



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

Appeal Number: UI-2022-003467
EA/13408/2021

THE IMMIGRATION ACTS

**Heard at Field House
On 20th September 2022**

**Decisions & Reasons Promulgated
On 1st November 2022**

Before

UPPER TRIBUNAL JUDGE LINDSLEY

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

**LIRIM MIFTARI
(ANONYMITY ORDER NOT MADE)**

Respondent

Representation:

For the Appellant: Ms A Everett, Senior Home Office Presenting Officer
For the Respondent: Mr N Ahmed, of Evolent Law Solicitors

DECISION AND REASONS

Introduction

1. The claimant is a citizen of Albania born in 1994. He was refused leave to remain under Appendix EU as the durable partner of Ms Mara Hann, a citizen of Germany on 11th June 2021. His appeal against this decision was allowed by First-tier Tribunal Judge Manuell in a determination promulgated on the 24th May 2022.

2. Permission to appeal was granted to the Secretary of State by Judge of the First-tier Tribunal Aldridge on 1st July 2022 on the basis that it was arguable that the First-tier judge had erred in law in interpreting Appendix EU Annex I of the Immigration Rules incorrectly.
3. The matter came before me to determine whether the First-tier Tribunal had erred in law, and if so to consider whether any such error was material and the decision should be set aside. Both parties agreed that if there was an error of law as argued for by the Secretary of State that there was no need for any submissions on remaking as I would then simply remake the appeal by dismissing it.

Submissions – Error of Law & Remaking

4. In oral submissions from Ms Everett and the grounds of appeal it is argued for the Secretary of State, in summary, as follows. It is argued that the First-tier Tribunal materially misdirected itself in law as Appendix EU required that the claimant have a relevant document, or have applied for a relevant document prior to 31st December 2020, showing that his residence had been facilitated under the 2016 EEA Regulations. This had not happened with this claimant and he could not meet the requirements of paragraph (b)(ii)(bb)(aaa) of Annex 1 of Appendix EU. Further he had not had any other type of lawful residence in the UK. The cases of Batool & others (other family members: EU exit) [2022] UKUT 00219 and Celik (EU exit; marriage; human rights) [2022] UKUT 00220 were relied upon in support of the conclusion that the First-tier Tribunal had erred in law.
5. In response to the submission of Mr Ahmed that paragraph (b)(i) and (ii) of Annex 1 of Appendix EU meant that a durable partner living in the UK could either have a residence card showing his residence had been facilitated (paragraph (b)(i)) or not have one (paragraph (b)(ii)) Ms Everett argued that this paragraph in fact addressed a scenario where the durable partner had not yet entered the UK and so did not have a residence card for that reason and had formed their durable relationship abroad. These were not the facts of this case as the claimant was in the UK and had formed his durable relationship in this country, and there was no residence card because no application had been made prior to the 31st December 2020 despite this being a theoretical possibility. An error of law should therefore be found and the appeal remade dismissing it.
6. In submissions Mr Ahmed argued that paragraph (b)(ii)(bb)(aaa) of Annex 1 of Appendix EU was the key to what had been argued before the First-tier Tribunal, as is set out in the skeleton argument which had been before the First-tier Tribunal, and that it was on this basis that the First-tier Tribunal properly found that the appellant was entitled to succeed. He argued that whatever was intended the drafting of the Immigration Rules means that it is possible to either have a residence card as per b(i) or not as per (b)(ii)(bb)(aaa), and that although (b)(ii)

(bb)(aaa) starts with addressing those not resident in the UK it then turns after to those who are by way of what is said after “unless”; and further it is not addressing those who are not currently in the UK as they are dealt with under the Immigration Rules by way of applications under the separate Appendix EU Family Permit. In addition, Mr Ahmed argued, it would not be reasonable to have different rules under Annex 1 of Appendix EU permitting those to succeed who had no residence card by 31st December 2020 simply because they had formed their durable partnership abroad rather than in the UK.

7. At the end of the hearing I reserved my decision.

Conclusions – Error of Law

8. This appeal turns on the interpretation of the definition of durable partner in Appendix EU Annex 1 with focus on the meaning of b(ii)(bb) (aaa). Neither party argued that the cases of Celik or Batool provided guidance with respect to this particular provision. As Mr Ahmed submitted it was accepted by those representing the claimants in both Celik and Batool that they could not succeed under the Immigration Rules. The guidance in the headnotes of both cases holds that unless the durable partner fell within (b)(i) they did not succeed under the Immigration Rules. I find that Mr Ahmed is correct to submit that there is another group of durable partners who do not hold a relevant document and did not apply for one prior to the specified date who can succeed in meeting the definition as clearly something is meant by what is said at b(ii). I set out the provision below but with my own highlighting in an attempt to assist navigation of this densely drafted provision with respect to b(i) and b(ii).

Appendix EU: Annex 1: Definitions

durable partner

9. **(a)** 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 subparagraph (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**

10. This application was made after the specified date, on 26th February 2021, so the claimant meets the provision at (b)(ii)(aaa). I find that this provision applies to those in the UK, as those who are not in the UK are dealt with under Appendix EU Family Permit. The question arises as to the meaning of (b)(ii)(bb)(aaa) in this context. I find that this provision means that to qualify the person must not have been resident in the UK as a durable partner at any time before the specified date (31st December 2020). I find that what is said after “unless” means that the person cannot qualify under this provision as not being a durable partner in the UK by simply not having a relevant document or being unlawfully present in the UK prior to the specified date. I conclude what is meant is a person who has entered the UK after 31st December 2020 and makes an application, and who is a durable partner of a relevant EEA citizen or a durable partner of a qualifying British citizen, where, as suggested by Ms Everett, the durable partnership was formed abroad in another EU state so that person had no opportunity to apply for a relevant document.
11. The First-tier Tribunal addresses their reasoning on the meaning of paragraph (b)(ii)(bb)(aaa) at paragraphs 18 of the decision. The First-tier Tribunal rightly acknowledges that the provision is hard to

understand, describing it as densely drafted. I find however that the interpretation given, that “unless” in this paragraph meant that it was possible to qualify either by having applied for a relevant document as per paragraph (b)(i) or not having one as per (b)(ii) and being unlawfully present, is not sufficiently reasoned; is inherently unlikely as it would have been possible to have simply stated that possession of a relevant document was not necessary to succeed if this was what was meant for people who could have applied for one as they were in a durable partnership before the specified date but had not done so prior to the specified date; and amounts to a misdirection of law as I find it actually means what is set out above at paragraph 10 of this decision.

12. I remake the appeal by finding that the claimant is unable to fulfil the requirements of Appendix EU as he did he did not hold a relevant document showing his residence had been facilitated under the 2016 EEA Regulations on 31st December 2020, nor had he applied for such a document prior to this specified date; and he did not meet the requirements of paragraph (b)(ii)(bb)(aaa) of Annex 1 of Appendix EU as his case is that he was a durable partner in the UK without a relevant document prior to the specified date. As a result he cannot succeed in his appeal under the Immigration Rules, and it must be dismissed.

Decision:

1. The making of the decision of the First-tier Tribunal involved the making of an error on a point of law.
2. I set aside the decision of the First-tier Tribunal.
3. I re-make the decision in the appeal by dismissing it.

Signed: Fiona Lindsley
2022
Upper Tribunal Judge Lindsley

Date: 21st September