IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2023-000600
First-tier Tribunal No: EA/04197/2022

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On the 08 July 2024

Before

UPPER TRIBUNAL JUDGE SHERIDAN
DEPUTY UPPER TRIBUNAL JUDGE METZER

Between

ELTON ISAKU
(NO ANONYMITY ORDER MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

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

Heard at Field House on 10 June 2024

DECISION AND REASONS

1. The appellant is a citizen of Albania who entered the UK unlawfully in 2014. In March 2020, he met an EEA citizen and they began living together in June 2020. They became engaged in August 2020 and married in April 2021.

2. In April 2020 the appellant applied for pre-settled status under the EU Settlement Scheme.

3. In April 2022 his application was refused on the basis that:

(a) he was not entitled to leave as a spouse because he was not married by 31 December 2020 (i.e. the end of the transition period following the UK's Withdrawal from the EU; referred to as "the Specified Date" in Appendix EU of the Immigration Rules); and

(b) he was not entitled to leave as a durable partner because he did not have a "relevant document" as defined in Annex 1 of Appendix EU. Relevant documents include registration certificates, family permits and residence cards issued under the EEA Regulations.

4. The appellant appealed to the First-tier Tribunal under the Immigration (Citizens' Rights Appeals) (EU Exit) Regulations 2020 on the basis that the respondent's decision was inconsistent with the EU Withdrawal Agreement and with Appendix EU of the Immigration Rules.

5. The appeal came before Judge of the First-tier Tribunal Khawar ("the judge"). In a decision promulgated on 2 December 2022, the judge dismissed the appeal. The appellant is now appealing against this decision.

Decision of the First-tier Tribunal

6. The judge first considered whether the appellant fell within the scope of the definition of a durable partner in Annex 1 of Appendix EU despite not having a relevant document. In his skeleton argument before the First-tier Tribunal, Mr Wilding submitted that although the definition of a durable partner – in particular sub-paragraph (aaa) of the definition – is "fiendish to follow" and "unclear", a close analysis of the wording leads to the conclusion that a person without a relevant document, such as the appellant, meets the requirements of sub-paragraph (aaa). The judge rejected Mr Wilding's submissions, characterising them as "highly artificial".

7. The judge then considered whether the appellant fell within the scope of the EU Withdrawal Agreement. The judge rejected this argument for the reasons given by the Upper Tribunal in *Celik (EU exit; marriage; human rights)* [2022] UKUT 00220 (IAC). Before us, Mr Wilding confirmed that the judge's findings in respect of the Withdrawal Agreement were not challenged in the light of the Court of Appeal judgment upholding *Celik*.

Grounds of Appeal

8. In the appellant's amended grounds of appeal there is now a single argument, which is that the judge failed to adequately address the submissions advanced before him in respect of the appellant falling within the scope of the definition of durable partner in Appendix EU by operation of sub-paragraph (aaa).

9. The grounds acknowledge that there is a recently reported Upper Tribunal decision finding that individuals in the circumstances of the appellant do not meet the definition of durable partner in Annex 1 of Appendix EU: *Hani (EUSS durable partners: para. (aaa))* [2024] UKUT 00068. The grounds argue that *Hani* was wrongly decided; and in any event, should not be followed as the issues relevant to this appeal were obiter.

Relevant Law

10. 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
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> (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:
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> (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…" [Emphasis added]

11. The "specified date" for present purposes was 31 December 2020 at 11.00PM.

Analysis

12. As observed in *Hani*, the drafting of sub-paragraph (aaa) is confusing and difficult to follow. In his skeleton argument before the First-tier Tribunal Mr Wilding characterised the wording of the sub-paragraph as "fiendish", "impenetrable" and "unclear". Mr Tufan did not express disagreement with this description; and neither do we.

13. That said, it is tolerably clear that, in broad terms, sub-paragraph (aaa) divides into two categories individuals who, on the specified date, were in a durable relationship with an EEA national (as defined in sub-paragraph (a)) but did not hold a relevant document. The first category are those who had another lawful basis to be in the UK on the specified date (this would include, for example, individuals in the UK with a right to work or study). The second category are those who did not have a lawful basis to be in the UK on the specified date.

14. It is apparent that sub- paragraph (aaa) envisages that individuals falling into each of the two categories will be treated differently: with one category requiring a relevant document and the other not. What is unclear, from a purely textual reading of the words (without considering the purpose or context) is which of the two categories requires a residence card and which does not.

15. Mr Wilding argued that the "not" in the last sentence of sub-paragraph (aaa) (which we have emphasised in the extract above) means that it is those who did not have a lawful basis to stay on the specified date who do not need to have a residence card.

16. We start by noting that Mr Wilding could not be certain of this interpretation of sub-paragraph (aaa) because his own characterisation of sub-paragraph (aaa), with which we agree, is that it is unclear.

17. Where the wording of the Immigration Rules is unclear, it is appropriate, when seeking to understand what is meant, to consider the context and relevant background. This is made clear in *Mahad v Entry Clearance Officer* [2009] UKSC 16, where in paragraph 10 it is stated:

> 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."

18. We are in no doubt that the function of sub-paragraph (aaa) is to provide an exception to the requirement to hold a residence card to those who had another lawful basis to stay in the UK on the specified date, but not to those who were in the UK without another lawful basis. We reach this conclusion for several reasons.

19. First, constructing the provision in this way is logical. As explained in paragraph 37 of *Hani*:

> 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.

20. Second, it would be absurd to carve out an exception for those in the UK that benefits those in the UK unlawfully but excludes those who were in the UK lawfully. As stated in paragraph 22 of *Hani:*

> 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.

21. Third, in April 2023 the respondent amended sub-paragraph (aaa). Since this date, the definition of (aaa) is the following:

> "(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.".

22. Mr Wilding accepted that the amended definition makes it clear that the exception in (aaa) applies to those who otherwise had a lawful basis to stay in the United Kingdom; not those who lacked a lawful basis to be in the UK. In the Explanatory Memorandum explaining this amendment to the Rues, it is stated, in paragraph 7.17, that the change to the definition of durable partner was made:

> to underline the original policy intent under the EUSS that it is only where they had another lawful basis of stay in the UK before the end of the transition period that a durable partner who was not documented as such under the EEA Regulations can rely on that residence.

23. This makes it clear that the amendment in the wording of sub-paragraph (aaa) was to clarify – not change – its meaning.

24. For these reasons, we agree with the panel in *Hani* that the effect of sub-paragraph (aaa) – both before and after the amendment in April 2023 - is that a person who, at the specified date, was in a durable partnership with an EEA national but did not have a relevant document does not fall within the scope of the definition of durable partner in Appendix EU unless they otherwise had a lawful basis of stay in the UK.

25. Accordingly, any error by the judge in failing to adequately engage with Mr Wilding's arguments on this issue is immaterial because, on the construction of sub-paragraph (aaa) that we consider to be correct, the appellant is incapable of meeting the definition of a durable partner under Annex 1 of Appendix EU.

Notice of Decision

The decision of the First-tier Tribunal did not involve the making of a material error of law and therefore stands.

D. Sheridan

Judge of the Upper Tribunal
Immigration and Asylum Chamber

6 June 2024