UT Neutral Citation Number: [2024] UKUT 00068 (IAC)

Hani (EUSS durable partners: para. (aaa))

Upper Tribunal
(Immigration and Asylum Chamber)

Heard on 8 January 2024
Promulgated on 21 February 2024

THE IMMIGRATION ACTS

Before

UPPER TRIBUNAL JUDGE STEPHEN SMITH
DEPUTY UPPER TRIBUNAL JUDGE JARVIS

Between

Sherif Hani
(NO ANONYMITY DIRECTION MADE)

Appellant

and

Secretary of State for the Home Department

Respondent

Representation:
For the Appellant: Mr P. Georget, Counsel instructed by Malik and Malik Solicitors
For the Respondent: Mr P. Deller, Senior Home Office Presenting Officer

(1) The effect of paragraph (b)(ii)(bb)(aaa) of the definition of "durable partner" in Annex 1 of Appendix EU to the Immigration Rules, as inserted by Statement of Changes HC 813 (from 31 December 2020 to 11 April 2023), is that a person who was in a durable partnership but did not have a "relevant document", and who did not otherwise have a lawful basis of stay in the United Kingdom at the "specified date" of 31 December 2020 at 11.00PM, is incapable of meeting the definition of "durable partner".

(2) Nothing in the amendment to paragraph (aaa) made by HC 1160 with effect from 12 April 2023 calls for a different approach.

(3) Secretary of State for the Home Department v Kabir UI-2022-002538 did not seek to give guidance about para. (aaa) and does not establish any proposition to be followed.

(4) A "lawful basis of stay" under para. (aaa) does not include residence in the United Kingdom on immigration bail.

DECISION AND REASONS

1. In this decision, we address:

   a. The meaning of paragraph (b)(ii)(bb)(aaa) ("para. (aaa)") in the definition of "durable partner" in Annex 1 to Appendix EU of the Immigration Rules ("the first issue"); and

   b. Whether being subject to immigration bail under Schedule 10 to the Immigration Act 2016 ("the 2016 Act") amounts to a "lawful basis of stay" for the purposes of para. (aaa) ("the second issue").

2. The questions arise for consideration in the context of an appeal against a decision of the Secretary of State dated 23 June 2021 to refuse the appellant's application for leave to remain under the EU Settlement Scheme ("the EUSS") as a durable partner.

3. The appeal was originally heard and allowed by First-tier Tribunal Judge R. Sullivan ("Judge Sullivan") under the Immigration (Citizens' Rights Appeals) (EU Exit) Regulations 2020 ("the 2020 Regulations"). The Secretary of State appealed to the Upper Tribunal. By a decision promulgated on 19 April 2023, Upper Tribunal Judge Rimington allowed the Secretary of State's appeal, set aside the decision of the First-tier Tribunal, and directed that the matter be reheard in the Upper Tribunal, acting under section 12(2)(b)(ii) of the Tribunals, Courts and Enforcement Act 2007. It was in those circumstances that the matter resumed before us.

4. We record our considerable gratitude to both advocates for the quality of their submissions.

Factual background

5. The appellant is a citizen of Albania born in March 1993. He claims to have entered the UK clandestinely in January 2018. He claimed asylum in June 2020 and was placed (and remains) on immigration bail. In early August 2020, he met Ana-Maria Podaru, a citizen of Romania to whom we will refer as "the sponsor". They entered a relationship and began to cohabit in September 2020. In December 2020, the appellant withdrew his claim for asylum and, on 10 February 2021, applied for pre-settled status under the EUSS as the durable partner of the sponsor. The application was refused on 23 June 2021, and it is that refusal decision that is under appeal before us.

6. The appellant and the sponsor married on 22 June 2021. On 16 December 2021, the sponsor gave birth to the appellant's son. Judge Sullivan found that the appellant's relationship with the sponsor was genuine and subsisting, and

accepted that it was a durable partnership. Those findings were not challenged by the Secretary of State and we approach our analysis on the footing that the appellant and the sponsor are in a durable partnership.

7. The Secretary of State refused the appellant's EUSS application because he had not provided a "relevant document" demonstrating that his residence as a durable partner had been recognised by the Secretary of State. He had not, therefore, provided sufficient evidence to confirm that he was a durable partner of a relevant EEA citizen, and did not meet the requirements for settled or pre-settled status under the EUSS.

Principal controversial issues

8. Para. (aaa) of the definition to "durable partner" in Annex 1 of Appendix EU enables certain persons in a durable partnership to meet the definition of "durable partner" even where they did not hold a residence card in that capacity prior to the specified date of 31 December 2020 at 11.00PM. The appellant's case is that the Secretary of State's decision of 23 June 2021 is not in accordance with the "residence scheme immigration rules" (i.e., Appendix EU of the Immigration Rules: see section 17(1) of the EU Withdrawal Agreement Act 2020) for the purposes of regulation 8(3)(b) of the 2020 Regulations. On his case, because he was on immigration bail imposed in December 2020 at the specified date of 11.00PM on 31 December 2020, he otherwise had a "lawful basis of stay in the United Kingdom" for the purposes of para. (aaa), did not need a "relevant document", and accordingly met the definition of durable partner.

9. In the version relevant to these proceedings, para. (aaa) is engaged where an applicant:

> "(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**…" (Emphasis added)

10. Put simply, Mr Georget's case is as follows:

    a. Para. (aaa) exempts those in a durable partnership from the need to have held a relevant document if they otherwise had "a lawful basis of stay in the UK…";

    b. The appellant's immigration bail was a "lawful basis of stay";

    c. Accordingly, the appellant's durable partnership with the sponsor was such that he meets the definition of "durable partner", and the appeal should be allowed.

11. For the Secretary of State, Mr Deller agrees with point (a), above, but submits that immigration bail is incapable of amounting to a "lawful basis of stay" in the sense envisaged by para. (aaa). The appeal should be dismissed.

THE FIRST ISSUE

The law: “durable partner” and para. (aaa)

12. The version of the definition of “durable partner” in Annex 1 to Appendix EU relevant to these proceedings is that inserted by HC 813, and was in force from 31 December 2020 until 11 April 2023. On 12 April 2023, HC 1160 made minor amendments to the definition. For the reasons we will address in due course, those amendments appear to have made no substantive changes to the underlying eligibility criteria in the definition.

13. The definition of “durable partner” at the date of the appellant’s application to the Secretary of State was that:

> “(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 two years (unless there is other significant evidence of the durable relationship); and
>
> (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 subparagraph (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…”

14. The “specified date” for present purposes was 31 December 2020 at 11.00PM.

Decisions of the Upper Tribunal: *Basha, Drini* and *Kabir*

15. The parties note that although there has been no reported authority concerning para. (aaa), there are at least two unreported authorities which do engage with and advance consistent positive explanations of para. (aaa): *Basha v Secretary of State for the Home Department* UI-2022-003113 (promulgated on 10 March 2023) and *Drini v Secretary of State for the Home Department* UI-2022-000383 (promulgated on 24 April 2023). Mr Georget invited us to follow the approach taken by these decisions, with some refinements to reflect the facts of these proceedings. Mr Deller expressly endorsed the reasoning in *Basha*, and did not demur in relation to *Drini*.

16. In *Basha*, the First-tier Tribunal had treated the "unless" clause at the heart of para. (aaa) as a positive attribute, meaning that a person in a durable partnership *without* a lawful basis of stay (and without a relevant document) was able to meet the definition of "durable partner". Mr Basha had been in a durable partnership but otherwise had no lawful basis of stay and, acting in reliance on para. (aaa), the First-tier Tribunal allowed his appeal. The Secretary of State appealed to the Upper Tribunal; the appeal was allowed, the decision of the First-tier Tribunal was set aside and remade, and the appellant's appeal was dismissed. At para. 31 of the Upper Tribunal's decision, the panel held that the "unless" meant that where a putative durable partner did not hold a "relevant document" and did not otherwise have a lawful basis of stay, the criteria in para. (aaa) were incapable of being satisfied:

> "If the 'unless' exception is engaged, the 'first half' criteria in paragraph (aaa) [i.e. the criteria preceding the 'unless'] are incapable of being satisfied, and this route to qualify as a durable partner falls away. Put another way, if the 'unless' applies, an applicant will not be able to avail themselves of the route to recognition as a durable partner provided by the first half criteria in paragraph (aaa)."

17. In *Drini*, the appellant's circumstances were similar to those of Mr Basha. He was found to be in a durable partnership on the specified date of 31 December 2020, but otherwise had no lawful basis of stay. His appeal was dismissed by the First-tier Tribunal, and on his appeal to the Upper Tribunal he submitted that para. (aaa) meant that his unlawful residence had the effect of disapplying the requirement to hold a "relevant document", and that it should have been allowed. The appeal was dismissed by Upper Tribunal Judge Mandalia for reasons very similar to those adopted in *Basha*. See para. 24:

> "The word 'unless' introduces an exception. The effect of that exception is that where an applicant can bring themselves within the scope of what follows after the word 'unless', the 'first-half' criteria in paragraph (aaa) are incapable of being satisfied, and that route to qualify as a durable partner falls away. In other words, if the 'unless' applies, an applicant will not be able to avail themselves of the route to recognition as a durable partner provided by the first half criteria in paragraph (aaa)."

18. The above unreported decisions may be contrasted with *Secretary of State for the Home Department v Kabir* UI-2022-002538, to which Mr Georget referred at para. 8 of his skeleton argument. The facts in *Kabir* were similar to the present matter, and those in *Basha* and *Drini*; the appellant had no lawful basis of stay on 31 December 2020, but was in a durable partnership. Relying on para. (aaa), the First-tier Tribunal allowed the appeal. The Secretary of State appealed. By a

decision promulgated on 3 January 2023, a panel of the Upper Tribunal dismissed the appeal, on the basis that the meaning of para. (aaa) was not clear, and the Secretary of State had not demonstrated how and why the First-tier Tribunal made an error of law.

19. Neither party encouraged us to adopt the approach taken in *Kabir*, and we respectfully do not do so. Properly understood, the conclusion in *Kabir* was that it was not possible to reach a conclusion concerning the meaning of para. (aaa) on the basis of the submissions of the parties in those proceedings. *Kabir* did not rule out the possibility that a meaningful construction of para. (aaa) could be possible. In *Basha* and *Drini*, both of which post-date *Kabir*, different constitutions of the Upper Tribunal reached detailed, substantive and consistent conclusions about the interpretation of para. (aaa), on the basis of fuller submissions and greater assistance than the tribunal enjoyed in *Kabir*. We have considered the conclusions in *Basha* and *Drini* for ourselves (noting that a member of the present panel was also a member of the panel in *Basha*), and respectfully adopt them.

Para. (aaa): requirement for relevant document where no other lawful basis of stay

20. The following analysis is largely adopted from the reasoning in *Basha*.

21. The drafting of para. (b)(ii)(bb)(aaa) is complex. Particular confusion has arisen due to the "unless" clause towards the end of the paragraph. As set out above, on some constructions, the "unless" serves to benefit a person unlawfully present in the UK, as though it renders an applicant's otherwise unlawful presence in the UK a positive attribute, and part of the criteria to be recognised as a durable partner.

22. Such a construction would lead to an absurdity. It would enable putative durable partners who would otherwise not enjoy any lawful immigration status to be able to rely on their unlawful presence as a means to regularise their stay. In our judgment, it is unlikely that the Secretary of State sought to introduce such a far-reaching amnesty through the drafting of para. (aaa). Properly understood, it cannot have that effect.

23. It is important to recall that, by definition, para. (b)(ii)(bb)(aaa) only applies to applicants who are or were in a durable relationship with a relevant EEA citizen: see paragraph (a) of the definition of "durable partner". The analysis that follows therefore takes place on the footing that the existence of a durable relationship with an EEA sponsor is not in issue (as found by the judge in these proceedings). Merely being in a durable partnership with an EEA national does not render an applicant a "durable partner" for the purposes of Appendix EU, of course; that is the question the definition of "durable partner" goes onto address, and which we consider below.

24. Para. (b)(ii)(bb)(aaa) is in two halves, separated by the "unless". The requirement imposed by the "first half" is as follows:

> "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…"

25. The “first half criteria”, as we shall call them, are relatively self-explanatory. The term “not resident… as” introduces a qualitative requirement for the applicant’s residence *not* to have been in a capacity which met the definition of a “family member of a relevant EEA citizen.” The “not” means that an applicant’s residence must not have been in that capacity in order to meet that criterion. It is hardly surprising that such residence must “not” have been on that basis, since para. (b)(i) addresses cases where an applicant’s residence was as a recognised durable partner, in possession of a relevant document.

26. Most third country applicants with no pre-specified date lawful basis of stay who marry an EEA sponsor after the specified date will meet the “first half criteria” with ease: by definition, they will not have been resident as the durable partner of a relevant EEA citizen or qualifying EEA citizen during the relevant period. On a straightforward reading an application of the “first half” of para. (aaa), therefore, most such applicants would succeed.

27. The first half criteria, taken in isolation, therefore cast the net very broadly: the criteria encompass those in a durable partnership who are unlawfully resident, on the one hand, and migrants with a lawful immigration status, on the other. For example, a student with leave to remain in the UK on that basis who is in a durable relationship with an EEA national without a relevant document would *not* have been:

> “…resident in the UK and Islands as the durable partner of a relevant EEA citizen… on a basis which met the definition of ‘family member of a relevant EEA citizen…’”

28. It follows that the “first half criteria” are strikingly broad. But for an exception to their scope, most unlawfully resident putative durable partners would succeed under para. (aaa), even though (i) they were unlawfully resident at the relevant times; (ii) had not applied for their claimed durable partnership to be facilitated prior to the conclusion of the implementation period; and (if relevant) (iii) did not marry an EEA national until after the UK’s withdrawal from the EU was complete. That cannot have been the intention of the rules. It would lead to the absurdity identified above.

29. It is at this stage in the analysis that the “unless” enters the equation. It is a conjunction; it introduces an exception to the previous criteria, namely the otherwise very broad “first half criteria” in para. (aaa). In this connection we respectfully adopt para. 31 of *Basha*, which we quoted in part above, and now do so in full:

> “The scope of the first half criteria is narrowed in the following way by the ‘unless’. If the ‘unless’ exception is engaged, the ‘first half’ criteria in paragraph (aaa) are incapable of being satisfied, and this route to qualify as a durable partner falls away. Put another way, if the ‘unless’ applies, an applicant will not be able to avail themselves of the route to recognition as a durable partner provided by the first half criteria in paragraph (aaa).”

30. We therefore turn to the “unless” criteria in the “second half” of para. (aaa). Understood against the above background, the “second half” criteria assume a significance and clarity which is not otherwise readily apparent.

31. The “second half” of para. (aaa) provides:

> “…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"

32. Application of the "unless" requirement involves an examination of the reasons why an applicant ostensibly meets the first half criteria. It involves consideration of two factors, both of which must be present in order to disqualify an applicant from enjoying the otherwise broad benefit of the first half criteria in para. (aaa). The two "unless" requirements are as follows:

    a. First, "the reason why… they were not so resident is that they did not hold a relevant document as the durable partner of a relevant EEA citizen…"

    b. Secondly, "and they did not otherwise have a lawful basis of stay in the UK and Islands for that period…"

33. As to "*did not hold a relevant document*", this criterion means that the applicant had not been issued with a relevant document, namely a residence card (or an EEA Family Permit) as a durable partner under the 2016 Regulations. The inclusion of this criterion underlines the centrality of holding a relevant document to an individual's recognition as a durable partner under the regime under Article 3(2)(b) of Directive 2004/38/EC. The requirement to have held a relevant document reflects the nature of the facilitation duty to which the UK was subject under Article 3(2)(b) of Directive 2004/38/EC (both in its application to the UK as a Member State, and pursuant to the EU Withdrawal Agreement during the implementation period). The need to hold a relevant document as a durable partner flows from the fact that residence rights enjoyed by durable partners were those that were conferred by the host Member State following an extensive examination of the personal circumstances of an applicant, rather than existing as a matter of law pursuant to the EU Treaties or Directive 2004/38/EC. To enjoy a right to reside as a durable partner required a positive step on the part of the UK as the host Member State in the form of issuing a relevant document; the Withdrawal Agreement refers to holding a relevant document as residence being "facilitated": see Art. 10(2).

34. Again, the class of persons who would not have been resident as a durable partner because they did not hold a document in that capacity would, in principle, be very broad. It would encompass unlawfully resident applicants, on the one hand, and a potentially limitless cadre of those holding leave to remain (or another form of right to reside), on the other.

35. The operative wording of the "unless" exception is therefore found in the final clause: "*and they did not otherwise have a lawful basis of stay in the UK and Islands for that period...*" This is the crucial wording that gives effect to the "unless" and avoids the otherwise absurd consequences that would result, but for the engagement of the exception. It requires an examination of the immigration status of the applicant at the relevant time. It is the means by which para. (aaa) distinguishes between applicants with no lawful basis of stay, on the one hand, and persons with a lawful basis of stay on some other basis, on the other.

36. A person with no lawful basis of stay at the relevant times is incapable of satisfying paragraph (aaa). By contrast, an applicant who held leave in some other capacity, for example as a student, would otherwise have had a lawful basis of stay in the UK.

37. There is a logic to this construction, which must reflect the intention of the EUSS and the Withdrawal Agreement. Those who enjoyed a lawful basis of stay will not be penalised for having failed to obtain a document they didn't need. By contrast, those who did not hold a relevant document (nor applied for the facilitation of their relationship prior to the conclusion of the implementation period) yet were present unlawfully prior to the end of the implementation period and remain so unlawfully resident in the UK cannot regularise their status through the EUSS. That is entirely consistent with the Withdrawal Agreement, and the Immigration Rules drafted to give it effect.

Statement of Changes to the Immigration Rules HC 1160

38. With effect from 12 April 2023, para. (aaa) in the definition of "durable partner" was amended by HC 1160 to read:

> "(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.".

39. While this rule change introduces a degree of clarity through the use of two bullet points, we do not consider it to make any substantive change to the underlying eligibility criteria contained in the original version of para. (aaa). The operative wording is identical. The introduction of the bullet points appears to be intended to make the provision easier to read, while retaining the substantive requirements of the original version.

Conclusion: para. (aaa)

40. Drawing this analysis together, our conclusions concerning para. (aaa) are:

a. The effect of paragraph (b)(ii)(bb)(aaa) of the definition of "durable partner" in Annex 1 of Appendix EU to the Immigration Rules, as inserted by Statement of Changes HC 813 (from 31 December 2020 to 11 April 2023), is that a person who was in a durable partnership but did not have a "relevant document", and who did not otherwise have a lawful basis of stay in the United Kingdom at the "specified date" of 31 December 2020 at 11.00PM, is incapable of meeting the definition of "durable partner".
b. Nothing in the amendment to paragraph (aaa) made by HC 1160 with effect from 12 April 2023 calls for a different approach.
c. *Secretary of State for the Home Department v Kabir UI-2022-002538* did not seek to give guidance about para. (aaa) and does not establish any proposition to be followed.

THE SECOND ISSUE

Lawful basis of stay: submissions

41. This issue concerns the meaning of the requirement that a putative durable partner "did not otherwise have a lawful basis of stay in the UK and Islands for that period…"

42. Mr Georget's case is that, by being placed on immigration bail in December 2020 (the precise date is unclear to us), the appellant's "stay" in the UK acquired a lawful basis, and that, accordingly, he satisfied para. (aaa). He makes the following submissions.

43. First, Mr Georget accepts that the term "lawful basis of stay" is not defined in Annex 1 for the purposes of the EUSS, or elsewhere in the legislative and Immigration Rules landscape of the EUSS. In his submission, the term cannot simply be shorthand for holding leave to remain (or permission to stay) for otherwise that would have been the term used by the rules. Paragraph 6 of the Immigration Rules defines the term "permission to stay" as meaning leave to remain under the Immigration Act 1971; nothing in para. (aaa) seeks to rely on that terminology, or otherwise define the term. Adopting the approach in *Mahad v Entry Clearance Officer* [2009] UKSC 16, immigration bail is capable of amounting to a "lawful basis of stay".

44. Secondly, where elsewhere the Immigration Rules deal with the issue of lawful residence, the concept is not simply equated with leave to remain. For example, at the time of the appellant's application other provisions of the Immigration Rules then in force, namely para. 276A(b), treated periods spent on temporary admission as lawful residence, provided such periods were followed by a grant of leave. The Immigration Rules cannot be assumed to be internally incoherent or inconsistent, pursuant to *Mahad*.

45. Prior to its amendment on 6 April 2022, para. 276A(b) provided:

> "'lawful residence' means residence which is continuous residence pursuant to:
>
> (i) existing leave to enter or remain; or
>
> (ii) temporary admission within section 11 of the 1971 Act where leave to enter or remain is subsequently granted"

46. Thirdly, in *SC (Jamaica) v Secretary of State for the Home Department* [2017] EWCA Civ 2112, Sir Ernest Ryder equated "lawful", in the sense of "lawfully resident" under para. 399A of the Immigration Rules, with "permitted by law": see para. 56. The appellant in those proceedings had been granted temporary admission upon his arrival in the UK, and held that status until he was later granted indefinite leave to remain as a refugee in line with his mother. The period for which SC was on temporary admission was held to count towards the periods for which he was regarded as being "lawfully resident" in the UK. The appellant's residence on immigration bail, which has superseded temporary admission, should be treated in the same way.

47. Fourthly, the Secretary of State's operational policy guidance *EU Settlement Scheme: EU other EEA and Swiss citizens and their family members*, Version 17.0 (relied which the Secretary of State relied upon at para. 1(g) of the grounds of appeal to the Upper Tribunal), supports the appellant's case. At page 119 it gives the example of a migrant with leave as a student as having a lawful basis of stay. The significance lies in the fact that the example of the student is merely *an example*; the guidance does not seek to adopt the same restrictive approach as the Secretary of State.

48. In response, Mr Deller accepted that "lawful basis of stay" in para. (aaa) is not restricted to holding leave to remain. The concept would encompass, for example, those exempt from immigration control under section 8 of the Immigration Act 1971, such as the members of diplomatic missions. Mr Deller submitted that the fact that Appendix EU does not define the term does not mean that the concept may simply be imported from elsewhere in the rules. The reason for this aspect of para. (aaa) is relevant; its intention was to avoid those who did not need to obtain a relevant document as a durable partner because they had another lawful basis of stay were not subsequently exposed to unfairness through having not obtained a document they did not need at the time. It would be extraordinary, he submitted, if para. (aaa) treated those on immigration bail as having a "lawful basis of stay", thereby enabling anyone who had claimed asylum and who was in a durable partnership on 31 December 2020 to regularise their stay on that basis.

Legal framework

49. Immigration bail is established by Schedule 10 to the Immigration Act 2016 ("the 2016 Act"). In broad terms, para. 1 of Schedule 10 provides that the Secretary of State may grant a person immigration bail if the person is being detained under powers pertaining to their examination or removal (para. 16(1), (1A), (2) of Schedule 2 to the 1971 Act, section 62 of the Nationality, Immigration and Asylum Act 2002), or under powers pertaining to their deportation (para. 2(1), (2), (3) of Schedule 3 to the 1971 Act, section 26(1) of the UK Borders Act 2007). The power is also engaged where a person is liable to detention under one of the above provisions: para. 1(2), and may also be exercised by the First-tier Tribunal, on application (see para. 1(3)).

50. The present immigration bail regime repealed the former temporary admission regime which preceded it: see para. 20 of Schedule 10. The regime provisions are relevant since they formed part of the reasoning in *SC*. Immediately before its repeal, para. 21(1) of Schedule 2 to the 1971 Act provided:

> "(1) A person liable to detention or detained under paragraph 16(1), (1A) or (2) above **may, under the written authority of an immigration officer, be temporarily admitted to the United Kingdom** without being detained or be released from detention; but this shall not prejudice a later exercise of the power to detain him."

Immigration bail not a "lawful basis of stay" for the purposes of para. (aaa)

51. The principles we are to apply are not in dispute. In *Odelola v Secretary of State for the Home Department* [2009] UKHL 25, [2009] 1 WLR 1230 at para. 4, Lord Hoffman summarised the task of constructing a provision of the Immigration Rules in these terms:

> "Like any other question of construction, this 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."

52. At para. 10 of *Mahad*, Lord Brown said:

> "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."

53. Later in the same paragraph, Lord Brown accepted that central question was what the Secretary of State intended by making the rules, but clarified that:

> "that intention is to be discerned objectively from the language used, not divined by reference to supposed policy considerations."

54. Starting from first principles, the EUSS implements the EU Withdrawal Agreement. The Withdrawal Agreement is by its very nature a transitional agreement. It governs the UK's transition from EU Member State to being a third country, from the perspectives of the EU and its Member States, the UK, and citizens of those countries and third countries.

55. The EUSS was intended to make provision to provide post-Brexit rights of residence for EU citizens and their family members, including durable partners. In some cases, the provision made by the EUSS goes beyond the minimum standards imposed by the Withdrawal Agreement.

56. Prior to the UK's withdrawal from the EU, non-EU citizens in a "durable relationship, duly attested" with an EU citizen enjoyed relatively preferential rights to have their residence "facilitated" as a matter of domestic law, and the host Member State was obliged to undertake an extensive examination of their personal circumstances, and to justify any denial of entry or residence: see Art. 3(2)(b) of Directive 2004/38/EC on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States ("the Directive"). In contrast to the rights of residence enjoyed by EU citizens and their non-EU family members under Article 2(2) and Articles 20 and 21 of the Treaty on the Functioning of the European Union, rights of residence (as opposed to mere facilitation) enjoyed by so-called "durable partners" were conferred by domestic law. The position was summarised in these terms in *Celik v Secretary of State for the Home Department* [2023] EWCA Civ 921 at para. 13:

> "Any right to reside [enjoyed by a durable partner] was granted by the Member State in accordance with its national legislation and the Member State had a wide discretion as to the factors to be taken into account in deciding whether to grant a right to reside to an extended family member. The criteria used had to be consistent with the normal meaning of 'facilitate' and 'dependence' and could not deprive them of effectiveness, and the individual was entitled to a judicial remedy to ensure that the national legislation remained within the limits set by the Directive."

57. Durable partners and other extended family members are dealt with by Article 10(2) to (5) of the Withdrawal Agreement. The agreement addresses three scenarios involving durable partners:

a. First scenario: durable partners whose residence "was facilitated" by the host Member State before the end of the implementation period, at 11.00PM on 31 December 2020: Article 10(2);

b. Second scenario: durable partners who had applied for facilitation before the end of the implementation period, but in relation to whom a decision had not been taken before the conclusion of the implementation period and whose residence is "being facilitated" (that is, under consideration for substantive facilitation through a pending application): Article 10(3);

c. Third scenario: durable partners who (i) were in a relationship with an EU citizen before the conclusion of the implementation period, but (ii) who resided outside the host State before the end of the implementation

period, provided the relationship continues at the point residence is sought ("a joining durable partner"). See Article 10(4). This paragraph provides that such a right to reside will be "without prejudice to any right to residence which the persons concerned may have in their own right."

58. There is at least one further durable partner scenario that is not addressed by the Withdrawal Agreement ("the fourth scenario"), namely where a third country durable partner resided lawfully in the UK at the conclusion of the implementation period on a basis other than as a durable partner, and later seeks leave to remain under the EUSS as a durable partner. It is hardly surprising the Withdrawal Agreement did not cover such persons; they were lawfully resident under the UK's domestic immigration regime. Their UK-based residence was wholly outside the scope of EU law.

59. The fourth scenario is the category of residence captured by para. (aaa). As we have set out above, the "unless" in para. (aaa) means that those in a durable partnership at the end of the implementation period who had another lawful basis of stay, and so had no need to apply for their residence to be facilitated as a durable partner, will not be penalised for having failed to obtain a "relevant document" they did not need.

60. Article 10(4), addressing the third scenario identified above, sheds light on the approach of the agreement to putative durable partners who may hold a separate right of residence in their own capacity. It recognises and confirms that prospective durable partners may hold such a right of residence without prejudice to their potential status as a durable partner. It allows a prospective durable partner to choose to rely on the Article 10(4) facilitation route, or to pursue a (parallel) right of residence in their own capacity.

61. It is significant that Article 10(4) recognises that durable partners may have a right to residence in their own capacity and expressly preserves their ability to rely on such a right of residence. It is significant that the parties to the agreement recognised that a putative durable partner may legitimately have a right of residence in their own capacity, which may exist in parallel to any facilitation right that individual may in due course enjoy as a joining family member.

62. It is against that background that the EUSS, and para. (aaa) in particular, sought to make provision to address the position of durable partners. Para. (aaa) was intended to ensure that those who did not need to rely on the facilitation rights they enjoyed under Directive 2004/38/EC due to holding another lawful basis of stay would not be penalised for deciding not to rely on rights they did not need. As we have set out above, the Withdrawal Agreement makes clear that durable partners' rights of residence under the agreement are not mutually exclusive with any other bases of stay the individual may have in his or her own right.

63. That approach may be contrasted with a person on immigration bail under Schedule 10. The power to grant immigration bail is engaged where a person is being detained under immigration powers, or is liable to be so detained. By definition, immigration detention powers are not engaged in relation to a person who is lawfully resident in the United Kingdom. As the editors of *Macdonald's Immigration Law and Practice*, 10th Ed., put it at para. 17.74, "In all cases where the Secretary of State or immigration officers have a power to detain, they also have a power to release." Immigration bail powers are used to regulate the conditions under which a person is released from detention, or subject to non-detention based curtailment of their liberty, through the imposition of a range of

conditions, such as reporting conditions, employment or work conditions, residence conditions, electronic monitoring conditions and others: see para. 2 to Schedule 10. Nothing in Schedule 10 supports the proposition that being subject to such conditions (and the imposition of *a* condition is a mandatory requirement of immigration bail: see Schd. 10, para. 2(1)) has the ability to convert a person's presence in the UK to a lawful basis of stay.

64. We do not consider that the appellant is aided by the judgment of the Court of Appeal in *SC*, for the following reasons.

65. First, *SC* concerned temporary admission and not immigration bail.

66. Secondly, para. 276A(b) of the rules, to which Sir Ernest Ryder looked for assistance, has been revoked and is no longer in force"; at para. 56, Sir Ernest ascribed significance to the "internal consistency" of the use of the term in paras 276A(b) and 399A(a) of the rules as then in force.

67. Thirdly, the context in *SC* was a retrospective examination of the status of an appellant placed on temporary admission who was later granted indefinite leave to remain as a refugee, for the purposes of ascertaining the overall length of his "lawful residence". Consistent with para. 276A(b) as then in force, SC's time on temporary admission retrospectively acquired a quality it did not have at the time, by virtue of the subsequent regularisation of SC's status. It was in that context that Sir Ernest Ryder held that SC's residence on temporary admission was "lawful residence."

68. The analysis in *SC* is therefore of no assistance to the appellant in these proceedings. The present issue is not whether the appellant's overall length of residence may retrospectively be categorised as lawful, in light of a subsequent grant of leave. Unlike SC, there has been no grant of refugee status, nor other event capable of retrospectively changing the quality of his immigration bail status. The appellant remains on the immigration bail he was placed on when claiming asylum, a claim he has since withdrawn. The issue in this case concerns the quality of the appellant's residence at a particular point in time, namely 11.00PM on 31 December 2020. That reflects the context and purpose of the EUSS. It is a transitional regime, concerned with rights and quality of residence at a particular point in time, for the purposes of determining the onward, post-Brexit immigration status of those within the scope of the Withdrawal Agreement and the EUSS.

69. In conclusion, we consider that "lawful basis of stay" in para. (aaa) does not include residence in the United Kingdom on immigration bail. That takes into account the language of the EUSS, the purpose and approach of the Withdrawal Agreement to comparable scenarios, other provisions of the Immigration Rules, the immigration bail regime and the circumstances under which liability to be placed on immigration bail is engaged, and the extracts of *SC* to which we were referred.

Conclusion : para. (aaa) applied to the appellant's case

70. At 11.00PM on 31 December 2020 the appellant was on immigration bail. That was not a "lawful basis of stay" for the purposes of para. (aaa), with the consequence that the absence of a "relevant document" was fatal to his application succeeding as the durable partner of Ms Podaru, the sponsor.

71. The Secretary of State's decision of 23 June 2021 was thus in accordance with the residence scheme immigration rules, and this appeal is dismissed.

Notice of Decision

The decision of Judge Sullivan involved the making of an error of law and is set aside.

We remake the decision, dismissing the appeal.

Stephen H Smith

Judge of the Upper Tribunal
Immigration and Asylum Chamber

20 February 2024