IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No.: UI-2024-005345

First-tier Tribunal No:
EU/55777/2023

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On the 12 February 2025

Before

DEPUTY UPPER TRIBUNAL JUDGE MONSON

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

GEISLA RAIRA LOPES DE SOUSA
(ANONYMITY ORDER NOT MADE)

Respondent

Representation:
For the Appellant: Ms Siobhan Lecointe, Senior Home Office Presenting Officer
For the Respondent: Mr Paul Richardson, Counsel instructed by AQ Archers Solicitors

Heard at Field House on 22 January 2025

DECISION AND REASONS

1. For the sake of continuity, I refer to the parties as they were before the First-tier Tribunal, although the Secretary of State is the appellant in the appeal before the Upper Tribunal.

2. The appellant, Ms de Sousa, appealed against the Secretary of State's decision dated 30 September 2023 to refuse to grant her leave to remain

under the EU Settlement Scheme Immigration Rules as the spouse or durable partner of a relevant EEA citizen.

3. The Secretary of State's reasoning was that as she had married the relevant sponsor after 23:00 GMT on 31 December 2020, she must have been the durable partner of the relevant sponsor by that date and time. The required evidence of a family relationship as a durable partner of a relevant sponsor was a valid registration certificate, family permit (or a letter from the Secretary of State issued after 30 June 2021 confirming their qualification for one) or a residence card issued under the EEA Regulations, or an EU Settlement Scheme family permit as the durable partner of that relevant sponsor and evidence to satisfy the Secretary of State that the partnership remained durable at the date of application.

4. As she did not hold a relevant document, she must meet the alternative criteria set out in Annex 1 to Appendix EU.

5. It was accepted that she met the criteria to provide alternative evidence of being a durable partner of a relevant sponsor, and as such consideration had been given as to whether the evidence provided showed that the partnership was formed and was durable before 23:00 GMT on December 2020, and that the partnership remained durable at the date of application. A durable partnership was where the couple had lived together in a relationship akin to marriage or a civil partnership for at least two years by that date and time, unless there was by that date and time other significant evidence of the durable relationship.

6. It was not accepted that the partnership she had formed was durable before 23:00 GMT on 31 December 2020 because the evidence of cohabitation covered a period of less than two years by 23:00 GMT on 31 December 2020, and there was insufficient other significant evidence that the relationship was durable by that date and time. She had stated in a telephone call to the Home Office that she did not have any joint bills or joint bank accounts prior to 31 December 2020.

7. The decision attracted a right of appeal under the Immigration (Citizens' Rights) Appeals (EU Exit) Regulations 2020 ("The CRRA Regulations 2020"). The available grounds of appeal were that the decision was not in accordance with the Residence Scheme Immigration Rules, or that it breached her rights under the Withdrawal Agreement.

8. In support of her appeal, the appellant made a witness statement on 8 September 2024, which was endorsed with a Statement of Truth. In her statement, she said that she and her sponsor were both Portuguese nationals. When their relationship started in 2018, she was living in Portugal, while her partner was settled in the UK under EU Treaty rights. They started to spend some considerable time together during her sponsor's frequent visits to see her in Portugal. Their relationship went from strength to strength, and they decided to live together in the UK. However, in 2020 the Covid-19 period happened, which caused delay in

their plans to live together in the UK until such time as they were able to travel freely.

9. After travel restrictions eased, she came to the UK in 2022. She initially stayed in Cardiff and then she moved to Poole to start life with her then partner and now husband. They had got married on 11 February 2023 and they had had their first child together who was now 6 months old.

10. As she understood from the Secretary of State's decision that she was able to provide alternative evidence to prove that their relationship existed before 31 December 2020, she had now managed to provide a certified translation of a bank statement for a joint account with her husband at a Portuguese bank, dated 5 March 2020 to 4 April 2020. She had previously submitted this as an untranslated document, and hence it was not considered by the Secretary of State. This piece of evidence clearly showed that their relationship was already subsisting prior to the specified date. She had not kept a lot of information, as she was not sure if it would be needed for any such purpose. She also enclosed a letter from Simar Loures, with a certified translation, which was addressed to both of them at their address in Portugal, dated January 2020. This showed that they were living in a relationship in January 2020.

The Decision of the First-tier Tribunal

11. The appellant's appeal came before Judge LK Gibbs sitting at Hatton Cross on 23 September 2024. Both parties were legally represented. The Judge received oral evidence from the appellant and her husband. In closing submissions, the Presenting Officer accepted that there was no doubt that their relationship was genuine, but she submitted that as they had not cohabited for two years prior to the date of application, they could not succeed in the appeal.

12. In her decision promulgated on 14 October 2024, Judge Gibbs found that the appellant and her husband were credible witnesses. In 2019 they bought a property together in Portugal, where the appellant lived and Mr Freitas could stay when he visited. In this way, they had their own place and their own space, and she had documentary evidence before her which corroborated this evidence. She found that the couple planned for the appellant to move to the UK in 2020, but these plans had to be put on hold because of Covid and the restrictions which were introduced. The appellant eventually moved on 9 January 2022, initially staying with her uncle while her husband's flatmate made alternative arrangements. The couple then moved in together in Poole and their marriage certificate reflected the fact of their cohabitation. Their son was born in January 2024, and their relationship was ongoing. The Judge concluded at paragraph [9] as follows:

> "I am therefore satisfied the couple have been in a relationship since 2018. This relationship has grown, involving a joint purchase of a property in 2019, the appellant's move to the UK, their marriage and the birth of their son. As recognised in the respondent's own Guidance, living together for two years

> is a rule of thumb and is not, I find, a requirement. I am satisfied on the facts of this case that the couple were in a durable relationship prior to the specified date."

The Grounds of Appeal to the Upper Tribunal

13. In the grounds of appeal to the Upper Tribunal, a member of the Specialist Appeals Team submitted that the Judge had materially directed herself in law in finding that the Secretary of State's guidance should be regarded as a rule of thumb. She failed to have regard to *Celik* [2023] EWCA Civ 921 with respect to Articles 10(2) and (3) of the Withdrawal Agreement. A person is only within the scope of Article 10(2) if they have made an application for facilitation which was granted before the end of the transition period. A person is only within the scope of Article 10(3) if they made an application for facilitation before the end of the transition period and this was granted - and residence facilitated - after the end of the transition period.

The Rule 24 Response

14. Following the grant of permission to appeal, a Rule 24 response opposing the appeal was settled by Mr Shahnawaz Khan of Counsel, who had appeared on behalf of the appellant before Judge Gibbs. In his Rule 24 response dated 23 December 2024, he submitted that the Secretary of State's grounds of appeal were flawed because the Secretary of State failed to appreciate that the appellant was not resident in the UK at the specified date because she was residing in Portugal. In such circumstances, having regard to the definition of a durable relationship in Annex 1 of Appendix EU, the Judge was correct to consider whether the appellant had formed a durable relationship before the specified date, and she was thus entitled to take into consideration evidence which suggested that a relationship was so formed. The fact that the appellant did not hold a relevant document was not fatal to her appeal, because the Tribunal was entitled to consider whether she had actually formed a durable relationship with the sponsor.

The Hearing in the Upper Tribunal

15. At the hearing before me to determine whether an error of law was made out, Ms Lecointe submitted that the Judge failed to have regard to the fact that the appellant did not satisfy the requirement of there being "other significant evidence" that the relationship was durable by the specified date. Oral evidence was not enough, and the evidence did not go back to 2018.

16. On behalf of the appellant, Mr Richardson submitted that the Judge had made an unambiguous finding in para [9] of the Decision. The Secretary of State had raised a single ground of appeal, and there was no challenge to the Judge's factual finding in para [9]. The appellant came within the scope of Article 10(4) of the Withdrawal Agreement, and the Judge had not

erred in law in treating the appellant as meeting the definition of a durable partner contained in para (aaa) of Annex 1.

17. In reply, Mr Lecointe accepted that the refusal decision said that the appellant met the criteria to provide alternative evidence of being a durable partner. However, she submitted that the evidence provided was insufficient to establish that the relationship was formed by the specified date.

Discussion and Conclusions

18. The general rule is that an applicant for a grant of status under the EU Settlement Scheme as a durable partner must hold a relevant document. But there are exceptions. The first principal exception was addressed by the Upper Tribunal in *Hani (EUSS: Durable partners: paragraph (aaa))* [2024] UKUT 00068 (IAC).

19. *Hani* confirms that an applicant is exempt from holding a relevant document where the applicant can prove that they had lawful leave to enter or remain in the UK at the same time as they were in, or in the process of forming, a durable relationship with an EEA national sponsor.

20. The issue in *Hani* was whether illegal migrants could benefit from this exemption. The panel in *Hani* adopted the reasoning in *Basha* and held that para (aaa) is divided into two halves separated by the word “unless”. Whereas an illegal migrant comes within the scope of “the first half criteria”, the effect of the “unless” clause is to exclude the illegal migrant from benefitting from the first half criteria.

21. The second principal exception to the general rule is where the applicant was not residing at all in the UK or Islands prior to the specified date. They satisfy the first half criteria of para (aaa), and - unlike illegal migrants - they are not excluded as potential beneficiaries by the second half criteria of para (aaa).

22. Accordingly, as submitted in the Rule 24 response, the single ground of appeal was based upon a fundamental misconception. The appellant was not applying as a person who had been in the UK prior to the specified date without lawful leave to enter or remain, but as a person who at all material times had been lawfully residing in her home country of Portugal. The refusal decision expressly recognised that in the circumstances the appellant did not have to hold a relevant document, but could rely instead on evidence that she had formed a durable relationship with the relevant sponsor by the specified date.

23. Ms Lecointe was constrained to recognise this in oral argument, and so she fell back on an alternative ground of appeal, which is that the Judge was wrong to find that the appellant has discharged the burden of proof.

24. However, the Secretary of State did not seek or obtain permission to argue this as a ground of appeal. Moreover, I do not consider that the point

taken by Ms Lecointe can be characterised as *Robinson* obvious. It is not the case that the Judge decided the issue purely on the oral evidence. It is clear from her line of reasoning that she also based her decision upon the documentary evidence that was referred to in the appellant's appeal statement. Another Tribunal might reasonably have reached the conclusion that, notwithstanding the credibility of the oral evidence, the documentary evidence was insufficient to discharge the burden of proving that the relationship had become durable by 31 December 2020, as opposed to being on the way to becoming durable. However, the Judge was not clearly wrong to find in the appellant's favour on this issue.

Notice of Decision

The decision of the First-tier Tribunal did not contain an error of law, and accordingly the decision stands. This appeal to the Upper Tribunal is dismissed.

Anonymity

The First-tier Tribunal did not make an anonymity direction, and I do not consider that the appellant requires anonymity for these proceedings in the Upper Tribunal.

Andrew Monson
Deputy Judge of the Upper Tribunal
Immigration and Asylum Chamber
5 February 2025