



IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2022-001523

First-tier Tribunal No: EA/10845/2021

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On 11 July 2024

Before

UPPER TRIBUNAL JUDGE DANIEL SHERIDAN
DEPUTY UPPER TRIBUNAL JUDGE SHEPHERD

Between

Secretary of State for the Home Department

Appellant

and

Anit Khadka
(NO ANONYMITY DIRECTION MADE)

Respondent

Representation:

For the Appellant:

Mrs Nolan, Senior Home Office Presenting Officer

For the Respondent:

Mr Youssefian, Counsel instructed by Paul John & Co Solicitors

Heard at Field House on 24 June 2024

DECISION AND REASONS

Background

1. This is an appeal by the Secretary of State. However, we will refer to the parties as they were designated in the First-tier Tribunal.
2. The appellant is a citizen of Nepal who entered the UK in 2009 as a student. He had leave until August 2014. Thereafter, he remained in the UK unlawfully.
3. In 2018 the appellant applied for asylum. His application was refused on 19 January 2021.
4. On 5 February 2021 the appellant applied for leave under the EU Settlement Scheme on the basis of his relationship with an EEA national who was granted settled status in August 2019 ("the sponsor"). The respondent refused the application.

5. The appellant appealed to the First-tier Tribunal where his appeal came before Judge of the First-tier Tribunal Wood (“the judge”). In a decision promulgated on 22 January 2022, the judge allowed the appeal. The respondent now appeals against this decision.

Decision of the First-tier Tribunal

6. The judge found that the appellant and sponsor were, and since 2015 have been, in a durable relationship but that this was insufficient to satisfy the requirements of Appendix EU of the Immigration Rules because the appellant was required by the definition of “durable partner” in Annex 1 to Appendix EU to have a “relevant document”, such as a residence card, at the end of the transition period on 31 December 2020 (referred to in Appendix EU as “the specified date”) but did not have such a document. However, the judge found – and allowed the appeal on the basis – that it would be disproportionate under the EU Withdrawal Agreement for the appellant to be expected to leave the UK.

The agreed error of law

7. It was common ground that the judge erred by finding that it would be disproportionate under the EU Withdrawal Agreement to refuse the appellant leave. This is because, as the Court of Appeal confirmed in Celik v Secretary of State for the Home Department [2023] EWCA Civ 921, a partner of an EEA national who was not married to the EEA national before the specified date, does not fall within the scope of, or have any rights under, the EU Withdrawal Agreement.

Submissions

8. We heard oral submissions from Mr Youssefian and Mrs Nolan. After the hearing, Mr Youssefian emailed written submissions. We invited Mrs Nolan to respond, which she did. Despite the procedural irregularity we have considered the written submissions.
9. In summary, Mr Youssefian argued that the error is immaterial because the appellant was entitled to leave under Appendix EU. He submitted that the definition of “durable partner” in Annex 1 of Appendix EU carves out an exception to the requirement to hold a “relevant document” for individuals who, on the specified date, had a “lawful basis of stay in the United Kingdom”. Mr Youssefian maintained that the appellant had a lawful basis of stay because he had a pending asylum application on the specified date.
10. Mr Youssefian acknowledged that the appellant could only succeed if we accept that having a pending asylum claim means that he had a “lawful basis of stay in the UK”.
11. Mrs Nolan did not dispute that the appellant would succeed under Appendix EU if he was able to demonstrate that he had a lawful basis to stay on the specified date. Her argument was that the appellant did not have a lawful basis to stay because he was in the UK unlawfully when he applied for asylum; and having a pending asylum application did not change the fact that he had no lawful basis to stay in the UK.

The definition of “durable partner” in Annex 1 to Appendix EU

12. The definition of “durable partner” in Annex 1 to Appendix EU changed in April 2023. It is the version in force before the change that is relevant. It provides 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 (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 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, 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]

Analysis

13. The definition set out above was recently considered by the Upper Tribunal in Hani (EUSS durable partners: para. (aaa)) [2024] UKUT 00068 (IAC). The appellant in Hani was a citizen of Albania who entered the UK unlawfully and applied for asylum in June 2020. In December 2020 (i.e. prior to the specified date) he withdrew his asylum application and was placed on immigration bail. He then applied in February 2021 for pre-settled status.
14. The panel in Hani found that, as the appellant did not have a "relevant document" on the specified date, he would only be capable of meeting the definition of a durable partner if he otherwise had a lawful basis to stay in the UK.
15. The panel then considered whether having immigration bail on the specified date meant that the appellant had a lawful basis to stay, and concluded that it did not. The panel observed that the power to grant immigration bail is engaged where a person is being detained under immigration powers, or is liable to be so detained, and therefore:

"By definition, immigration detention powers are not engaged in relation to a person who is lawfully resident in the United Kingdom".

16. As emphasised by Mr Youssefian, there is an important distinction between this case and Hani, which is that in this case, unlike in Hani, on the specified date the appellant had a pending asylum application.
17. This case turns on whether having a pending asylum application means that the appellant had a lawful basis stay in the UK for the purpose of the definition of a durable partner in Appendix EU.
18. Mrs Nolan identified two authorities which, in our view, make it clear that a person who overstays and then makes an asylum claim cannot be characterised as having a lawful basis of stay in the UK whilst the asylum claim is pending (unless he is ultimately successful in the asylum claim).
19. The first case is Akinyemi v The Secretary of State for the Home Department [2017] EWCA Civ 236, where at paragraph 39 the following is said:
- “In that connection Mr Dunlop referred to the decision of the Supreme Court in R (ST (Eritrea)) v Secretary of State for the Home Department [2012] UKSC 12, [2012] 2 AC 135. The issue in that case was whether an asylum-seeker was "lawfully" in the UK, within the meaning of the Refugee Convention, during the period when she had been given temporary admission pending a decision of her claim. The Court held that she was not, since she had not been given leave to enter. **The word "lawfully" implied a positive right to be in the contracting state, "not just being tolerated"** (per Lord Hope at para. 32 (p. 151 C-D)), and **the appellant had no such right even though she could not be removed** (para. 35 (pp. 152-3)). The House distinguished the decision of the House of Lords in Szoma v Secretary of State for Work and Pensions [2005] UHL 64, [2006] 1 AC 564, in which it was held that a refugee on temporary admission was "lawfully present in the United Kingdom" for the purpose of entitlement to income support, on the basis that the House was there concerned with different legislation with a different purpose.” [Emphasis added].
20. The second case is CI (Nigeria) v The Secretary of State for the Home Department [2019] EWCA Civ 2027. In CI the Court of Appeal considered whether the appellant in that case was “lawfully resident in the UK”, for the purpose of section 117C(4)(a) of the 2002 Act, whilst his asylum application was pending. The Court of Appeal drew a distinction between asylum seekers who are subsequently granted leave as a refugee and those who are not; finding that those in the former category fall to be treated as lawfully resident during the period their asylum application was pending whereas those in the latter category (ie those whose asylum claim is ultimately not successful) do not. In paragraphs 47-48 it is stated:
47. In these circumstances it can be said that being a refugee within the meaning of the Refugee Convention does not, by itself, give rise to a legitimate expectation of being permitted to stay in the UK (and establish a private and family life here): it is only where the individual concerned satisfies the conditions for being granted leave to remain as a refugee - including the condition that there is no safe country to which they can be removed - that such a legitimate expectation arises. The subsequent grant of leave to remain shows that this condition was met and that it would, in consequence, have been a breach of the UK's obligations in international law to expel such an individual from the UK. This provides a justification for treating an applicant for asylum who has been temporarily admitted to the UK while their application is determined and who is subsequently granted leave to remain as a refugee as "lawfully resident" in the UK during this period for the purposes of section 117C(4)(a) of the 2002 Act.
48. It is not necessary or pertinent to pursue this question further, however, as the decision in SC (Jamaica) is a binding precedent. What matters for present purposes is that **there is no warrant for extending the ratio of that case to**

overstayers whose claim for asylum has been rejected but who later apply on the basis of their continued presence in the UK for a legal right to remain. [Emphasis added]

21. In accordance with CJ, as the appellant's asylum claim was not successful, he was not "lawfully resident in the UK" whilst his asylum claim was pending for the purposes of section 117C(4)(a) of the 2002 Act. But could he have had "a lawful basis of stay" for the purposes of the definition of a durable partner in Appendix EU whilst his asylum claim was pending even if he was not "lawfully resident" during that time for the purposes of section 117C(4)(a) of the 2002 Act? Mr Youssefian argued that he could as, in his view, "lawful basis of stay in the UK" is broader than "lawfully resident in the UK".
22. We are not persuaded by this argument. We can see no reason in logic or principle to construe the phrase "lawful basis of stay in the UK" as broader than "lawfully resident in the UK". In our view both the term "lawful basis" and the term "lawfully resident" imply a positive right to be in the contracting state, not just that a person's presence is tolerated. In circumstances where a person with a pending asylum application is not "lawfully resident in the UK" for the purposes of section 117C(4)(a) of the 2002 Act, we are not satisfied that there is any reason to treat him as having a "lawful basis of stay in the UK" for the purposes of Appendix EU.
23. As the appellant did not have a relevant document and did not otherwise have a lawful basis to stay in the UK at the specified date, he does not meet the definition of a durable partner in Annex 1 of Appendix EU to the Immigration Rules.

Conclusion

24. As accepted by Mr Youssefian, the judge erred by finding that it would be disproportionate under the EU Withdrawal Agreement to refuse the appellant leave. As a consequence of this error of law we set aside the decision.
25. We remake the decision by dismissing the appeal on the basis that (a) the appellant is not entitled to leave pursuant to Appendix EU because he does not meet the definition of a durable partner in Annex 1 to Appendix EU, for the reasons given above; and (b) as he was not married to an EEA national at the end of the transition period, he does not have any rights under, and falls outside the scope of, the EU Withdrawal Agreement for the reasons given in Celik.

Notice of Decision

The decision of the First-tier Tribunal is set aside. We remake the decision by dismissing the appeal.

D. Sheridan
Upper Tribunal Judge Daniel Sheridan

Judge of the Upper Tribunal
Immigration and Asylum Chamber

9.7.2023