IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Appeal No: UI-2022-003486
First-tier Tribunal No:
EA/52882/2021
IA/11850/2021

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On the 25 July 2024

Before

UPPER TRIBUNAL JUDGE KOPIECZEK

Between

ASHAR BOAHEMAA
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Not represented; sponsor appears
For the Respondent: Ms A. Nolan, Senior Home Office Presenting Officer

Heard at Field House on 17 June 2024

DECISION AND REASONS

1. The appellant is a citizen of Ghana, born in 1974. The sponsor, Mr Theophilus Adjei, appeared before me in person, without legal representation, as he did on the last occasion.

2. The appellant's appeal comes back before me following a hearing before me on 16 August 2023, which resulted in my finding that the First-tier Tribunal ("FtT") erred in law in allowing the appellant's appeal against the respondent's decision dated 31 May 2021 to refuse the appellant's application for a family permit as the spouse of an EEA national.

3. It is useful to refer to those paragraphs of my earlier, error of law, decision for further background. I said the following:

> "17. The respondent's decision refusing the application for a family permit was made pursuant to the Immigration (European Economic Area) Regulations 2016. The respondent's decision dated 31 May 2021 states that
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> > "An application for an EEA Family Permit can be made by all eligible close family members of an EEA national sponsor where the relationship existed and the sponsor was residing in the UK as a qualified person under the Immigration (European Economic Area) Regulations 2016 at the end of the transition period at 23:00 GMT on 31 December 2020."
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> 18. The respondent's appeal to the Upper Tribunal is predicated on the basis that the EEA Regulations apply to the appellant's appeal. Notwithstanding the UK's exit from the European Union, and the end of the 'transition period' on 31 December 2020, it has not been suggested by the respondent at any time that the EEA Regulations do not govern this appeal. I therefore proceed on the basis that the EEA Regulations do indeed apply to this appeal.
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> 19. The FtJ found at para 17 that the appellant's marriage to the sponsor took place on 29 January 2021, as evidenced by the marriage certificate. At para 11 he referred to the sponsor's evidence that he entered into a proxy marriage with the appellant on 10 November 2019, followed by the "court marriage" on 29 January 2021. Again, at para 11 the FtJ referred to the marriage as a "customary marriage" on 10 November 2019.
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> 20. The respondent's argument, in essence, is that the appellant had not adduced evidence of the validity of the "unregistered proxy marriage" said to have taken place in 2019. I agree with that submission. There was no evidence to support the assertions as to the validity of the 2019 proxy marriage according to Ghanaian law (see *Cudjoe*, cited above). The marriage certificate is evidence of the marriage that was registered on 29 January 2021, but that was after the UK had left the EU and the EEA Regulations no longer applied, which is what the refusal decision is predicated upon.
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> 21. Accordingly, I am satisfied that the FtJ erred in law in finding both that the proxy marriage was a valid marriage according to Ghanaian law, and that the marriage registration of 29 January 2021 was sufficient to bring the appellant within the EEA Regulations as an extended family member (see EEA Regulations 8(5)).
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> 22. However, contrary to the respondent's argument, I am satisfied that there was evidence before the FtJ that the appellant and the sponsor were in a durable relationship from November 2019 (para 18 of the FtJ's decision). Unfortunately, the FtJ did not explain in that paragraph why he came to that conclusion.

23. Under the heading "My Findings of Fact and Conclusions", at para 11 the FtJ did, however, refer to evidence given by the sponsor that after the customary marriage the appellant moved into his home, and that he had been travelling to Ghana either yearly or sometimes twice a year, and that he is financially responsible for her. The FtJ appears to have accepted all this evidence, including with reference to money transfer receipts, and the evidence that the appellant has access to money from the sponsor's Ghanaian taxi business. There was some evidence before the FtJ of stamps in the sponsor's passport which supported his claim of visits, although of course on their own these could not prove that the sponsor visited the appellant.

24. Although, therefore, the FtJ did not draw together at para 18 the threads of the evidence and his findings as to durable relationship, it is clear that he accepted the evidence that there was a durable relationship. I am satisfied that he was entitled to do so.

25. As already indicated, I am satisfied that the FtJ erred in law in the respects to which I have referred at my para 21 above. There is something to be said for the proposition that that error of law is not material given the FtJ's findings on durable relationship. However, I do not consider that the position is sufficiently clear at this stage in terms of whether the appellant would have been entitled to succeed in his appeal purely on the basis of 'durable relationship' to say that the error of law by the FtJ is not material. In other words, I am satisfied that the decision must be set aside.

26. There may need to be a further hearing in the Upper Tribunal, subject to what is said below, for the decision to be re-made. It is plainly not appropriate for the appeal to be remitted to the FtT, given the findings of fact that can be preserved and given the limited scope of any re-making.

27. In advance of the further hearing in the Upper Tribunal, the respondent will be required to consider, in the light of the FtJ's findings as to durable relationship, and my conclusion that he was entitled to find that there was a durable relationship on the basis of the evidence before him which he accepted, whether the appellant's appeal should, therefore, be allowed. I give directions below to give effect to that consideration."

4. The respondent did not consider that the appellant's appeal should be allowed. Hence, the further hearing.

5. At the resumed hearing, I heard submissions from Ms Nolan first, in order to assist the sponsor, so that he could understand the Secretary of State's position on the appeal.

6. Ms Nolan submitted that the appellant's application was made after the specified date of 31 December 2020. There was a grace period during with the Immigration (European Economic Area) Regulations 2016 ("the EEA Regulations") continued to apply; up until 30 June 2021. Ms Nolan

submitted that, as set out in the respondent's decision, the appellant needed to meet the relevant requirements within the grace period.

7. Ms Nolan referred to The Citizens' Rights (Application Deadline and Temporary Protection) (EU Exit) Regulations 2020 ("the 2020 Regulations"), in particular with reference to regs 3(2) and 3(6) to the effect that the appellant cannot come within those regulations because the sponsor regularised his status and was granted indefinite leave to remain ("ILR") on 3 December 2019. Ms Nolan accepted that the respondent's decision should have referred to those regulations and then stated that the decision would then be considered under Appendix EU of the Immigration Rules.

8. Ms Nolan also submitted that the appellant is also caught by the decision of the Court of Appeal in *Celik v Secretary of State for the Home Department* [2023] EWCA Civ 921.

9. The sponsor said in reply that he had given reasons as to why his marriage could not take place during lockdown. He had wanted to arrange the marriage for the appellant's birthday but then the pandemic happened. The sponsor also said that he did not know when he applied for ILR that he would not be able to bring his wife to the UK.

Assessment and Conclusions

10. The 2020 Regulations specify 30 June 2021 by which applications for residence status must be made following the UK's withdrawal from the EU. According to the Explanatory Note to the 2020 Regulations, reg 3 provides that certain provisions of the EEA Regulations 2016 will continue to apply during the grace period to individuals who do not have leave to enter or remain in the United Kingdom under residence scheme immigration rules.

11. In summary, reg 3(2) states that the EEA regulations (including in relation to family members and durable partners) continue to apply during the grace period in relation to a 'relevant person'. Under reg 3(6) a 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. It includes under subparagraph (b) under the definition of 'relevant person' a person who is a relevant family member who does not have leave. The effect of the definitions of "family member" and "relevant family member" in the 2020 Regulations is to include durable partners who have leave to remain, which the sponsor does, as those who are *excluded* from the benefit of the EEA Regulations.

12. The sponsor had leave to remain which he obtained on 3 December 2019. He cannot, therefore, be a relevant person. The further consequence is that the appellant is not entitled to the family permit that she seeks under the EEA Regulations.

13. Furthermore, applying *Celik (EU exit; marriage; human rights)* [2022] UKUT 00220 (IAC), approved by the Court of Appeal, the appeal cannot succeed, notwithstanding what is said about the appellant's intent to marry, but inability to do so because of the pandemic.

14. In all those circumstances, this appeal must be dismissed.

15. In case it arises for future consideration, it is to be remembered that I decided in my error of law decision that the FtT's conclusion that the appellant is in a durable relationship with the sponsor is a conclusion that is not marred by error of law.

A.M. Kopieczek

Upper Tribunal Judge Kopieczek 19/07/2022