



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

Case No.: UI-2022-003714

First-tier Tribunal No:  
EA/01062/2022

**THE IMMIGRATION ACTS**

**Decision & Reasons Issued:**

**On 8<sup>th</sup> of February 2024**

**Before**

**DEPUTY UPPER TRIBUNAL JUDGE MONSON**

**Between**

**SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Appellant

**and**

**MOHAMED TAHAR LALLEM**  
**(NO ANONYMITY ORDER MADE)**

Respondent

**Representation:**

For the Appellant: Mr S. Walker, Senior Home Office Presenting Officer

For the Respondent: None.

**Heard at Field House on 1 February 2024**

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

**DECISION AND REASONS**

1. The Secretary of State has been granted permission to appeal against the decision of First-tier Tribunal Judge Farmer promulgated on 23 June 2022 ("the Decision"). By the Decision, the Judge allowed the appellant's appeal against the decision of the Secretary of State to refuse to grant the

appellant settled or pre-settled status under the EU Settlement Scheme in the capacity of a durable partner of a relevant EEA citizen.

### **Relevant Background**

2. The appellant is a national of Algeria, whose date of birth is 31 March 1990. He entered the UK on 13 January 2020 on a visit visa. He met his EEA citizen sponsor in March 2020 and began a relationship. They got engaged on 20 August 2020 and entered an Islamic marriage on 24 September 2020. Their civil marriage was postponed due to Covid restrictions, and they eventually married in a civil ceremony in June 2021. His sponsor gave birth to their daughter on 31 January 2022.
3. In the refusal decision, the Secretary of State said that the appellant's asserted relationship with his sponsor could not be accepted prior to 31 December 2020. This was because the required evidence of a family relationship as 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**

4. The appellant's appeal came before Judge S.L. Farmer sitting in the First-tier Tribunal at Hatton Cross on 4 April 2022. Both parties were represented by Counsel.
5. For the reasons which she gave at paras [11] to [24] of the Decision, the Judge found that although the appellant did not hold a relevant document, he nonetheless met the definition of a durable partner contained in Appendix EU, Annex 1.
6. Her reasoning was that, although the appellant did not hold the relevant document as required by sub-paragraph (b)(i), another route was provided in sub-paragraph (b)(ii). She found that the definition made provision for an individual who did not hold a relevant document. She went on to set out the relevant provisions of sub-paragraph (b)(ii), including sub-sub-paragraph (aaa).
7. The Judge found that the appellant met the requirements of sub-sub-paragraph (aaa). She accepted that the effect of (aaa) was that the appellant could qualify as a durable partner even though he did not have a residence card and even though he was in the UK unlawfully.

### **The Grounds of Appeal to the Upper Tribunal**

8. On 1 July 2023 Simon Armstrong of the Specialist Appeals Team made an in-time application for permission to appeal. He submitted that the Judge's interpretation of paragraph (b)(ii)(bb)(aaa) of Annex 1 of Appendix EU was incorrect and was incompatible with the requirements of the Withdrawal Agreement that the EU Settlement Scheme was designed to implement. The Judge's interpretation would mean that for the requirement to be lawfully resident under EU Law as of 31 December 2020 would be obsolete. He submitted that the Judge had materially erred in law in finding that the appellant satisfied the requirements of Appendix EU, despite not being lawfully resident in the UK as of 31 December 2020.

### **The Reasons for the Grant of Permission to Appeal**

9. On 29 July 2022 Judge Boyes granted the Secretary of State permission to appeal as the grounds of appeal were clearly arguable.

### **The Hearing in the Upper Tribunal**

10. At the hearing before me to determine whether an error of law was made out, there was no appearance by the appellant. The appeal had been adjourned from 10 October 2023 when he also did not appear. As he had not been properly notified of the hearing on 10 October 2023, DUTJ Jarvis had adjourned the appeal with directions.
11. The appellant was directed to notify the Upper Tribunal if he intended to participate in the proceedings within 14 days of the date of the notice.
12. The appellant did not notify the Upper Tribunal that he intended to participate in the proceedings within 14 days of the date of the notice or at all.
13. Accordingly, I decided that it was in accordance with the overriding objective to proceed with the hearing in the appellant's absence.

### **Discussion and Conclusions**

14. Although the appellant has since been granted leave to remain under Appendix FM, this does not mean that he has constructively abandoned his EUSS appeal.
15. Until a recent clarificatory amendment, the definition of a durable partner in Annex 1 was so convoluted that it was readily susceptible to misinterpretation.
16. 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.

17. 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.
18. Although not remarked on by the Panel, the interpretation of the First-tier Tribunal Judge was entirely in line with the Home Office's published Policy Guidance dated 9 November 2022. It is clear from this guidance - and also from subsequent versions of it - that there is an exemption from holding a relevant document where the applicant can prove that they had lawful leave to enter or remain in the UK at the same time as they were in, or in the process of forming, a durable relationship with an EEA national sponsor.
19. 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."*

20. 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.
21. 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.
22. 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."*
23. Upper Tribunal Judge Norton-Taylor's reasoning was two-fold. Firstly, he found that for the appellant to come within the scope of the exception, he needed to show that he was a *"joining family member of a relevant sponsor"* as required by Annex 1 (b)(ii). But the appellant was never a joining family member of a relevant sponsor because he had always been in the UK. In other words, he was not 'joining the sponsor'. He continued:

"Further or alternatively (i.e. if my conclusion in the preceding paragraph is wrong), the appellant had been in this country unlawfully, never having been issued with a residence card or granted leave to remain. I am satisfied that the part of the definition following on from the word "unless" in Annex 1 (b)(ii)(bb)(aaa) means that a person cannot say they were not resident in the United Kingdom at any time before the specified date as a durable partner simply because they were in this country unlawfully and without a residence card as a durable partner. To put it in a different way, the exception to the requirement to have had a residence card as a durable partner applies only to those persons who applied under the EUSS after 31 December 2020 and had had leave to remain, but were not here with a residence card as a durable partner."
24. Upper Tribunal Judge Mandalia reached the same conclusion in the case of *Ermin Drini*, UI-2022-000383, which was promulgated on 24 April 2023. At para [27] of his decision, he said:

“It is what follows, the second criterion, that is in my judgment crucial to the application of the exception provided for, and that concerns the immigration status of the applicant. The focus is upon the reason why the individual does not hold a relevant document. The criteria applies “where the reason why ... they were not so resident is that they did not otherwise have a lawful basis of stay.” It is the use of the double negative in sub-paragraph (aaa) that causes confusion. Properly read, a person who did not otherwise have a lawful basis of stay in the UK could not meet that criterion. By contrast, an applicant who did otherwise have a lawful basis of stay in the UK can satisfy both criteria and can benefit from paragraph (aaa). For example, a person who held leave in some other capacity, for example as a student, would otherwise have had a lawful basis of stay in the UK and would not have required their presence in the UK to have been facilitated as a durable partner under the EEA Regulations. Their presence in the UK would be lawful by another route.”

25. Judge Mandalia continued in [28]:

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

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

27. 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, as was this appellant.

28. Although the appellant entered the UK lawfully, he became an overstayer once his visit visa expired, and he did not seek to regularise his status under the EEA Regulations 2016 by applying for a residence card before 31 December 2020.

29. No blame attaches to Judge Farmer for misconstruing sub-sub-paragraph (aaa), but she was wrong to accept the construction contended for by Counsel for the appellant. Judge Farmer materially erred in law in

concluding that the appellant could win his appeal by reference to this sub-sub-paragraph. The only conclusion that was lawfully open to the Judge was that the appeal should be dismissed.

### **Notice of Decision**

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

### **Anonymity**

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

Andrew Monson  
Deputy Judge of the Upper Tribunal  
Immigration and Asylum Chamber  
6 February 2023