



IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2023-003000

First-tier Tribunal No: EA/14763/2021

THE IMMIGRATION ACTS

**Decision & Reasons Issued:
On 9th of November 2023**

Before

UPPER TRIBUNAL JUDGE HANSON

Between

**AC
(ANONYMITY ORDER MADE)**

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr C Holmes instructed by Axis Solicitors Limited.

For the Respondent: Mr C Bates, A Senior Home Office Presenting Officer.

Heard at Manchester Civil Justice Centre on 1 November 2023

Order Regarding Anonymity

Pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008, the appellant is granted anonymity.

No-one shall publish or reveal any information, including the name or address of the appellant, likely to lead members of the public to identify the appellant. Failure to comply with this order could amount to a contempt of court.

DECISION AND REASONS

1. The appellant, a citizen of Albania, appeals with permission a decision of First-tier Tribunal Judge Mack ('the Judge'), promulgated on 18 May 2023, in which the Judge dismissed his appeal against refusal of his application made on 30 June 2021. The date of refusal is 12 October 2021.
2. The Judge notes the appeal relates to a refusal of an application for pre-settled status under Appendix EU. The Judge sets out findings of fact from [28]. At [40-41] the Judge writes:

40. In this case, on the 1st of April 2020, the appellant applied for an extension to his visit visa on account of the global COVID-19 pandemic, including that at the time it was impossible for him to return to Italy. Whilst he claims he wasn't notified of the decision he did not take the simple step of checking. If he had checked he would have discovered that his application was successful, and that on the 28th of July 2020 he had been granted further leave to remain as a visitor until the 28th of January 2021.
 41. So whilst he had leave to remain as a visitor, at 11:00 PM on the 31st of December 2020, this leave expired, so when he applied for pre settled status on the 30th of June 2021 he did not have lawful leave to remain.
3. At [45 – 46]:
45. I find it relevant that if the appellant had complied with his responsibilities he would have chased up the decision following his application in April 2020 and he also would have applied for a registration certificate, family permit, or residence card issued under the EEA Regulations. The decision of the UK Government to require certain documentation is hardly a new concept, and I find not unreasonably onerous.
 46. In all the circumstances I find the respondent entitled to make the decision that the appellant had not provided the relevant evidence to demonstrate he is the durable partner. The decision was not unlawful. As such the appellant does not meet the eligibility requirements under EU11 for settled status or the rule under EU14 for pre-settled status the application is refused under rule EU6.
4. The appellant sought permission to appeal, Mr Holmes noting in his pleadings that the single issue to be determined before the First-tier Tribunal was the question of whether an individual who held lawful immigration status under the Immigration Rules, but not a relevant document, met the definition of a Durable Partner. It was argued that as at 11 PM on 31 December 2020 the appellant held leave to remain in the United Kingdom as a visitor and it was not therefore a requirement of Appendix EU that he held a "relevant document" and the fact the appellant's visa expired sometime thereafter is irrelevant.
5. It was argued on the appellant's behalf that at [42] – [46] the Judge finds the appellant was required to hold leave to remain at the date of application in addition to the specified date which is not said to be a requirement of the Immigration Rules.
6. Permission to appeal was granted by another judge of the First-tier Tribunal on 24 June 2023, the operative part of the grant being in the following terms:
3. The grounds of the application for permission to appeal contend that the Judge has erred in law through a misdirection as to the requirements of the relevant immigration rules. The Judge found that it was insufficient that the appellant was accepted to be in the UK lawfully on the specified date of 31/12/2020, as he was unable to show that he was still here lawfully at the date of application on 30/06/2021. The appellant submits that there is no such requirement found within the rules themselves.
 4. I consider arguable that the Judge has erred in law, for the reasons stated in the detailed grounds. This is a matter which warrants further attention by the Upper Tribunal, and permission to appeal is therefore granted.

Discussion and analysis

7. At the outset Mr Bates conceded the Judge had legal error in a manner material to the decision to dismiss the appeal for the reasons set out in the grounds seeking permission to appeal and grant of permission to appeal, in that the

- Judge had failed to answer the question posed by Mr Holmes which was the material issue in the appeal.
8. In relation to disposal, as the Judge had failed to deal with the material aspect of the case it was submitted the appeal should be remitted to the First-tier Tribunal.
 9. I find the Judge has erred in law in a manner material to the decision to dismiss the appeal such that the determination must be set aside.
 10. In relation to disposal, I have regard to the Practice Statement on remittals and also the recent decision of the Upper Tribunal in Begum (Remaking or remittal) [2023] UKUT 00046. I accept as a starting point that the default position is that the appeal remains within the Upper Tribunal.
 11. In considering whether an exception to the general principle applies, the nature of the error of law is a failure of the First-tier Tribunal to consider and make findings upon the key question in this appeal. The failure of the Judge to address the question posed by Mr Holmes has denied the appellant a fair hearing or other opportunity to put their case and to have a reasoned judgement delivered upon the same by the First-tier Tribunal.
 12. I find in this appeal it is material to take into account the loss of the two tier decision-making process if the appeal is retained within the Upper Tribunal. The nature of the unfairness means that none of the findings can be preserved as they do not address the core issue. It will therefore be necessary for a judge on the next occasion to make findings upon the question set out above.
 13. I consider on balance that this is the case in which an exception to the general principle set out in paragraph 7(2)(a) and (b) of the Practice Statement is made out. The interests of justice require the appeal to be remitted.
 14. I set the decision of the Judge aside. There shall be no preserved findings. I remit the appeal to the First-tier Tribunal sitting at Manchester to be heard *de novo* by a judge other than Judge Mack.

Notice of Decision

15. The First-tier Tribunal has been found to have materially erred in law. I set that decision aside. The appeal shall be remitted to the First-tier Tribunal sitting at Manchester to be heard *de novo* by a judge other than Judge Mack.

C J Hanson

Judge of the Upper Tribunal
Immigration and Asylum Chamber

3 November 2023