IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2022-000232
First-tier Tribunal No:
EA/01470/2021

THE IMMIGRATION ACTS

Heard at Field House IAC
On the 23 November 2022

Decision & Reasons Promulgated
On the 15 February 2023

Before

UPPER TRIBUNAL JUDGE FRANCES
UPPER TRIBUNAL JUDGE KAMARA

Between

WASEEM ASAD
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr Z Malik K.C., instructed by Lamptons Solicitors
For the Respondent: Mr S Whitwell, Home Office Presenting Officer

DECISION AND REASONS

1. The appellant is a citizen of Pakistan born on 1 January 1980. He appeals against the decision of First-tier Tribunal Judge Courtney ('the judge') promulgated on 9 September 2021 dismissing his appeal against the refusal of pre-settled status under the EU Settlement Scheme ('EUSS').

2. The judge dismissed the appellant's appeal on the grounds the appellant did not meet the definition of 'dependent relative' in Annex 1 of Appendix EU ('the EUSS rules'). He could not meet the requirements of EU14 and was not entitled to be issued with a family permit under the EUSS.

3. The grounds to the First-tier Tribunal submitted the judge failed to consider the evidence of dependency, had she done so she would have found the appellant was a family member who came within the Withdrawal Agreement ('WA'). The judge wrongly restricted her assessment to the EUSS rules contrary to the Immigration (Citizens' Rights Appeals) (EU Exit) Regulations 2020 ('the 2020 Exit Regulations'). Permission to appeal was refused on the grounds that it was accepted these arguments were not made before the judge and were not 'Robinson' obvious.

4. The grounds to the Upper Tribunal submitted the judge misconstrued the phrase 'residence card' in the definition of 'relevant document' in Annex 1 of Appendix EU and erred in upholding the Secretary of State's decision because it breached the appellant's rights under the WA. It was submitted the Upper Tribunal enjoys a wide discretion and is entitled to permit this latter ground to be advanced even if it was not 'Robinson' obvious. The grounds rely on numerous cases at [12]. It was submitted the point relates to the appellant's right of residence in the UK and is of wider importance. Permission was granted by Upper Tribunal Judge Bruce on all grounds on 8 April 2022.

Relevant facts

5. The appellant moved to Italy from Pakistan on 20 January 2010 to reside with his brother, Ali Liaquat ('the sponsor'), a citizen of Italy. The sponsor moved to the UK in December 2014.

6. The appellant held an Italian residence issued on 6 December 2017 and valid until 15 September 2022 entitled 'Residence card of a family member of a union citizen'. He was admitted to the UK in 2018 and has been residing in the UK since October 2018.

7. The sponsor was granted indefinite leave to remain under the EUSS on 21 May 2020. The appellant made an application under the EUSS on 3 November 2021 which was refused on 4 March 2021 on the basis the appellant had not been issued with a family permit or residence card.

Relevant law

8. The relevant law is set out at Annex A and includes the relevant parts of the WA, Directive 2004/38/EC ('the Directive') and case law: Batool and others (other family members: EU exit) [2022] UKUT 00219 (IAC) and Celik (EU exit; marriage; human rights) [2022] UKUT 00220 (IAC).

Issues on appeal

9. The appellant is the brother of an EEA national. He has to show his entry and residence in the UK was facilitated before 11pm on 31 December 2020 to demonstrate he has a right of residence under the WA.

10. There is no dispute on the facts in this case and the appellant relies on the decisions in Batool and Celik. He accepts he has never made an application under the Immigration (EEA) Regulations 2016 ('the 2016 EEA Regulations') and he does not hold a residence card issued in the UK.

11. The first issue is whether the appellant should be permitted to rely on the WA to succeed on his appeal under the 2020 Exit Regulations when this ground was not relied on before the First-tier Tribunal.

12. The second issue is whether the appellant's admission to the UK in 2018, evidenced by the stamps in his passport stating, "Admitted to the UK under the Immigration (EEA) Regulations 2016" amounts to 'facilitation'.

13. The third issue is whether the appellant's Italian residence card is a 'relevant document' under Appendix EU.

Appellant's submissions

14. Mr Malik relied on his skeleton argument dated 21 November 2022 and submitted the appellant had a right of residence under the WA and he held a 'relevant document', namely a residence card as a family member issued by the Italian authorities. The appellant applied under the EUSS on 3 November 2020 and had a right of appeal under Regulation 3 of the 2020 Exit Regulations on the grounds set out in Regulation 8, namely the refusal decision of 4 March 2021 breached his rights under the WA and/or it was not in accordance with the EUSS rules

15. In summary, Mr Malik submitted the appellant satisfied Article 3(2) of the Directive and had been issued with a residence card as a dependent family member by the Italian authorities in 2017. The appellant was admitted to the UK under the 2016 EEA Regulations in 2018 and had remained in the UK since October 2018. This was evidenced by the two stamps in his passport on 14 September 2018 (Gatwick) and 14 October 2018 (Luton) stating "Admitted to the United Kingdom under the Immigration (EEA) Regulations 2016." The stamps in the appellant's passport were sufficient to demonstrate the appellant's entry and residence was being facilitated by the UK. Accordingly, the appellant satisfied Articles 9, 10(2) and 13(3) of the WA and, following Batool, he was entitled to rely on the WA to succeed on his appeal under the 2020 Exit Regulations.

16. Further or alternatively, Mr Malik relied on Mahad v ECO [2009] UKSC 16 at [10] and submitted that on a proper construction of the EUSS rules, in the context of the WA, the appellant's Italian residence card was a 'relevant document' under Annex 1 of Appendix EU. This was consistent with the WA which was directly enforceable. Mr Malik submitted the phrase 'issued in the UK' only applied to a derivative residence card. If it applied to the other documents listed it would give rise to the anomalous situation where a person whose right of residence had been facilitated would have a right of residence under the WA but would not qualify under the EUSS rules. The appellant held a relevant document and was a dependent relative under Appendix EU.

17. Mr Malik submitted the Upper Tribunal had jurisdiction to deal with the ground of appeal under the WA and permission had been granted on that ground. There were numerous authorities to show the Upper Tribunal had a wide discretion. Mr Malik relied on [26] of Batool in which the Presidential Panel allowed the appellant to withdraw the concession that he did not qualify under the WA made before the First-tier Tribunal.

18. Mr Malik invited us to set aside the judge's decision and substitute our decision allowing the appeal. He submitted the appellant had a right of residence under the EUSS rules and under the WA agreement. In answer to questions from the panel he submitted 'facilitation' includes an admission at port and was not limited to an application and decision under the 2016 EEA Regulations. Under Regulation 11(3) of the 2016 EEA Regulations admission without a stamp would also be 'facilitation'. The appellant was admitted to the UK in 2018 and he was still here. There was no requirement to make a further application.

Respondent's submissions

19. Mr Whitwell relied on his skeleton argument dated 22 November 2022 and submitted the WA was not argued before the judge and [23] and [24] of his skeleton argument was dispositive of that ground. The judge granting permission erred by not taking into account that new counsel had been instructed and taken a better point. The cases relied on in the grounds involved consideration of the second appeals test. Mr Whitwell submitted we are not bound the Presidential Panel in Batool because this was not a case of some importance. We were invited to use our case management powers and not allow the appellant to argue the appeal under the WA.

20. In relation to 'facilitation', Mr Whitwell relied on [30] of his skeleton argument and submitted the stamp in the appellant's passport was erroneous because the appellant did not hold a family permit or residence card issued under the 2016 EEA Regulations. The chronology did not assist the appellant. The sponsor came to the UK in 2014 and the appellant's Italian residence card was issued in 2017. The appellant had initially been refused entry in October 2018. This was not 'facilitation' for the purposes

of the EUSS rules and the stamp was not a relevant document. The appellant could not bring himself within the WA.

21. Mr Whitwell submitted the definition of 'relevant document' was clear in Annex 1 of Appendix EU and it had to be issued in the UK. It could not be inferred the residence card issued by the Italian authorities was a relevant document. We were invited to dismiss the appeal.

22. In response, Mr Malik submitted the second appeals test in the Court of Appeal was not relevant to all the cases relied on at [12] of the grounds and the Upper Tribunal had a wide discretion. This was an important point and there was no prejudice to the respondent who had had adequate opportunity to deal with the matters raised in the grounds and upon which permission was granted. The WA was relevant background to interpreting the EUSS rules.

23. The respondent's decision did not address the Italian residence card, the basis of issue or the time of issue. If the respondent was of the view there was an abuse of the EUSS rules, the application should have been refused on that basis. The stamp was not erroneous and followed the decision of a High Court Judge. The appellant had not been removed since his admission. Even if the stamp was issued in error, it was not the fault of the appellant and his entry and residence had been facilitated. The appellant was not granted temporary admission to make an application. He was admitted under the 2016 EEA Regulations. There was an extensive examination of all the circumstances following the appellant's interview at port. The respondent's submissions did not address the grounds and the EUSS rules should be construed against the background of the WA. The appellant's interpretation of 'relevant document' was consistent with the WA.

Conclusions and reasons

24. The Upper Tribunal has a wide discretion to consider matters not raised in the First-tier Tribunal. The ground of appeal under the WA relates to the appellant's right of residence and is of wider importance given the decisions in Batool and Celik. This ground of appeal was raised in the grounds dated 17 September 2021 seeking permission to appeal the decision promulgated on 9 September 2021. The respondent has had ample opportunity to address the matters raised in the renewed grounds dated 22 January 2022 and Upper Tribunal Judge Bruce granted permission on all grounds. In the circumstances, we consider it is appropriate to permit the appellant to appeal on the ground that the refusal decision breached his rights under the WA notwithstanding this point was not raised before the First-tier Tribunal.

25. The appellant can only benefit under the WA if he is a 'family member' under Article 9. He can bring himself within that definition if he can show

his entry and residence in the UK was facilitated before 31 December 2020.

26. The appellant was admitted to the UK on two occasions in 2018 and his passport was stamped on each occasion as "Admitted to the UK under the Immigration (EEA) Regulations 2016." The appellant's second admission to the UK followed a decision by a High Court Judge dated 14 October 2018 which stated:

> "The [appellant] says that he is entitled to enter the UK under the Immigration (EEA) Regs 2016. He says that he is an extended family member of Mr Ali Shoukat. The [respondent] doubts whether he qualifies because it is said that he is not a dependant. I cannot express a view on that because no further information has been given. However, as the [respondent's] representative properly accepts, that point has not been relied upon in the decision letter. Instead the letter relies upon the statutory requirement that a valid EEA residence card be produced at entry. I have seen from the Solicitors a card issued on 6 12 2017. How it came to the Solicitors is not stated. The [respondent] seems to have the same card and cannot explain this morning why the card itself fails to satisfy the particular requirement relied upon in the decision letter to remove. In all the circumstances I am satisfied that a temporary injunction must be granted."

27. The appellant's Italian residence card was sufficient to resist removal. The respondent was prevented from removing the appellant pending the application of judicial review. We were told the application for judicial review was subsequently withdrawn.

28. The appellant claims to have remained in the UK since October 2018 and there was no evidence to the contrary. The respondent had not sought to remove the appellant and the nature and validity of the appellant's Italian residence card was not challenged. The respondent refused the appellant's application under the EUSS because the appellant had not been issued with a family permit under the 2016 EEA Regulations.

29. At the time the appellant was admitted to the UK in 2018 the 2016 EEA Regulations were still in force. Once it is established the appellant is an extended family member under Regulation 8 the respondent has a discretion whether to grant a right of entry or residence having conducted an extensive examination of the personal circumstances of the appellant. There was no evidence from the respondent to show the stamps in the appellant's passport did not amount to the respondent exercising discretion in the appellant's favour.

30. There was no evidence from the respondent to show that the stamps were erroneous or that, notwithstanding the appellant's entry to the UK, he still had to apply for a UK residence card under the 2016 EEA Regulations within a specified time. There was no time limit on the stamps. The appellant's Italian residence card was valid until 2022 and he was

admitted to the UK under the 2016 EEA Regulations prior to the UK's exit from the EU.

31. The only sensible inference to be drawn on the evidence before us is that the appellant's entry and residence was facilitated prior to 31 December 2020. He satisfies Article 10(2) and falls to be treated as a family member under the WA.

32. The definition of a 'relevant document' in Annex 1 Appendix EU states:

> "(a)(i)(aa) a family permit, registration certificate, residence card, document certifying permanent residence, permanent residence card or derivative residence card issued by the UK under the EEA Regulations on the basis of an application made under the EEA Regulations before (in the case, where the applicant is not a dependent relative, of a family permit) 1 July 2021 and otherwise before the specified date; or …"

33. We are not persuaded the phrase "issued by the UK" relates only to a derivative residence card. We find it applies to the other documents listed. We find the EUSS rules require the relevant document to be issued in the UK and it is accepted the appellant does not have a family permit or residence card issued under the 2016 EEA Regulations. He has an Italian residence card and a stamp in his passport which is not part of the definition of 'relevant document'. He cannot succeed under the EUSS rules.

34. The argument before us was that the EUSS rules should be interpreted against the background of the WA. It was not the appellant's case that the EUSS rules were incompatible with the WA and we were not directed to any part of the WA in this respect. An appeal against the decision of the First-tier Tribunal was not the appropriate forum for that argument. We agree with the judge's findings at [13] of her decision. We find there was no error of law in the judge's decision to dismiss the appeal under the EUSS rules.

35. We are of the view the two grounds of appeal under the 2020 Exit Regulations adequately provide for this situation and it is not incompatible for the appellant to fail under the EUSS rules and succeed under the WA.

36. Accordingly, the judge erred in law in failing to consider the alternative ground of appeal under the 2020 Exit Regulations. We set aside her decision to dismiss the appellant's appeal and remake it. The appeal is allowed under regulation 8(2) of the 2020 Exit Regulations. The decision of 4 March 2021 breaches the appellant's rights under the WA.

Notice of Decision

Appeal allowed

J Frances

Signed Date: 9 December 2022
Upper Tribunal Judge Frances

TO THE RESPONDENT
FEE AWARD

We make no fee award. The ground of appeal under the WA was not raised before the First-tier Tribunal and there was no error of law in the decision to dismiss the appeal under Appendix EU.

J Frances

Signed Date: 9 December 2022
Upper Tribunal Judge Frances

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.

ANNEX A
RELEVANT LAW AND RULES

THE WITHDRAWAL AGREEMENT

PART TWO - CITIZENS' RIGHTS - TITLE I - GENERAL PROVISIONS

Article 9:

For the purposes of this Part, and without prejudice to Title III, the following definitions shall apply:

(a) "family members" means the following persons, irrespective of their nationality, who fall within the personal scope provided for in Article 10 of this Agreement:

(i) family members of Union citizens or family members of United Kingdom nationals as defined in point (2) of Article 2 of Directive 2004/38/EC of the European Parliament and of the Council;

(ii) persons other than those defined in Article 3(2) of Directive 2004/38/EC whose presence is required by Union citizens or United Kingdom nationals in order not to deprive those Union citizens or United Kingdom nationals of a right of residence granted by this Part;

Article 10(2)

Without prejudice to Title III, this Part shall apply to the following persons:

Persons falling under points (a) and (b) of Article 3(2) of Directive 2004/38/EC whose residence was facilitated by the host State in accordance with its national legislation before the end of the transition period in accordance with Article 3(2) of that Directive shall retain their right of residence in the host State in accordance with this Part, provided that they continue to reside in the host State thereafter.

Article 13(3)

Family members who are neither Union citizens nor United Kingdom nationals shall have the right to reside in the host State under Article 21 TFEU and as set out in Article 6(2), Article 7(2), Article 12(2) or (3), Article 13(2), Article 14, Article 16(2), Article 17(3) or (4) or Article 18 of Directive 2004/38/EC, subject to the limitations and conditions set out in those provisions.

DIRECTIVE 2004/83/EC

Article 3

1. This Directive shall apply to all Union citizens who move to or reside in a Member State other than that of which they are a national, and to their family members as defined in point 2 of Article 2 who accompany or join them.

2. Without prejudice to any right to free movement and residence the persons concerned may have in their own right, the host Member State

shall, in accordance with its national legislation, facilitate entry and residence for the following persons:

(a) any other family members, irrespective of their nationality, not falling under the definition in point 2 of Article 2 who, in the country from which they have come, are dependants or members of the household of the Union citizen having the primary right of residence, or where serious health grounds strictly require the personal care of the family member by the Union citizen;

(b) the partner with whom the Union citizen has a durable relationship, duly attested.

The host Member State shall undertake an extensive examination of the personal circumstances and shall justify any denial of entry or residence to these people.

Batool and others (other family members: EU exit) [2022] UKUT 00219 (IAC)

(1) An extended (oka other) family member whose entry and residence was not being facilitated by the United Kingdom before 11pm GMT on 31 December 2020 and who had not applied for facilitation of entry and residence before that time, cannot rely upon the Withdrawal Agreement or the immigration rules in order to succeed in an appeal under the Immigration (Citizens' Rights Appeals) (EU Exit) Regulations 2020.

(2) Such a person has no right to have any application they have made for settlement as a family member treated as an application for facilitation and residence as an extended/other family member.

Celik (EU exit; marriage; human rights) [2022] UKUT 00220 (IAC)

(1) A person (P) in a durable relationship in the United Kingdom with an EU citizen has as such no substantive rights under the EU Withdrawal Agreement, unless P's entry and residence were being facilitated before 11pm GMT on 31 December 2020 or P had applied for such facilitation before that time.

(2) Where P has no such substantive right, P cannot invoke the concept of proportionality in Article 18.1(r) of the Withdrawal Agreement or the principle of fairness, in order to succeed in an appeal under the Immigration (Citizens' Rights) (EU Exit) Regulations 2020 ("the 2020 Regulations"). That includes the situation where it is likely that P would have been able to secure a date to marry the EU citizen before the time mentioned in paragraph (1) above, but for the Covid-19 pandemic.

(3) Regulation 9(4) of the 2020 Regulations confers a power on the First-tier Tribunal to consider a human rights ground of appeal, subject to the prohibition imposed by regulation 9(5) upon the Tribunal considering a new matter without the consent of the Secretary of State."