



IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2022-003302

First-tier Tribunal No: EA/15553/2021

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On 7 August 2023

Before

UPPER TRIBUNAL JUDGE JACKSON

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

And

IBRAHIM BANGURA
(NO ANONYMITY ORDER MADE)

Respondent

Representation:

For the Appellant: Mr A Kanu, legal representative

For the Respondent: Mr C Bates, Senior Home Office Presenting Officer

Heard at Field House by remote video means on 27 June 2023

DECISION AND REASONS

1. This has been a remote hearing which has not been objected to by the parties. The form of remote hearing was by video, using Teams. There were no technical difficulties for the hearing itself and the papers were all available electronically.
2. The Secretary of State appeals with permission against the decision of First-tier Tribunal Judge Birrell promulgated on 4 May 2022, in which Mr Bangura's appeal against the decision to refuse his application under the EU Settlement Scheme (the EUSS) as a family member dated 5 November 2021 was allowed. For ease I continue to refer to the parties as they were before the First-tier Tribunal, with Mr Bangura as the Appellant and the Secretary of State as the Respondent.
3. The Appellant is a national of Sierra Leone, born on 15 September 1969, who first entered the United Kingdom in 2002 and who following an unsuccessful asylum claim, remained in the United Kingdom without leave. He met his partner in 2016, since when they have cohabited and had three children together. The Appellant had made an unsuccessful application under the Immigration (European Economic Area) Regulations 2016. The Appellant then made an

application under the EUSS on the basis that he was a family member, namely the durable partner (now spouse) of an EEA national and it is the refusal of that application which is the subject of this appeal.

4. The Respondent refused the application the basis that there was insufficient evidence of the Appellant being a family member of an EEA national because he did not have an EEA Residence Card (the required relevant document).
5. Judge Birrell allowed the appeal in a decision promulgated on 4 May 2022 on the basis that although the Appellant's marriage on 6 December 2021 was after the specified date, he was at that date a durable partner meeting the definition of such in Annex 1 of Appendix EU, specifically paragraph (b)(ii)(bb)(aaa) in relation to relevant documentation (or alternatives thereto). In particular, the Appellant was not otherwise a family member, he had no EEA Residence Card, he was unlawfully in the United Kingdom and was not in a partnership of convenience or any other durable relationship.

The appeal

6. The Respondent appeals on two grounds as follows. First, that the First-tier Tribunal materially erred in law in misunderstanding the applicable rules in Appendix EU. Specifically, the interpretation given to paragraph (b)(ii)(bb)(aaa) in the definition of durable partner in Annex 1 is one which would undermine the purpose of the requirement of a relevant document as evidence of facilitation and residence in accordance with the EU Withdrawal Agreement. Secondly, that the First-tier Tribunal materially erred in law in relying on guidance from the Respondent as an aid to interpretation and which in any event could not depart from the proper meaning of the rule.
7. On behalf of the Respondent, Mr Bates submitted that there were alternative ways of producing a relevant document as the durable partner set out in the definitions of Annex 1 to Appendix EU. These included that a person was not resident in the United Kingdom at all before the specified date, or that they were resident, but not as the family member of an EEA citizen. Within the definition in (aaa), the 'unless' part was submitted to apply to a person where the reason that they were not resident as a durable partner or with an EEA Residence Card was that they otherwise had lawful status, i.e. a different form of leave to remain in the United Kingdom. The intention being that those persons otherwise here lawfully would not be penalised for being in a relationship with an EEA national but did not require leave as such. This Appellant's residence had not been facilitated under the Immigration (European Economic Area) Regulations 2016, nor did he otherwise have any lawful leave to remain. The provision's purpose was not to disadvantage those who had complied with the immigration rules. Contrary to this, it was submitted that the First-tier Tribunal's interpretation treated those who were in the United Kingdom unlawfully more favourable than those here with leave to remain, which is both irrational and perverse and there are no reasons why the provision would have been drafted in that way.
8. Mr Bates submitted that the interpretation contended for by the Respondent was consistent with the Upper Tribunal's decision in Celik (EU exit; marriage; human rights) [2022] UKUT 00220 (IAC) that a person whose entry and residence had not been facilitated under the Immigration (European Economic Area) Regulations 2016 had no substantive rights under the EU Withdrawal Agreement. The Appellant's underlying claim to be a durable partner of an EEA national was not sufficient as that did not give rise to any automatic rights of residence, these must be recognised and facilitated by the Respondent. The Respondent did not

dispute the nature of the Appellant's relationship, just that it was not covered by the requirements of Appendix EU or the EU Withdrawal Agreement.

9. As to the guidance referred to by the First-tier Tribunal, this was not legislation and can not override the wording of the rules where contrary to it. It was misconceived to rely on guidance in these circumstances. In any event, amendments have been made to the definition in Annex 1 to Appendix EU which shows the intention more clearly and consistently.
10. On behalf of the Appellant, Mr Kanu submitted that the First-tier Tribunal had interpreted the rules correctly and applied them to this Appellant. When deciphering the meaning of durable partner, it was submitted that the Appellant's history was important, in that he arrived in 2002 as a refugee but became an overstayer because of poor legal representation. It was accepted that he had no lawful leave to remain at the specified date and his earlier application for an EEA Residence Card had only been refused because he did not have a passport. The Appellant has been living with his partner in a relationship akin to marriage, where his partner and children have a permanent right to reside and therefore he meets the criteria in the Immigration Rules regardless of whether he had leave to remain. Mr Kanu offered little by way of submissions as to the correct interpretation of the relevant provision, nor why the Appellant's status in the United Kingdom was irrelevant to it. Further, it was submitted that the Respondent could not disavow herself of her own guidelines as to the relevant provisions.
11. Mr Kanu also submitted that the interpretation of paragraph (b)(ii)(bb)(aaa) of the durable partner definition in Annex 1 to Appendix EU should be a proportionality exercise, but could not explain what he meant by that, on what basis proportionality is relevant to interpretation of what is now a domestic provision of the Immigration Rules or on what basis that would in any event assist the Appellant or support the interpretation given by the First-tier Tribunal.

Findings and reasons

12. The relevant requirements of the EUSS scheme are set out in Appendix EU to the Immigration Rules, paragraph EU14 of which sets out the eligibility requirements for a person seeking pre-settled status, which includes in Condition 1(a)(ii) a family member of a relevant EEA citizen and in (b) that the applicant is not eligible for indefinite leave to remain under paragraph EU11 as they have not yet completed a continuous qualifying period of five years.
13. 'Family member of a relevant EEA citizen' is then defined in Annex 1 to Appendix EU as follows:

A person who does not meet the definition of 'joining family member of a relevant sponsor' in this table, and who has satisfied the Secretary of State, including by the required evidence of family relationship, that they are (and for the relevant period have been), or (as the case may be) for the relevant period (or at the relevant time) they were:

(a) the spouse or civil partner of a relevant EEA citizen, and:

- (i) the marriage was contracted or the civil partnership was formed before the specified date; or*
- (ii) the applicant was the durable partner of the relevant EEA citizen before the specified date (the definition of 'durable partner' in this table being met before that date rather than at the date of application), and the partnership remained durable at the specified date; or ...*

14. 'Durable partner' is defined in Annex 1 as follows:

(a) *the person is, or (as the case may be) for the relevant period was, in a durable relationship with a relevant EEA citizen, 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 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 spouse or civil partner of a relevant sponsor (as described in subparagraph (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 ... 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 subparagraph (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 subparagraph (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 partner was formed and durable before (in the case of a family member of a qualifying British citizen as described in subparagraph (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 persons's relationship with that party.

15. The First-tier Tribunal decision also referred to the Respondent's guidance for applicants under the EUSS in relation to evidence of relationship, which referred to an unmarried partner without a relevant document as needing to show evidence:

- *of your relationship to your unmarried (durable) partner*
- *that your relationship existed by 31 December 2020*
- *that your relationship continues to exist on the date you apply*

16. The First-tier Tribunal fairly notes in the decision that the definition section in Appendix EU so far as it defines durable partner does not make easy reading, but finds in paragraph 14 that:

"... I am satisfied however that (aaa) can be read as being met where someone did not otherwise qualify as a family member, as defined, did not have a residence card, and was unlawfully in the UK and it wasn't a partnership of convenience and neither party has not had for the relevant period another durable partnership. All of those are met by the Appellant. ..."

17. In paragraph 15, the First-tier Tribunal does on to state:

"My interpretation of (aaa), that there is no requirement for a documented right of residence, is confirmed by the above exert from the Respondent's own guidance which shows that the requirement to have a document is not fatal to any application, provided that the evidence of the relationship can be shown to have existed as of 31/12/20 and that it continues to exist. In other words, the Respondent tells applicants that they do not necessarily need a document under the requirements in order to qualify for status as a durable partner. The Respondent's only reason for refusal is that the Appellant did not have a document before end of 31/12/20, however on their own guidance for applicants this is not necessary."

18. The only issue remaining that was under challenge is whether the Appellant could satisfy any of the alternative provisions to holding a relevant document for the purposes of the second part of the definition of 'durable partner'. It is not suggested that anything other than that in (aaa) could apply given that the Appellant was in the United Kingdom at the specified date. Whilst I have every sympathy for Judge Birrell trying to interpret what is a particularly bad example of appalling drafting in the Immigration Rules, I find for the following reasons that the interpretation used was an error of law and the Respondent's guidance to applicants was not a suitable supporting reason for the interpretation used.

19. The first part of the definition in (aaa) is that the applicant was not resident in the United Kingdom as the durable partner of a relevant EEA citizen anytime before the specified date, is relatively straightforward and easily met by a person such as the Appellant. The second part of the definition, starting with 'unless' is more difficult and introduces a restriction narrowing the first part of the definition. The two 'unless' requirements are (i) that the applicant did not hold a relevant document as a durable partner; and (ii) the applicant did not otherwise

have a lawful basis of stay in the UK and Islands for that period. The requirement in (i) is also relatively straightforward and an applicant who did hold a relevant document would fall within an earlier part of the definition. The second 'unless' requirement in (ii) is one which distinguishes between those applicants who had a lawful basis of stay in the UK and Islands and those who did not, with only the former falling within the definition.

20. The requirement for a person to otherwise have a lawful basis of stay in the UK and Islands would be effective so as not to penalise a person who is here on some other lawful basis and therefore had no need previously to apply for an EEA Residence Card. The alternative interpretation, as used by the First-tier Tribunal would, to the contrary, produce an absurd and irrational result which would benefit those here entirely unlawfully and penalise those who were otherwise compliant with immigration requirements. That can not be the result intended and such an outcome would go against the normal principles of interpretation of the Immigration Rules as set out most recently by the Supreme Court in R (on the application of Wang and another) v Secretary of State for the Home Department [2023] UKSC 21.
21. An interpretation which benefitted those here unlawfully over and above those with a different lawful basis of stay would also be inconsistent with the logic and intention of the EUSS and the EU Withdrawal Agreement, which are both, broadly intended, to protect the rights existing as at the specified date in the period after the UK left the EU. A person here unlawfully has no such rights and to read the requirement that way would also be contrary to the decision in Celik, that only those whose entry and residence has been facilitated by the United Kingdom have any substantive rights under the EU Withdrawal Agreement. Any person here unlawfully can not be said to have had their entry and residence facilitated even in the most broad terms.
22. For these reasons, the First-tier Tribunal erred in its interpretation of (aaa) by finding that the Appellant satisfied it as a person unlawfully in the United Kingdom. As such, the decision of the First-tier Tribunal must be set aside. The Appellant can not meet the requirement in paragraph (b)(ii)(bb)(aaa) of the definition of durable partner in Annex 1 to Appendix EU, as correctly interpreted, and therefore can not meet the requirements of paragraph EU14 for a grant of pre-settled status. The appeal is therefore remade to dismiss the appeal.
23. The second ground of appeal is not material to the outcome given the findings above and in any event, the First-tier Tribunal only supported its interpretation as being consistent with the Respondent's guidance as opposed to strictly using that as an aid to interpretation. In any event, I consider the Respondent's guidance to be neutral as it does not directly address the point as to the requirements in or interpretation of (aaa) given that it is silent as to any requirement as to an applicant's immigration status. This information would in any event be known to the Respondent and not a point upon which an applicant should need to provide separate evidence with an application, contrary to those points specifically mentioned as to the relationship relied upon which would need to be separately evidenced in the absence of them holding a relevant document.

Notice of Decision

The making of the decision of the First-tier Tribunal did involve the making of a material error of law. As such it is necessary to set aside the decision.

I set aside the decision of the First-tier Tribunal.

The decision on appeal is remade as follows:

The appeal is dismissed on all grounds.

G Jackson

Judge of the Upper Tribunal
Immigration and Asylum Chamber

27th July 2023