



**IN THE UPPER TRIBUNAL**  
**IMMIGRATION AND ASYLUM**  
**CHAMBER**

Case Nos: UI-2022-006392  
UI-2022-006393  
UI-2022-006394  
UI-2022-006395  
First-tier Tribunal Nos: EA/03613/2022  
EA/03610/2022  
EA/03616/2022  
EA/03621/2022

**THE IMMIGRATION ACTS**

**Decision & Reasons Issued:**  
**On 8<sup>th</sup> March 2024**

**Before**

**UPPER TRIBUNAL JUDGE STEPHEN SMITH**  
**DEPUTY UPPER TRIBUNAL JUDGE JARVIS**

**Between**

**AMNA SHAHZAD**  
**HADI AHMAD**  
**HAJRA SHAHZAD**  
**ABDUR REHMAN AHMAD**  
(NO ANONYMITY ORDERS MADE)

Appellants

**and**

**THE SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Respondent

**Representation:**

For the Appellant: Ms G. Patel, Counsel instructed by Malik Legal Solicitors Ltd.  
For the Respondent: Ms A. Ahmed, Senior Home Office Presenting Officer

**Heard at Field House on 8 January 2024**

**DECISION AND REASONS**

**Introduction**

1. This decision relates to the substantive appeals by the Appellants against the decisions of the Respondent (of varying dates) taken under Appendix EU of the Immigration Rules. This decision should be read in conjunction with the Upper Tribunal's earlier error of law decision

2. (dated 2 October 2023) which set aside the decision of First-tier Tribunal Judge Austin (with some preserved findings), dated 19 October 2022, and is included in the Annex to this decision.

### **The Upper Tribunal's error of law decision**

3. In the error of law decision, the Upper Tribunal panel preserved Judge Austin's findings of fact in respect to the evidence of cohabitation between Appellant 1 and the Sponsor as well as the genuine nature of the relationship between the parties: at paragraph 33.
4. As a result of the error of law decision, directions were issued to the parties raising a number of questions:
  - a) Does the Respondent maintain the concession that the Appellants had Leave to Remain up until 30 June 2021?
  - b) If not, is there any evidence that the Respondent gave Exceptional Assurances to Appellants 2, 3 & 4?
  - c) On the basis that Appellant 1 has evidenced that she was given such an Assurance, what do the parties say about the status of the Exceptional Assurance? In other words, is it said that this constituted Leave to Remain?
  - d) If the Assurance did not constitute Leave to Remain, was Appellant 1 nonetheless residing in the UK as a visitor when the application was made on 4 June 2021?
  - e) If she was not, was she nonetheless residing in the UK lawfully at that time?
  - f) Is there a difference in the relevant date of consideration between an application under EU14 and one made under EU14A?
  - g) What is the correct interpretation of (aaa) as applicable to this appeal?
  - h) What does "that period" within the wording of (aaa) mean?

### **Relevant background**

5. All four Appellants are Pakistani nationals who hold refugee status in Spain. Appellant 1 was born on 16 June 1982, Appellant 2 on 17 October 2003, Appellant 3 on 16 October 2005 and Appellant 4 on 5 July 2006.
6. There is no dispute that the Appellants' Sponsor, Mr Amir Ali is a German national who was granted indefinite leave to remain under Appendix EU of the Rules on 26 June 2020.
7. There is equally no dispute that he and Appellant 1 carried out an Islamic marriage in the United Kingdom on 29 August 2020. Furthermore, the uncontested evidence shows that the Sponsor and Appellant 1 were formally married under UK law on 10 May 2021.

8. The Sponsor is therefore the partner of Appellant 1 and the stepfather of Appellants 2, 3 and 4.
9. In respect of the Appellants' immigration histories, the following is relevant:
  - a) Appellant 1 entered the United Kingdom using a visit visa extant until 11 February 2021.
  - b) On 4 September 2020, Appellants 2, 3 and 4 entered the United Kingdom also using visit visas: Appellant 2 and 4's visit visas expired on 27 February 2021 and Appellant 3's on 1 March 2021.
  - c) On 6 June 2021, the Appellants all applied for leave to remain under Appendix EU of the Rules.
10. All four of the applications were refused by the Respondent but at **different times**: Appellant 1's application was refused on 15 October 2021; Appellant 2's on 3 November 2021, Appellant 3's on 25 August 2021 and Appellant 4's on 19 August 2021.
11. Additionally, and although we do not have the full documentary evidence before us, Ms Ahmed conceded during the hearing that the Appellants had asked for an Exceptional Assurance under the '*Coronavirus (COVID-19): advice for UK visa applicants and temporary UK residents*' policy by email on 3 February 2021 which led to Exceptional Assurances being given to all four Appellants from **16 February 2021 until 31 March 2021**.
12. The documentary evidence now before the Upper Tribunal also shows that the Appellants made a second email request for an Exceptional Assurance on 25 March 2021 which resulted in the giving of Exceptional Assurances lasting from **8 April 2021 until 30 June 2021**.

### **The hearing before First-tier Tribunal Judge Austin**

13. Relevant to the substantive appeal before us, we should note that Judge Austin made the following record in respect of the way the case was put by the Respondent at that hearing:
  - a) The Presenting Officer accepted that Appellants 2, 3 and 4 are dependent upon Appellant 1 and that therefore if Appellant 1 succeeded in her appeal, then all of the appeals should succeed, paragraph 1.
  - b) The Presenting Officer argued that no valid document had been issued under Annex 1 of Appendix EU and therefore Appellant 1 could not be recognised as a durable partner of a relevant EEA citizen, paragraph 7.
  - c) The Presenting Officer did not challenge any of the oral evidence given during the hearing which, the Judge noted, was consistent with the witness statements, paragraph 8.

### **The remaking hearing in the Upper Tribunal**

14. At the beginning of the hearing, we sought to clarify the material issues to be determined and also the nature of the hearing before us.

15. Ms Patel submitted that she was not going to call the Appellants to give evidence on the basis that the Upper Tribunal had preserved relevant findings at paragraph 33 of the error of law decision and that this was a sufficient evidential underpinning for her submissions as to the relevant legal issues.

*The rule 15(2A) applications*

16. Preliminarily there were also applications under rule 15(2A) of the Upper Tribunal Procedure Rules from both representatives to adduce further evidence.

17. The Respondent sought to adduce a witness statement from the Presenting Officer who appeared on behalf of the Respondent at the First-tier Tribunal appeal hearing (dated 31 December 2023). At paragraph 3 of the statement, Mr McHale asserts that he does not recall agreeing that the Appellants had leave to remain in the UK until 30 June 2021 but, at paragraph 4, agreed it was likely that he did submit that if Appellant 1 succeeded in her appeal then the other appeals would also succeed.

18. We should note that Ms Patel did not object to the application for this evidence to be submitted and we therefore admitted it. We should also add in any event that the question of whether the Appellants did have leave to remain valid until 30 June 2021, is essentially a legal/factual issue for the Tribunal to decide. The Upper Tribunal is ultimately not bound by a concession which is mistakenly made in law subject to fairness principles: see Koori & Ors v The Secretary of State for the Home Department [2016] EWCA Civ 552, at paragraphs 31 – 33, as one such authority.

19. Ms Patel made her own 15(2A) application on the basis of seeking to rely upon the four Exceptional Assurance letters which were all issued by the Respondent on 8 April 2021 extant until 30 June 2021.

20. There was no opposition to this from Ms Ahmed and we considered that the evidence should be admitted as it had been adduced in response to the directions of the Upper Tribunal following the error of law decision.

21. In terms of preliminary issues, we also record that Ms Ahmed indicated that she would be seeking to argue that the Appellants had failed to show sufficient evidence of a durable relationship between the Sponsor and Appellant 1 at the relevant date of 31 December 2020. Ms Patel understandably objected to this bearing in mind that it had been, on the face of it, subject to a preserved finding in the Upper Tribunal's error of law decision but we nonetheless heard submissions from Ms Ahmed which we deal with later in this decision.

22. In respect of the totality of the material before us we record that we have taken into account the composite bundle served by the Respondent on 4 January 2024 consisting of 701 PDF pages; the Presenting Officer's witness statement dated 31 December 2023; the Appellants' supplementary bundle (with an additional skeleton argument dated 2 January 2024) of 305 PDF pages and the Appellants' rule 24 response drafted for the purposes of the error of law hearing itself (dated 8 February 2023).

*The competing submissions*

23. At this stage we only touch lightly upon the oral submissions as made by the representatives in the hearing before us as we intend to deal with them fully in our

findings and reasons. We should however record that both representatives have plainly sought to assist the Tribunal with detailed written legal arguments which have been of some assistance. We do however also note that the oral submissions of both representatives evolved during the hearing. We have therefore done our best to fairly characterise the submissions as they were finally made by both representatives where necessary.

## **Findings and reasons**

24. We therefore start by observing that we are faced with a number of broad thematic questions to answer:

- a) What is the applicable version of the rules under Appendix EU in these appeals?
- b) Do the Appellants meet the full requirements of either the *family member of a relevant EEA citizen* route (EU14) or *joining family member of a relevant sponsor* route (EU14A)?

### ***What is the applicable version of the rules to be applied?***

25. For reasons which we lay out later in this decision, the question of which version of the rules applies is an important one.

26. We therefore start by finding that the decisions to refuse in each appeal fall under the relevant definition in reg. 3(1)(c) of the Immigration (Citizens' Rights Appeals) (EU Exit) Regulations 2020 ("the 2020 Regulations"):

"(c) not to grant any leave to enter or remain in the United Kingdom in response to P's relevant application..."

27. This means that the corollary ground of appeal under reg. 8(3)(b) is that the decision under appeal *'is not in accordance with residence scheme immigration rules'*. For completeness, neither party has sought to argue by reference to the 'first ground of appeal' (reg. 8(2)) relating, in broad terms, to certain parts of the Withdrawal Agreement.

28. In interpreting the meaning of reg. 8(3)(b) we have held in mind the Supreme Court's recent restatement of the principles of interpretation in the context of the Immigration Rules, in Wang & Anor, R (on the application of) v Secretary of State for the Home Department [2023] UKSC 21 ("Wang") at paragraphs 29 - 31:

"29. It was common ground between counsel that the leading authority on the general principles to be applied in interpreting the Immigration Rules is Mahad v Entry Clearance Officer [2009] UKSC 16; [2010] 1 WLR 48 and, in particular, the following two passages in the judgment of Lord Brown of Eaton-under-Heywood. The first is his citation at para 10 from Lord Hoffmann's judgment in MO (Nigeria) v Secretary of State for the Home Department [2009] UKHL 25 [2009] 1WLR 1230, para 4:

"Like any other question of construction, this [whether a rule change applies to all undetermined applications or only to subsequent applications] depends upon the language of the rule, construed against the relevant background. That involves a consideration of the

immigration rules as a whole and the function which they serve in the administration of immigration policy.”

30. The second is Lord Brown’s own contribution, later in paragraph 10:

“Essentially it comes to this. The Rules are not to be construed with all the strictness applicable to the construction of a statute or a statutory instrument but, instead, sensibly according to the natural and ordinary meaning of the words used, recognising that they are statements of the Secretary of State’s administrative policy.”

31. Neither of these dicta suggest that, apart possibly from a relaxation of strictness, the interpretation of the Immigration Rules involves any significant departure from the general principles of statutory construction. Lord Hoffmann’s dictum states in terms that general principles of construction apply, so that interpretation should be contextual and purposive. Lord Brown’s encouragement to apply sensibly rather than strictly the natural and ordinary meaning of the words is simply the consequence of keeping in mind the context and purpose of the Immigration Rules. More to the point, neither dictum is inconsistent with the principle enunciated by Ribeiro PJ and approved in *Rosendale*, which requires a purposive approach to construction and a realistic and unblinkered approach to the application of the relevant provisions to the facts.”

29. We start then with section 17 of the 2020 Act which defines the meaning of the term ‘residence scheme immigration rules’ as used in Part 3. Part 3 gives power to a Minister of the Crown, inter alia, to make regulations “*for, or in connection with, appeals against citizens’ rights immigration decisions of a kind described in the regulations*”, (section 11 (1)).

30. Specifically at section 11(2)(b), the Act provides for decisions “*made in connection with leave to enter or remain in the United Kingdom by virtue of residence scheme immigration rules*”.

31. The definition reads:

“(1) In this Part, “residence scheme immigration rules” means—

(a) Appendix EU to the immigration rules except those rules, or changes to that Appendix, which are identified in the immigration rules as not having effect in connection with the residence scheme that operates in connection with the withdrawal of the United Kingdom from the EU, and

(b) any other immigration rules which are identified in the immigration rules as having effect in connection with the withdrawal of the United Kingdom from the EU.”

32. We have also taken into account the wording of an alternative ground within the overall ‘second ground of appeal’ in reg. 8(3): that being reg. 8(3)(a). In that ground, a person who receives a decision which either cancels or curtails pre-existing leave to remain/enter granted under the residence scheme rules (see regs. 3(1)(a) & (b)), can appeal on the ground available at reg. 8(3)(a) that the decision:

“...it is not in accordance with the provision of the immigration rules by virtue of which it was made...”

33. We consider this provision to be relevant to our interpretation when setting reg. 8(3)(b) into its specific legal context.
34. Whilst we note the term “immigration rules” is used rather than “residence scheme immigration rules”, we are satisfied that it can only mean by reference to the residence scheme immigration rules as this is expressly specified as the relevant grant of leave in reg. 3(1)(a) affected by a decision to curtail or cancel.
35. Most importantly to our assessment however is the requirement that the appeal relate to the “provision” of the rules “by virtue of which it was made”. This, in our view, unambiguously limits the Tribunal’s consideration to the version of the rule which applied at the time the decision to curtail or cancel was made.
36. By contrast, in the context of the appeal right which applies in these cases: reg. 8(3)(b), the drafter has plainly not sought to proscribe the provision, or the rules used to make the decision under appeal. Equally the definition of the term ‘residence scheme immigration rules’ in the 2020 Act is simply ‘Appendix EU’ (or other rules intended for the purpose of facilitating the UK’s withdrawal). There is no suggestion in either the primary or secondary legislation that a previous version of the rules is relevant to an appeal under reg. 8(3)(b).
37. We consider this to be significant and conclude that the difference reflects the fact that, in this kind of appeal, the Tribunal is able to look at any other relevant route under the residence scheme rules, as amended from time to time, when considering the decision to refuse to grant leave.
38. We therefore proceed on the basis that the rules to be applied in these four appeals are those at the date of the hearing.

***Do the Appellants meet EU14 of Appendix EU - family members of an EEA citizen?***

39. We should record that initially Ms Patel argued that the Appellants were no longer relying upon an argument under EU14 of Appendix EU on the basis that Appellant 1 did not have a relevant document (as defined in Annex 1 of Appendix EU) at the material dates. Ms Patel therefore submitted, at that stage, that she was only relying upon the *joining family member of a relevant sponsor* route under Appendix EU14A.
40. By the end of her submissions however, Ms Patel in fact submitted that the Appellants did meet the requirements in **both** EU14 and EU14A of Appendix EU.

*EU14 and the relevant definitions in Annex 1*

41. In order to make this decision accessible we have decided to cite only the relevant parts of the relevant definitions in Annex 1 as relevant to the appeals before us. We are satisfied that the wording of EU14 below is the relevant wording for the purposes of these appeals:

“Persons eligible for limited leave to enter or remain as a relevant EEA citizen or their family member, as a person with a derivative right to reside or with a Zambrano right to reside or as a family member of a qualifying British citizen

EU14. The applicant meets the eligibility requirements for limited leave to enter or remain where the Secretary of State is satisfied, including (where applicable) by the required evidence of family relationship, that, at the date of application and in an application made by the required date, condition 1 or 2 set out in the following table is met:

Condition 1 is met where:

(a) The applicant is:

- (i) a relevant EEA citizen; or
- (ii) a family member of a relevant EEA citizen; or
- (iii) a family member who has retained the right of residence by virtue of a relationship with a relevant EEA citizen; or
- (iv) a person with a derivative right to reside; or
- (v) a person with a Zambrano right to reside; and

(b) The applicant is not eligible for indefinite leave to enter or remain under paragraph EU11 of this Appendix solely because they have completed a continuous qualifying period of less than five years ; and

(c) Where the applicant is a family member of a relevant EEA citizen, there has been no supervening event in respect of the relevant EEA citizen”

42. There follow a number of interrelated definitions in Annex 1 to the Appendix which we attempt to identify and consider below.

#### Appellant 1 - durable partner

43. As we have detailed earlier, Ms Ahmed contended that the Respondent should be able to argue at the hearing that Appellant 1 did not meet the first part of the definition of a *durable partner* in Annex 1.

44. We note at this juncture that the parties have both argued their respective cases by reference to the current version of the *durable partner* definition in Annex 1 (as amended by HC 1160 on 12 April 2023). We agree that this is the correct version of the rules to be applied for the reasons we have already given. Therefore the relevant part of the definition at the date of the hearing read:

“(a) the person is, or (as the case may be) for the relevant period was, in a durable relationship with a relevant EEA citizen (or, as the case may be, with a qualifying British citizen or with a relevant Sponsor), with the couple having lived together in a relationship akin to a marriage or civil partnership for at least 2 years (unless there is other significant evidence of the durable relationship);  
...”

45. We start by detailing the findings made by Judge Austin either directly or by virtue of his general acceptance of the witnesses’ evidence:

- a) Appellant 1 and the Sponsor were family friends for a long time before meeting at a family gathering in Spain in February 2020 – their relationship began from then.



- b) The Sponsor returned to the UK after 2 weeks in Spain and the relationship continued by messages and calls. On 18 June 2020 the parties decided to marry in Spain, but this took time due to the need to obtain the relevant documents. In the interim Appellant 1's mother (residing in the UK) was diagnosed with cancer and was very ill; this led to the Appellants applying for and receiving visit visas to come to the UK.
- c) As a consequence of Appellant 1's mother's dying wish, the parties were married religiously on 29 August 2020 and they started living together from 1 September 2020. Appellants 2, 3 and 4 all joined the household after their arrival a few days later.
- d) The parties made three attempts to register their marriage in the UK, but each one was thwarted by the Covid-19 restrictions at the time.
- e) Eventually on 10 May 2021, they successfully registered their marriage.
- f) The Appellants reside in a family unit with the Sponsor.

46. Ms Ahmed argued that Judge Austin's findings established that the parties had only been together in a relationship in the UK from August 2020 meaning that, by the specified time and date (11pm on 31 December 2020), Appellant 1 could only show three months of cohabitation in contrast to the general requirement for a period of two years as stated in the rules.

47. Ms Ahmed further argued that there was insufficient evidence to support the conclusion that there was *significant evidence* of the durable relationship before 31 December 2020: this being the alternative consideration to two years cohabitation.

48. We can dispose of this argument fairly briefly. Even setting aside the fact that this hearing was a substantive one and not an error of law hearing and further ignoring the fact that Ms Ahmed's argument was not the Respondent's case at the First-tier Tribunal hearing; not raised in the Respondent's grounds of appeal in the error of law proceedings and was subject to a preserved finding of the previous Upper Tribunal panel, we consider that it is unmeritorious.

49. In our view the Tribunal is entitled to consider all of the evidence when assessing whether or not the durable relationship in question met the definition in Annex 1 at the relevant time/s.

50. We also add that the definition does not exclude durable relationships conducted outside of the UK subject to the other requirements of the relevant route.

51. Whether looked at through the prism of the circumstances as at 12 September 2022 (when Judge Austin heard the appeal) or 8 January 2024 (the appeal before us), we conclude that the evidence is only one way in showing a clearly durable relationship at 31 December 2020: this is based on the totality of the undisputed evidence of the cohabitation, genuineness of the relationship and the role of the Sponsor as the step-father of the other three Appellants. We therefore conclude that this constitutes *significant evidence* of the durable relationship.

52. In respect of the relevant times under EU14 read with Annex 1, we find that:

- a) Appellant 1 was in a durable relationship with the Sponsor before the specified date (31 December 2020) and the partnership was durable at 31 December 2020 [as required in the definition: *family member of a relevant EEA citizen*, (a)(ii)].
- b) At the date of the application [EU14], Appellant 1 was married to the Sponsor: Appellant 1 has produced a marriage certificate which meets the documentary requirement in *required evidence of family relationship*, (a)(i) where the applicant does not have a *relevant document* as defined.

53. There is no dispute that the Sponsor is a *relevant EEA citizen* but for completeness we find that he is a German national who was granted indefinite leave to remain on 26 June 2020 and was therefore resident in the UK before the specified date (31 December 2020) [as required in the definition: *relevant EEA citizen (where, in respect of the application under consideration, the date of application by the relevant EEA citizen or their family member is before 1 July 2021)*, (b)(i) read with (a)].

54. The Sponsor's indefinite leave to remain has not lapsed, been cancelled, revoked or invalidated; the former requirement being governed by the terms of article 13 of the Immigration (Leave to Enter and Remain) Order 2000 [as per EU5 of the Appendix].

55. In this context we also find that there has been no *supervening event* in respect of the Sponsor (as defined in Annex 1) as required at (c) in EU14, condition 1.

#### *The relevant document requirement*

56. There is of course a second requirement in the *durable partner* definition, that being the need at (b)(i) of the definition for Appellant 1 to have had a *relevant document* as the durable partner of the EEA citizen. We therefore cite the relevant part of (b) of the definition as it stands at the date of the hearing:

" ...

(b)(i) the person holds a relevant document as the durable partner of the relevant EEA citizen (or, as the case may be, of the qualifying British citizen or of the relevant sponsor) for the period of residence relied upon; for the purposes of this provision, where the person applies for a relevant document (as described in sub-paragraph (a)(i)(aa) or (a)(ii) of that entry in this table) as the durable partner of the relevant EEA citizen or, as the case may be, of the qualifying British citizen before the specified date and their relevant document is issued on that basis after the specified date, they are deemed to have held the relevant document since immediately before the specified date; or

(ii) where the person is applying as the durable partner of a relevant sponsor (or, as the case may be, of a qualifying British citizen), or as the spouse or civil partner of a relevant sponsor (as described in sub-paragraph (a)(i)(bb) of the entry for 'joining family member of a relevant sponsor' in this table), and does not hold a document of the type to which sub-paragraph (b)(i) above applies, and where:

(aa) the date of application is after the specified date; and

(bb) the person:

(aaa) was not resident in the UK and Islands as the durable partner of a relevant EEA citizen (where that relevant EEA citizen is their relevant sponsor) on a basis which met the entry for 'family member of a relevant EEA citizen' in this table, or, as the case may be, as the durable partner of the qualifying British citizen, at (in either case) any time before the specified date, unless (in the former case):

- the reason why they were not so resident is that they did not hold a relevant document as the durable partner of that relevant EEA citizen for that period; and

- they otherwise had a lawful basis of stay in the UK and Islands for that period; or..."

57. A *relevant document* is, by definition in Annex 1, a document which was issued under the EEA Regulations - in this case Appellant 1 has never had such a document (and neither have the other Appellants).

*A lawful basis of stay*

58. The alternative at (b)(ii) is that the person in question otherwise had a lawful basis of stay in the UK prior to the specified date as explained in this decision. However, this does not assist Appellant 1 in this case as the wording of (b)(ii) only applies to *joining family member* applications (under EU11A and EU14A):

"...where the person is applying as the durable partner of a relevant sponsor (or, as the case may be, of a qualifying British citizen), or as the spouse or civil partner of a relevant sponsor (as described in sub-paragraph (a)(i)(bb) of the entry for 'joining family member of a relevant sponsor' in this table), and does not hold a document of the type to which sub-paragraph (b)(i) above applies, and..."

59. On this basis then Appellant 1 does not have access to the alternative basis of qualification in (b)(ii) and therefore Appellant 1 does not meet the full definition of a *durable partner* under Annex 1.

Appellants 2, 3 and 4 - children of a relevant spouse

60. The opening requirement in the definition of a *family member of a relevant EEA citizen* is that the applicant **does not** meet the definition of *joining family member of a relevant sponsor*. For the reasons which we give, we find that Appellants 2, 3 and 4 do qualify under the *joining family member* route and so the Appellants do not qualify under EU14. However, for completeness we go on to consider the other sub-criteria of EU14 read with Annex 1 in case we are wrong about the application of EU14A:

*The Respondent's reasons for refusal*

61. The Respondent refused the applications for different reasons:

a) Appellant 2 had provided a marriage certificate for her mother and stepfather but had not shown that he had a family relationship with the Sponsor before the specified date.

- b) Appellant 3 for the same reason as Appellant 2.
- c) Appellant 4 for the wholly incoherent reason that he was not a durable partner to his stepfather.

### ***The Tribunal's assessment***

62. In assessing the much more detailed submissions before us, we make the following findings.

63. Annex 1 gives the following definition of a *family member of a relevant EEA citizen*:

“... ”

(d) the child or dependent parent of the spouse or civil partner of a relevant EEA citizen (as described in sub-paragraph (a) above), and the family relationship existed before the specified date; or...”

64. In respect of the definition of *child* in Annex 1, this reads:

“(a) the direct descendant under the age of 21 years of a relevant EEA citizen (or, as the case may be, of a qualifying British citizen or of a relevant Sponsor) or of their spouse or civil partner; or...”

65. We also highlight the second sub-paragraph (c) within the definition:

“(c) ‘spouse or civil partner’ means (as the case may be) the person described in sub-paragraph (a)(i) or (a)(ii) of the entry for ‘family member of a qualifying British citizen’ in this table, in sub-paragraph (a) of the entry for ‘family member of a relevant EEA citizen’ in this table or in the first subparagraph (a) (together with either the second sub-paragraph (a) or sub-paragraph (b)(i) or (b)(ii)) of the entry for ‘joining family member of a relevant sponsor’ in this table”

66. We therefore find:

- a) At the date of application [EU14], the children were all under 21 years old (Appellant 2 was 17, Appellant 3 was 15 and Appellant 4 was 14 years old) and direct descendants of their mother (Appellant 1) who was, by that stage, the spouse of an EEA citizen [as required in the definition: *child*, (a)].
- b) As shown above, the definition of spouse of a relevant EEA citizen includes a person who was previously the durable partner at 31 December 2020 by specific reference to the earlier definition in (a). On that basis we find that the specified family relationship between the Appellants did exist before 31 December 2020. The family relationship has been sufficiently evidenced [as per the definition: *required evidence of family relationship*].
- c) However, we also find that, read as a whole, the scheme required the Appellants’ mother (Appellant 1) to meet the other requirements of Annex 1 as the spouse who was formerly a durable partner which included that she had the necessary documentation to meet the *family member of a relevant EEA citizen* route. On the basis of our findings above we conclude that the children have not established a relationship with a qualifying parent for the purposes of EU14.

***Do the Appellants meet EU14A of Appendix EU - joining family members of a relevant sponsor?***

67. The alternative argument is that the applications are in fact made under EU14A (the *joining family member* route); the relevant definition at the **time of the application** was:

“Persons eligible for limited leave to enter or remain as a joining family member of a relevant Sponsor

EU14A. The applicant meets the eligibility requirements for limited leave to enter or remain as a joining family member of a relevant Sponsor where (i) (in cases where the application is made within the UK) the applicant is not in the UK as a visitor and (ii) the Secretary of State is satisfied, including by the required evidence of family relationship, that, at the date of application and in an application made after the specified date and by the required date, the condition set out in the following table is met:

The Condition is met where:

(a) The applicant is:

(i) a joining family member of a relevant Sponsor; or  
(iii) a family member who has retained the right of residence by virtue of a relationship with a relevant Sponsor; and

(b) The applicant is:

(i) not eligible for indefinite leave to enter under paragraph EU11A of this Appendix, where the application is made outside the UK; or

(ii) not eligible for indefinite leave to remain under paragraph EU11A of this Appendix, where the application is made within the UK, solely because they have completed a continuous qualifying period of less than five years which began after the specified date”

68. We pause here to reflect upon the need to ascertain the applicable rules/version of the rules.

*EU14A - the prohibition on visitors*

69. This issue is potentially important to this part of the Appellants’ appeal because the wording of EU14A at the date of the applications **prohibited** those residing in the UK as visitors from applying as a *joining family member*:

“...(i) (in cases where the application is made within the UK) the applicant is not in the UK as a visitor...”

70. The first complexity arising from this prohibition is that, by the time of the refusals of the applications of Appellants 1 and 2, the prohibition had been removed from

the rules by HC 617 (10 September 2021) which took effect from 6 October 2021 with no saving provisions; whereas the prohibition was still in the rules when Appellants 3 and 4's refusals were decided.

71. Secondly, the explanatory memorandum to the statement of change explains that:

“From 6 October 2021, the temporary concession to this effect outside Appendix EU where certain joining family members are concerned, as currently set out in the EUSS caseworker guidance, will cease to operate...”

72. The temporary concession was not in the Respondent's 'EU Settlement Scheme: EU, other EEA and Swiss citizens and their family members' guidance at the time the applications were made but was by the time all the applications were **decided**. The concession was housed in 'EU Settlement Scheme: EU, other EEA and Swiss citizens and their family members' (Version 13.0 - 20 July 2021) at page 98:

“Temporary concession

The requirement that a person applying as a joining family of a relevant sponsor must not be in the UK as a 'visitor', in accordance with that definition in Annex 1 to Appendix EU, is disapplied, as a temporary concession outside Appendix EU, where the applicant's leave as a visitor expires on or before 30 December 2021. This includes applicants who entered the UK from 1 January to 30 June 2021 with six months' visitor leave, and those who arrive after 30 June 2021 but whose visitor leave is of less than six months' duration. It also includes applicants who make a late application, where there are reasonable grounds for them having missed the deadline, if they are still visitors when they apply.”

73. Thirdly, depending upon our view of the immigration statuses of the Appellants as at the date of the applications, the Upper Tribunal is left with difficulty as to how a temporary concession outside of the rules can be engaged with by the Tribunal when the sole ground of appeal argued before us is that the decision taken is not in accordance with the residence scheme rules.

74. In respect of this latter point, we have decided that we do not need to grapple with it because of: 1) our conclusion that the applicable rules are those at the date of the hearing and/or 2) our findings below about the immigration statuses of the Appellants when they made their applications on 6 June 2021.

The immigration status of the Appellants as at the relevant dates

75. We start by finding that there is no dispute that the Appellants were residing lawfully in the UK as visitors at the specified date.

76. The more difficult question, arising from the prohibition on applications from those residing as visitors in the UK, is what the immigration status of the Appellants was at the time of their applications?

77. Whilst it is plain that the visit visas of all four Appellants had expired by (at the latest) 1 March 2021, it is also the case that the Appellants had all applied for, and been given, Exceptional Assurances by the Respondent for the periods: **16 February 2021 until 31 March 2021** and **8 April 2021 until 30 June 2021** meaning that they all had such Assurances at the time of their applications on 6 June 2021.

78. In her submissions, Ms Patel put her emphasis on the immigration statuses of the Appellants at the specified date – as we have seen however that the legal issues are more complicated than the scope of that analysis.
79. Nonetheless, Ms Patel also argued that the Exceptional Assurances issued to the Appellants constituted “*a lawful basis of stay*” on the same conditions which they had previously enjoyed.
80. In response, Ms Ahmed submitted that an Exceptional Assurance as given did not constitute a grant of leave but was an “*assurance to those unable to leave the UK who had shown the same with evidence, that a positive outcome to their request meant they would not be treated as overstayers or suffer prejudice to future applications due to their continued stay in the UK.*”

*The Exceptional Assurance policy*

81. Underlying the Exceptional Assurances given in this case was the ‘Coronavirus (COVID-19): advice for UK visa applicants and temporary UK residents’ policy (and hereafter ‘the Exceptional Assurance policy’), which has been amended over time.
82. As at the time of the first set of Exceptional Assurances given on 16 February 2021, the Exceptional Assurance policy (last updated on 15 February 2021) stated, inter alia, the following:

“You are expected to take all reasonable steps to leave the UK where it is possible to do so or apply to regularise your stay in the UK. You are allowed to access Visa and Immigration services as these are considered an essential public service and will continue to operate safely under local and national restrictions.

If you intend to leave the UK but have not been able to do so and you have a visa or leave that expires between 1 January 2021 and 28 February 2021 you may request additional time to stay, known as ‘exceptional assurance’.”

“In your email you should attach evidence to show why you cannot leave the UK. For example, if you can’t leave the UK because you can’t find a flight before your leave/visa expires, you’ll need to submit a copy of a confirmed flight ticket. If you can’t leave the UK because you have coronavirus, you’ll need to submit confirmation of your positive coronavirus test result.

During the time in which your request for ‘exceptional assurance’ is pending you will continue on the conditions as per your current or most recently expired visa.”

“If you are granted ‘exceptional assurance’ it will act as a short-term protection against any adverse action or consequences after your leave has expired. If conditions allowed you to work, study or rent accommodation you may continue to do so during the period of your exceptional assurance. Exceptional assurance does not grant you leave. It is a means to protect those who are unable to leave the UK due to COVID-19 restrictions and not to facilitate travel, other than to return home.”

83. The version of the policy extant at the time of the second Assurances was similarly worded apart from the extending of the scheme until 30 June 2021.

*The arguments of the parties*

84. In our judgement, properly analysed, neither party argued before us that the Appellants' leave to enter as visitors had been extended so that they were, as a matter of immigration law, visitors at the date of the application on 6 June 2021.

85. In our view the parties were correct not to classify the Appellants' statuses in the UK at that date as amounting to being visitors in the UK.

86. However, there is the more complicated question of what the precise nature of the Exceptional Assurance is?

87. In her written submissions, Ms Ahmed contended that:

- a) An Exceptional Assurance is not a grant of leave as expressly stated in the policy and the Assurances themselves.
- b) Such an Assurance constituted a promise that the person in question would be given short-term protection from any adverse action or consequences.
- c) The background to the Assurances was the difficulties caused to international travel from the restrictions arising from the covid-19 pandemic.
- d) A person with an Assurance could either apply for a new Assurance (whilst the scheme was in operation) or apply in-country for permission to stay even if there would normally be an expectation of an out-of-country application.

88. In her written argument, Ms Patel ventured that it was not necessary to determine whether residence during the period of an Exceptional Assurance constituted leave to remain as it was plainly a lawful basis of stay as required in Appendix EU.

89. In our view however, it is necessary to look at the precise nature of the Exceptional Assurances in order to resolve this issue.

***The Tribunal's assessment***

90. For the purposes of our assessment, it is clearly necessary to look carefully at the wording of the Exceptional Assurance policy and the Exceptional Assurances themselves.

91. We therefore note the following:

- a) As Ms Ahmed pointed out, the policy and the individual Assurances all clearly assert that the Assurances given did not constitute leave to remain/enter.
- b) However, it is also material to record that the policy and Assurances both state in more or less the same wording that:

“During the time in which your request for ‘exceptional assurance’ is pending you will continue on the conditions as per your current or most recently expired visa.”



c) The Assurances themselves also say in terms:

“During this time... [the period of Exceptional Assurance], you will not be regarded as an overstayer or suffer any detriment in any future applications.”

92. In our judgement, it is important to start with the observation that the Assurances (and policy) seek to extend, where applicable, the pre-existing conditions attached to any recent leave.

93. This is material because the power to add, vary or revoke conditions attached to leave derives from statute – the 1971 Immigration Act, (“the 1971 Act”), at s. 3(3) (a):

“(3) In the case of a limited leave to enter or remain in the United Kingdom,—

(a) a person’s leave may be varied, whether by restricting, enlarging or removing the limit on its duration, or by adding, varying or revoking conditions, but if the limit on its duration is removed, any conditions attached to the leave shall cease to apply; and...”

94. Reverting to s. 3(1) of the Act, we also cite the following:

“3 General provisions for regulation and control.

(1) Except as otherwise provided by or under this Act, where a person is not a British citizen—

(a) he shall not enter the United Kingdom unless given leave to do so in accordance with the provisions of, or made under,] this Act;

(b) he may be given leave to enter the United Kingdom (or, when already there, leave to remain in the United Kingdom) either for a limited or for an indefinite period;

(c) if he is given limited leave to enter or remain in the United Kingdom, it may be given subject to all or any of the following conditions...”

95. In our view, it is clear that the giving of conditions can only happen if the person in question has been given limited leave to enter or remain, [s. 3(1)(c)].

96. That is not however the end of the matter, the Court of Appeal in Ahmadi v Secretary of State for the Home Department [2013] EWCA Civ 512, (“Ahmadi”) decided that the wording of s. 4(1) of the 1971 Act means that the giving or varying of leave under s. 3 of the 1971 Act is only exercised where that decision is given in writing to the person concerned: see paragraph 22 of that judgment.

97. Looking back to the Exceptional Assurances as given in these appeals, there is no dispute that the Respondent expressly allowed for the variation of any pre-existing conditions.

98. The knottier question arises as to whether the duration of any pre-existing leave was varied by the terms of the Assurances as given?

99. We have certainly dwelt carefully upon the wording in the policy and Assurances that the giving of an Assurance did not constitute an extension of leave and Ms Ahmed's submission that the Assurances generally acted only as promises of no adverse immigration consequences during the period given, but have concluded, with respect, that this cannot be right.

100. We start by reference to the general principles as laid out in s. 1 of the 1971 Act:

"1 General principles.

(1) All those who are in this Act expressed to have the right of abode in the United Kingdom shall be free to live in, and to come and go into and from, the United Kingdom without let or hindrance except such as may be required under and in accordance with this Act to enable their right to be established or as may be otherwise lawfully imposed on any person.

(2) Those not having that right may live, work and settle in the United Kingdom by permission and subject to such regulation and control of their entry into, stay in and departure from the United Kingdom as is imposed by this Act; and indefinite leave to enter or remain in the United Kingdom shall, by virtue of this provision, be treated as having been given under this Act to those in the United Kingdom at its coming into force, if they are then settled there (and not exempt under this Act from the provisions relating to leave to enter or remain)."

101. We also observe that the power to give permission to live, work and settle to a person without a right of abode in the UK derives from s. 1(2) (as above). The Supreme Court in Munir & Anor, R (on the application of) v Secretary of State for the Home Department [2012] UKSC 32 also concluded that grants of leave to remain or enter made outside of the Immigration Rules (in that case under the 'seven year child concession' (DP5/96)) were still, nonetheless, made by the power given in the 1971 Act:

"44. In my view, it is the 1971 Act itself which is the source of the Secretary of State's power to grant leave to enter or remain outside the immigration rules. The Secretary of State is given a wide discretion under sections 3, 3A, 3B and 3C to control the grant and refusal of leave to enter or to remain: see paras 4 to 6 above. The language of these provisions, especially section 3(1)(b) and (c), could not be wider. They provide clearly and without qualification that, where a person is not a British citizen, he may be given leave to enter or limited or indefinite leave to remain in the United Kingdom. They authorise the Secretary of State to grant leave to enter or remain even where leave would not be given under the immigration rules."

102. In this case, the Respondent avers that the Assurances were effectively promises that the Appellants' residence in the UK would merely be officially tolerated, but did not amount to the grant or extension of leave. We do not agree and have concluded that the nature of the Assurances given in these appeals amounted to more than just a tolerance of their residence in the UK.

103. Turning back to the wording of the policy and the Assurances, despite the statement that the application of the Assurance did not constitute an extension of leave, we have already observed that the Assurances themselves told the

Appellants that they would not be regarded as overstayers or suffer any detriment in any future applications. We also know that this included that any future application, which would normally be required to be made out-of-country, could be made in-country without adverse impact. We accept that, if the Assurances did no more than promise not to hold against the appellants the otherwise adverse consequences of becoming overstayers, the Secretary of State's position would have considerable force.

104. Significantly, however, the Assurances went much further than merely undertaking not to hold the otherwise adverse consequences of becoming an overstayer against the appellant. They sought to extend the conditions of the appellants' previous grants of leave beyond the expiry dates of those grants of leave.

105. We therefore conclude that such an Assurance was one which, in substance, spoke directly to the living and working entitlement of the Appellants and could only have been made by reference to the power in s. 1(2) read with s. 3(3) - thereby constituting a grant of leave to remain. We also conclude that both the variation of the conditions and duration were communicated to the Appellants in their respective Assurances which were therefore compliant with Ahmadi.

106. Drawing those threads together we have decided that such an Assurance is effectively a grant of leave to remain/enter taken outside of the Immigration Rules and the Appellants were therefore **not** visitors at the time of the applications.

107. We have furthermore taken into account the definition of a visitor in paragraph 6 of the Immigration Rules which reads as:

““Visitor” means a person granted permission under paragraphs 40-56Z, 75A-M or 82-87 of the rules in force before 24 April 2015 or Appendix V on or after 24 April 2015 or Appendix V: Visitor after 9am on 1 December 2020.”

108. In this case there is no suggestion that the Appellants were considered by reference to, or had the duration of their leave extended beyond the expiry of their visas as visitors, Appendix V of the Rules and we therefore conclude that they were not visitors (as defined) on 6 June 2021.

109. The knock-on effect of that finding is that we conclude that even if the rules as at the date of the application were the applicable ones (which we have decided they are not) the Appellants nonetheless do not fall foul of the visitor prohibition and have access to EU14A.

Appellant 1 - durable partner/spouse of a relevant sponsor

110. In applying the current version of the rules, we can discern no material difference between the current rules and those extant at the date of the application and/or at the dates of the refusals.

111. As for Appellant 1's claim to be a *durable partner* who became the spouse of a *relevant Sponsor*, for the purposes of EU14A read with Annex 1, we make the following findings:

- a) Appellant 1 was in a durable relationship with the Sponsor before the specified date (31 December 2020) and the partnership was durable at 31

December 2020 [as required in the definition: *joining family member of a relevant Sponsor*, (a)(i)(bb) read with *durable partner*, (a)].

- b) In respect of the second part of the *durable partner* definition: Appellant 1 did not have a *relevant document* [as required in the definition: *durable partner*, (b)(i)]
- c) In respect of the alternative route within (b)((ii):
  - i. Appellant 1 was applying as the spouse of a *relevant Sponsor* [(b)(ii)].
  - ii. The application was after the specified date as required in (b)(ii)(aa).
  - iii. Appellant 1 was not resident in the UK prior to the specified date as a *family member of a relevant EEA citizen* because she did not have a *relevant document* but, as we have explained, Appellant 1 could show the alternate basis of having resided in the UK lawfully before and at the specified time date [(b)(ii)(bb)(aaa)].
- d) At the date of the application [EU14A], Appellant 1 was married to the Sponsor: Appellant 1 has produced a marriage certificate which meets the documentary requirement in *required evidence of family relationship*, (a)(i) where the applicant does not have a *relevant document* as defined. This is therefore compliant with *joining family member of a relevant Sponsor*, (a)(ii) (aa).

*The conditions in (a) - (d) of the definition of a joining family member of a relevant sponsor*

112. This is not however the end of the substantive requirements in the *joining family member of a relevant Sponsor* definition - at the end of the definition the rule requires that the applicant meet one of four further conditions in (a)-(d).

113. We start by finding that neither (c) nor (d) apply as the children in this case were all born before the specified date.

114. We therefore turn to (a) and (b), which read:

“(a) (where sub-paragraph (c) or (d) below does not apply) they were not resident in the UK and Islands on a basis which met the definition of ‘family member of a relevant EEA citizen’ in this table (where that relevant EEA citizen is their relevant Sponsor) at any time before the specified date; or

(b) (where sub-paragraph (c) or (d) below does not apply) they were resident in the UK and Islands before the specified date, and:

(i) one of the events referred to in sub-paragraph (b)(i) or (b)(ii) in the definition of ‘continuous qualifying period’ in this table has occurred, and after that event occurred they were not resident in the UK and Islands again before the specified date; or

(ii) the event referred to in sub-paragraph (a) in the definition of ‘supervening event’ in this table has occurred, and after that event

occurred they were not resident in the UK and Islands again before the specified date; or

(iii) they are the specified spouse or civil partner of a Swiss citizen, and they do not rely on any period of residence in the UK and Islands before the marriage was contracted or the civil partnership was formed; or..."

115. The events referred to in condition (b)(i) are drawn from the definition of *continuous qualifying period*, (b)(i) & (ii):

"(i) absence(s) from the UK and Islands which exceeded a total of six months in any 12-month period, except for:

(aa) a single period of absence which did not exceed 12 months and was for an important reason (such as pregnancy, childbirth, serious illness, study, vocational training or an overseas posting); or

(bb) any period of absence on compulsory military service; or

(cc) any period of absence on a posting on Crown service or (as a spouse, civil partner, durable partner or child) any period of absence accompanying a person on a posting on Crown service; or

(dd) any period spent working in the UK marine area (as defined in section 42 of the Marine and Coastal Access Act 2009); or (ee) any period of absence due directly to an order or decision to which sub-paragraph (b)(iii) below refers, where that order or decision has been set aside or revoked; or

(ee) a period of absence under sub-paragraph (b)(i)(aa), (b)(i)(bb), (b)(i)(cc) or (b)(i)(dd) above which exceeded 12 months because COVID-19 meant that the person was prevented from, or advised against, returning earlier; where this is the case, the period of absence under this sub-paragraph exceeding 12 months will not count towards any period of residence in the UK and Islands on which the person relies; or

(ff) any period of absence on compulsory military service; or

(gg) any period of absence on a posting on Crown service or (as a spouse, civil partner, durable partner or child) any period of absence accompanying a person on a posting on Crown service; or

(hh) any period spent working in the UK marine area (as defined in section 42 of the Marine and Coastal Access Act 2009);..."

116. The second event in (b)(ii) of the definition of *continuous qualifying period* relates to imprisonment and is not applicable here.

117. In respect of condition (b)(ii) this is drawn from part of the definition of a *supervening event*, (a) and relates to a break of residence of 5 years or more for someone who previously had permanent residence under the EEA regulations (documented or undocumented).

118. Condition (b)(iii) relates to the spouse of a Swiss citizen and so we need say no more about it.

119. As far as we understood it, Ms Ahmed's argument in writing related to (b) of the final conditions specified in the definition of a *durable partner*. However, in her submissions before us, Ms Ahmed was somewhat equivocal about her argument that Appellant 1 could not succeed as a *joining family member* on the basis that she needed to have broken the continuity of her residence in the UK by leaving for more than six months. In closing she left the matter to the Upper Tribunal to decide.

120. Ms Patel asserted in her submissions that Appellant 1 took the benefit of (a) of the conditions' definition without any further development of the argument.

### ***The Tribunal's assessment***

121. This is a further example of the complex drafting of the Appendix EU scheme: the differences between the *family member of a relevant EEA citizen* and *joining family member of a relevant sponsor* routes are not detailed in the route criteria at EU14 and EU14A which would have provided an accessible guide to the different requirements, but are largely contained within the definitions and sub-definitions in Annex 1.

122. Looking at those differences through the specific facts of this case, namely the status of Appellant 1 as the former durable partner of her EEA national Sponsor before 31 December 2020 who then married her Sponsor after that date but before 31 June 2021, we conclude (**non-exhaustively**) that:

- a) A person who applies for leave under the *family member of a relevant EEA citizen* route and who did not have a documented right of permanent residence, must (as part of the overall requirements):
  - i. Evidence that they were documented under the EEA Regulations as such a family member (whether a durable partner or spouse/civil partner) [*required evidence of family relationship, (a)(i)*]; or
  - ii. Evidence that they were legally married to their Sponsor by the production of a valid document of record of a marriage recognised under the law of England and Wales, Scotland or Northern Ireland or of the Islands [*required evidence of family relationship, (a)(i)*].
- b) In the case of a durable partner or former durable partner who then later married their Sponsor by the relevant date and made their application after 31 December 2020, they must, for the purposes of the *joining family member of a relevant sponsor* route:
  - i. Evidence they were not residing in the UK in a way which meets the requirements of the *family member of a relevant EEA citizen* route [*durable partner, (b)(ii)(aa)(aaa)*].
  - ii. Evidence that they were residing in the UK lawfully before 31 December 2020 [*durable partner, (b)(ii)(aa)(aaa)*].

- iii. Or evidence that they were resident in the UK prior to 31 December 2020 but had a qualifying break in residence which occurred before 31 December 2020 and meant that they were not in the UK again before that date [*durable partner*, (b)(i)(aa)(bbb)].
- iv. A qualifying break in residence prior to 31 December 2020 is a single period of absence which exceeded a total of 6 months in any 12-month period [*continuous qualifying period*, (b)(i)].

123. It is of course important for us to emphasise that the preceding paragraph is not to be taken as a comprehensive shorthand for how the two routes are to be satisfied but as a general overview of some of the differences for the purposes of remaking this decision.

124. This analysis therefore sets the backdrop for the meaning of the final conditions (a) - (d) of the definition of a *joining family member of a relevant sponsor*. In respect of condition (a) we repeat the wording in the rules:

“(a) (where sub-paragraph (c) or (d) below does not apply) they were not resident in the UK and Islands on a basis which met the definition of ‘family member of a relevant EEA citizen’ in this table (where that relevant EEA citizen is their relevant Sponsor) at any time before the specified date; or

125. On the basis of our findings so far, Appellant 1 was not residing in the UK as a family member of a relevant EEA citizen at any time before 31 December 2020 because she was not documented as a durable partner under the EEA Regulations and because she was not married under English and Welsh law until after that date.

126. She did however have an EEA citizen as her Sponsor at the relevant times. For completeness, in respect of the requirement for the Sponsor to be a *relevant* one for the purposes of the *joining family member* definition, we make the following findings:

- a) The date of application was after the specified date and before 1 July 2021 [*relevant Sponsor*, (a)].
- b) The Sponsor is an EEA citizen who was granted indefinite leave to remain under EU2 which had not lapsed, been revoked, cancelled or invalidated [*relevant Sponsor*, (i)(aa)].
- c) There has therefore been no *supervening event* relating to the Sponsor and therefore (c) of EU14A is met.

127. That being the case, we find that Appellant 1 is able to show that condition (a) is met and therefore also show that all of the relevant substantive parts of Annex 1 are met in line with the overall requirements in EU14A.

#### Appellants 2, 3 and 4 – children of a relevant spouse

128. The definition of the relevant relationships for these Appellants as children (as defined in Annex 1) under EU14A is held in *joining family member of a relevant sponsor*, (e):

“ ...

(e) the child or dependent parent of the spouse or civil partner of a relevant sponsor, as described in sub-paragraph (a) above, and all the family relationships:

(i) existed before the specified date (unless, in the case of a child, the person was born after that date, was adopted after that date in accordance with a relevant adoption decision or after that date became a child within the meaning of that entry in this table on the basis of one of sub-paragraphs (a)(iii) to (a)(xi) of that entry); and

(ii) continue to exist at the date of application (or did so for the period of residence relied upon)..."

129. This definition is also to be read with the further definition of *spouse in child* (see above) which allows for those who were *durable partners* before the specified date and were spouses of the *relevant sponsor* by the date of the application (on the *joining family member of a relevant sponsor* route).

130. Drawing that together we find that:

a) Appellants 2, 3 and 4 are the children of Appellant 1 who qualified as a *durable partner* and then a *spouse* at the relevant dates.

b) The relationship with Appellant 1 existed before the specified date ((e)(i)) and at the date of the application ((e)(ii)).

131. In respect of the further conditions in *joining family member of a relevant sponsor* (as explained above), we find that the Appellants meet condition (a) as they did not meet the definition of a *family member of a relevant EEA citizen*.

132. On that basis we find that the Appellants meet the requirements in EU14A read with Annex 1 of Appendix EU.

### **Notice of Decision**

The appeals are allowed under the EU residence scheme rules.

**I P Jarvis**

Deputy Judge of the Upper Tribunal  
Immigration and Asylum Chamber

7 March 2024



**ANNEX**



**IN THE UPPER TRIBUNAL**  
**IMMIGRATION AND ASYLUM CHAMBER**

Case No: UI-2022-006392  
UI-2022-006393  
UI-2022-006394  
UI-2022-006395  
First-tier Tribunal No: EA/03613/2022  
EA/03610/2022  
EA/03616/2022  
EA/03621/2022

**THE IMMIGRATION ACTS**

**Decision & Reasons Issued:**

.....

**Before**

**UPPER TRIBUNAL JUDGE PITT**  
**DEPUTY UPPER TRIBUNAL JUDGE JARVIS**

**Between**

**THE SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Appellant

**and**

**AMNA SHAHZAD**  
**HADI AHMAD**  
**HAJRA SHAHZAD**  
**ABDUR REHMAN AHMAD**  
**(NO ANONYMITY ORDERS MADE)**

Respondents

**Representation:**

For the Appellant: Mr P. Deller, Senior Home Office Presenting Officer  
For the Respondent: Ms G. Patel, counsel instructed by Malik Legal Solicitors Ltd.

**Heard at Field House on 4 September 2023**

**DECISION AND REASONS**

## **Introduction**

1. The Appellant in this case is in fact the Secretary of State for the Home Department, however for ease of reference we refer to the parties as they were at the First-tier Tribunal hearing.
2. For the purposes of this judgment, Mrs Amna Shahzad is Appellant 1; Hadi Ahmad is Appellant 2; Hajra Shahzad is Appellant 3 and Abdur Rehman Ahmad is Appellant 4.
3. The Respondent appeals the decision of First-tier Tribunal Judge Austin (and hereafter “the Judge”) dated 19 October 2022 to allow the Appellants’ appeals against the Respondent’s refusals of their applications made under Appendix EU of the Rules.
4. Permission was granted by Judge Gumsley on 29 December 2022 on the basis that the Judge arguably misapplied the Rules.

## **The relevant background**

5. All four Appellants sought Leave to Remain under Appendix EU on the basis of their relationships to the Sponsor, Mr Amir Sohail Ali, who is a German national: Appellant 1 is his wife and Appellants 2, 3 & 4 are his step-children.
6. Appellant 1 first entered the UK as a visitor on 14 August 2020 (with a visit visa valid until 11 February 2021) in order to visit her mother who was unwell; the remaining Appellants arrived in the UK on 4 September 2020 - they also entered as visitors. Again for completeness, Appellant 2’s visit visa was valid until 27 February 2021; Appellant 3’s visit visa was valid until 1 March 2021 and Appellant 4’s visit visa was valid until 27 February 2021.
7. On 29 August 2020, Appellant 1 married the Sponsor by way of a religious ceremony and began to live with him from 1 September 2020. They later carried out a registry office marriage on 10 May 2021.
8. It appears from the paperwork before us that all four Appellants made their applications under Appendix EU on 4 June 2021. For completeness Appellant 1’s refusal is dated 15 October 2021; Appellant 2’s refusal is dated 3 November 2021; Appellant 3’s refusal is dated 25 August 2021 and Appellant 4’s refusal is dated 19 August 2021.
9. Although nothing turns upon it in respect of the error of law arguments before us, we should note that the Judge appears to have been under the impression that the Appellants had Leave to Remain in the United Kingdom until 30 June 2021 (see para. 12). We were told by Ms Patel that was based upon a concession made by the Presenting Officer.
10. On the face of the documentary evidence before us, there is in fact only evidence that Appellant 1 was granted an Exceptional Assurance by the Respondent valid until 30 June 2021. There is no documentary evidence before us to show that the other three Appellants either applied for an Exceptional Assurance or were given one in similar terms.

## **The Judge's findings**

11. In short, the Judge made the following key findings:

- (a) Appellant 1 and the Sponsor have been cohabiting since 1 September 2020 as have the other three Appellants since they entered the United Kingdom a few days later, para. 11.
- (b) The Judge also accepted that the Sponsor and Appellant 1 were not married until 10 May 2021 due to delays caused by the lockdown during the Covid pandemic, para. 11.
- (c) The Judge also concluded, in somewhat unclear terms, that Appellant 1 is the durable partner of the Sponsor since their relationship began in August 2020, para. 14.
- (d) The Judge further found that Appellant 1 and the Sponsor have lived together in a relationship akin to marriage for at least two years, para. 14.
- (e) At paras. 14 & 15, the Judge concluded that the Appellants qualify as *joining family members of a relevant sponsor* under Appendix EU.
- (f) At para 15, the Judge also found that:
  - i. Appellant 1 is married to a *relevant sponsor*;
  - ii. Appellant 1 meets the definition of a *durable partner* before the specified date (31 December 2020).
  - iii. Appellant 1 was not resident in the UK on a basis which met the definition of a *family member of a relevant EEA citizen* at any time before the specified date.
  - iv. Appellant 1 is therefore not required to show that she was issued with a *relevant document* because she was not resident in the UK before the specified date in a way which met the rules but was visiting the UK lawfully before 31 December 2020.

12. The Judge therefore allowed the appeal under Appendix EU14A of the Rules.

## **The parties' competing arguments**

13. Mr Deller spoke to the Respondent's ground of appeal and, after some discussion with the panel, agreed that in effect his complaints were, firstly that the Judge had conflated two different legal paths under Appendix EU (the *family member of a relevant EEA citizen* route under EU14 and the *joining family member of a relevant sponsor* route under EU14A).

14. Secondly, Mr Deller contended that the Judge's findings on the complicated issues relating to the potential exception for a durable partner to hold a *relevant document* provided for by reference to b(ii)(bb)(aaa) (and hereafter "(aaa)") of the definition of a durable partner in Annex 1 to Appendix EU, were legally insufficient.

15. In her response, Ms Patel provided the Tribunal (and the Respondent) with a rule 24 response which had been served in February 2023, in which she repeated the detailed written submissions she had helpfully provided to the First-tier Tribunal, (dated 13 September 2022) and responded to the Respondent's single ground of appeal.

16. Ms Patel emphasised that the Judge had made findings in respect of both the *family member of a relevant EEA citizen* and *joining family member of a relevant sponsor* routes as both were argued in her written submissions.

17. Ms Patel was unable to assist the Upper Tribunal with any further information about whether or not Appellants 2, 3 & 4 were ever granted Exceptional Assurances by the Respondent but emphasised that the Presenting Officer had conceded that all four Appellants had Leave to Remain until 30 June 2021.
18. Ms Patel relied upon those detailed written submissions and submitted that it was open to the Judge to conclude that Appellant 1 did take the benefit of the exception to the requirement to have a *relevant document* issued before 31 December 2020 provided for in (aaa) of Appendix EU.

### **Findings and reasons**

19. In coming to our conclusions, we have had careful regard to all of the documents in the stitched bundle of 470 pages which includes the original Appellant's skeleton argument (which primarily deals with Article 8 ECHR issues) and the detailed written submissions provided by Ms Patel to the First-tier Tribunal dated 13 September 2022.
20. We should also note that at times Mr Deller's error of law arguments did veer somewhat from the relatively limited way in which the case had been put in writing and so we have sought to restrict our assessment of the Respondent's error of law appeal to the written ground and oral submissions which speak to the detail of that ground.
21. In terms of our specific findings, we should also start by saying that the complexities of Appendix EU and Appendix EU (Family Permit) are well rehearsed in a number of judgments both from the Upper Tribunal and from the Superior Courts. This is particularly reflected in the terms of the version of (aaa) applicable to the Respondent's decision and the appeal before us:

" ...

(ii) where the person is applying as the durable partner of a relevant Sponsor (or, as the case may be, of a qualifying British citizen), or as the spouse or civil partner of a relevant Sponsor (as described in sub-paragraph (a)(i)(bb) of the entry for 'joining family member of a relevant Sponsor' in this table), and does not hold a document of the type to which sub-paragraph (b)(i) above applies, and where:

(aa) the date of application is after the specified date; and

(bb) the person:

(aaa) was not resident in the UK and Islands as the durable partner of a relevant EEA citizen (where that relevant EEA citizen is their relevant Sponsor) on a basis which met the definition of 'family member of a relevant EEA citizen' in this table, or, as the case may be, as the durable partner of the qualifying British citizen, at (in either case) any time before the specified date, unless the reason why, in the former case, they were not so resident is that they did not hold a relevant document as the durable partner of a relevant EEA citizen for that period (where their relevant Sponsor is that relevant EEA citizen) and they did not otherwise have a lawful basis of stay in the UK and Islands for that period; or..."

22. In dealing with the competing arguments before us, we firstly find that the Respondent was properly on notice that the Appellant was seeking to argue both the *family member of a relevant EEA citizen* route under EU14 as well as the *joining family member* route under EU14A via the very detailed submissions document provided by Ms Patel prior to the First-tier Tribunal hearing.
23. Secondly, there is no doubt in our mind that the statutory appeal provisions provided for in the Immigration (Citizens' Rights Appeals) (EU Exit) Regulations 2020 give power to a judge to consider all arguments made under all potentially relevant parts of the applicable rules framework as per reg. 8(3)(b):
- “(b)where the decision is mentioned in regulation 3(1)(c) or (d), it is not in accordance with residence scheme immigration rules;”
24. It is very clear from the written submissions document from Ms Patel that she laid out in detail why the Appellants say that Appellant 1 did not need to have a *relevant document* showing that she had been recognised/facilitated as a durable partner under the 2016 EEA Regulations before the specified date of 31 December 2020. In those submissions Ms Patel also commendably grappled with the torturous wording of (aaa).
25. We have taken that carefully into account, but ultimately the focus of our assessment has to be the decision of the Judge.
26. In looking at the judgment, we can see, at para. 7, a summary of the Presenting Officer's submission that, as no relevant document had been issued under the Rules, Appellant 1 was not entitled to be granted Leave as a durable partner of a relevant EEA citizen.
27. It may be said that, if the summary is correct, the Respondent's position was somewhat limited bearing in mind the issues in the appeal but the difficulty we have with the Judge's decision, in agreement with Mr Deller's main point, is that the Judge simply has not explained why Ms Patel's submission, that Appellant 1 was not required to show a *relevant document*, was accepted and the Respondent's position rejected.
28. In coming to that conclusion, we have kept in mind South Bucks District Council v Porter (2) [2004] UKHL 33, in which the House said at para. 26:
- "The reasons for a decision must be intelligible and they must be adequate. They must enable the reader to understand why the matter was decided as it was and what conclusions were reached on the "principal important controversial issues", disclosing how any issue of law or fact was resolved. Reasons can be briefly stated, the degree of particularity required depending entirely on the nature of the issues falling for decision. The reasoning must not give rise to a substantial doubt as to whether the decision-maker erred in law, for example by misunderstanding some relevant policy or some other important matter or by failing to reach a rational decision on relevant grounds. But such adverse inference will not readily be drawn. The reasons need refer only to the main issues in the dispute, not to every material consideration."
29. We have also applied the reasoning in Simetra Global Assets Ltd & Anor v Ikon Finance Ltd & Ors [2019] EWCA Civ 1413 at para. 46:

“Without attempting to be comprehensive or prescriptive, not least because it has been said many times that what is required will depend on the nature of the case and that no universal template is possible, I would make four points which appear from the authorities and which are particularly relevant in this case. First, succinctness is as desirable in a judgment as it is in counsel's submissions, but short judgments must be careful judgments. Second, it is not necessary to deal expressly with every point, but a judge must say enough to show that care has been taken and that the evidence as a whole has been properly considered. Which points need to be dealt with and which can be omitted itself requires an exercise of judgment. Third, the best way to demonstrate the exercise of the necessary care is to make use of "the building blocks of the reasoned judicial process" by identifying the issues which need to be decided, marshalling (however briefly and without needing to recite every point) the evidence which bears on those issues, and giving reasons why the principally relevant evidence is either accepted or rejected as unreliable. Fourth, and in particular, fairness requires that a judge should deal with apparently compelling evidence, where it exists, which is contrary to the conclusion which he proposes to reach and explain why he does not accept it.”

30. We therefore find that the Judge was required, as a matter of law, to provide sufficient detail in the final paragraphs of the judgment in order for the Respondent to understand why her position on the correct approach to the wording of (aaa) was not accepted.
31. Looking at para. 15, the Judge ultimately says no more than that they agree with the Appellants' argument - we find that this is plainly not a lawful finding applying the authorities quoted above.

### **Notice of Decision and Directions**

32. On that basis then we conclude that the Judge did materially err in the way laid out above and we set aside the decision.
33. We can see no need for the Judge's findings in respect of the cohabitation of the Appellants with the Sponsor and the nature of the relationship to be set aside and so these are preserved. The parties will of course focus their attention on those findings in the context of the relevant dates as described in the relevant parts of Appendix EU.
34. Due to the complexities inherent in this case and the relatively unusual factual issues arising in respect of the immigration statuses of the four Appellants, we direct that the parties provide skeleton arguments for the next hearing and in drafting those documents expressly deal with the following key issues:
- (a) Does the Respondent maintain the concession that the Appellants had Leave to Remain up until 30 June 2021?
  - (b) If not, is there any evidence that the Respondent gave Exceptional Assurances to Appellants 2, 3 & 4?
  - (c) On the basis that Appellant 1 has evidenced that she was given such an Assurance, what do the parties say about the status of the Exceptional Assurance? In other words, is it said that this constituted Leave to Remain?

- (d) If the Assurance did not constitute Leave to Remain, was Appellant 1 nonetheless residing in the UK as a visitor when the application was made on 4 June 2021?
- (e) If she was not, was she nonetheless residing in the UK lawfully at that time?
- (f) Is there a difference in the relevant date of consideration between an application under EU14 and one made under EU14A?
- (g) What is the correct interpretation of (aaa) as applicable to this appeal?
- (h) What does “that period” within the wording of (aaa) mean?

35. The skeleton arguments should be served no later than 14 days before the date of the rehearing.

***I P Jarvis***

Deputy Judge of the Upper Tribunal  
Immigration and Asylum Chamber

8 September 2023