Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: UI-2022-005990**
First-tier Tribunal No: EA/00679/2022

THE IMMIGRATION ACTS

Decision & Reasons Promulgated:
On the 18 October 2023

Before

UPPER TRIBUNAL JUDGE KEBEDE
DEPUTY UPPER TRIBUNAL JUDGE HUTCHINSON

Between

GULFRAZ TAYYAB
[NO ANONYMITY ORDER MADE]

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the appellant: Mr S Mustafa, of Counsel, instructed by Dyson Solicitors
For the respondent: Mr D Clarke, Senior Home Office Presenting Officer

Heard at Field House on 25 April 2023

DECISION AND REASONS

1. The appellant appeals with permission from the decision of the First-tier Tribunal dismissing his appeal, against the respondent's decision, dated 30 December 2021 to refuse to allow his application for pre-settled status under the EU Settlement Scheme (EUSS). The appellant is a citizen of Pakistan, born on 29 October 1986.

Background

2. The appellant entered the UK as a student in 2009 with leave expiring on 30 April 2012. On 10 July 2012 he married and subsequently applied for leave to remain as the spouse of a settled person. That application was refused and although he succeeded on appeal, the relationship broke down before any leave to remain in the UK was granted. On 26 November 2019 the appellant applied for leave under the EUSS as the durable partner of his current wife, Ms Justyna Jozwiak, (a Polish citizen who obtained pre-settled status under EUSS on 15 January 2020) the respondent refusing that application on 20 November 2020. On 19 December 2020, after the first EUSS application had been refused, the Appellant made a further application on the basis of his relationship with Ms Jozwiak. The Respondent refused that application on 27 February 2021 on the basis that the Appellant was not a "durable partner". The respondent did not consider whether the Appellant was married to an EU national.

3. The appellant and Ms Jozwiak undertook an Islamic Nikah ceremony in the UK on 17 January 2020. They subsequently undertook a proxy Islamic Nikah ceremony in Pakistan, which was registered there, on 2 March 2020. On 14 May 2021 the Appellant and his first wife were legally divorced in the UK. On 2 June 2021, the Appellant and Ms Jozwiak married each other at the Dumfries Registry Office.

4. On 8 June 2021, the appellant made a third application under the EUSS. The Respondent refused that application on 30 December 2021. That decision was appealed to the First- tier Tribunal, the appellant not appealing either the November 2020 or the February 2021 decisions.

First-tier Tribunal decision

5. The appellant's appeal against the refusal dated 30 December 2021, was heard by First-tier Tribunal Judge Brannan on 26 July 2022. In a decision promulgated on 8 August 2022, Judge Brannan dismissed the appellant's appeal under Regulation 8, Immigration (Citizens' Rights Appeals) (EU Exit) Regulations 2020.

6. It was not disputed before the First-tier Tribunal, that if the appellant's marriage on 2 March 2020 was valid in England, the appellant succeeded as he would have become upon that marriage a family member of an EU national in the UK with an automatic right of residence under EU law until 31 December 2020 and should therefore have been granted leave under EUSS when he applied

7. The judge considered the validity of the appellant's 2 March 2020 marriage by proxy. The judge considered **CB (Validity of Marriage: proxy marriage) Brazil [2008] UKAIT 00080**, in relation to the validity of that marriage, with **CB** relied on by the appellant for the proposition that there is no exception in immigration cases to the rule of private

international law that validity of a marriage is governed by the *lex loci celebrationis.* The judge considered the Court of Appeal case of **Apt v Apt [1948],** considered in **CB,** including that:

'in the absence of legislation to the contrary, there is no doctrine of public policy by which such a ceremony, valid where it was performed, may be held to be ineffective in this country to constitute a valid marriage.'

In the penultimate paragraph of **Apt:**

"…we are unable to see any reason in public policy which would require the English courts, if they recognize the validity of proxy marriages celebrated outside the United Kingdom, to deny to a person domiciled in this country the right of so celebrating a marriage, provided, of course, that he or she has in other respects capacity to marry and does not infringe any provision of English law."

8. The judge went on to consider however, that there was legislation 'to the contrary' in English law relevant to polygamous marriages. It was the judge's finding that Section 57 of the Offences Against the Person Act 1861 provided that the appellant, if he did marry Ms Jozwiak on 2 March 2020, committed the offence of bigamy. The judge considered the legal authorities on bigamy, concluding that the appellant's marriage dated 2 March 2020 was not valid in England. Whilst the judge accepted that generally a proxy marriage is valid in England, if valid in the country it took place in, such a marriage was contrary to the law of England and applying *lex loci celebrationis* the marriage cannot be recognised.

9. The judge concluded that the 2 March 2020 marriage was not valid and therefore the appellant was not a family member of Ms Jozwiak prior to 31 December 2020. He therefore did not gain an automatic right of residence under the applicable provisions.

10. The judge considered the appellant's argument, that in the alternative he met the definition of 'durable partner' under the immigration rules and was therefore entitled to pre-settled status.

11. It was not contested that the appellant had been in a relationship akin to marriage for two years. The judge considered the provision of EU14 of Appendix EU. As the appellant was not married by the 'specified date' of 31 December 2020 the judge found that he was not a family member of a relevant EEA citizen. The judge went on to consider the definition of durable partner under Appendix EU.

12. The judge considered the definition of durable partner under Annex 1, Definitions (b)(i), and found that the appellant did not hold the required 'relevant document' for the period relied on. In relation to (b)(ii) the judge considered the provisions in detail, concluding that the appellant was excluded as he did not hold a relevant document and had no other lawful basis to stay in the UK.

13. The judge considered the Withdrawal Agreement and the appellant's argument that his applications made on 26 November 2019 and 19 December 2020 were applications for facilitation of entry and residence within the meaning of Article 10(3) of the Withdrawal Agreement. The judge considered that the issue in both refusals was not whether the appellant was a durable partner, within the meaning of Directive 2004/38/EC, but rather the absence of a residence card under the 2016 Regulations in both applications. The judge concluded that the application under EUSS on 19 December 2020 was an application for facilitation of entry and residence within the meaning of Article 10 (3) of the Withdrawal Agreement. The judge concluded that although in his findings on the evidence, the appellant was a durable partner when he made his December 2020 application under the EUSS and to refuse that application may have been in breach of the Withdrawal Agreement, the appellant did not appeal that 27 February 2021 decision.

14. The judge ultimately concluded that the decision under appeal before the First-tier Tribunal did not breach the appellant's rights under the Withdrawal Agreement and as the appellant did not, and never had, a right to live in the UK as a durable partner, it was plainly also not disproportionate to refuse to grant leave under EUSS.

Permission to appeal

15. Permission to appeal was sought by the appellant on the following grounds. Firstly, that the judge erred in considering *lex loci celebrationis* not applicable upon the appellant's proxy marriage in Pakistan on 2 March 2020, with the judge failing to appreciate that section 57 of the Offences Against the Person Act 1861 does not consider bigamy to be extended to any second marriage contracted elsewhere than in England and Ireland by any other than a subject of Her Majesty. As neither the sponsor nor the appellant were British nationals or subjects the provision did not extend to them. Therefore the appellant's marriage of 2 March 2020 was recognised in the UK under **Awuku v Secretary of State for the Home Department [2017] EWCA Civ 178**. Secondly, the judge erred in considering that the appellant had to have a lawful basis to stay in the UK without needing a relevant document (the judge having accepted that the appellant met the rest of the Annex 1, Appendix EU definition of durable partner) whereas the definition states 'they did not otherwise have lawful basis of stay in the UK and Islands for that period'. Thirdly, that the judge accepted that the appellant's application dated 19 December 2020 was made for facilitation of residence for the purposes of Article 10(3) of the Withdrawal Agreement. The judge erred in not considering that the appellant had applied for facilitation for residence and that therefore his rights under the Withdrawal Agreement were breached.

16. Permission was granted by the First-tier Tribunal. No Rule 24 response was made. The matter then came before us and both parties made submissions.

Submissions

17. Mr Mustafa submitted that his main point was in relation to the validity of the proxy marriage which took place on 2 March 2020. Mr Mustafa submitted that the section 57 of the Offences Against the Person Act 1861 was clear (as set out at paragraph [27] of the decision of the First-tier Tribunal). He submitted that, as discussed at paragraph 29, the appellant was protected by the second paragraph as neither he the appellant nor his wife was a 'subject of Her Majesty' and therefore the marriage conducted in Pakistan was recognised as valid, applying *lex loci celebrations.* Mr Mustafa submitted that the 2 March 2020 marriage did not come to be recognised in the UK until 8 June 2021 when the appellant applied for the third time under EUSS, by which stage the appellant had divorced his first wife, on 14 May 2021. For the purposes of UK law Mr Mustafa submitted that there was only one marriage relied on. Only 2 things were relevant: was the marriage recognised where it was conducted and secondly was it the only marriage relied on. On grounds 2 and 3 Mr Mustafa relied on the arguments made before the First-tier Tribunal.

18. Mr Clarke relied **on Abdin (domicile – actually polygamous marriages) [2012] UKUT 00309 (IAC**), which was authority for the proposition that under section 11(d) of the Matrimonial Causes Act 1973, a polygamous marriage entered into outside England and Wales shall be void if either party at the time of the marriage was domiciled in England and Wales. Mr Clarke further relied on the House of Lords case of **Mark v Mark [2005] UKHL42** in respect of domicile. This held that an individual, who can only have one domicile at a time, can be domiciled in the UK, including by choice, even if in the UK unlawfully. Mr Clarke submitted that there was nothing to suggest that the appellant had any other intention than to remain in the UK. In respect of ground 2, whilst paragraph 7 of the grounds suggested that the appellant could succeed under Appendix EU on the basis of being unlawfully in the UK, Mr Clarke submitted that this was a perverse interpretation of (b)(ii)(bb)(aaa) of the definition of durable partner. Mr Clarke relied on the respondent's EU Settlement Scheme guidance, Version 19 which provided that a durable partner who did not hold a relevant document before the specified date and did not otherwise have a lawful basis of stay, cannot otherwise qualify as a family member. He submitted that the policy guidance confirms the correct interpretation of (aaa), that it required lawful residence. In terms of ground 3 the decision under appeal relates to the 8 June 2021 application made by the appellant. Regardless of the merits of the judge's comment that the refusal of the December 2019 application was not in accordance with Article 10(3) of the Withdrawal Agreement, that was not the decision under appeal before the First-tier Tribunal.

19. In response, Mr Mustafa submitted that the point in Article 10(3) of the Withdrawal Agreement was the wording, which provided that persons who have applied for facilitation of entry and residence before the end of the transition period, which the appellant had on 19 December 2020, fell to be

considered under Article 10(2). Therefore Mr Mustafa argued that there had been a breach of the appellant's rights under the Withdrawal Agreement in being deprived of the right of residence in the UK.

Discussion

20. We have firstly considered the judge's findings that the appellant's proxy marriage was not valid in England, the judge finding at paragraph [32]:

'While generally a proxy marriage is valid in England if valid in the country where it was performed, it goes against the law of England for such a marriage to be entered into when a party to it is in England or Ireland and is already married. As a result, applying *lex loci celebrationis* the marriage cannot be recognised'.

21. The decision of the Court of Appeal in **Awuku** (above) confirmed that the formal validity of a marriage is governed by the *lex loci celebrationis*, i.e., the law of the country where the marriage was celebrated.

22. However, we reject the submission of Mr Mustafa that the March 2020 marriage of the appellant and his second wife was not invalid as a result of section 57 of the Offences against the Person Act 1861, because neither the appellant nor his wife were 'subjects of Her Majesty'.

23. The judge considered at paragraph [26] that the jurisprudence established that there was no policy, if the validity of proxy marriages outside the UK was recognised, to deny to a person domiciled in the UK, the right of so celebrating a marriage 'provided of course, that he or she had in other respects capacity to marry and does not infringe any provision of English law" The judge having then considered section 57 of the Offences Against the Person Act 1861, considered that this was a 'provision of English law' that was infringed by a polygamous marriage. The judge at [29] considered the argument that the appellant is now making, whether the first subclause of the second paragraph of section 57 protected the appellant as he is not a subject of Her Majesty and specifically rejected that argument at paragraph [29] to [31] of his decision, the judge having difficulty in seeing that it was parliament's intention to allow someone in England to be able to enter a polygamous marriage by the use of proxy.

24. Even if the judge was wrong in relation to the legislative provisions relied on (and Mr Clarke submitted that the judge reached the correct conclusion if potentially by the wrong route), there was, in the alternative, no material error in those findings.

25. **Abdin** (above) relied on section 11 of the Matrimonial Causes Act 1973 (as amended) which provides:

'"Nullity

11 Grounds on which a marriage is void.

A marriage celebrated after 31st July 1971 shall be void on the following grounds only, that is to say-

(a) that it is not a valid marriage under the provisions of the Marriage Acts 1949 to 1986 that is to say where –

(i) the parties are within the prohibited degrees of relationship;

(ii) either party is under the age of sixteen; or

(iii) the parties have intermarried in disregard to certain requirements as to the formation of marriage;

(b) that at the time of the marriage either party was already lawfully married or a civil partner;

(c) that the parties are not respectively male and female;

(d) in the case of a polygamous marriage entered into outside England and Wales, that either party was at the time of the marriage domiciled in England and Wales.

For the purposes of paragraph (d) of this subsection a marriage is not polygamous if at its inception neither party has any spouse additional to the other."

26. Section 11(d) of the Matrimonial Causes Act 1973 provides therefore that a person with a domicile in England and Wales is not permitted to marry polygamously.

27. The judge was not referred to either **Abdin** or section 11 the Matrimonial Causes Act 1971. However, in finding as he did, at paragraph 32, having considered the provisions and jurisprudence before him, including in relation to domicile at [26], that the marriage was not valid in the UK given that a party to the marriage was in the UK and was already married, the judge was, in terms, applying the effects of the domicile provisions of section 11(d) of the Matrimonial Causes Act 1971.

28. We agree with Mr Clarke that given the authorities, including **Mark v Mark** (above) the appellant, who had arrived in the UK in 2009 and has remained since then, including after the expiry of his student leave in 2012, has acquired the UK as a domicile of choice (and such is not vitiated by the fact that the appellant has remained illegally in the UK). There is nothing before the First-tier Tribunal judge, or otherwise, to suggest that his intention was anything other than to make the UK his home permanently. Mr Mustafa made no submissions to the contrary, either before the First-tier Tribunal or before this Tribunal.

29. The judge of the First-tier Tribunal was correct to consider, at [32] that given the appellant and the sponsor were in England (and therefore the UK), and the appellant was already married, the marriage could not be

recognised in law. Although the judge did not make findings specifically on domicile, any error is not material, as the acquisition of a domicile of choice meant that the appellant's marriage to the sponsor, being actually polygamous, was void (see including Macdonald's Immigration Law and Practice para 11.31, including that a man or woman whose personal law does not allow polygamous marriage has no capacity to contract a valid polygamous marriage **– Adepoju v Akiinola [2016] EWHC 3160).**

30. Although not specifically in the grounds, Mr Mustafa argued before us that the proxy marriage 'did not come to the UK for recognition' until 8 June 2021 when the appellant made the application currently under appeal, by which stage he was divorced. Even if such a ground was before us, that argument must fail for two reasons. Firstly, as correctly found by the First-tier Judge and considered in detail above, the 2 March 2020 marriage was void for reasons of polygamy. Secondly, Mr Mustafa is incorrect in stating that the marriage did not come to the UK for recognition until 8 June 2021; as the entire premise of the appellant's case before the First-tier Tribunal was that if the 2 March 2020 marriage was valid in the UK, the appellant became upon that marriage a family member of an EU national, with an automatic right of residence under EU law until 31 December 2020. Therefore the appellant was in effect seeking recognition of the proxy marriage as valid on 31 December 2020, when the appellant was still married to his first wife.

31. Ground 1 is not made out.

32. In relation to ground 2, Mr Mustafa contended that the judge erred, at paragraph 54, in considering that the appellant required a lawful basis to stay in the UK without needing a relevant document, in order to fall under the definition of 'durable partner' for the purposes of Appendix EU. We are of the view that this ground is misconceived and involves a misunderstanding of the definition of 'durable partner' under Appendix EU.

33. The definition of 'durable partner', under Appendix EU, Annex 1 – Definitions, as set out by the judge of the First-tier Tribunal at paragraph 41 is as follows:

(a) the person is, or (as the case may be) for the relevant period was, in a durable
relationship with a relevant EEA citizen (or, as the case may be, with a qualifying
British citizen or with a relevant sponsor), 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, as the case may be, of the qualifying British citizen
or of the relevant sponsor) 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) of that entry in
this table) as the durable partner of the relevant EEA citizen or, as the case
may be, of the qualifying British citizen 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 case may be, of a qualifying British citizen), 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, as the case may be, as the durable partner of the qualifying British citizen, 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 has 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) it is, or (as the case may be) for the relevant period was, not a durable partnership of convenience; and

(d) neither party has, or (as the case may be) for the relevant period had, another
durable partner, a spouse or a civil partner with (in any of those circumstances)
immigration status in the UK or the Islands based on that person's relationship
with that party

in addition, to meet condition 6 in the table in paragraph EU11 of this Appendix
(or condition 3 in the table in paragraph EU11A), the above requirements are to
be met with reference to the period immediately before the death of the relevant
EEA citizen (or, as the case may be, of the relevant sponsor) rather than to the
date of application

34. It was not disputed that the appellant did not have a relevant document. What was in dispute was the judge's detailed consideration of the definition of durable partner under Appendix EU, where the judge ultimately concluded, at paragraph [54] that whilst there were two classes of people who fall within the scope of *(aaa)* above, the first who were not resident in the UK the second who were but had another lawful basis to stay in the UK without needing a relevant document, the appellant fell into neither category.

35. It was Mr Mustafa's submission that the Upper Tribunal in **Celik (EU exit; marriage; human rights) [2022] UKUT 00220 (IAC),** which is currently under consideration by the Court of Appeal, did not consider the above point that the appellant would meet the definition of 'durable partner' as he 'did not otherwise have lawful basis of stay in the UK'..

36. We find that the judge's reading of the definition of durable partner is the correct one. Although as the judge of the First-tier Tribunal put it, the definition 'contains astonishingly complex numbering' the reference to

'otherwise have a lawful basis of stay in the UK' under (aaa) is designed to exempt an individual otherwise lawfully in the UK (for example as a student) who otherwise meets the definition of durable partner but did not hold the relevant document.

37. Such an interpretation is confirmed by the respondent's EU Settlement Scheme Guidance including in summary at page 119 of the guidance:

"The effect of the above provisions is that, where, at the specified date, a person was
continuously resident in the UK and Islands as the durable partner of a relevant EEA
citizen (where that relevant EEA citizen is their relevant sponsor) and did not hold a
relevant document as that durable partner, they must (unless they otherwise had a
lawful basis of stay in the UK and Islands for that period, for example as a student)
break their continuity of residence in the UK and Islands before they can apply as a
joining family member and the durable partner of the relevant sponsor. They can
then rely on the evidence referred to in the previous paragraph. In such a case, the
person's continuous qualifying period as a joining family member of a relevant
sponsor can only have commenced on or after 1 January 2021."

38. We agree with Mr Clarke, that the correct interpretation of (aaa) requires lawful residence in the UK, as it seeks to cover the position where someone was here lawfully on a different basis and therefore would not have needed a relevant document as a durable partner, as opposed to putting those in the UK unlawfully, in a stronger position, which is the interpretation argued by the appellant.

39. Ground 2 is not made out.

40. We find ground 3 to be similarly without merit. The appellant relied on Article 10(3) of the Withdrawal Agreement, on the basis that the judge had accepted, at pargraphs 77-80 that the appellant's application dated 19 December 2020 was made for facilitation of residence for the purposes of Article 10(3).

41. Articles 10(2) and 10(3) of the Withdrawal Agreement provide:

10(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."

10(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."

42. The judge found at paragraph [80] that had the appellant's application under EUSS, considered by the respondent in December 2020 been treated as an application for a residence card, a refusal would not have been in accordance with the Immigration (European Economic Area) Regulations 2016 (2016 Regulations). The judge was satisfied that applying Article 10(3) of the Withdrawal Agreement to those facts the respondent's 27 February 2021 refusal of the appellant's 19 December 2020 decision may have been in breach of the Withdrawal Agreement. However, given that the appellant did not exercise his right of appeal against that decision the judge went on to find at paragraph [81] that the respondent was no longer compelled to facilitate residence as the application which was the subject of the appeal, was not made before 31 December 2020 and the breach of the Withdrawal Agreement was not the subject of the appeal.

43. In any event, even if the appellant had appealed the 27 February 2021 decision, in our findings he still could not have benefited from the Withdrawal Agreement as Article 10(3) required that an applicant's *residence is being facilitated by the host State'* which was not the case in respect of the respondent's decision, as the appellant's application was refused, not facilitated.

44. Although Mr Mustafa argued that a broader interpretation of 'facilitation' under the Withdrawal Agreement was required, we cannot agree. There was no error in the judge's conclusion. Notwithstanding that the judge's interpretation, that the respondent's 19 December 2020 decision was in breach, might well not withstand scrutiny, including that the appellant had not made an application under the 2016 Regulations, there was no material error in the judge's ultimate conclusion that the appellant had not appealed that decision and therefore could not benefit from Article 10 of the Withdrawal Agreement.

45. Ground 3 is not made out.

DECISION

46. The making of the decision of the First-tier Tribunal did not involve an error on a point of law requiring it to be set aside. The decision to dismiss the appeal shall stand.

Signed M M Hutchinson Date: 3 May 2023

Deputy Upper Tribunal Judge Hutchinson