2020. For one reason or another, they did not marry in fact until July 2021."

12. The error of fact asserted by ground one is that the documents show that the Appellant's and Sponsor's wedding was in fact booked for 23 December 2020 but then had to be cancelled due to Covid restrictions. I accept that is what the documents show. As a matter of fact, however, and whatever the reason for it, the Judge was right to say that the couple were not able to and did not in fact marry until July 2021.

13. The Respondent says that any error in that regard is immaterial. The Appellant was not in fact and in law a family member (as a spouse) of the Sponsor until July 2021. I agree. If the Appellant had been a family member because he had married the Sponsor before 11pm on 31 December 2020 he would have been in a different legal position. As it was, however, and whatever the reasons why he could not or did not marry by that date, he was not in fact and in law a family member by the specified date. Accordingly, any error in relation to what the documents showed was due to occur on 23 December could make no difference to the outcome.

14. Turning then to the fourth ground, the Appellant has very helpfully provided a transcript of the hearing before Judge Eldridge ("the Transcript"). The point made in the pleaded ground is that the Judge should not have

taken issue with the durability of the relationship as the Respondent had not done so. Stemming from that, it is said that the Judge confined his findings on the durability of the relationship to the length of that relationship and without hearing evidence or submission on that issue. The Judge had also ignored the fact of the marriage.

15. Ms Joshi focussed rather more on the reasons which the Judge had given. She submitted that the Judge had relied solely on the length of the relationship and had not taken into account the evidence about the intensity of the relationship or other evidence about it and had not taken into account that the couple had married. As Mr Whitwell submitted, that was more akin to a rationality or perversity challenge.

16. Mr Whitwell pointed out that the Respondent had taken issue with the durability of the relationship in her decision letter. As I have already noted, the issues which the Judge considered he had to determine were those raised by the Respondent and that was one of them.

17. Whilst I accept that the Transcript shows that there was limited questioning of the Appellant and Sponsor, there were a few questions asked in cross-examination about the address at which the couple live and also the language in which they communicate (given that the Sponsor gave her evidence in Spanish).

18. As a matter of fact, Ms Joshi accepted that the couple had been in a relationship only for a few months at the specified date. She said that the witness statements showed the intensity of the relationship which should have been considered by the Judge. However, a fair reading of the evidence says very little about that supposed intensity. The statements are ones of fact. The Appellant's statement deals with the very fast progression of the relationship but does not disclose any intensity of it. The Sponsor's statement simply adopts the Appellant's statement "to save the judge's reading time" and annexes documents to show that the wedding scheduled for 23 December 2020 was cancelled. The documentary evidence in the Appellant's bundle is thin – consisting of mobile phone bills for the Appellant and tenancy agreements in the Sponsor's name (showing that they resided at the same address from September 2020), medical documents relating to the Sponsor, correspondence concerning the wedding booking and some photographs as well as the marriage certificate.

19. The Judge was entitled to consider the durability of the relationship. Indeed, as the Judge records at [10] of the Decision, he was asked to do so by Ms Joshi for the Appellant. In any event, this was an issue raised by the Respondent. There is therefore no procedural unfairness which arises.

20. The Judge has considered the evidence at [14] and [15] of the Decision. As I have already concluded, although there is an error made regarding what the documents show about what was due to happen on 23 December 2020, the Judge reached findings which were open to him about the length of the relationship and when the marriage occurred, both of which are factually

accurate. In light of the paucity of any other evidence, the Judge was entitled to conclude that the Appellant had not shown that he was a durable partner absent evidence to that effect.

Grounds Two and Three

21. These grounds focus on paragraph 3 of the 2020 Regulations. It is however necessary to set that paragraph in context. Paragraph 2 of those Regulations provides for a deadline of 30 June 2021 for the submission of applications (for present purposes) in compliance with Article 18(1)(b) of the Withdrawal Agreement. That concerns the issuance of residence documents for EU citizens, their family members and "other persons, who reside in its territory in accordance with the conditions set out in this Title". Article 18(1)(b) refers to a deadline for the submission of applications not less than 6 months from the end of the "transition period" – hence the reference at paragraph 2 of the Regulations to 30 June 2021.

22. Paragraph 3 thereafter makes provision for the Immigration (European Economic Area) Regulations 2016 ("the EEA Regulations") to continue to have effect in spite of their revocation on 31 December 2020 "in relation to a relevant person" during the "grace period". The "grace period" is defined as being the period immediately after "IP completion day" (31 December 2020) and coming to an end at the "application deadline" (30 June 2021).

23. A "relevant person" is defined at paragraph 3(6) as follows:

> "'relevant person' means a person who does not have (and who has not, during the grace period, had) leave to enter or remain in the United Kingdom by virtue of residence scheme immigration rules and who—
>
> (j) immediately before IP completion day—
>
> (i) was lawfully resident in the United Kingdom by virtue of the EEA Regulations 2016, or
>
> (ii) had a right of permanent residence in the United Kingdom under those Regulations (see regulation 15), or
>
> (k) is not a person who falls within sub-paragraph (a) but is a relevant family member of a person who immediately before IP completion day—
>
> (i) did not have leave to enter or remain in the United Kingdom by virtue of residence scheme immigration rules, and
>
> (ii) either—
>
> (aa) was lawfully resident in the United Kingdom by virtue of the EEA Regulations 2016, or
>
> (bb) had a right of permanent residence in the United Kingdom under those Regulations (see regulation 15)."

24. A "relevant family member" (which forms part of the definition under 3(6)(k)) is defined as follows:

"'relevant family member', in relation to a person ('P'), means a family member who—

(f) was a family member of P immediately before IP completion day;

(g) is P's child and—

(i) the child's other parent is a relevant person or has leave to enter or remain in the United Kingdom by virtue of residence scheme immigration rules;

(ii) the child's other parent is a British citizen;

(iii) P has sole or joint rights of custody of the child in the circumstances set out in the last point of Article 10(1)(e)(iii) of the withdrawal agreement or the last point of Article 9(1)(e)(iii) of the EEA EFTA separation agreement, or

(iv) P falls within Article 10(1)(e)(iii) of the Swiss citizens' rights agreement (children of beneficiaries of that agreement);

(h) becomes a family member of P after IP completion day by virtue of being issued with an EEA document (see paragraph (b)(ii) of the definition of 'family member'), or

(i) is the spouse or civil partner of P and P is a national of Switzerland."

25. The Appellant relies upon the definition of a family member in paragraph 3(6) as follows:

"'family member'—

(d) has the same meaning as in paragraph (1) of regulation 7 of the EEA Regulations 2016 (read with paragraph (2) of that regulation) as those Regulations had effect immediately before IP completion day, and

(e) includes an extended family member within the meaning of regulation 8 of those Regulations as they had effect immediately before IP completion day if that person—

(i) immediately before IP completion day satisfied the condition in regulation 8(5) of those Regulations (durable partner), or

(ii) holds a valid EEA document (regardless of whether that document was issued before or after IP completion day)"

26. Before considering if and how those definitions apply to the Appellant, it is necessary to draw a distinction, as has always been evident in EU law, between a family member and an extended family member. The Tribunal has recently had cause to consider this in relation to the position of extended family members (who also fell within paragraph 8 of the EEA Regulations) and family members within the EUSS in Batool and others (other family members: EU exit) [2022] UKUT 00219 (IAC) ("Batool"). The position of extended family members in EU law derives from Article 3(2) of Directive 2004/38/EC. As the cases to which the Tribunal draws attention at [37] to [42] of Batool make clear, the rights of extended family members are limited to a right to have their entry and residence "facilitated" by "an extensive examination of [their] personal circumstances". Unlike family members they do not have an automatic right of entry and residence consequent on the rights of the EU citizen. An extended family member is

entitled to be treated as a "family member" if their status is recognised as such (see [41] of Batool).

27. Turning back to the provisions of the 2020 Regulations, the Appellant is not and could not be a "relevant person". Although he had no leave to enter or remain under "residence scheme immigration rules", neither was he lawfully resident by virtue of the EEA Regulations. He had never made any application under those Regulations or had his residence facilitated thereunder. Nor could he be a "relevant family member" for the purposes of paragraph 3(6)(k) of the 2020 Regulations. He was not a family member before "IP completion day" as he was not married to the Sponsor before 31 December 2020. He could not become a family member thereafter as he was not "issued with an EEA document" (which is defined by paragraph 3(6)(b)(ii) as a family permit, registration certificate or residence card).

28. Since the Appellant was not and could not be a "relevant person" within the definitions in paragraph 3(6) of the 2020 Regulations, it is apparent from paragraph 3(2) that the provisions of the EEA Regulations could not continue to have any application to him. As I put it to Ms Joshi and as Mr Whitwell submitted, the provisions of paragraph 3 (and indeed the 2020 Regulations as a whole) are saving provisions in order to continue to apply certain provisions of the EEA Regulations during the "grace period" and "whilst applications are finally determined" (see in that regard the heading to Part 3 of the 2020 Regulations). Although Ms Joshi disavowed any reliance on the 2020 Regulations as conferring rights on the Appellant, it is evident from her submissions that this is precisely what she sought to achieve. As Mr Whitwell pointed out, the Appellant cannot derive from one isolated definition an additional right under the EEA Regulations when he made no application in that regard.

29. Even if the Appellant relies on paragraph 3(6)(e)(i) of the 2020 Regulations, that does not avail him since paragraph 8(5) of the EEA Regulations would require the Appellant to be able to prove "to the decision maker" that he was in a durable relationship with the Sponsor as at 31 December 2020. Neither the Respondent nor the Judge were satisfied of that.

30. As Mr Whitwell also pointed out, the Tribunal's guidance in Batool is fatal to the Appellant's case in this regard. As the Tribunal made clear at [2] of its guidance an extended family member "has no right to have any application they have made for settlement as a family member treated as an application for facilitation and residence as an extended/other family member" (see in that regard [66] to [72] of the decision). Although Ms Joshi sought to distinguish the Appellant's case from Batool on the basis that Batool concerned entry clearance appeals, she offered no reason why that made any difference to the legal position in this regard.

31. There is a further reason derived from paragraph 3(2) why the Appellant's arguments in relation to the 2020 Regulations are misconceived and that arises from the "grace period" itself. That is because that period ends with

the "application deadline". As I have already pointed out, that deadline is defined at paragraph 2 of the 2020 Regulations as "the end of June 2021". The Appellant made his application on 8 July 2021. That is the point made by Judge Eldridge at [17] of the Decision and is fatal to the Appellant's case under the 2020 Regulations.

32. For all those reasons, the Appellant can derive no benefit from the 2020 Regulations. The Judge was right to say what he did at [18] of the Decision. It follows that the Appellant has not made out his case under ground two and ground three also falls away in consequence.

Argument in relation to Appendix EU

33. Although the foregoing should be the end of the matter since what I say deals with the grounds as pleaded, Ms Joshi sought to introduce a new argument. Not only was this not pleaded (and she did not apply to amend her grounds) but it is not an argument which appears to have been raised before Judge Eldridge. It is not referred to in the Transcript. It cannot be an error of law for a Judge to fail to deal with an argument which is not put to him.

34. Mr Whitwell did object to the raising of this argument but, since I heard from Ms Joshi de bene esse and Mr Whitwell was able to make submissions in response in spite of having no notice of the argument, I deal with it.

35. Ms Joshi sought to rely on the definition of durable partner in Annex 1 to Appendix EU (in relation to EU11). That reads as follows so far as relevant:

> "(a) the applicant is, or (as the case may be) for the relevant period was, in a durable relationship with the relevant EEA citizen …. , with the couple having 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);
>
> and
>
> (b) (i) the person holds a relevant document as the durable partner of the relevant EEA citizen [or].... for the period of residence relied upon: for the purposes of this provision, where the person applies for a relevant document (as described in sub-paragraph (a)(i)(aa) or (a)(ii) or that entry in this table) as the durable partner of the relevant EEA citizen [or]….before the specified date and their relevant document is issued on that basis after the specified date, they are deemed to have held the relevant document since immediately before the specified date;
>
> or
>
> (ii) where the person is applying as the durable partner of a relevant sponsor …or as the spouse or civil partner of a relevant sponsor (**as described in sub-paragraph (a)(i)(bb) of the entry for 'joining family member of a relevant sponsor'** in this table), and 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]… **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

(bbb) was resident in the UK and Islands before the specified date, and one of the events referred to in sub-paragraph (b)(i) or (b)(ii) in the definition of 'continuous qualifying period' in this table occurred and after that event occurred they were not resident in the UK and Islands again before the specified date;

or

(ccc) was resident in the UK and Islands before the specified date, and the event referred to in sub-paragraph (a) in the definition of 'supervening event' in this table has occurred and after that event occurred they were not resident in the UK and Islands again before the specified date,

the Secretary of State is satisfied by evidence provided by the person that the partnership was formed and was durable before (in the case of a family member of a qualifying British citizen as described in sub-paragraph (a)(i)(bb) or (a)(iii) of that entry in this table) the date and time of withdrawal and otherwise before the specified date;

and

(c) …

(d) …"

[my emphasis]

36. Ms Joshi accepts that the Appellant cannot meet the definition in (a) and (b)(i) read together as he does not have a relevant document (nor has he ever applied for one) and has not been a durable partner for two years. Ms Joshi argued however that the Appellant could meet (b)(ii)(bb)(aaa) of the definition, in particular because of the words which I have underlined in the extract above. She argued that this meant that, although the Appellant was not outside the UK, he could be considered to be outside the UK. That is because he was not within the UK as a family member because he did not hold a relevant document. Nor did he have leave to remain. Accordingly, he fell within the alternative definition in (b)(ii). She argued that the Appellant could also fall within the exception to (a) due to "other significant evidence" of the durable relationship.

37. Mr Whitwell drew my attention to Home Office guidance entitled "EU Settlement Scheme: EU, other EEA and Swiss citizens and their family members" version 18.0 which was updated on 9 November 2022 ("the Guidance"). Mr Whitwell accepted that, as guidance for Home Office caseworkers, it could only take him so far in relation to what was meant by (b)(ii) of the definition section. As Mr Whitwell pointed out by reference to pages 116-117 of the Guidance, the section on which Ms Joshi relies is under the heading of "Joining Family Members". The Guidance explains the words on which Ms Joshi relies as meaning that "a durable partner who did not hold a relevant document as the durable partner of a relevant EEA citizen (where their relevant sponsor is that relevant EEA citizen) for a period of residence in the UK and Islands before the specified date, and who did not otherwise have a lawful basis of stay in the UK and Islands for that period, cannot qualify as a joining family member on this basis".

38. The first difficulty for the Appellant with Ms Joshi's argument is that Judge Eldridge did not consider that there was other significant evidence of a durable relationship. The relationship had been in being for only a few months by the specified date. The couple had married but other than the marriage, there was very little evidence about the relationship. Accordingly, the Appellant could not satisfy (a) of the definition in any event.

39. The second difficulty as I have already pointed out, is that this argument was never made to Judge Eldridge and as such cannot form the basis for a submission that the Judge made an error of law.

40. The third difficulty is that this was never part of the Appellant's grounds of appeal and no application was made to amend.

41. Fourth, and in any event, Ms Joshi's argument is misconceived and based on a misreading of the definition. The word "unless" within (b)(ii)(bb)(aaa) indicates that is an exception to that part of the provision. However, the provision itself requires the durable partner to be resident outside the UK. The provision cannot be interpreted as meaning that the durable partner must be outside the UK unless he is within the UK and not considered to be resident because he has not been recognised as a durable partner and is here unlawfully. That would be a nonsense. If Ms Joshi's interpretation were correct, that would mean, for example, that a person such as the Appellant whose right as a durable partner had never been recognised and had been here unlawfully would be in a better position than someone whose right had not been recognised but had been here lawfully. That is further confirmed by the words I have emboldened in the extract above. The reference is to durable partners who are resident outside the UK and who were not resident as family members prior to the specified date. That such persons had to be outside the UK is made clear by the reference to "joining family member of a relevant sponsor" (my emphasis) in the body of the main part of the provision.

42. The Guidance explains that the reason for the wording of (b)(ii)(bb)(aaa) is to prevent an individual such as this Appellant from simply leaving the UK

and making an application after the specified date from outside the UK to be a durable partner even though he had not been recognised as such when he was in the same relationship before he left at a time when he was in the UK unlawfully prior to the specified date.

43. There are two reasons why I consider the foregoing interpretation of (b)(ii)(bb)(aaa) (in other words as explained in the Guidance) to be correct.

44. First, this Tribunal provided guidance in relation to durable partners and in relation to the EUSS in Celik (EU exit; marriage; human rights) [2022] UKUT 00220 (IAC) ("Celik"). Headnote [1] provides that "[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." I asked Ms Joshi to explain how the Appellant's case could be distinguished from that of Mr Celik. She said that Mr Celik made an application before the end of the grace period (30 June 2021). The Appellant made his application after that date. I had some difficulty understanding how a person whose application was made outside even the grace period which applied was in a better position than one who made the application within time. Ms Joshi did not offer any explanation of how that could possibly be the correct interpretation other than to say that this is what the Rules provide. I have to say that I cannot understand why, if her submission were correct, Mr Celik would not equally have benefitted on the facts. I accept however that this does not appear to have been part of the definition which the Tribunal considered and therefore that no similar argument was made.

45. Second, however, and stemming from what is said in Celik, the interpretation for which Ms Joshi contends would be inconsistent with the Withdrawal Agreement. Article 10 of the Withdrawal Agreement defines family members. The Appellant is not a family member within any of the definitions in Article 10(1). Article 10(2), (3) and (4) are relevant to this case:

> "2. Persons falling under points (a) and (b) of Article 3(2) of Directive 2004/38/EC whose residence was facilitated by the host State in accordance with its national legislation before the end of the transition period in accordance with Article 3(2) of that Directive shall retain their right of residence in the host State in accordance with this Part, provided that they continue to reside in the host State thereafter.
>
> 3. Paragraph 2 shall also apply to persons falling under points (a) and (b) of Article 3(2) of Directive 2004/38/EC who have applied for facilitation of entry and residence before the end of the transition period, and whose residence is being facilitated by the host State in accordance with its national legislation thereafter.
>
> 4. Without prejudice to any right to residence which the persons concerned may have in their own right, the host State shall, in accordance with its national legislation and in accordance with point (b) of Article 3(2) of Directive 2004/38/EC, facilitate entry and residence for the partner with whom the person referred to in points (a)

> to (d) of paragraph 1 of this Article has a durable relationship, duly attested, where that partner resided outside the host State before the end of the transition period, provided that the relationship was durable before the end of the transition period and continues at the time the partner seeks residence under this Part."

46. Broadly, those within Article 10(2) and Article 10(3) are permitted to stay in the UK under Appendix EU as durable partners applying (a) and (b)(i) of the definition of Annex 1 to Appendix EU and paragraph EU11. Those within 10(3) fall within that definition if they are subsequently recognised as durable partners applying the 2020 Regulations which permits the EEA Regulations to continue to apply after 31 December 2020 to those who made an application before that date. Broadly, Article 10(4) is applied by (a) and (b)(ii) of the definition (which includes (bb)(aaa) on which the Appellant relies). As Article 10(4) makes clear, it applies only to those durable partners resident outside the UK before the end of the transition period. In other words, it is intended to and does apply only to "joining family members".

47. The final difficulty, in any event, is that the words following all of the sub-sections of (b)(ii)(bb) require that "the Secretary of State is satisfied by evidence …that the partnership was formed and was durable before (in the case of a family member of a qualifying British citizen as described in sub-paragraph (a)(i)(bb) or (a)(iii) of that entry in this table) the date and time of withdrawal and otherwise before the specified date". Even if Ms Joshi were correct, therefore, the Appellant would still have to provide evidence to satisfy the Respondent and then, if necessary, the Judge that the relationship was durable at the specified date. Neither the Respondent nor Judge Eldridge accepted that to be the case. I have concluded that the Judge has not erred in this regard.

CONCLUSION

48. For all of the foregoing reasons, the Appellant has failed to show that the Decision contains errors of law. Accordingly, I uphold the Decision with the consequence that the Appellant's appeal remains dismissed.

DECISION

The Decision of First-tier Tribunal Judge Mark Eldridge promulgated on 17 March 2022 does not involve the making of an error on a point of law. I therefore uphold the Decision with the consequence that the Appellant's appeal remains dismissed.

Signed: L K Smith

Upper Tribunal Judge Smith Dated: 11 November 2022