



**Upper Tribunal
(Immigration and Asylum Chamber)**

Appeal Number: UI-2022-000383
(EA/12101/2021)

THE IMMIGRATION ACTS

**Heard at Field House
On 17th November 2022**

**Decision & Reasons Promulgated
On 24th April 2023**

Before

UPPER TRIBUNAL JUDGE MANDALIA

Between

**ERMIN DRINI
(NO ANONYMITY DIRECTION)**

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr N Ahmed, Evolent Law

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

DECISION AND REASONS

Introduction

1. The appellant is a national of Albania. His appeal against the respondent's decision of 20th July 2021 to refuse his application for leave to remain under the EU Settlement Scheme (EUSS) under the Immigration (Citizens' Rights Appeals) (EU Exit) Regulations 2020 was dismissed by First-tier Tribunal Judge T Lawrence for reasons set out in a decision promulgated on 14th January 2022.
2. Judge Lawrence noted the appellant had provided evidence of his marriage to Tatjana Todorcic, an EEA national. He noted that the marriage occurred on 15 April 2021 which was after the United Kingdom left the European Union on 31 December 2020, so he was not considered to be the spouse of a relevant EEA citizen. He noted the respondent had concluded the appellant did not meet the definition of a durable partner of Ms Todorcic,

because he had not provided evidence of a valid family permit or residence card issued under the EEA Regulations as the durable partner of that EEA citizen, nor had he provided evidence which satisfied the respondent that the durable partnership continues to subsist in the absence of a documented right of permanent residence.

3. The appellant and Ms Todorcic gave evidence at the hearing of the appeal. At paragraphs [14] and [15] of his decision Judge Lawrence said:

“14. I find that the Appellant has enjoyed a committed relationship with Ms Todorcic since before 31 December 2020, continuously until their marriage on 15 April 2021 and after to date.

15. I also find that the couple had an intention to marry prior to 31 December 2020 but were unable to do so owing to delays in the necessary process for doing so that were occasioned by the coronavirus public health crisis.”

4. At paragraph [22] of his decision, Judge Lawrence said the material question is whether the appellant resided in the host State in accordance with Union law before the end of the transition period and has continued to reside there thereafter. At paragraph [24] he said:

“The Appellant was before the end of the transition period the durable partner of the Union citizen and continued to be so until he became the Union citizen’s spouse.”

5. At paragraph [25] of his decision, Judge Lawrence noted that Article 3(2) of the Citizens Directive does not require Member States to grant a right of entry and residence to third-country family members, such as unregistered partners. He said:

“...The Appellant was never granted a right of entry and residence by the UK, so he cannot be said to have resided in that host State in accordance with Union law as the durable partner of a Union citizen.”

6. At paragraphs [28] to [35] of the decision, Judge Lawrence addressed the residence scheme under the Immigration Rules. He referred to Appendix EU of the Immigration Rules but concluded that while the appellant is the spouse of a relevant EEA citizen, he cannot satisfy the respondent, or the Tribunal, that he was the durable partner of the relevant EEA citizen before the specified date including by the required evidence of a family relationship’. At paragraph [34], Judge Lawrence explained that was because the marriage to the relevant EEA citizen was contracted after the specified date.

7. The appellant claims Judge Lawrence misinterpreted the definition ‘Durable Partner’ under Annex 1 of Appendix EU. The appellant refers in particular to paragraph (b)(ii)(bb)(aaa). The appellant claims that the relevant provision is as follows:

(b)

- (i) ...; or
- (ii) ... where the person is applying as the durable partner of a relevant sponsor ... and does not hold a document of the type to which sub-paragraph (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; or [appellant's emphasis]

...

8. The appellant claims (b)(ii) is relevant here, and addresses the circumstances in which an individual can be a 'durable partner' where they do not hold a relevant document. The appellant claims paragraph (b)(ii) (aa) required that the date of application is after the specified date. Additionally paragraph (b)(ii)(bb) requires the individual to satisfy either one of the provisions set out in (aaa), (bbb) or (ccc). Here, Mr Ahmed submits it is (aaa) that is relevant, and requires that the following conditions are met;

The person was not resident in the UK at any time before the specified date

- i) As the durable partner of a relevant EEA citizen, or
- ii) On a basis which met the definition of 'family member of a relevant EEA citizen' in the table

Unless

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 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.

9. Mr Ahmed submits construed in that way, an individual can satisfy the definition of durable partner if he/she was present in the UK before the specified date and had a durable relationship, but did not hold a relevant document or lawful basis of stay. Here, it is claimed, the appellant was resident in the UK but did not have a relevant document and neither did he have lawful basis of stay in the UK. Therefore, he satisfies (b)(ii)(bb)(aaa).
10. Permission to appeal was granted by First-tier Tribunal Judge Nightingale on 8th March 2022. She considered it arguable that the Judge fell into error in failing to consider whether the requirements for a durable partner were met by reason of fulfilment of Annex 1 Part (b)(ii)(bb)(aaa) on the basis of undocumented residence.
11. Before me, Mr Ahmed acknowledged that the decisions of the Upper Tribunal in Celik (EU exit; marriage; human rights) [2022] UKUT 00220 (IAC) and Batool & Ors (other family members: EU exit) [2022] UKUT 00219 (IAC), that post-date the decision of Judge Lawrence, act to re-enforce the decision of Judge Lawrence as far as Article 3(2) of the Citizens Directive and the Withdrawal Agreement are concerned. However, he submits those decision do not address the issue here, which is the definition of “durable partner” as set out in Annex 1 of Appendix EU of the Immigration Rules.
12. Mr Ahmed adopted the grounds of appeal and submits a careful reading of the definition of a ‘durable partner’ as set out, is required. He submits that the first part of (b)(ii)(bb)(aaa) read alone, would exclude the appellant because it requires that the appellant was not resident in the UK and Islands as the durable partner of a relevant EEA citizen on a basis which met the definition of ‘family member of a relevant EEA citizen’, or, as the durable partner of the qualifying British citizen, at any time before the specified date. However that is followed by the word “unless” so that if the appellant can bring himself within what follows, he meets the definition of a durable partner. Here, the reason why the appellant was not so resident is that he did not hold a relevant document as the durable partner of a relevant EEA citizen for that period, and he did not otherwise have a lawful basis of stay in the UK for that period.
13. Mr Ahmed submits Judge Lawrence therefore erred in his conclusion that the appellant was not a durable partner of the relevant EEA citizen before the specified date and the decision should be set aside.
14. In reply, Mr Walker adopted the respondent’s Rule 24 response dated 1st April 2022. He submits the position the appellant finds himself in, is analogous to the appellant in Celik. He refers to paragraphs [51] and [52] of the decision of the Upper Tribunal in Celik and submits there can be no doubt that the appellant’s residence in the United Kingdom was not facilitated by the respondent before 11pm on 31 December 2020. As in Celik, It was not enough that the appellant may, by that time, have been in a durable relationship with Tatjana Todorcic, whom he married on 15th

April 2021. As the Tribunal said in Celik, unlike spouses of EU citizens, extended family members enjoyed no right, as such, of residence under the EU free movement legislation. The rights of extended family members arose only upon their residence being facilitated by the respondent, as evidenced by the issue of a residence permit, registration certificate or a residence card. In the rule 24 reply, the respondent claims that in order to meet the definition of a 'durable partner' as set out in Annex 1, the appellant needed, *inter alia*, to demonstrate that he held a valid relevant document before 31 December 2020 as evidence of his residence having been facilitated under the EEA Regulations which transposed Article 3.2 (b) of the Directive. The appellant held no such document. Properly read, (b) (ii)(aaa) that is relied upon, cannot reasonably be understood to mean that a lack of the necessary documentation can lead to the conclusion that the appellant was a durable partner of an EEA national during the relevant period.

Decision

15. As Mr Ahmed quite properly acknowledges, the Upper Tribunal handed down guidance in relation to the interpretation of the Withdrawal Agreement and the EU Settlement Scheme in the reported decision of Celik [2022] UKUT 00220. He properly acknowledges that Celik is the current state of the law and that decision operates to fortify the decision of Judge Lawrence as far as Article 3(2) of the Citizens Directive and the Withdrawal Agreement are concerned. Although not entirely irrelevant, I accept that Celik does not address the particular grounds of appeal relied upon here, that focus upon the definition of a 'durable partner' under Annex 1 of Appendix EU of the Immigration Rules.
16. It is useful to being by setting out the definition of a 'durable partner' as set out in Annex 1 (Definitions) of Appendix EU as it was at the date of the hearing before the First-tier Tribunal:

Durable Partner:

- 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 sub-paragraph (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; or

(bbb) was resident in the UK and Islands before the specified date, and one of the events referred to in sub-paragraph (b)(i) or (b)(ii) in the definition of 'continuous qualifying period' in this table has occurred and after that event occurred they were not resident in the UK and Islands again before the specified date; or

(ccc) was resident in the UK and Islands before the specified date, and the event referred to in sub-paragraph (a) in the definition of 'supervening event' in this table has occurred and after that event occurred they were not resident in the UK and Islands again before the specified date,

the Secretary of State is satisfied by evidence provided by the person that the partnership was formed and was durable before (in the case of a family member of a qualifying British citizen as described in sub-paragraph (a)(i)(bb) or (a)(iii) of that entry in this table) the date and time of withdrawal and otherwise before the specified date; and

- (c) it is, or (as the case may be) for the relevant period was, not a **durable partnership of convenience**; and
- (d) neither party has, or (as the case may be) for the relevant period had, another durable partner, a spouse or a civil partner with (in any of those circumstances) immigration status in the UK or the Islands based on that person's relationship with that party

in addition, to meet condition 6 in the table in paragraph EU11 of this Appendix (or condition 3 in the table in paragraph EU11A), the above requirements are to be met with reference to the period immediately before

the death of the relevant EEA citizen (or, as the case may be, of the relevant sponsor) rather than to the date of application”

17. Judge Lawrence did not make any express reference to paragraph (b)(ii)(bb)(aaa) of Appendix 1 of Appendix EU. It is however clear that his analysis focussed on the definition of “durable partner” contained in Annex 1 as far as relevant to applicants who had not been issued with a relevant document, namely the criteria contained in paragraph (b)(ii) and what follows.
18. Annex 1 sets out definitions, including the definition of a ‘durable partner’. As far as relevant here, it is clear from the wording of paragraph (a) that paragraph (b)(ii)(bb)(aaa) only applies to applicants who are or were in a durable relationship with a relevant EEA citizen. If there is no durable relationship that is the end of the matter.
19. Here, at paragraph [13], Judge Lawrence found that the appellant “*has enjoyed a committed relationship*” with Ms Todorcic since before 31 December 2020, and which has endured since their marriage on 15th April 2021. Nevertheless, Mr Ahmed accepts the appellant cannot meet the definition in (b)(i) of Annex 1, which requires the individual to hold a relevant document as the durable partner of the relevant individual. Mr Ahmed accepts the appellant does not have a relevant document (nor has he ever applied for one).
20. The appellant therefore relies upon the alternative, set out in paragraph (b)(ii). It is uncontroversial that the date of the appellant’s application is after the specified date. Mr Ahmed submits that here, subparagraph (aaa) is therefore relevant, and it is the interpretation of that subparagraph that is at the heart of this appeal. Although subparagraph (b)(ii)(aaa) is not easy to understand, I reject the submission made by Mr Ahmed that it should be read in the way contended by Mr Ahmed.
21. Subparagraph (aaa) is in two halves, separated by the word “unless”. The first half of sub-paragraph (aaa) deals with two separate scenarios.
 - (a) where the individual was not resident in the UK as the durable partner of a relevant EEA citizen on a basis which met the definition of ‘family member of a relevant EEA citizen’ in that table; or
 - (b) where the individual was not resident in the UK as the durable partner of a qualifying British citizen.

In either case the use of the words “*was not resident in the UK*” at the outset means that the individual’s residence in the UK must not have been in that capacity in order to meet that criterion.

22. It is unsurprising that the residence must “not” have been on basis set out since paragraph (b)(i) addresses cases where the individual holds a relevant document as the durable partner of the relevant individual. If

sub-paragraph (aaa) is read in the way submitted by Mr Ahmed, a person such as the appellant who has never been recognised by the respondent as having any lawful basis to be in the UK, would be in a better position than someone who was lawfully in the UK. If Mr Ahmed is correct, the word “unless” serves to benefit a person unlawfully present in the UK, as a factor that positively weights in favour of that individual. It would be to 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 status. That would be absurd and cannot have been the intention of the legislature.

23. The decision in Celik is not altogether irrelevant. That is because that decision concerns individuals that were not resident in the UK as the durable partner of a relevant EEA citizen on a basis which met the definition of ‘family member of a relevant EEA citizen’. It is clear therefore that that cohort of applicant would benefit from the first scenario in the first half of subparagraph (aaa) that I have identified at [21] above. However the first half of subparagraph (aaa) is broader and would also include, for example, others with some other form of leave to remain in the UK such as students. Such individuals would not be resident in the UK as a durable partner, whether that is on a basis which met the definition of ‘family member of a relevant EEA citizen’ or as the durable partner of a qualifying British citizen.
24. The word “unless” introduces an exception. The effect of that exception is that where an applicant can bring themselves within the scope of what follows after the word “unless”, the “first-half” criteria in paragraph (aaa) are incapable of being satisfied, and that route to qualify as a durable partner falls away. In other words, if the “unless” applies, an applicant will not be able to avail themselves of the route to recognition as a durable partner provided by the first half criteria in paragraph (aaa).
25. In that light, one turns to the criterion set out after the word “unless”. Here the focus is the reason why, in the former case (*i.e. the person was not resident in the UK and Islands as the durable partner of a relevant EEA citizen on a basis which met the definition of ‘family member of a relevant EEA citizen’*) the individual was not so resident. To that end, subparagraph (aaa) states:

“unless 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 ... and they did not otherwise have a lawful basis of stay (*my emphasis*) in the UK and Islands for that period.”
26. There are two criteria, both of which must be satisfied. First, the individual “did not hold a relevant document”, and second, “they did not otherwise have a lawful basis of stay”. The relevant document for the purposes of the first criterion is a residence card (or an EEA Family Permit) as a durable partner under the 2016 Regulations. The ‘right to reside’ in this context is ‘facilitated’ by the UK as the host Member State by issuing a relevant

document. That first criterion again emphasises the importance attached to the individual having been issued with a relevant document that recognises residence rights enjoyed by durable partners and conferred following an extensive examination of the personal circumstances of the applicant.

27. It is what follows, the second criterion, that is in my judgement 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 subparagraph (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 criterion 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.
28. Read in this way, subparagraph (aaa) avoids the absurdity that would otherwise 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 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.
29. Properly read, subparagraph (aaa) does not confer a benefit to a person by having regard to their immigration status and treating unlawful presence in the UK as a factor that positively weights in favour of that individual. To the contrary, understandably, it protects those 'durable partners' who previously had no need to secure a document because they otherwise have a lawful basis of stay in the UK. It is logical that individuals who enjoyed leave to remain in their own capacity 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. The construction I have set out is entirely consistent with the Withdrawal Agreement, and the Immigration Rules drafted to give it effect.
30. For these reasons, paragraph (aaa) cannot be read in the way suggested by Mr Ahmed. The appellant's claim is based on a misreading of the

