IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2022-003363
First-tier Tribunal No: EA/13185/2021

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On the 20 March 2024

Before

UPPER TRIBUNAL JUDGE MANDALIA

Between

Secretary of State for the Home Department

Appellant

and

Muhammad Khalid Mahmood
(NO ANONYMITY DIRECTION MADE)

Respondent

REPRESENTATION

For the Appellant: Mr C Bates, Senior Home Office Presenting Officer
For the Respondent: No appearance

Heard at Birmingham Civil Justice Centre on 15 March 2024

DECISION AND REASONS

INTRODUCTION

1. The appellant in the appeal before me is the Secretary of State for the Home Department ("SSHD") and the respondent to this appeal is Mr Muhammad Khalid Mahmood. However, for ease of reference, in the course of this decision I adopt the parties' status as it was before the FtT. I refer to Mr Mahmood as the appellant, and the Secretary of State as the respondent.

2. The appellant is a national of Pakistan. On 18 March 2021 he made an application under the EU Settlement Scheme. He relied upon his relationship with Ms Marlena Anna Szlaga ("Ms Szlaga"), a Polish national exercising treaty rights in the UK. Ms Szlaga was granted settled status in the UK under the EU Settlement Scheme on 24 September 2019. The application made by the appellant was refused by the respondent for reasons set out in a decision dated 2 September 2021. The respondent noted the appellant had not been issued with a family permit or residence card under the EEA Regulations as a relative of an EEA national and does not meet the requirements for settled status as a family member of a relevant EEA citizen.

3. The appellant's appeal against that decision was allowed by First-tier Tribunal Judge Juss for reasons set out in a decision promulgated on 6 June 2022. The respondent claims the judge misapplied the relevant provisions of the Agreement on the Withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community (the Withdrawal Agreement) that was domestic legal effect by the European Union (Withdrawal Agreement) Act 2020. The respondent claims that on any view, the appellant's residence as a 'durable partner' of Ms Szlaga was not 'facilitated' in the UK before the transition period for which the Withdrawal Agreement provided, ended (i.e. 11pm on 31 December 2020).

4. Permission to appeal to the Upper Tribunal was granted by First-tier Tribunal Judge Boyes on 22 June 2022.

5. The appellant filed a Rule 24 Reply dated 13 July 2012. The appellant maintains he falls within the definition of a 'durable partner' set out in Appendix EU and that he was residing in the UK as the family member of an EEA national prior to 31 December 2020. He claims the 2016 EEA Regulations conferred a right on the appellant, and that he is entitled to rely upon that right that existed as a matter of EU Law. The appellant claims there was a breach of Article 18(1)(o) of the Withdrawal Agreement. He claims it was open to the FtT to allow the appeal for the reasons that it gave.

6. On 31 January 2023 the Court of Appeal handed down its judgement in *Celik v SSHD* [2023] EWCA Civ 921. On 23 October 2023, Upper Tribunal Judge Blundell issued Directions. He said:

> "2. The Court of Appeal's judgment was handed down on 31 July 2023 and the papers have been placed before me today to give instructions for the listing of the appeal. As presently advised, it is my provisional view that Judge Juss's decision cannot survive the decision of the Court of Appeal. Provisionally, it seems likely that the outcome of the appeal will be that the Secretary of State succeeds in establishing an error of law on the part of the judge and that the decision on the appeal can be remade in the Upper Tribunal in accordance with the decision of the Court of Appeal.
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> 3. The parties must now review their positions in light of the Court of Appeal's decision.

> 4. If Mr Mahmood accepts that the Secretary of State's appeal should be allowed, he should acknowledge that in writing within 21 days of the date on which these directions are sent.
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> 5. If he contends that the Upper Tribunal ought to uphold the FtT's decision for reasons other than those given by that tribunal or if he seeks to rely on any grounds on which he was unsuccessful in the proceedings which are the subject of the appeal, he is required by rule 24(1B) to file and serve a response to the grounds of appeal. Any such response should be received no later than 21 days after these directions are sent.
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> 6. The papers will be placed before a judge after the expiry of the 21 day period and consideration will be given to the just and timely disposal of the appeal, taking into account any submissions made to that point."

7. No response has been received by the Tribunal to those directions from the appellant. The matter was therefore listed for hearing before me for disposal. Notice of the Hearing listed before me was sent to the parties on 28 February 2024. A copy was sent by email to both the appellant and his representative. Neither the appellant nor his representatives have contacted the Tribunal and there is no explanation for the appellant's absence. The Tribunal has not received any application for an Adjournment. Having reviewed the Tribunal's records I am satisfied that the appellant has had notice of the hearing listed before me and that it is in the interests of justice and in accordance with the overriding objective that I should proceed to hear the appeal and dispose of the same in the appellant's absence.

DECISION

8. First-tier Tribunal Judge Juss allowed the appeal and gave three principal reasons for doing so. First, the appellant and his wife were in a 'durable relationship' before the specified date (31 December 2020). The appellant is not therefore required to produce a 'relevant document'. Second, the sponsor had sent off her Polish passport to be renewed in or about June 2021, because her previous passport had expired in 2020 and she had been unable to renew it because of the 'coronavirus lockdown'. The fact that she did not have a valid passport at the time was '*force majeure'* and should not be held against her. Third, the appellant is a 'durable partner' as defined in Annex 1 of Appendix EU by reference to (a)(ii)(bbb).

9. I accept, as Mr Bates submits, that none of the brief reasons given by the judge withstands scrutiny. In summary, the appellant's case before the FtT appears to have been that those in a durable partnership are exempt from the need to have held a relevant document. The judge said, at [20]:

> "…If the Appellant was in a 'durable relationship' prior to the specified date, (and indeed now have a child together), which the evidence shows to be the case (which is not taken up as an issue in the RL), then the Appellant does not require the production of the a 'document.' The facts show that when the application was made to the Respondent for a 'residence card' the Appellant's documents were not an issue. The issue consisted of the absence of the sponsor's passport. But if the Appellant and the sponsor were in a durable relationship prior to the specified date, and if it is the case

that the Appellant does not then require a 'document' in order to meet the requirements, he succeeds..."

10. It is useful to being by setting out the definition of a 'durable partner' as set out in Annex 1 (Definitions) of Appendix EU as it was at the date of the hearing before the First-tier Tribunal:

> **"Durable Partner**:
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> (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
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> (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
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> **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:
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> **(aa)** the date of application is after the specified date; and
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> **(bb)** the person:
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> **(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
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> **(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"

11. Taking the first and the third reasons that he gave, the judge does not set out any reasons why he has concluded that the appellant falls within the definition of a 'durable partner' on the facts. He appears to refer to (a)(ii)(bbb) of Appendix 1, but fails to explain the basis upon which he concludes that *"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"*. It did not form any part of the appellant's case that there were absences from the UK.

12. Judge Juss did not make any express reference to paragraph (b)(ii)(bb)(aaa) of Appendix 1 of Appendix EU. Paragraph (b)(ii)(bb)(aaa) is in two halves, separated by the word "unless". The first part, preceding the word 'unless' requires that the applicant's residence was not in a capacity which met the definition of a *"family member of a relevant EEA citizen."*. The use of the word "unless" then introduces an exception. The effect of that exception is that where an applicant can bring themselves within the scope of what follows after the word "unless", the criteria in the first part of paragraph (aaa) *(that precede the word 'unless')* are incapable of being satisfied, and that route to qualify as a durable partner falls away. In other words, if the "unless" applies, an applicant will not be able to avail themselves of the route to recognition as a durable partner provided by the first half criteria in paragraph (aaa). The two "unless" requirements are as follows:

    a. "the reason why… they were not so resident is that they did not hold a relevant document as the durable partner of a relevant EEA citizen…"

b. "and they did not otherwise have a lawful basis of stay in the UK and Islands for that period…"

13. There are two criteria, both of which must be satisfied. First, the individual "did not hold a relevant document", and second, "they did not otherwise have a lawful basis of stay". The relevant document for the purposes of the first criterion is a residence card (or an EEA Family Permit) as a durable partner under the 2016 Regulations. The 'right to reside' in this context is 'facilitated' by the UK as the host Member State by issuing a relevant document. That first criterion again emphasises the importance attached to the individual having been issued with a relevant document that recognises residence rights enjoyed by durable partners and conferred following an extensive examination of the personal circumstances of the applicant.

14. The second criterion concerns the immigration status of the applicant. The focus is upon the reason why the individual does not hold a relevant document. The criteria applies "*where the reason why…they were not so resident is that they did not otherwise have a lawful basis of stay*". It is the use of the double negative in subparagraph (aaa) that causes confusion. Properly read, a person who "did not otherwise have a lawful basis of stay" in the UK could not meet that criterion. By contrast, an applicant who did otherwise have a lawful basis of stay in the UK can satisfy both criterion and can benefit from paragraph (aaa). For example, a person who held leave in some other capacity, for example as a student, would otherwise have had a lawful basis of stay in the UK, and would not have required their presence in the UK to have been facilitated as a durable partner under the EEA Regulations. Their presence in the UK would be lawful by another route.

15. It is clear therefore that a person who was in a durable partnership but did not have a "relevant document", and who did not otherwise have a lawful basis of stay in the United Kingdom at the "specified date" of 31 December 2020 is incapable of meeting the definition of "durable partner". Judge Juss therefore erred in allowing the appeal for the first and third reasons that he gave. The second reason given is that the appellant's partner had sent off her passport to be renewed in or around June 2021. It is not at all clear what relevance that had to the judge's assessment of whether the appellant meets the requirements of Appendix EU. The respondent did not refuse the application that gave rise to the decision under appeal because the appellant had failed to provide a valid passport to confirm the identity and nationality of the sponsor. A previous application made by the appellant on 22 December 202 for a residence card had been refused on that basis by the respondent on 25 February 2021, but that was not the decision under appeal before the FtT. The decision under appeal, as confirmed on the Form IAFT-5 'Appeal against your Home Office decision' was the respondent's decision dated 2 September 2021.

16. Judge Juss therefore erred in allowing the appeal for the three reasons that he gave, and his decision must be set aside.

17. The appropriate course is for me to remake the decision. The appellant accepts he did not have a 'relevant document'. For the reasons I have set out, on a proper reading of the relevant provisions, a person who was in a durable partnership but did not have a "relevant document", and who did not otherwise have a lawful basis of stay in the United Kingdom at the "specified date" of 31 December 2020 is incapable of meeting the definition of "durable partner".

18. In *Celik v SSHD* [2023] EWCA Civ 921, the Court of Appeal held that on the proper interpretation of Article 10 of the EU Withdrawal Agreement, an individual who had married an EU national after the end of the post-EU exit transition period did not have any right to reside in the UK. The fact that their marriage had been delayed due to the COVID-19 pandemic did not alter the interpretation of the Withdrawal Agreement.

19. The appellant's appeal cannot therefore succeed and I dismiss the appeal.

NOTICE OF DECISION

20. The decision of First-tier Tribunal Judge Juss promulgated on 6 June 2022 is set aside.

21. I remake the decision and dismiss the appeal.

V. Mandalia
Upper Tribunal Judge Mandalia

Judge of the Upper Tribunal
Immigration and Asylum Chamber

15 March 2024