IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No.: UI-2022-003508
First-tier Tribunal No: EA/07669/2021

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On the 04 April 2024

Before

DEPUTY UPPER TRIBUNAL JUDGE MONSON

Between

FATJON MUSTAJ
(ANONYMITY ORDER NOT MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr Tom Wilding, Counsel instructed by AJ Jones Solicitors
For the Respondent: Mr Tony Melvin, Senior Home Office Presenting Officer

Heard at Field House on 18 March 2024

DECISION AND REASONS

1. The appellant has been granted permission to appeal against the decision of First-tier Tribunal Judge Bart-Stewart promulgated on 28 June 2022 ("the Decision"). By the Decision, the Judge dismissed the appellant's appeal against the decision of the Secretary of State to refuse to grant the appellant settled or pre-settled status under the EU Settlement Scheme in the capacity of a durable partner of a relevant EEA citizen.

Relevant Background

2. The appellant is a national of Albania, whose date of birth is 6 June 1997. He says he entered the United Kingdom illegally in April 2017.

3. On 7 April 2021 the appellant sought to regularise his status in the UK by making an application for pre-settled status as the spouse of Andrea Maria Todea, a Romanian national, who had been granted pre-settled status on 1 May 2020. He said that he had met his sponsor in November 2019 and that they had started a relationship soon afterwards. They had begun to live together in November 2020, and they had got married on 3 April 2021.

4. In the refusal decision, the Secretary of State said that the appellant had not provided sufficient evidence to confirm that he was a durable partner of a relevant EEA citizen. This was because the required evidence of family relationship for a durable partner of a relevant EEA citizen, prior to marriage, was a valid family permit or residence card issued under the EEA Regulations as the durable partner of that EEA citizen and, where the applicant did not have a documented right of permanent residence, evidence which satisfied the Secretary of State that the durable partnership continued to subsist. Home Office records did not show that he had been issued with a family permit or residence card under the EEA Regulations as a durable partner of his EEA national sponsor.

The Decision of the First-tier Tribunal

5. The appellant's appeal came before Judge Bart-Stewart sitting in the First-tier Tribunal at Taylor House on 4 April 2022. The appellant was represented by Mr Jesurum of Counsel, and there was no representation on behalf of the Secretary of State. The appellant and the sponsor each adopted their respective witness statements, and an unsigned witness statement was adopted by a supporting witness, Blerum Derri. None of the witnesses was asked any questions.

6. In his skeleton argument for the hearing, Mr Jesurum submitted that the appellant met the definition of a durable partner within Appendix EU, as he came within the scope of an exception which was spelt out in the definition.

7. His submission was that, although the appellant did not hold a relevant document as required by sub-paragraph (b)(i), another route was provided by sub-sub-paragraph (aaa). The only reason why he was not resident in the UK as a durable partner was because he did not hold a relevant document as a durable partner - and the appellant met the other requirement of (aaa) which was that he did not otherwise have a lawful basis of stay in the UK.

8. Mr Jesurum acknowledged that this construction was "counter-intuitive" but he submitted that it was supported by the guidance quoted in the skeleton argument which gave examples of what documents would be required where there was no relevant document.

9. In the Decision, Judge held at [9] that the evidence of the couple was unchallenged. They had started living together at the same address in November 2020 and on a date after 1 December 2020 the appellant had proposed marriage. They contacted the register office to give notice of intention to marry, and they were offered an appointment on 21 December 2020. But due to lockdown restrictions, this was twice put back.

10. At [15], the Judge accepted that the couple were in a durable relationship now, but she held that the appellant had failed to show that he was a durable partner of an EEA citizen on 31 December 2020, given that they had only cohabited for a month by that time, which was well short of the required two years' living together.

11. At [18], the Judge said that the appellant accepted that he did not have a relevant document to prove he was a durable partner before the specified date. Therefore, he did not satisfy the definition of a durable partner for the purposes of Appendix EU.

12. The Judge went on to dismiss the appeal under the Rules and by reference to the Withdrawal Agreement

The Grounds of Appeal to the Upper Tribunal

13. On 10 July 2022 Mr Wilding settled the grounds of appeal.

14. Ground 1 was that the Judge had not given adequate reasons for finding that the couple were not in a durable relationship before the specified date. Ground 2 was that the Judge's reasoning in para [15] was perverse. Ground 3 was that the Judge had erred in failing to consider, unbeknown to her, a relevant piece of guidance issued by the respondent to applicants on the gov.uk website which contradicted the respondent's guidance to caseworkers upon which the Judge relied when construing the rules.

15. Ground 4 was that the Judge had materially misapplied the law in her construction of the rules. The relevant part of the rules, including sub-sub-paragraph (aaa), were "almost indecipherable" but the appellant submitted that a "proper, positive reading of the rules" fell in his favour.

16. Ground 5 was that the Judge had conducted an inadequately reasoned proportionality assessment under the Withdrawal Agreement.

The Reasons for the Eventual Grant of Permission to Appeal

17. Permission to appeal was refused by First-tier Tribunal Elliott on 20 July 2022, but was granted by Upper Tribunal Judge Norton-Taylor on 28 September 2022, as he considered all the grounds were arguable, although he was of the view that Ground 5 was doubtful in view of *Celik* [2022] UKUT 00220. He directed the respondent to provide a Rule 24 response on Grounds 3 and 4, and he directed the appellant to file and serve a concise skeleton argument no later than 7 days prior to the hearing.

The Rule 24 Response

18. In a detailed Rule 24 Response dated 24 November 2022, Chris Avery of the Specialist Appeal Team submitted that the appellant could not succeed on any ground of appeal in the light of *Celik.*

Further Directions from Upper Tribunal Judge Lesley Smith

19. The Tribunal's decision in *Celik* was upheld by the Court of Appeal in *Celik* [2023] EWCA Civ 921 which was handed down by the Court of Appeal on 31 July 2023.

20. In Directions dated 6 November 2023. Upper Tribunal Judge Lesley Smith said it was her provisional view that the grounds of appeal could not succeed following the Court of Appeal's Judgment, and she invited the appellant to withdraw his appeal.

21. However, if the appellant considered that some of his original grounds still had arguable merit, he had to provide written amended grounds of appeal within 21 days of the date of her directions being sent.

22. In the absence of a substantive response to her directions within 21 days, the appeal would be listed for disposal on notice to the parties shortly after the expiry of the 21 days' period.

Late application for the disposal hearing to be converted to an error of law hearing

23. The appellant failed to comply with the directions, and so the appeal was listed for disposal.

24. On 14 March 2024 I received from Field House correspondence a letter dated 13 March from AJ Jones Solicitors requesting that the disposal hearing be converted to an error of law hearing on 18 March or another suitable date. In response to the directions of UTJ Smith, they had contacted Counsel for advice on the merits. He had confirmed on 12 December 2023 that Ground 1 to 4 were maintained, and no amendment to the grounds were necessary. *Celik* was not authority on the interpretation of the rules, and this issue required to be determined. Due to an error on their part, they had missed the deadline to respond to the directions, for which they apologised profusely.

25. On 15 March 2024 I gave permission for the hearing to be converted to an error of law hearing.

The Hearing in the Upper Tribunal

26. At the hearing before me to determine whether an error of law was made out, Mr Wilding developed Grounds 1-4. Mr Wilding said he was aware of three unreported decisions of the Upper Tribunal on the construction of

(aaa), but they did not take a uniform approach. He submitted that an authoritative reported decision was required. In reply, Mr Melvin relied on the Rule 24 Response opposing the appeal and on the Court of Appeal decision in *Celik.* I reserved my decision.

Discussion and Conclusions

29. As to Grounds 1 and 2, I do not consider that the Judge's reasoning was inadequate or perverse. It was open to the Judge to find that the relationship had not acquired the quality of durability by 31 December 2020. The fact that it had become durable since that date did not entail that it had become durable by the specified date. As to Ground 3, it does not appear to be disputed that at all material times the guidance to caseworkers was to the effect of the guidance I have set out below at [34]. Accordingly, even if the online guidance to applicants suggested at the time – or continues to suggest now - that illegal migrants without a relevant document are nonetheless capable of qualifying for status as durable partners under the rules (a point which is strongly contested by the respondent), it was not and is not reasonably capable of determining how the rules should be properly construed.

30. As to Ground 4, I accept that, prior to the clarificatory amendment made by HC 1160 with effect from 12 April 2023, the definition of a durable partner in Annex 1 was so convoluted that it was readily susceptible to misinterpretation.

31. In *Kabir,* UI-2022-002538, promulgated on 3 January 2023, the facts were that the First-tier Tribunal Judge found that the appellant had lawful leave to remain under the Immigration Rules until 25 August 2021. Although the appellant had not been issued with a family permit or residence card recognising or facilitating a right of residence under EU Law prior to 31 December 2020, Judge O'Garro was satisfied that the couple were in a committed relationship that could be viewed as durable before the end of the transition period, and that the appellant thereby came within the definition of a durable partner contained in Annex 1 of Appendix EU by reference to the section that appeared to relate to those who did not hold a relevant document, namely paragraph (b)(ii)(bb)(aaa) of the definition.

32. The Secretary of State appealed to the Upper Tribunal contesting the Judge's finding. The Panel which heard the appeal held that the burden was on the Secretary of State to show how and why it was said that the First-tier Tribunal had erred in law in allowing the appeal with reference to the said paragraph of Annex 1 of Appendix EU, which the Upper Tribunal observed was "*simply unclear*" in terms of its meaning. The Panel said that they could not exclude the possibility that if the provision was explained properly with reference to the other definitions obtained in Appendix EU, it might reveal that the Judge's interpretation was incorrect. However, neither the grounds of appeal nor the oral submissions explained the intended meaning of this part of the Rules adequately. Given the incoherence of this aspect of the Rules, it could not be said that the Judge's attempted interpretation was irrational, and the Secretary of

State's appeal was dismissed on the ground that she failed to show how or why the Judge's finding amounted to an error of law.

33. Although not remarked on by the Panel, the interpretation of First-tier Tribunal Judge O'Garro was entirely in line with the Home Office's published Policy Guidance dated 9 November 2022. It is clear from this guidance – and also from subsequent versions of it - that there is an exemption from holding a relevant document where the applicant can prove that they had lawful leave to enter or remain in the UK at the same time as they were in, or in the process of forming, a durable relationship with an EEA national sponsor.

34. The general rule is set out in the guidance at page 118, and then there is a discussion of the exceptions. It is expressly stated at page 119 that when considering whether a person with another lawful basis to stay in the UK and Islands before the specified date was the durable partner of a relevant EEA citizen before the specified date, only the period for which the person had another lawful basis for staying in the UK and Islands before that date can be considered for the purposes of assessing whether the partnership was durable before that date. The Home Office goes on to give the following specific example:

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

35. In *Alijaj*, UI-2022-00361, which was promulgated on 7 February 2023, the opposite set of facts applied. The appellant was a citizen of Albania who had arrived in the UK on an unknown date and had resided in the country unlawfully ever since. In July 2018 he formed a relationship with a Polish national sponsor. They began cohabiting in December 2019 and they got married on 7 July 2021. On 6 October 2021 the appellant applied for a grant of status under the EU Settlement Scheme, and the application was refused.

36. On appeal to the First-tier Tribunal, the First-tier Tribunal Judge was more than satisfied that the relationship was genuine and subsisting, and that it had become durable by November 2020 at the latest. The Judge concluded that the appellant satisfied the definition of a family member of a relevant EEA citizen by virtue of meeting the definition of a durable partner set out in Annex 1 of Appendix EU to the Immigration Rules. The Judge found that the appellant did not hold a relevant document, but did meet the definition in Annex 1 (b)(ii)(bb)(aaa). The Judge concluded that the appellant thereby satisfied the relevant Immigration Rule and was therefore entitled to succeed in his appeal.

37. Upper Tribunal Judge Norton-Taylor set aside the decision of the First-tier Tribunal on the ground that the First-tier Tribunal Judge had materially erred in law, and substituted a decision dismissing the appellant's appeal. He held that the interpretation that the Judge had given to the definition of a durable partner in Annex 1 was not the proper one. He continued at [33]: "*Having said that, one really cannot blame the Judge for the error. The legal position was close to being impenetrable."*

38. Upper Tribunal Judge Norton-Taylor's reasoning was two-fold. Firstly, he found that for the appellant to come within the scope of the exception, he needed to show that he was a "*joining family member of a relevant sponsor*" as required by Annex 1 (b)(ii). But the appellant was never a joining family member of a relevant sponsor because he had always been in the UK. In other words, he was not 'joining the sponsor'. (The same objection was raised by Judge Elliott when refusing permission to appeal in this case.) Upper Tribunal Judge Norton-Taylor continued:

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

39. The authoritative reported decision of the Upper Tribunal that was called for by Mr Wilding is *Hani (EUSS durable partners: para (aaa))* [2024] UKUT 00068 (IAC). This was promulgated on 21 February 2024, but we were not alerted to its existence as a reported case by the time of the hearing on 18 March 2024.

40. In *Hani* a panel chaired by Upper Tribunal Judge Stephen Smith considered *Kabir* and the unreported cases of *Basha* and *Drini* in which the UT had arrived at the same conclusion as *Alijaj,* which is that para (aaa) has the opposite effect to that contended for by Mr Wilding. The panel in *Hani* adopted the reasoning in *Basha* and held that para (aaa) is divided into two halves separated by the word "unless". Whereas an illegal migrant comes within the scope of "the first half criteria", the effect of the "unless" clause is to exclude the illegal migrant from benefitting from the first half criteria.

41. I find the reasoning of the Panel is compelling and persuasive, and I am not persuaded to depart from it. In short, while Mr Wilding is right that the appellant meets the criteria of the "unless" clause, he is wrong as to its effect. It does not operate to benefit the appellant. On the contrary, it operates to exclude him from the class of beneficiaries who are not required to hold a relevant document. Conversely, a migrant who

otherwise has lawful leave benefits from the first half criteria, and is not caught by the "unless" clause.

42. I am reinforced in this conclusion by *Celik* [2023] EWCA Civ 921 at [68] where the Court of Appeal dismissed the ground of appeal that the refusal of a grant of status was not in accordance with Appendix EU. The facts of that case were essentially the same as in this case, so it follows inexorably that the Court of Appeal did not find that sub-sub-paragraph (aaa) was of assistance to the appellant, who was present in the UK unlawfully.

43. The only conclusion that was lawfully open to Judge Bart-Stewart was that the appeal should be dismissed, and so no error of law is made out.

Notice of Decision

The decision of the First-tier Tribunal did not contain an error of law, and accordingly the decision stands. The appellant's appeal to the Upper Tribunal is dismissed.

Anonymity

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

Andrew Monson
Deputy Judge of the Upper Tribunal
Immigration and Asylum Chamber
28 March 2024