



IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM
CHAMBER

Case No.: UI-2022-006066

First-tier Tribunal No:
EA/13213/2021

THE IMMIGRATION ACTS

**Decision & Reasons Issued:
On 14th of December 2023**

Before

DEPUTY UPPER TRIBUNAL JUDGE MONSON

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

**DARIO RAPUSHAJ
(ANONYMITY ORDER NOT MADE)**

Respondent

Representation:

For the Appellant: Mr E Tufan, Senior Home Office Presenting Officer
For the Respondent: None.

Heard at Field House on 30 November 2023

Although the Secretary of State is the appellant in this appeal to the Upper Tribunal, for ease of reference I shall refer to the parties as they were before the First-tier Tribunal.

DECISION AND REASONS

1. The Secretary of State has been granted permission to appeal against the decision of First-tier Tribunal Judge Chamberlain promulgated on 20 April 2022 ("the Decision"). By the Decision, the Judge allowed the appellant's appeal against the decision of the Secretary of State to refuse to grant the appellant settled or pre-settled status under the EU

Settlement Scheme in the capacity of a durable partner of a relevant EEA citizen.

Relevant Background

2. The appellant is a national of Albania, whose date of birth is 17 March 1997. He admits that he entered the United Kingdom illegally in November 2018, and that he has never had leave to remain in the UK under the Immigration Rules.
3. In May 2021 the appellant sought to regularise his status in the UK by making an application for a pre-settled status under Appendix EU. In a covering letter dated 6 May 2021, Kilby Jones Solicitors LLP acknowledged that the appellant had entered the UK clandestinely in November 2018. They said that his sponsor was born on 30 April 1999 in Poland, and she was a Polish national who had been granted pre-settled status in the UK on 1 July 2020. The appellant and the sponsor had met through mutual friends in March 2020. They had started a relationship in April 2020. They had moved in together to an address in Milton Keynes on 16 October 2020, and the couple had lived at this address ever since. In November 2020 the appellant had proposed marriage to the sponsor, and she had accepted his proposal. The couple had given notice of intention to get married on 4 December 2020 and the Home Office had decided not to investigate the relationship. The couple had since got married on 1 April 2021 in the UK.
4. The appellant's solicitors submitted that the engagement and the notice of intention to get married were sufficient evidence of the couple being durable partners prior to the specified date of 31 December 2020.
5. In the refusal decision dated 2 September 2021, the Secretary of State said that the appellant's asserted relationship with his sponsor could not be accepted prior to 31 December 2020. This was because the required evidence of family relationship of a durable partner of a relevant EEA citizen, prior to marriage, was a valid family permit or residence card issued under the EEA Regulations as the durable partner of that EEA citizen and, where the applicant did not have a documented right of permanent residence, evidence which satisfied the Secretary of State that the durable partnership continued to subsist. Home Office records did not show that he had been issued with a family permit or residence card under the EEA Regulations as a durable partner of his EEA national sponsor.

The Decision of the First-tier Tribunal

6. The appellant's appeal came before Judge Chamberlain sitting in the First-tier Tribunal at Birmingham on 4 April 2022. The appellant was represented by Counsel, and there was no representation on behalf of the Secretary of State.
7. For the reasons which she gave at paras [11] to [22] of the Decision, the Judge found that although the appellant did not hold a relevant document,

he nonetheless met the definition of a durable partner contained in Appendix EU, Annex 1.

8. Her reasoning was that, although the appellant did not hold the relevant document as required by sub-paragraph (b)(i), another route was provided in sub-paragraph (b)(ii). She found that the definition made provision for an individual who did not hold a relevant document. She went on to set out the relevant provisions of sub-paragraph (b)(ii), including sub-sub-paragraph (aaa).
9. The Judge found that the appellant met the requirements of sub-sub-paragraph (aaa). This was because the only reason why he was not resident in the UK as a durable partner was because he did not hold a relevant document as a durable partner and the appellant met the other requirement which was that he did not otherwise have a lawful basis of stay in the UK. Therefore, she found that the appellant met the definition of a durable partner when he made his application.
10. The Judge noted that Counsel submitted in the alternative that the refusal was a breach of the Citizen's Directive and of the Withdrawal Agreement. However, she indicated that she did not need to deal with this argument, as she found that the appellant succeeded on the ground that he met the definition of a durable partner as set out in Annex 1 to Appendix EU.

The Grounds of Appeal to the Upper Tribunal

11. On 26 April 2022 Juliet McNamee of the Specialist Appeals Team made an in-time application for permission to appeal. The ground of appeal was that the Judge had made a material misdirection of law on a material matter. She submitted that the Judge's interpretation of paragraph (b)(ii)(bb)(aaa) of Annex 1 of Appendix EU was incorrect and was incompatible with the requirements of the Withdrawal Agreement that the EU Settlement Scheme was designed to implement. The Judge's interpretation would mean that for the requirement to be lawfully resident under EU Law as of 31 December 2020 would be obsolete. She submitted that the Judge had materially erred in law in finding that the appellant satisfied the requirements of Appendix EU, despite not being lawfully resident as of 31 December 2020.

The Reasons for the Grant of Permission to Appeal

12. On 19 May 2022 Judge Singer granted the Secretary of State permission to appeal on the grounds that had been raised. Judge Singer held that it was arguable that the Judge erred in assessing the definition of 'durable partner' under Annex 1 to Appendix EU in the Immigration Rules, with reference to paragraph (b)(ii)(bb)(aaa) of those Rules. It did not appear that the Judge had considered paragraph (b)(ii)(bb) in its entirety. While the Judge correctly noted that there was scope for a durable partnership to

succeed where the appellant did not have a relevant document by the specified date, it was arguable that that could only have applied had the partnership been formed and was durable “before the date and time of withdrawal” (i.e. before 11pm on 31 January 2020). Here the parties only met in March 2020, on the Judge’s findings at para [13].

The Secretary of State’s Response to Directions

13. In a Response dated 21 September 2023, Arifa Ahmed of the Home Office provided a Position Statement on the impact of the decision in *Celik* [2023] EWCA Civ 921 which was handed down by the Court of Appeal on 31 July 2023.
14. She submitted that *Celik* at [68] established that there was no obligation to read down the relevant Rules if a person was not married to the family member at the material time, or where the person was not a durable partner within the meaning of Annex 1 to Appendix EU as he did not have a residence card and did not otherwise have a lawful basis of stay in the UK.
15. She submitted that the First-tier Judge had misinterpreted the requirements of (b)(ii)(bb)(aaa). The Secretary of State maintained that sub-sub-paragraph (aaa) applied in summary to those who did not hold a relevant document because they otherwise had a lawful basis of stay in the UK and Islands before the specified date. The definition of ‘durable partner’ had now been amended to give clarity on its intent. She went on to set out the revised definition.

The Hearing in the Upper Tribunal

16. At the hearing before me to determine whether an error of law was made out, there was no appearance by the appellant. His solicitors had previously come off the record, and therefore he had been sent the standard directions for a litigant in person. Mr Tufan expressed no surprise at the appellant’s non-appearance, as he believed that the appellant might have left the country. As there was no evidence of this, I considered that it was in accordance with the overriding objective to proceed with the hearing in the appellant’s absence.
17. On the question of the proper construction of sub-sub-paragraph (aaa) in its original form, Mr Tufan drew my attention to the unreported decision of Upper Tribunal Judge Norton-Taylor in UI-2022-003617, a decision promulgated on 7 February 2023. Mr Tufan submitted that the First-tier Tribunal Judge had erred in law in her construction of sub-sub-paragraph (aaa) for the reasons given by Upper Tribunal Judge Norton-Taylor.

Discussion and Conclusions

29. Prior to the recent clarificatory amendment referred to in the Position Statement, the definition of a durable partner in Annex 1 was so convoluted that it was readily susceptible to misinterpretation.
30. In *Kabir*, UI-2022-002538, promulgated on 3 January 2023, the facts were that the First-tier Tribunal Judge found that the appellant had lawful leave to remain under the Immigration Rules until 25 August 2021. Although the appellant had not been issued with a family permit or residence card recognising or facilitating a right of residence under EU Law prior to 31 December 2020, Judge O'Garro was satisfied that the couple were in a committed relationship that could be viewed as durable before the end of the transition period, and that the appellant thereby came within the definition of a durable partner contained in Annex 1 of Appendix EU by reference to the section that appeared to relate to those who did not hold a relevant document, namely paragraph (b)(ii)(bb)(aaa) of the definition.
31. The Secretary of State appealed to the Upper Tribunal contesting the Judge's finding. The Panel which heard the appeal held that the burden was on the Secretary of State to show how and why it was said that the First-tier Tribunal had erred in law in allowing the appeal with reference to the said paragraph of Annex 1 of Appendix EU, which the Upper Tribunal observed was "*simply unclear*" in terms of its meaning. The Panel said that they could not exclude the possibility that if the provision was explained properly with reference to the other definitions obtained in Appendix EU, it might reveal that the Judge's interpretation was incorrect. However, neither the grounds of appeal nor the oral submissions explained the intended meaning of this part of the Rules adequately. Given the incoherence of this aspect of the Rules, it could not be said that the Judge's attempted interpretation was irrational, and the Secretary of State's appeal was dismissed on the ground that she failed to show how or why the Judge's finding amounted to an error of law.
32. Although not remarked on by the Panel, the interpretation of the First-tier Tribunal Judge was entirely in line with the Home Office's published Policy Guidance dated 9 November 2022. It is clear from this guidance - and also from subsequent versions of it - that there is an exemption 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.
33. The general rule is set out in the guidance at page 118, and then there is a discussion of the exceptions. It is expressly stated at page 119 that when considering whether a person with another lawful basis to stay in the UK and Islands before the specified date was the durable partner of a relevant EEA citizen before the specified date, only the period for which the person had another lawful basis for staying in the UK and Islands before that date can be considered for the purposes of assessing whether the partnership

was durable before that date. The Home Office goes on to give the following specific example:

“A is a non-EEA citizen who formed a partnership relationship with B, an EEA citizen resident in the UK, in September 2018. A was subsequently granted 30 months’ leave to remain in the UK on 1 February 2019 under Appendix FM to the Immigration Rules. Before that, A had been in the UK for several years without a lawful basis to stay. 1 February 2019 will therefore be the point from which you can assess whether, in respect of A’s application to the Scheme as a family member of a relevant EEA citizen, A’s partnership relationship with B was durable before the specified date.”

34. In *Alijaj*, UI-2022-00361, which was promulgated on 7 February 2023, the opposite set of facts applied. The appellant was a citizen of Albania who had arrived in the UK on an unknown date and had resided in the country unlawfully ever since. In July 2018 he formed a relationship with a Polish national sponsor. They began cohabiting in December 2019 and they got married on 7 July 2021. On 6 October 2021 the appellant applied for a grant of status under the EU Settlement Scheme, and the application was refused.
35. On appeal to the First-tier Tribunal, the First-tier Tribunal Judge was more than satisfied that the relationship was genuine and subsisting, and that it had become durable by November 2020 at the latest. The Judge concluded that the appellant satisfied the definition of a family member of a relevant EEA citizen by virtue of meeting the definition of a durable partner set out in Annex 1 of Appendix EU to the Immigration Rules. The Judge found that the appellant did not hold a relevant document, but did meet the definition in Annex 1 (b)(ii)(bb)(aaa). The Judge concluded that the appellant thereby satisfied the relevant Immigration Rule and was therefore entitled to succeed in his appeal.
36. Upper Tribunal Judge Norton-Taylor set aside the decision of the First-tier Tribunal on the ground that the First-tier Tribunal Judge had materially erred in law, and substituted a decision dismissing the appellant’s appeal. He held that the interpretation that the Judge had given to the definition of a durable partner in Annex 1 was not the proper one. He continued at [33]: *“Having said that, one really cannot blame the Judge for the error. The legal position was close to being impenetrable.”*
37. Upper Tribunal Judge Norton-Taylor’s reasoning was two-fold. Firstly, he found that for the appellant to come within the scope of the exception, he needed to show that he was a *“joining family member of a relevant sponsor”* as required by Annex 1 (b)(ii). But the appellant was never a joining family member of a relevant sponsor because he had always been in the UK. In other words, he was not ‘joining the sponsor’. He continued:

“Further or alternatively (i.e. if my conclusion in the preceding paragraph is wrong), the appellant had been in this country unlawfully, never having been issued with a residence card or granted leave to remain. I am satisfied that the part of the definition following on from the word “unless” in Annex 1 (b)(ii)(bb)(aaa) means that a person cannot say they were not resident in the United Kingdom at any time before the specified date as a durable partner simply because they were in this country unlawfully and without a residence card as a durable partner. To put it in a different way, the exception to the requirement to have had a residence card as a durable partner applies only to those persons who applied under the EUSS after 31 December 2020 and had had leave to remain, but were not here with a residence card as a durable partner.”

38. Upper Tribunal Judge Mandalia reached the same conclusion in the case of *Ermin Drini*, UI-2022-000383, which was promulgated on 24 April 2023. At para [27] of his decision, he said:

“It is what follows, the second criterion, that is in my judgment crucial to the application of the exception provided for, and that 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 sub-paragraph (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 criteria 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.”

39. Judge Mandalia continued in [28]:

“Read in this way, sub-paragraph (aaa) avoids the absurdity that would otherwise enable putative durable partners who had otherwise not enjoyed any lawful immigration status, to be able to rely on their unlawful presence as a means to regularise their status. It would be absurd if a person such as the appellant whose right as a durable partner had never been recognised and who has been in the UK unlawfully, would be in a better position than someone whose right as a durable partner had not been recognised because it did not need to be, because that individual has been in the UK lawfully for other reasons.”

40. In conclusion, while the Panel in *Kabir* did not exclude the possibility that the First-tier Tribunal Judge in that case might have been wrong to construe sub-paragraph (aaa) in the same way as it has since been construed by Upper Tribunal Judges Norton-Taylor and Mandalia, the balance of authority is clearly in favour of the construction that the Secretary of State invites me to follow in this appeal.

41. I am reinforced in this conclusion by *Celik* [2023] EWCA Civ 921 at [68] where the Court of Appeal dismissed the ground of appeal that the refusal of a grant of status was not in accordance with Appendix EU. The facts of that case were essentially the same as in this case, so it follows inexorably that the Court of Appeal did not find that sub-sub-paragraph (aaa) was of assistance to the appellant, who was present in the UK unlawfully.
42. No blame attaches to Judge Chamberlain for misconstruing sub-sub-paragraph (aaa), but she was wrong to accept the construction contended for by Counsel for the appellant. Judge Chamberlain materially erred in law in concluding that the appellant could win his appeal by reference to this sub-sub-paragraph. The Judge did not address an alternative argument based on the Withdrawal Agreement, but given the appellant's circumstances, he could not benefit from any of the provisions of the Withdrawal Agreement in any event. As to the Citizen's Directive, it was irrelevant. The only conclusion that was lawfully open to the Judge was that the appeal should be dismissed.

Notice of Decision

The decision of the First-tier Tribunal contained a material error of law, and accordingly the decision is set aside and the following decision is substituted: the appellant's appeal against the refusal of a grant of status under the EU Settlement Scheme is dismissed.

Anonymity

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

Andrew Monson
Deputy Judge of the Upper Tribunal
Immigration and Asylum Chamber
4 December 2023