IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2022-006367

First-tier Tribunal No:
EA/16655/2021

THE IMMIGRATION ACTS

Decision & Reasons Issued:

On 15th of May 2024

Before

UPPER TRIBUNAL JUDGE PERKINS
DEPUTY UPPER TRIBUNAL JUDGE LEWIS

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

FLAMUR MARASHI
(NO ANONYMITY ORDER MADE)

Respondent

Representation:
For the Appellant: Mr E Tufan, Senior Home Office Presenting Officer
For the Respondent: Mr T Wilding, Counsel instructed by A J Jones Solicitors

Heard at Field House on 10 April 2024

DECISION AND REASONS

Introduction & Background

1. We have both written substantial parts of this judgment.

2. This is an appeal by the Secretary of State against a decision of the First-tier Tribunal to allow the appeal of the respondent, hereinafter "the claimant", against a decision of the Secretary of State on 3 December 2021 refusing his application for permission to remain under the EU Settlement Scheme.

3. The claimant is a citizen of Albania born on 2 January 1992. His application was based on his relationship to Ms Vasiliki Grammatikopolou, a national of Greece. It was not disputed before the First-tier Tribunal that the couple were in

a durable relationship prior to the specified date of 31 December 2020 having cohabited since 2019, and that they had since married on 1 April 2021, and had had a child together (e.g. see paragraph 5 of the Decision of the First-tier Tribunal).

4. In the refusal letter dated 3 December 2021, the Respondent first determined, uncontroversially, that the Appellant was not a 'spouse' for the purposes of the Rules. Thereafter, the determinative reason for refusing the application was that the claimant could not show that he was a "durable partner" of a relevant EEA national at the required time within the definition in the Rules.

5. Under the Rules then applicable (see further below) it was not sufficient only to demonstrate the fact of a 'durable relationship' by 31 December 2020. There was a further requirement expressed in two alternatives. The first alternative was the possession of a relevant EEA family permit or residence card issued under the EEA Regulations (which the claimant did not have). It is the second alternative – and the meaning of the wording of the specified second alternative - that is the issue of controversy in these proceedings.

6. The First-tier Tribunal Judge found that the claimant was assisted by the second alternative as set out at paragraph (b)(ii)(bb)(aaa) of Annex 1 of Appendix EU to the Immigration Rules. The judge said at paragraph 14 of his Decision and Reasons:

> "I find that (aaa) can be read as being met where someone did not otherwise qualify as a family member, as defined, and did not have a residence card and was therefore unlawfully in the UK. In other words, if a person was in a durable relationship prior to specified date and was not in possession of a residence card, then they meet the criteria in (aaa). That is my interpretation when reading, (b)(ii)(aaa) as a whole."

7. It is the interpretation of paragraph (b)(ii)(aaa) that is the issue between the parties before us.

8. Put simply, it is the Secretary of State's position that the so-called 'unless' clause in subparagraph (aaa) favours a person who had a lawful basis of stay, and the First-tier Tribunal was in error in adopting an interpretation under which the 'unless' clause favoured a person who had no lawful basis of stay.

9. For the avoidance of any doubt, we reject Mr Wilding's submission that the grounds of appeal settled by the Secretary of State do not encompass the issue. Whilst he is right to say that the case concerned construction of the Immigration Rules and that regard to EU law was not strictly necessary, the grounds on any sensible construction make it plain that it was alleged that the interpretation of the Rules favoured by the First-tier Tribunal was unjustified and we find the challenge as articulated before us, and discussed below, was encompassed within the terms of the grounds.

The relevant definition under the Rules

10. The Secretary of State's decision was made on 16 February 2022. We set out below the relevant terms of the definition of "durable partner" under Annex 1 of Appendix EU of the Immigration Rules. We find it helpful to remember that a person can be in a 'durable relationship' without being within the definition of "durable partner". A person is a durable partner if:

> "(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..."

Analysis

11. In considering the meaning of the Rules we are guided by the observations of the Supreme Court in **AM (Somalia) & others [2009] UKSC 16** at paragraph 10:

"There is really no dispute about the proper approach to the construction of the Rules. As Lord Hoffmann said in Odelola v Secretary of State for the Home Department [2009] 1 WLR 1230, 1233 (paragraph 4):

"Like any other question of construction, this [whether a rule change applies to all undetermined applications or only to subsequent applications] depends upon the language of the rule, construed against the relevant background. That involves a consideration of the immigration rules as a whole and the function which they serve in the administration of immigration policy."

> That is entirely consistent with what Buxton LJ (collecting together a number of dicta from past cases concerning the status of the rules) had said in Odelola in the Court of Appeal ([2009] 1 WLR 126) and, indeed, with what Laws LJ said (before the House of Lords decision in Odelola) in the present case. Essentially it comes to this. The Rules are not to be construed with all the strictness applicable to the construction of a statute or a statutory instrument but, instead, sensibly according to the natural and ordinary meaning of the words used, recognising that they are statements of the Secretary of State's administrative policy. The respondent's counsel readily accepted that what she meant in her written case by the proposition "the question of interpretation is . . . what the Secretary of State intended his policy to be" was that the court's task is to discover from the words used in the Rules what the Secretary of State must be taken to have intended. After all, under section 3(2) of the Immigration Act 1971, the Secretary of State has to lay the Rules before Parliament which then has the opportunity to disapprove them. True, as I observed in Odelola (para 33): "the question is what the Secretary of State intended. The rules are her rules." But that intention is to be discerned objectively from the language used, not divined by reference to supposed policy considerations. Still less is the Secretary of State's intention to be discovered from the Immigration Directorates' Instructions (IDIs) issued intermittently to guide immigration officers in their application of the rules."

12. Accordingly we have sought to interpret the definition of a durable partner under the Rules 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 – the relevant background, and the function of these particular Rules, being that the European Union Settlement Scheme is designed to enable EU, EEA EFTA and Swiss citizens living in the UK by the end of the transition period on 31 December 2020, and their family members, and the family members of certain British citizens returning with them from EU, EEA EFTA countries or Switzerland, to obtain UK immigration status (either pre-settled status or settled status) to live in the UK – (e.g. see paragraph EU1 of Appendix EU: "This Appendix sets out the basis on which an EEA citizen and their family members, and the family members of a qualifying British citizen, will, if they apply under it, be granted indefinite leave to enter or remain or limited leave to enter or remain".) However, we are cautious that the intention of any particular provision is to be discerned objectively from the language used.

13. Be that as it may, and insofar as the requirement is to interpret the words sensibly and in accordance with their natural and ordinary meaning, it is to be acknowledged that there has been significant controversy beyond this instant appeal as to what that natural and ordinary meaning might be. This is manifest from the exploration of the issue in the case now relied upon by the Secretary of State – **Hani (EUSS durable partners: para. (aaa)) [2024] UKUT 00068 (IAC)**. The controversy has focused on what has been described as the 'unless' clause in subparagraph (aaa), and specifically whether it operates in favour or against a person who "did not otherwise have a lawful basis of stay". A consideration of **Hani** and the cases cited therein reveals that not only have different claimants taken opposite views on this issue, but that the Respondent's position has not always been presented consistently – e.g. compare and contrast the Respondent's position in **Hani** with that in **Kabir UI-2022-002538**. Something of the complexity in alighting upon a natural and ordinary meaning is further illustrated in **Kabir** by the Tribunal concluding that the meaning of

subparagraph (aaa) “is simply unclear”, and that it was “not possible to discern the meaning or application… with any confidence”.

14. In this latter context we are mindful of the observations at paragraph 19 of **Hani** – that **Kabir** did not rule out the possibility that a meaningful construction was possible, and indeed 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 make reference to the approach in **Kabir** merely as illustrative of the complexity of the drafting – a matter that is further underscored by a more recent amendment to the provision.

15. Mr Tufan’s submissions were extremely short but entirely apt. He said that for the reasons given by the Upper Tribunal in **Hani** and by the Court of Appeal in **Celik v SSHD [2023] EWCA Civ 921** the appeal should not have been allowed by the First-tier Tribunal and we should set aside that decision and substitute a decision dismissing the claimant’s appeal.

16. Mr Wilding did not agree. We have the benefit of Mr Wilding’s skeleton argument for the First-tier Tribunal dated 22 June 2022 and, more importantly, a skeleton argument dated 29 March 2024 prepared for the hearing before us. It merits careful consideration and was the basis of Mr Wilding’s oral submissions before us.

17. In the skeleton argument Mr Wilding summarised ground 1 in the Secretary of State’s grounds as the assertion that the judge “was wrong to find that the [claimant] met the provisions of the Immigration Rules because it was inconsistent with EU law”. He submitted that the criticism was unclear. He said the application was made under the Immigration Rules and analysed through the Immigration Rules. He said that the Immigration Rules are not part of the 2004 Citizens’ Directive or the EEA Regulations 2016. He said there was no challenge to the evidence about the relationship. They had been in a relationship since 2018 which was something like four years before the judge heard the appeal. He said that it was a “solid, longstanding relationship which as of 31/12/2020 was durable in nature”. He said the judge had to look at the requirements of the Immigration Rules.

18. Mr Wilding in his skeleton argument at paragraph 23 suggests that the words “and they did not otherwise have a lawful basis of stay in the UK …” assists the claimant because he did not.

19. We accept that Mr Wilding was plainly right to say that we do not have to follow **Hani**. It is not a decision that binds us. Moreover, the discussion of the point in **Hani** is obiter: it was common ground that the ‘unless’ clauses favoured a person who “otherwise had a lawful basis of stay”, the issue in dispute between the parties being whether immigration bail constituted a lawful basis of stay.

20. Whilst judicial comity inclines us not to disagree with the reasoning in **Hani**, ultimately we follow it because we find that it is right.

21. It may be seen that under the first part of the definition of a durable partner – (b)(i) - if there is a durable relationship and a person has a relevant document (i.e. they had been issued with documentation as a durable partner prior to the specified date), then the definition of a durable partner will be satisfied. The second part of the definition – (b)(ii) - provides a mechanism by which a person in a durable relationship may yet satisfy the definition of a durable partner notwithstanding not having been previously recognised as such

by the issuing of a relevant document. It is at this point that subparagraph (aaa) becomes relevant.

22. We accept and adopt the reasoning in **Hani** that the word 'unless' approximately halfway through subparagraph (aaa) introduces an exception to the broad category of persons identified in the first half of the subparagraph preceding the word 'unless', and in so doing it has the effect of reducing the scope of persons within the ambit of subparagraph (aaa). Further, particularly helpful, exposition of how the 'unless' clause operates is to be found at paragraph 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…"

23. Paragraphs 33 and 34 of **Hani** consider the first of the two 'unless' requirements, identifying that this would again encompass a very broad class of persons. Paragraph 35 characterises the second 'unless' requirement as "the operative wording of the "unless" exception", before continuing:

> "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."

24. We find that this is the correct approach to the interpretation of paragraph (aaa).

25. Accordingly we find that the approach taken by the First-tier Tribunal hearing the appeal was in error. The consequence of the First-tier Tribunal's interpretation is that a person who did not have the necessary documentation, and who did not otherwise have any lawful basis to be present in the UK, should be treated as if he (in this case) did have the necessary documentation. This (wrong) conclusion is what was described as an "absurdity" in **Hani**: see further paragraph 22:

> "Such a conclusion 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."

26. In noting this observation in **Hani** we are mindful of the cautious note sounded in **AM (Somalia)** concerning 'divining' intended meaning by reference to supposed policy considerations. However, it seems to us that in substance the comments in **Hani** are consistent with a recognition of the context of the particular Rules in Appendix EU, permissibly a matter for consideration in construing the particular provision within the Rules. As much is manifest from paragraph 37 of **Hani**.

27. For the avoidance of any doubt, we do not accept that the Respondent's guidance to applicants to which Mr Wilding referred us (Skeleton Argument at paragraph 28-30) assists the claimant's case. We note the caution expressed in **AM (Somalia)** in respect of having regard to guidance in discerning the intention of a rule. However, in any event and perhaps more particularly, we acknowledge Mr Tufan's observation that the guidance is headed 'EU Settlement Scheme: evidence of relationship', and as such on its face appears to address only the question of whether or not there is a durable relationship; it does not seemingly go to the issue of the route to satisfying the definition of a durable partner in circumstances where there is a durable relationship but no relevant document within the contemplation of paragraph (b)(i).

28. Submissions on ground 2 added nothing material. The claimant obviously accepts that the decision in **Celik** is against him. It may be right, as Mr Wilding argued, that **Celik** would not apply if the definition favoured by the First-tier Tribunal was permissible but it is not.

29. For all these reasons we find that the First-tier Tribunal erred in law. We set aside its decision and we substitute a decision dismissing the appeal against the Secretary of State's decision.

Notice of Decision

30. The First-tier Tribunal erred. We allow the Secretary of State's appeal. We set aside the decision of the First-tier Tribunal and we substitute a decision dismissing the claimant's appeal against the Secretary of State's decision.

Signed Jonathan Perkins
Jonathan Perkins
Judge of the Upper Tribunal

Dated 9 May 2024