IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2023-005433

First-tier Tribunal No: EA/00177/2023

THE IMMIGRATION ACTS

Decision & Reasons Issued:

On 25th of January 2024

Before

UPPER TRIBUNAL JUDGE HANSON

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MRS NANA SKHIRTLADZE
(NO ANONYMITY ORDER MADE)

Respondent

Representation:
For the Appellant: Mr Diwnycz, a Senior Home Office Presenting Officer.
For the Respondent: In person assisted by her husband.

Heard at Phoenix House (Bradford) on 24 January 2024

DECISION AND REASONS

1. The Secretary of State appeals with permission a decision of First-tier Tribunal Judge Cox ('the Judge'), promulgated on 1 November 2023, in which the Judge allowed Mrs Skhirtladze's appeal against the refusal of her application for status under Appendix EU of the Immigration Rules.
2. Mrs Skhirtladze is a national of Georgia born on 5 April 1988. Her application was based upon her being a family member of a relevant EEA citizen, namely Zauri Gzirishvili, her father-in-law.
3. The Judge notes there being no dispute in relation to the factual background which is summarised by the Judge at [5]-[10] in the following terms:

> 5. The Appellant left Georgia and arrived in the UK with her spouse and child on 05 October 2014 on a family permit issued under the EEA regulations as her father-inlaw was settled in the UK. On 23 April 2015, the Home Office issued them residence cards under the EEA regulations.
> 6. In May 2015 the Appellant and her son went to Georgia for one month and returned to the UK on 14 June 2015. In July 2015 she started working at Edwards Hotel London which she left in April 2016 as she was expecting her second baby.

7. In May 2016 the Appellant went to Georgia to give birth. On 20 June 2016, she gave birth via a caesarean delivery. On 11 September 2016 the Appellant returned to the UK with her children.
8. At the end of February 2017, the Appellant went back to Georgia to give birth a third time as she would have to have another caesarean operation and needed her mother's help to look after her young children. Her third operation was difficult and there were complications. As a result she did not return to the UK until June 2018 Since then she has lived continuously in the UK with her husband and her children. The children are going to school and her husband is working.
9. The Appellant, her husband and their children applied for settled status under the EUSS. Her husband and children were granted settled status, but her application was refused. The Respondent was not satisfied that the Appellant had completed a five year continuous qualifying period of residence in the UK. I pause to note that the children had been with her in Georgia for the whole time.
10. In conclusion, the Respondent was also not satisfied that that the Appellant met the eligibility requirements for settled status set out in rule EU11 or for pre-settled status set out in rule EU14 of Appendix EU to the Immigration Rules.

4. The Judge's findings, set out between [19 – 22] in the following terms:

19. The presenting officer submitted that the appellant needed to hold a valid residence card. The appellant acknowledge that her card had expired in April 2020, prior to the application being lodged. In this context, I note that 'holds' is in the present tense, and the key date is the date of application. In these circumstances, it is possible to interpret the definition of relevant document to be restricted to a valid or up to date document.
20. However, in my view, if the drafter had meant to limit the definition in that way, then, they could easily have said 'valid' instead of 'holds'. I am fortified in my view, by the fact, that under the Withdrawal Agreement, it is recognised that those who have been exercising Treaty Rights and whose entry and residence in the UK have been facilitated and recognised by the UK, then they continue to have rights after the UK left the European Union.
21. Accordingly, having carefully considered the provisions of Appendix EU, I find that the Appellant holds a relevant document, namely a residence card. Application of the law to the facts
22. Because I have found that the Appellant holds a relevant document and the presenting officer acknowledged that the Appellant met the other requirements of EU14, I am satisfied that she has established that she is a family member of a relevant EEA citizen, and she meets the requirements for leave under Appendix EU.

Notice of Decision

The appeal is allowed.

5. The Secretary of State sought permission to appeal asserting the Judge had erred in law by holding that the appellant before him met the requirement for a grant of pre-settled status under paragraph EU14 as a family member of a relevant EEA national. The grounds assert that whilst other family members were successful in their applications to Judge failed to properly interpret the requirements of the relevant rules given the chronology and the nature of the appellant's relationship with her EEA national sponsor. The grounds seeking permission to appeal plead:

2. In order to succeed in her application Ms Shkirtladze had to have started a Continuous Qualifying Period before 31 December 2020 which continued until her application. For this she relied on having previously been issued a residence card as a regulation 8(2) Extended Family member. It was pointed out that that document had expired in April 2020. Judge Cox noted the absence of a provision requiring the holding of a valid "relevant document" but failed to appreciate that this went to the

relevant period of residence being eligible to count towards a continuous qualifying period as defined. As an extended family member Ms Skhirtladze was only residing as a documented extended family member (and later as a "dependent relative" as defined in Appendix EU whilst she held a valid document while she held a valid and unexpired document – see regulation 7(3) of the 2016 Regulations. Thus during the period from April to December 2020 – the period relied on a starting a Continuous Qualifying Period – she was not a dependent relative at all. Whilst a relevant document had previously been issued the very nature of the right conferred by that document meant that she did not meet the definition of dependent relative for the period relied upon.

3. The Judge has thus failed correctly to apply requirements of the rules which Ms Skhirtladze simply did not meet. She did not start a continuous qualifying period before 31/12/20 as her residence was not as a dependent relative.

6. Permission to appeal was granted by another judge of the First-tier Tribunal on 4 December 2023, the operative part of the grant being in the following terms:

3. The Judge considered the wording of Appendix EU and determined a question of legal interpretation in the appellant's favour. In the absence of any settled case law on the matter, it is arguable that the Judge erred in determining the meaning of "relevant document". The remainder of the grounds are largely a repetition of the challenge to the legal interpretation. Permission is, however, granted on the grounds pleaded.

Discussion and analysis

7. The reasons for refusal letter dated 25th June 2021 set out the basis for the Secretary of State's concerns and why the application under the EU Settlement Scheme (EUSS) was refused. They are:
…

Careful consideration has been given as to whether you meet the eligibility requirements for settled status under the EU Settlement Scheme. The relevant requirements are set out in rule EU 11 of Appendix EU to the Immigration Rules.

Consideration has been given as to whether you qualify for settled status because you have a documented right of permanent residence. However, you have not provided a permanent residence card issued under the Immigration (European Economic Area) Regulations 2016 (or the preceding 2006 Regulations) in support of your application. In addition, we have checked our records and it does not appear that you have ever been issued such a document. You have provided a residence card under the EEA Regulations. However, that document does not certify that you have a right of permanent residence in the UK. Therefore, you do not meet the requirements for settled status on the basis of a documented right of permanent residence.

Consideration has been given as to whether you qualify for settled status on the basis of completing a continuous qualifying period of five years' residence in the UK and Islands. A five year continuous qualifying period means that for five years in a row, you were any combination of the following:

- A relevant EEA citizen;
- a family member of a relevant EEA citizen;
- a family member who retained the right of residence by virtue of a relationship with a relevant EEA citizen;
- a person with a derived right to reside;
- a person with a Zambrano right to reside;
- a family member of a qualifying British citizen;

- a family member who retained the right of residence by virtue of a relationship with a qualifying British citizen,

and in the UK and Islands for at least six months in any 12 month period. An exception to that is one period of up to 12 months absence from the UK and Islands for an important reason (for example pregnancy, childbirth, serious illness, study, vocational training or an overseas work posting), or an absence of any length;

- on compulsory military service; or
- on a posting on Crown service, including as a member of HM Forces; or
- as a spouse, civil partner, durable partner or child, accompanying a person on Crown service, including as a member of HM Forces.

However, whilst there is evidence that you have resided in the UK periodically between December 2014 and October 2018, this is a period of less than five years. The evidence available to us does not show that you have resided in the UK for five years. Therefore, you do not meet the requirements for settled status on the basis of a continuous qualifying period of five years.

We attempted to contact you 5 times by email and telephone between 4 June 2021 and 11 June 2021 to ask for the evidence specified above, but what has been provided is not sufficient because the Residents document provided does not show you have completed a five year continuous qualifying period of residence in the UK.

It is considered that the information available does not show that you meet the eligibility requirements for settled status set out in rule EU 11 or for pre-settled status set out in rule EU 14 of Appendix EU to the Immigration Rules. This is for the reasons explained above. Therefore, your application has been refused under rule EU6.

8. The appellant applied for administrative review of the decision of 25th of June 2021 on the following basis:

I was refused the grant the status under the EU settlement scheme. I would like to explain my situation. I arrived in the UK in October 2014 on an EEA family permit with my husband and child. Our EEA sponsor was my father-in-law which currently holds a settled status. In April 2015 we received the Residence cards under the EEA regulation. In June 2015 I started working in the Mayfair hotel where I worked until April 2016 and quit as I was expecting my second babe. (Unfortunately, I could not provide the evidence from my work as it is lost). In May 2016 I went to Georgia being 7 months pregnant to have a child there as it would be easier for me. My second child was born in Tbilisi in June 2016 my second child was born. I and my first son returned to the UK in September 2016. My second child stayed there as there were some delays regarding his documents. I still got pregnant and returned to Georgia in February 2017, I gave birth in August and in June 2018 I returned to the UK with my 3 children. Since then, I have not left the UK. My children are studying in the school here, they are registered In the GP here. My husband, my first son has status under new regulations. 2 other children`s applications are still under the consideration. Unfortunately, due to language problems, we could not provide the documents to prove this. We did not know we had to. I thought my old residence card would be enough. This must be a reason why my application was refused. Could you please consider my case and grant me permission? I am a mother of 3 children. I have never broken any immigration rules. I have never been an illegal emigrant. I have been living in the UK, but I admit I was spending lots of time in my country during these 7 years as I preferred to give birth there and get support from my mother to look after me and my children when there were babies. I could not get this support in the UK I only have my husband and father-in-law here and both work full time. But my children are older now, the study in the UK. My husband holds a settled status same as my father-in-law. We would like to rise our child and give education in the UK.

9. The original decision was upheld in a letter dated 19 December 2022, the relevant part of which reads:

You have stated in your application for an administrative review that you think the decision is wrong as you arrived in the UK in 2014 with your husband, child and father-in-law. You state that you received your residence cards under the EEA regulations in 2015. You go on to state that you started working in the UK in 2015 for a short period of time, you then fell pregnant with your second child. It is acknowledged that you then travelled back to Georgia to have your second and third child and you state that you have spent a lot of time during the last 7 years in your home country to utilise the support of your mother who helped you to look after the children. You state that as the children are now older you would like to raise your children in the UK and give them a good education.

Whilst it is acknowledged that you travelled to the UK in 2014 with your family and you were granted a residence card which was issued under the EEA regulations in April 2015 which was valid until April 2020. This document does not certify that you have a right of permanent residence in the UK and had also expired before you submitted your application under the EU Settlement Scheme on 15 February 2021. Whilst there is evidence that you periodically resided in the UK between 2014-2018 there is insufficient evidence to show that you have completed a five-year continuous qualifying period. I wrote to you on 02 December 2022 to ask for additional evidence which shows that you were resident in the UK from April 2015 – April 2020 however you failed to submit the requested evidence to show your residency in the UK. It is noted from your application for an administrative review you stated that due to language problems you were unable to submit the required evidence in your initial application. However, the onus is on you to submit all the requested evidence to support your application and seek legal or professional help to assist you in completing your application. I can confirm that all the evidence which has been submitted with your application has been thoroughly reviewed and although you have submitted additional documents as evidence with your application in the form of residence cards for your husband and children a copy of your father in law's passport and NHS letters, you have not provided sufficient evidence to prove your residency in the UK. I have also verified your national insurance number against the HMRC database, and this confirmed that there was limited data to support your employment within the UK for the period relied upon. For me to consider your application for settled status the required evidence must show that that you were resident in the UK and Islands (or, where applicable, the UK) before 11pm on 31 December 2020 and continue to reside in the UK and completed a continuous qualifying period of residence which also generally means that you have not been absent from the UK and Islands (or, where applicable, the UK) for more than 6 months in total (in a single period of absence or more than one) in any given 12-month period, throughout the period of residence relied upon.

I have also considered your application as to whether you qualify for pre-settled status on the basis of completing a continuous qualifying period of less than five years' residence in the UK and Islands. However, you do not meet the requirements for pre-settled status on the basis of a continuous qualifying period for the same reasons you do not meet the requirements for settled status on this basis because whilst there is evidence that you have resided in the UK periodically between 2014 and 2018 you have not provided sufficient evidence to confirm that you are currently completing a continuous qualifying period of residence in the UK and Islands. This is because the most recent evidence of you being resident in the UK and Islands is December 2017. As this is more than six months before you submitted your application, it appears that your continuous qualifying period of residence has been broken and has not been resumed.

Consideration has been given to Section 55 of the Borders Citizenship and Immigration Act 2009 (Duty regarding the Welfare of Children) The duty to have regard to the need to safeguard and promote the welfare of children requires us to consider the effect on any children of a decision to refuse leave or remove against the need to maintain the integrity of the Immigration control. It is noted your spouse and your child have leave to remain in

the UK and it is open for you to submit an appropriate application if you wish to do so. Therefore, it is considered your child's best interests continue to be met.

Therefore, as you have not provided sufficient evidence to prove your periods of residency within the UK, you therefore do not meet the requirements for settled status under EU11 or pre-settled status under EU14 of Appendix EU of the Immigration Rules. Therefore, the original decision of 11 May 2021 to refuse you settled status under EU6 of Appendix EU was correct and has been maintained.

10. Whilst I fully understand the reasons why Mrs Skhirtladze was out of the UK for the period that she was, there was no dispute as to the facts outlined in the Secretary of State's grounds seeking permission to appeal, including the expiration of Mrs Skhirtladze's previous visa.
11. Appendix EU is prescriptive and sets out criteria that need to be satisfied in order for individuals to succeed. On the facts of this case Mrs Skhirtladze was unable to meet the requirement for her to show five years continuous residence in the relevant period.
12. On that basis I find Secretary of State has made out his case. I find the Judge has erred in law in a manner material to the decision to allow the appeal. I set that decision aside.
13. Following further discussion in terms of the way forward, a point touched on by Mr Deller in the application for permission to appeal, it is clear that Mrs Skhirtladze has very strong family life in the United Kingdom with her husband and their three children. Her husband and the children have been granted status under the EUSS and the children appear to be doing well in the schools they are attending.
14. There was no human rights application/appeal before the Judge meaning it is therefore a new matter. Mr Diwnycz was asked whether he was in a position to consent on behalf of the Secretary of State to the Tribunal considering the Article 8 ECHR claim. He confirmed he was and that he gave such consent.
15. As noted above, it is not disputed that there is a protected right to family life enjoyed by Mrs Skhirtladze in the United Kingdom. It is not disputed that if any attempt was made to remove her from the United Kingdom at this time, without her husband and the children, there will be consequences of such severity so as to engage Article 8.
16. It was not disputed that the issue at large was therefore the proportionality of any interference.
17. The burden of proving that is upon the Secretary of State. This is a case in which Mrs Skhirtladze made an application under the EUSS to enable her to regularise her status to bring it in line with that of the other family members. The applications were made by her husband without the benefit of legal advice and so the fact she could not satisfy material criteria is not because it was a disingenuous application, but rather an application made without having full knowledge of the complexities of Appendix EU.
18. It was not established, on the facts as they exist at the date of this hearing, that it is proportionate to expect the family to return to Georgia to continue their family life there. I accept the importance of the UK having a valid and effective system of immigration control which adds considerable weight to the public interest. Having considered section 117 of the Nationality, Immigration, and Asylum Act 2002 and the lack of anything adverse arising therefrom in relation to Mrs Skhirtladze, and in the absence of any submission sufficient to establish that on the facts of this case the public interest should be the determinative factor, I find it has not been established that interference with Mrs Skhirtladze's protected family life is proportionate on the facts.

19. It is important to note that Mrs Skhirtladze is the primary carer of her three children as her husband works. There was some discussion about the effect of the grant pursuant to Article 8 as her husband and the children have been granted pre-settled status and are likely to be able to obtain settled status in due course. That is a matter for the Secretary of State to consider if Mrs Skhirtladze is entitled to a grant of leave on either the five year route or the ten year route to settlement. If Mrs Skhirtladze eventually obtains indefinite leave to remain in her status, in terms of the right to remain, will be identical to that of the other family members.
20. In summary, I find the Judge materially erred in law. I set that decision aside. I have gone on to consider the merits of the appeal in light of the Secretary of State's consent to my considering Article 8 ECHR as a new matter. I substitute a decision to dismiss Mrs Skhirtladze's appeal under the Immigration Rules with reference to Appendix EU but allow the appeal pursuant to Article 8 ECHR.

Notice of Decision

21. The decision of the Judge is set aside. I substitute a decision to allow the appeal pursuant to Article 8 ECHR only.

C J Hanson

Judge of the Upper Tribunal
Immigration and Asylum Chamber

24 January 2024