IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2022-006487
First-tier Tribunal No:
EA/50276/2021
IA/01515/2021

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On the 18 May 2023

Before

UPPER TRIBUNAL JUDGE PICKUP

Between

Xhuljano Gega
(NO ANONYMITY ORDER MADE)

Appellant

and

Secretary of State for the Home Department

Respondent

Representation:
For the Appellant: Mr C Timson of Counsel,instructed by Crystal Chambers
For the Respondent: Mr S Walker, Senior Home Office Presenting Officer

Heard by remote video at Field House on 18 May 2023

DECISION AND REASONS

1. The appellant, a national of Albania, has been granted permission to appeal to the Upper Tribunal against the decision of the First-tier Tribunal (Judge Swinnerton) dismissing his appeal against the respondent's decision of 10.2.21 to refuse his application made on 16.12.20 for an EEA Residence Card as the durable partner of an EEA national, BT, exercising Treaty rights in the UK.

2. At the First-tier Tribunal appeal hearing, the appellant, having married BT on 5.7.21, sought to amend his claim as a direct family member under Regulation 7 of the Immigration (EEA) Regulations 2016. However, the respondent did not accept that he could benefit from Regulation 7, as he made no application as a family member before the specified date of 31.12.20 and the marriage only took place after the UK's withdrawal from the EU.

3. The appellant had claimed that his relationship with BT began in 2017 and they had been living together since July 2020. The judge found no reliable evidence of

any relationship prior to 2020 and at [13] of the decision pointed out inconsistencies between the evidence of the appellant and BT as to the circumstances of their claimed relationship. At [14] the judge concluded that their relationship only began in mid-2020 and "not much before they started to live together in July 2020."

4. At issue in the appeal was whether the judge applied the correct test to the issue of a durable relationship. In granting permission, First-tier Tribunal Judge Pickering considered it "arguable that the Judge misdirected themselves in requiring the appellant to demonstrate cohabitation for two years prior to the 31 December 2020, as this was an appeal relating to an application under the 2016 Regulations on Geci (EEA Regs: transitional provisions; appeal rights) [2021] UKUT 285 (IAC) headnote 3)."

(1) Geci pointed out that the 2016 Regulations were repealed in their entirety but that some of the provisions were preserved by further regulations (including the EEA Transitional Regulations) but only for the purpose of appeals pending as at 31.12.20. The headnote at (3) held that, "*The effect of the amendments is that the sole ground of appeal is now, in effect, whether the decision under appeal breaches the appellant's rights under the EU Treaties as they applied in the United Kingdom prior to 31 December 2020.*

5. Mr Walker explained that the respondent has provided a Rule 24 reply, which Mr Timson had seen but which had not reached me prior to the hearing. Following submissions from both representatives, I reserved my decision to be able to read and consider the Rule 24 reply, forwarded to me after the hearing. The respondent does not resist the appeal, accepts that the decision is flawed for error of law, and invites the Upper Tribunal to remit the decision to be remade in the First-tier Tribunal. However, Mr Timson submitted that as the judge was satisfied that there was a durable relationship, just not one of at least two years duration, so that the appeal should be allowed outright and need not be remitted.

6. The grounds as drafted first adopt the novel argument advanced before the First-tier Tribunal that as there is an extant appeal under the 2016 Regulations, the consideration must be made as at the date of the appeal hearing and must, therefore, include the change of circumstances by marriage and attempt to amend the basis of the claim. I do not accept that argument as it is entirely inconsistent with Geci, which preserves the appellant's rights only as they existed 31.12.20. His only in-time application was for a Residence Card as the extended family member (EFM) of BT based on being a durable partner, which is covered by Regulation 8(5). As at 31.12.20, the appellant was not a family member and not married to BT and had no valid claim as a family member. It follows that he cannot succeed under the regulations relating to a family member. In any event, Mr Timson did not pursue that novel argument before the Upper Tribunal.

7. In relation to the durable relationship issue, it is common ground that the 2016 Regulations do not impose any such two-year requirement. A duration of at least two years is only what the respondent normally expects see evidenced. I accept and agree with the respondent's concession that the First-tier Tribunal Judge erred in law by apparently proceeding on the basis of a requirement that the durable relationship should have been in existence for at least two years; but that is not the requirement of the law. It follows that the appeal to the Upper Tribunal must be allowed.

8. I have carefully considered whether the findings necessarily amount to a finding that the appellant and BT were in a durable relationship by 31.12.20, so that the appeal should be allowed outright, as contended for by Mr Timson. However,

whilst at [14] of the decision the judge found that the appellant and BT "were not in a durable relationship akin to a marriage or civil partnership for at least two years as at 31.12.2020," I am not satisfied that it can necessarily be read into that phrase that the judge accepted that there was a durable relationship in existence as at 31.12.20. At [12] the judge found the evidence cast "doubt upon the credibility of the appellant and the sponsor with respect to the durability of their relationship." At [13] the judge found that "a couple who had been together in a durable relationship since 2017 would be able to give clear and consistent evidence in respect of the point in time when it was decided they would get married." The judge never actually stated plainly and simply that the relationship was durable.

9. Considering the matter carefully, as I must, I am satisfied that it would be going too far to conclude that the judge was satisfied that there was a durable relationship in existence as at 31.12.20. I bear in mind not only that the burden of discharging that requirement was on the appellant on the balance of probabilities but also that as the judge did not address their mind to the correct test, it is difficult to argue that the judge considered the matter adequately at all, thereby undermining any findings made as to durability.

10. It follows that whilst the appeal to the Upper Tribunal must be allowed for error of law, it should be remade in its entirety. As the Upper Tribunal is not the primary finder of facts, I am satisfied that the respondent is correct to submit that this is a matter which should be remitted to the First-tier Tribunal to be decided afresh (de novo) with no findings preserved, which is consistent with the Presidential Direction.

Notice of Decision

The appellant's appeal to the Upper Tribunal is allowed.

The decision of the First-tier Tribunal involved the making of a material error of law and is set aside in its entirety.

The remaking of the appeal is remitted to be remade by the First-tier Tribunal sitting at Manchester with no findings of fact preserved.

I make no order for costs.

DMW Pickup

DMW Pickup

Judge of the Upper Tribunal
Immigration and Asylum Chamber

18 May 2023