



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

Appeal Number: UI-2022-002538  
(EA/13870/2021)

**THE IMMIGRATION ACTS**

**Heard at Field House  
on 22 September 2022**

**Decision & Reasons Promulgated  
on 3 January 2023**

**Before**

**UPPER TRIBUNAL JUDGE CANAVAN  
DEPUTY UPPER TRIBUNAL JUDGE MAILER**

**Between**

**THE SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Appellant

**and**

**ISRAT RUMANA KABIR**

Respondent

**Representation:**

For the appellant: Mr T. Melvin, Senior Home Office Presenting Officer  
For the respondent: Ms J. Hassan, instructed by Morgan Hill Solicitors

**DECISION AND REASONS**

1. For the sake of continuity, we shall refer to the parties as they were before the First-tier Tribunal although technically the Secretary of State is the appellant in the appeal before the Upper Tribunal.
2. The original appellant (Ms Kabir) appealed the respondent's (SSHD) decision dated 25 August 2021 to refuse leave to remain under the immigration rules relating to the EU Settlement Scheme. The appeal was

brought under The Immigration (Citizens' Rights Appeals) (EU Exit) Regulations 2020 ('the CRA Regulations 2020').

3. First-tier Tribunal Judge C.A.S. O'Garro ('the judge') allowed the appeal in a decision sent on 08 March 2022. The judge considered evidence relating to the appellant's relationship with an EEA national. The judge noted that the appellant had not been issued with a family permit or residence card recognising or facilitating a right of residence under EU law prior to 31 December 2020 [16]. The appellant said that she started living with her partner in September 2020. They gave notice of their intention to marry on 05 October 2020. The couple said that they were unable to contract the marriage until 07 June 2021 because of delays resulting from Covid 19 restrictions. The judge found that there was no evidence to show that they were offered a date to marry in December 2020 that was subsequently cancelled. However, she was satisfied that the couple were in a committed relationship that could be viewed as durable before the end of the transition period on 31 December 2020 [36].
4. The judge found that the appellant did not hold a 'relevant document' issued under The Immigration (European Economic Area) Regulations 2016 ('the EEA Regulations 2016'). She went on to consider the definition of a 'durable partner' contained in Annex 1 of Appendix EU, and in particular, the section that appears to relate to those who do not hold a relevant document contained in paragraph (b)(ii)(bb)(aaa) of the definition [39]. Having noted that the provision was 'convoluted' and 'not clearly drafted', the judge concluded that the appellant appeared to come within the definition because she was in a durable relationship before 31 December 2020. At the date when she made the application for leave to remain under the EU Settlement Scheme the appellant had lawful leave to remain until 25 August 2021. The judge concluded that the appellant therefore met the Eligibility requirement of Paragraph EU14 of Appendix EU [42]-[43].
5. The Secretary of State applied for permission to appeal to the Upper Tribunal, referring in particular to the 'unless' clause in the last few lines of paragraph (b)(ii)(bb)(aaa) of Annex 1 of Appendix EU. The grounds of appeal are not particularised but made the following submission in relation to that paragraph:

'It is submitted that the requirements of the paragraph b(ii)(aaa) (sic) of Annex 1 are not met in this appellant's case as the appellant did not hold a relevant document as a durable partner, which remains a requirement within this paragraph of the Rules. Additionally, the appellant also had a lawful basis to remain in the UK for that period. It is submitted that the definition requires the appellant to be not resident as a durable partner and also, "... not otherwise have a lawful basis of stay in the UK and Islands for that period.". As the appellant had an alternative lawful basis to remain during that period, the appellant cannot satisfy the requirements of the definition of "durable partner" as defined in Annex 1 of Appendix EU [of] the

Immigration Rules. The appellant was not residing in accordance with EU law during the period claimed as they were residing within another capacity of the Immigration Rules.'

### **Decision and reasons**

6. At the crux of this appeal is the meaning of the definition of a 'durable partner' (other family member) contained in 'Annex 1 - Definitions - Durable Partner' for the purpose of defining a 'family member' of a relevant EEA citizen under the 'Eligibility' requirement contained in paragraph EU14 of Appendix EU of the immigration rules. This is the way the relevant section is presented in the online text of the immigration rules (including the same formatting):

'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: [our emphasis in bold]

(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...** [emphasis added in grounds of appeal]

7. On the face of it, the facts of this case come within the principles of EU law identified in *Celik and Batool and others (other family members: EU exit)* [2022] UKUT 219 (IAC). The appellant did not acquire rights of residence as a 'family member' before the end of the transition period because she did not marry her EEA national sponsor until after the United Kingdom had exited from the European Union. Even if she was in a durable relationship before the end of the transition period her entry as an 'other family member' had not been facilitated by the issuing of a residence card, nor had she made an application for facilitation of entry or residence before the end of the transition period on 31 December 2020. Her circumstances did not engage the terms of the Withdrawal Agreement.
8. The immigration rules are a statement of the Secretary of State's policy relating to entry and residence in the UK. They are a mechanism of domestic law. They should not be interpreted in the same way as a statute but should be construed sensibly according to the natural and plain meaning of the wording: see *Mahad and Others* [2009] UKSC 16.
9. Although the EU Settlement Scheme was intended to give effect to the Withdrawal Agreement the Secretary of State has discretion by operation of the Immigration Act 1971 to make provision for leave to enter or remain, which is wider than the provisions contained in EU law or the Withdrawal Agreement.
10. The question raised by the original appellant in this appeal is whether paragraph (b)(ii)(bb)(aaa) of Annex 1 of Appendix EU might provide a concession in a certain category of cases for those in a durable relationship with an EEA citizen who did not have a relevant document, but did have lawful leave at the date of the application.
11. For many years there have been calls for the immigration rules to be simplified and made more accessible. Parts of the EU Settlement Scheme contained in Appendix EU are the antithesis of this ambition, and if anything, manage to increase the complexity and construct even higher barriers to comprehension.
12. Given that the scheme was designed to regularise the status of millions of European citizens and their family members who were resident in the United Kingdom before it exited from the European Union, the provisions needed to be sufficiently clear for a lay person to apply for leave to enter or remain without the assistance of a legal representative. Instead, some parts are barely comprehensible even to experienced legal professionals, including the Secretary of State's own representatives, who through no fault of their own often seem unable to explain the meaning of the provisions to the Tribunal with any confidence.
13. The rules require navigation from definition to definition to understand a single requirement. The publicly available online provisions are formatted

in a dense and impenetrable way that ignore the usual conventions of legal drafting, with no paragraph breaks, confusing alphabetical sub-provisions, and define requirements by reference to multiple definitions elsewhere in the Appendix. Some provisions contain a series of requirements expressed in the negative, which makes the meaning more difficult to decipher. In short, some parts of the rules relating to the EU Settlement Scheme are so difficult to comprehend that it is at least arguable that they lack the clarity of law.

14. An aspect of the definition of a 'durable partner' contained in Annex 1 of Appendix EU (definitions) is one such example. In this case we have been asked to interpret the meaning of paragraph (b)(ii)(bb)(aaa) of Annex 1 (the provision not being numbered).
15. The starting point must be the stated intention of the rules. Appendix EU was originally designed to give effect to the then draft Withdrawal Agreement. It is the mechanism by which EU citizens and their family members who were resident in the United Kingdom before the end of the transition period, and the family members of certain British citizens, could apply for leave to enter or remain under UK immigration law.
16. Paragraph EU1 states that Appendix EU sets out the basis on which an EEA citizen and their family members will be granted indefinite leave to enter or remain or limited leave to enter or remain. Appendix EU then goes on to outline provisions relating to procedure and requirements for a valid application to be made.
17. Appendix EU then sets out certain conditions that must be satisfied in the 'Eligibility' requirements. These are separated into applications for indefinite leave to enter or remain or applications for limited leave to enter or remain. In turn each of those sections contain requirements relating to persons eligible for leave to enter or remain as a 'relevant EEA citizen', their 'family members', and certain derivative categories. There are separate sections for persons who are eligible for leave to enter or remain as 'joining family members'.
18. This is an appeal brought by the Secretary of State, yet her representative was not in a position to shed light on the meaning of the provision with reference to which the appeal was allowed. On behalf of the Secretary of State, Mr Melvin submitted that the appellant did not meet the requirements of the rules because she did not hold a 'relevant document' before the end of the transition period and cited the decision in *Celik (EU Exit; marriage; human rights)* [2002] UKUT 220 (IAC). When asked to explain the meaning and effect of paragraph (b)(ii)(bb)(aaa) he simply repeated that Appendix EU required the appellant to hold a relevant document as a durable partner. As set out below, there may be good reason why the Secretary of State's representatives might struggle to assist. However, it is reasonable for the Upper Tribunal to expect the Secretary of State, as represented in court, to be able to explain the meaning and effect of her own rules.

19. On behalf of the appellant, Ms Hassan made a valiant effort to break down the various elements of the paragraph, but the only way to attempt to understand the meaning is to consider it alongside other provisions scattered in the numerous definitions set out in Appendix EU. Unfortunately, the decision in *Celik* does not assist us in this task because the definition of 'durable partner' contained in paragraph (b)(ii)(bb)(aaa) was not considered.
20. The Upper Tribunal has spent a long time seeking to trace the origin and development of this part of the scheme before writing this decision. This has involved looking at past iterations of Appendix EU, the original Statement of Intent for the scheme, and the respondent's guidance for caseworkers.
21. Although we could attempt a more detailed analysis citing all the different definitions that one might need to turn to within the wording of paragraph (b)(ii) and Appendix EU, we conclude that it is not a proportionate use of court time. Having spent many hours considering this part of the rules one finds that there is nothing natural or plain about the wording that might reveal its intended meaning. A repeated reading of paragraph (aaa), the associated definitions within the Appendix, and the policy guidance only leads to a 'curiouser and curiouser' situation. Like Alice in Wonderland one falls down a rabbit hole and stumbles across a circular race, with the Eaglet exclaiming: 'Speak English!... I don't know the meaning of half of those long words, and what's more, I don't believe you do either!'
22. In the absence of any effective assistance from the Secretary of State, the most we can observe is this.
  - (i) **Paragraph (a)** of the definition of a durable partner sets out the core element of the definition. In addition to that, denoted by the word 'and' at the end of that section, a person must also show that they meet the requirements of either paragraph (b)(i) 'or' paragraph (b)(ii).
  - (ii) **Paragraph (b)(i)** relates to durable partners who have applied as family members of a 'relevant EEA citizen' who have, or have applied for, a 'relevant document' before the 'specified date' i.e. those who have, or have applied for a relevant document, before 31 December 2020.
  - (iii) **Paragraph (b)(ii)** relates to those who are applying as a durable partner of a 'relevant sponsor', a term that is distinct from a 'relevant EEA citizen', which is used in relation to applications for 'joining family members'. In broad terms it appears to relate to those who have applied as 'joining family members' after 31 December 2020 who do not have a relevant document. The meaning of sub-paragraph (aaa) is simply unclear.
23. We bear in mind that the burden is on the Secretary of State to show how and why it is said that the First-tier Tribunal erred in law in allowing the

appeal with reference to paragraph (b)(ii)(bb)(aaa) of Annex 1 of Appendix EU. We cannot exclude the possibility that, if the provision was explained properly with reference to the other definitions contained in Appendix EU, it might reveal that the judge's interpretation was incorrect on the facts of this case. However, neither the grounds of appeal nor the oral submissions explained the intended meaning of this part of the rules adequately. In the absence of detailed submissions, the Upper Tribunal would usually attempt a sensible interpretation of the rule from the plain wording. For the reasons given above, it is not possible to discern the meaning or application of paragraph (b)(ii)(bb)(aaa) with any confidence. Given the incoherence of this aspect of the rules, it cannot be said that the judge's attempted interpretation was irrational. The Secretary of State has failed to show how or why her finding amounted to an error of law.

## DECISION

The Secretary of State has failed to show that the First-tier Tribunal decision involved the making of an error of law

Signed M. Canavan                      Date 21 December 2022  
Upper Tribunal Judge Canavan

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### **NOTIFICATION OF APPEAL RIGHTS**

1. A person seeking permission to appeal against this decision must make a written application to the Upper Tribunal. Any such application must be **received** by the Upper Tribunal within the **appropriate period** after this decision was **sent** to the person making the application. The appropriate period varies, as follows, according to the location of the individual and the way in which the Upper Tribunal's decision was sent:
2. Where the person who appealed to the First-tier Tribunal is **in the United Kingdom** at the time that the application for permission to appeal is made, and is not in detention under the Immigration Acts, the appropriate period is **12 working days (10 working days, if the notice of decision is sent electronically)**.
3. Where the person making the application is in detention under the Immigration Acts, **the appropriate period is 7 working days (5 working days, if the notice of decision is sent electronically)**.
4. Where the person who appealed to the First-tier Tribunal is **outside the United Kingdom** at the time that the application for permission to appeal is made, the appropriate period is **38 days (10 working days, if the notice of decision is sent electronically)**.
5. A **"working day"** means any day except a Saturday or a Sunday, Christmas Day, Good Friday or a bank holiday.
6. The date when the decision is "sent" is that appearing on the covering letter or covering email