Neutral Citation Number: [2024] EWCA Civ 777

Case No: CA-2023-000371
Case No. CA-2023-001627

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE UPPER TRIBUNAL (IMMIGRATION AND ASYLUM CHAMBER)
UPPER TRIBUNAL JUDGE CANAVAN
APPEAL NUMBER UI-2022-003872
AND
UPPER TRIBUNAL JUDGE GLEESON AND DEPUTY UPPER TRIBUNAL JUDGE JUSS
APPEAL NUMBER Ui-2022-003053

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 10 July 2024

Before:

LORD JUSTICE UNDERHILL
(VICE-PRESIDENT of the COURT of APPEAL (CIVIL DIVISION))
LADY JUSTICE NICOLA DAVIES
and
LORD JUSTICE LEWIS

- -

Between:

LEONARD VASA

Appellant

- and -

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

THE AIRE CENTRE

Intervener

GENTJAN HASANAJ

Appellant

- and -

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

THE AIRE CENTRE

Intervener

- -
- -

Irene Sabic KC and Eva Doerr (instructed by **Duncan Lewis**) for the **Appellant in the first appeal**
Anthony Metzer KC and Sanaz Saifolahi (instructed by **Gulbenkian Andonian Solicitors**) for the **Appellant in the second appeal**
Thomas de la Mare KC, Bojana Asanovic and David Sellwood (instructed by **Freshfields Bruckhaus Deringer LLP)** for the **Intervener**
Julia Smyth and Natasha Jackson (instructed by the **Treasury Solicitor**) for the **Respondent in the first and second Appeal**

Hearing dates: 5 and 6 June 2024

- -

Approved Judgment

This judgment was handed down remotely at 10.30am on 10 July 2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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LORD JUSTICE LEWIS:

INTRODUCTION

1. These two appeals concern two individuals who came into the United Kingdom after immigration officers at the border stamped their passports with the words "Admitted to the United Kingdom under the Immigration (EEA) Regulations 2016". The issues in these appeals concern the nature and extent of the rights granted by the immigration officer in each case, and the relationship between those rights and the ability to apply for the new residence status recognised in the European Union Settlement Scheme contained in Appendix EU to the Immigration Rules ("the Settlement Scheme").

2. Mr Vasa was born on 24 February 2004. He is an Albanian national and is not, therefore, a national of a member state of the European Economic Area ("the EEA"). On 13 September 2020, when he was 16, he went to the British border controls at the Gare du Nord in Paris, together with his older brother, Lauren, and his father. Lauren is a Greek national. He had been living in London since 25 June 2018. Mr Vasa's passport was stamped and he was allowed to pass through the border control and travel to the United Kingdom. On 15 September 2020, he made an application under the Settlement Scheme for either pre-settled status (that is, limited leave to remain in the United Kingdom) or settled status (that is, indefinite leave to remain). By letter dated 23 October 2020 that application was refused as he did not possess one of the required documents, that is a family permit (which enables non-EEA nationals who are dependent on, or live in the same household as, an EEA national to enter the United Kingdom) or a residence card issued under the Immigration (European Economic Area) Regulations 2016 ("the 2016 Regulations"). He did not appeal against that decision. He made another application under the Settlement Scheme on 17 March 2021. That was refused for the same reason as the earlier application. He appealed against that decision. The First-tier Tribunal ("FTT") dismissed the appeal. On 23 January 2023, the Upper Tribunal allowed an appeal but on a basis now accepted by all parties to be erroneous (namely that Mr Vasa possessed a Greek residence permit). The Secretary of State appealed against the Upper Tribunal decision.

3. In Mr Hasanaj's case, he was born in January 1983. He is a national of Albania. He had lived in Italy since, it seems, about 2014. He has a sister who is an Italian national. He arrived at Stansted airport on 26 March 2019 together with his sister and his nieces. Mr Hasanaj's passport was stamped and he was allowed to pass though the border control at the airport and physically enter the United Kingdom. On 29 June 2021, he made an application under the Settlement Scheme. That was refused on 5 January 2022 as he had not produced a family permit or residence card. Mr Hasanaj did not have a family permit as he had been admitted pursuant to the stamp placed in his passport. The 2016 Regulations had been repealed and it was not possible to apply for a family permit or residence card in June 2021. Mr Hasanaj could not therefore satisfy the requirements of the Settlement Scheme. He appealed to the FTT which allowed his appeal. On 11 December 2022, the Upper Tribunal allowed an appeal by the Secretary of State. It held that the stamp in Mr Hasanaj's passport did not facilitate residence within the meaning of Article 10(2) of the Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community ("the Withdrawal Agreement"). Consequently, the Upper Tribunal held that refusal of pre-settled status did not

contravene any right of Mr Hasanaj under the Withdrawal Agreement. Mr Hasanaj appealed.

4. On their respective appeals, Mr Vasa and Mr Hasanaj effectively submitted that admission pursuant to the stamp in their respective passports amounted to facilitation of residence within the meaning of Article 10(2) of the Withdrawal Agreement and refusal to grant pre-settled status under the Settlement Scheme involved a breach of their rights under Article 18 of the Withdrawal Agreement or was disproportionate.

5. The Secretary of State submitted that the references to "facilitated" and "facilitation" in Article 10(2) and (3) of the Withdrawal Agreement meant that a person had to have made an application and been granted the right to enter and reside in the United Kingdom pursuant to the 2016 Regulations. Neither Mr Vasa nor Mr Hasanaj had made such applications, nor had they been granted any right to enter and reside pursuant to the 2016 Regulations. The stamps in their passport did not amount to such rights and did not mean that their residence in the United Kingdom had been facilitated within the meaning of Article 10(2) of the Withdrawal Agreement. Further, the Secretary of State submitted that the stamps in the passport simply admitted Mr Vasa and Mr Hasanaj to the United Kingdom but did not allow them to reside here for any period of time. Consequently, the stamps did not facilitate residence in the United Kingdom. Alternatively, he wished to submit that the actions of the immigration officers in admitting Mr Vasa and Mr Hasanaj were unlawful as the officers lacked the legal powers to admit them or they were mistaken in doing so. On that basis, the Secretary of State submitted that their residence had not been facilitated in the United Kingdom as the immigration officers should not have admitted them. Indeed, the consequence of those submissions, if correct, was (as counsel for the Secretary of State accepted) that Mr Vasa and Mr Hasanaj were illegal immigrants who were never lawfully permitted to be in the United Kingdom.

6. The Intervener, the AIRE Centre, put forward submissions on the basis of the Secretary of State being allowed to contend that Mr Vasa and Mr Hasanah were not lawfully admitted to the United Kingdom. If that were the case the Intervener submitted that attending at the border controls at Stansted airport or the Gare du Nord in Paris amounted to an application for facilitation of residence within the meaning of Article 10(3) of the Withdrawal Agreement. General principles of EU law and the Charter of Fundamental Freedoms applied and required the Secretary of State to enable Mr Vasa and Mr Hasanaj to complete or perfect that application and have a proper decision from the Secretary of State.

7. This is a short summary of the arguments made by the respective parties. As will appear from the reasoning below, I consider that these cases are in fact relatively straightforward. The immigration officers in these cases did take decisions in relation to Mr Vasa and Mr Hasanaj. Those decisions have never been challenged or found to be unlawful. The real issue is what rights were, objectively, granted by the decisions, as reflected in the stamps in the passports, and how, if at all, are those rights to be accommodated under the Withdrawal Agreement.

THE LEGAL FRAMEWORK

8. The relevant legal framework is set out in detail in the decision of this Court in *Celik v Secretary of State for the Home Department* [2023] EWCA Civ 921, [2024] 1 WLR

1946 at paragraphs 7 to 38. It is only necessary to set out the principal features of the legal framework for the purpose of this appeal.

The System Prior to the End of the Transition Period

9. While the United Kingdom was a member of the European Union, and during a transition period following its departure which ended at 11 p.m. on 31 December 2020, the United Kingdom was bound to give effect to European Union law on the free movement of European Union citizens and their family members: see paragraphs 7 to 9 of *Celik*.

10. Articles 20 and 21 of the Treaty on the Functioning of the European Union ("TFEU") provided that nationals of member states of the European Union were to be citizens of the European Union and were to have the right to move and reside freely within the territory of the member states "subject to the limitations and conditions laid down in the Treaties and by measures adopted to give them effect". Directive 2004/38/EC of the European Parliament and the Council of 29 April 2004 ("the Directive") was the principal EU legislative measure dealing with the rights and limitations of EU nationals and their family members to reside in the United Kingdom.

11. EU nationals and their family members as defined in Article 2 of the Directive had the right to enter the United Kingdom, reside there for an initial period of three months, and then to reside for a period longer than three months if certain conditions were fulfilled: see Articles 6 and 7 of the Directive. Those rights were derived from EU law itself. Family members were defined in Article 2(2) as (a) the spouse (b) the partner under a registered partnership (c) the direct descendants under the age of 21 (or over the age of 21 if they were dependants) and (d) the dependent direct relatives in the ascending line of the EU national.

12. Article 3 of the Directive dealt with family members other than those defined in Article 2 of the Directive (and often referred to as extended family members). Article 3(2) provided that:

> "2. Without prejudice to any right of 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 within the definition in … 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."

13. Article 3(2) did not oblige a member state to grant a right of entry and residence to extended family members, including durable partners, but only to facilitate entry and

residence. They did not, therefore, derive rights of entry and residence from EU law itself. Rather, Article 3(2) meant that member states had to confer a certain advantage on applications made by persons who have a relationship with an EU citizen, as compared with applications for entry and residence by other nationals of third states. Any right to reside was granted by the member state in accordance with its national legislation and the member state had a wide discretion as to the factors to be taken into account in deciding whether to grant a right to reside to an extended family member. The criteria used, however, had to be consistent with the normal meaning of "facilitate" and "dependence" and could not deprive them of effectiveness, and the individual was entitled to a judicial remedy to ensure that the national legislation remained within the limits set by the Directive. See *Secretary of State for the Home Department v Rahman (Case C-83/11*) [2013] QB 249 especially paras 21–25 of the judgment of the Court of Justice of the European Union, and also *SM (Algeria) v Entry Clearance Officer* (Case C-129/18) [2019] 1 WLR 5505 especially at paragraphs 57–73. Other principles of EU law may also apply such as the need to ensure an effective judicial remedy against a refusal: see, e.g. *Banger v Secretary of State for the Home Department* (Case *C-89/17)* [2019] 1 WLR 845 especially at paragraphs 47–51.

14. The 2016 Regulations were the principal means by which the United Kingdom gave effect to the provisions of the Directive. The 2016 Regulations recognised the right to enter and reside in the United Kingdom of EU nationals and their family members as defined in regulation 7 (which reflected the provisions of Article 2 of the Directive). In addition, Regulation 8 of the 2016 Regulations defined a category of persons described as "extended family members" (those defined in Article 3 of the Directive). Regulation 7(3) provided that extended family members issued with an EEA family permit, residence card or registration certificate (provision for which was made by the 2016 Regulations) "must be treated as family members" so long as they satisfied the conditions for being an extended family member (e.g. were a relative of an EEA national and were dependent upon, or were a member of the household of, the EEA national) and their relevant permit, residence card or certificate was still in force: see Regulation 7(3) of the 2016 Regulations. The 2016 Regulations were revoked on 31 December 2020 at the end of the transition period.

The provisions of the Withdrawal Agreement

15. As the recitals make clear, the Withdrawal Agreement was intended to "ensure an orderly withdrawal of the United Kingdom from the Union". It was recognised that it was "necessary to provide reciprocal protection for Union citizens and for United Kingdom nationals, as well as their respective family members, where they have exercised free movement rights before a date set in this Agreement".

16. The material parts of the Withdrawal Agreement for the purposes of this appeal are as follows. Part Two of the Withdrawal Agreement is headed "Citizens' Rights". Article 9 provided certain definitions. In particular, it defined "family members" for the purpose of determining who falls within Article 10 of the Withdrawal Agreement as those persons defined in article 2(2) of the Directive (i.e. spouses, civil partners, the direct descendants under the age of 21, or over the age of 21 if they were dependants, and the dependent direct relatives in the ascending line of the EU national) and one other category of persons which is not material for this case. Extended family

members, such as other dependent relatives or those living in the same household as an EU national, are not family members within the definition.

17. Article 10 then defines those who fall within the "personal scope" of the Withdrawal Agreement. Article 10(1) deals with European Union nationals and family members (i.e. those falling within the definition of Article 2 of the Directive) who were residing in the United Kingdom in accordance with EU law before the end of the transition period and who continued to do so afterwards. Their rights to enter and reside, derived from EU law, were continued after the end of the transition period by virtue of Title II of Part Two, and in particular, by Articles 13 to 15, of the Withdrawal Agreement.

18. Article 10(2) and (3) deal with the position of other family members (i.e. those defined in Article 3 of the Directive and whom the 2016 Regulations referred to as "extended family members"). Article 10(2) dealt with those extended family members whose residence in the United Kingdom had been facilitated in accordance with domestic law before the end of the transition period. Article 10(3) brought those persons who had applied for facilitation of entry and residence before the end of the transition period and whose residence was facilitated thereafter by the United Kingdom in accordance with domestic law within the scope of the Withdrawal Agreement. Articles 10(2) and (3) provide as follows:

> "2. 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.
>
> 3. Paragraph 2 shall also apply to persons falling under points (a) and (b) of article 3(2) of Directive 2004/38/EC who have applied for facilitation of entry and residence before the end of the transition period, and whose residence is being facilitated by the host State in accordance with its national legislation thereafter."

19. Title II does not confer any specific right on extended family members of EU nationals to reside in the United Kingdom after the end of the transition period. That is because such rights were granted under domestic law not EU law. However, as appears from the discussion below, the Withdrawal Agreement clearly proceeds on the basis that they will be able to rely on the rights recognised by domestic law after the end of the transition period.

20. Article 18 provides that the United Kingdom or member states may choose to provide for a new residence status which confers the rights guaranteed by Title II of Part Two of the Withdrawal Agreement and which is evidenced by a new residence document. The material provisions for present purposes are the following:

> "1. The host State may require Union citizens or United Kingdom nationals, their respective family members and other persons, who reside in its territory in accordance with the

conditions set out in this Title, to apply for a new residence status which confers the rights under this Title and a document evidencing such status which may be in a digital form.

Applying for such a residence status shall be subject to the following conditions:

(a) the purpose of the application procedure shall be to verify whether the applicant is entitled to the residence rights set out in this Title. Where that is the case, the applicant shall have a right to be granted the residence status and the document evidencing that status;

(b) the deadline for submitting the application shall not be less than 6 months from the end of the transition period, for persons residing in the host State before the end of the transition period…

(e) the host State shall ensure that any administrative procedures for applications are smooth, transparent and simple, and that any unnecessary administrative burdens are avoided;

(f) application forms shall be short, simple, user friendly and adapted to the context of this Agreement; applications made by families at the same time shall be considered together …

(i) the identity of the applicants shall be verified through the presentation of a valid passport or national identity card for Union citizens and United Kingdom nationals, and through the presentation of a valid passport for their respective family members and other persons who are not Union citizens or United Kingdom nationals; the acceptance of such identity documents shall not be made conditional upon any criteria other than that of the validity of the document. Where the identity document is retained by the competent authorities of the host State while the application is pending, the host State shall return that document upon application without delay, before the decision on the application has been taken …

(l) the host State may only require family members who fall under point (e) (i) of article 10(1) or article 10(2) or (3) of this Agreement and who reside in the host State in accordance with point (d) of article 7(1) or article 7(2) of Directive 2004/38/EC to present, in addition to the identity documents referred to in point (i) of this paragraph, the following supporting documents as referred to in article 8(5) or 10(2) of Directive 2004/38/EC : (i) a document attesting to the existence of a family relationship or registered partnership; (ii) the registration certificate or, in the absence of a registration system, any other proof that the Union citizen or the United Kingdom national with whom they reside actually resides in the host State; (iii) for direct descendants who are under the age of 21 or who are dependants and dependent direct relatives in the ascending line, and for those of the spouse or registered partner, documentary evidence that the conditions set out in point (c) or (d) of article 2(2) of Directive 2004/38/EC

> are fulfilled; (iv) for the persons referred to in article 10(2) or (3) of this Agreement, a document issued by the relevant authority in the host State in accordance with article 3(2) of Directive 2004/38/EC."

21. As indicated, the purpose of article 18 is to ensure that the rights of residence of EU nationals and their family members which are guaranteed by Title II are reflected in the new residence status and documents issued evidencing that status. Title II does not guarantee any rights conferred by national law on extended family members of EU nationals. They are, however, clearly intended to be within the scope of the residence status. That appears from the fact that the status applies to Union citizens, family members and "other persons", a phrase which is apt to include extended family members. Furthermore, Article 18(1)(l) expressly deals with the document that may be required of extended family members falling within Article 10(2) and (3) when they apply for the new residence status. The implication is that the new residence status will be available to extended family members falling within the scope of the Withdrawal Agreement and who satisfy the requirements of the Withdrawal Agreement applicable to them.

22. The rights conferred by the Withdrawal Agreement are given effect to in domestic law by virtue of section 7A of the European Union (Withdrawal) Act 2018, as amended by section 5 of the European Union (Withdrawal Agreement) Act 2020.

The United Kingdom Arrangements

23. The United Kingdom and a number of the member states of the European Union chose to create a new residence status as envisaged by Article 18 of the Withdrawal Agreement. On 30 March 2019, the United Kingdom adopted Appendix EU to the Immigration Rules setting out the arrangements for granting limited or indefinite leave to remain in the case of EU nationals and their family members. That Appendix contains the Settlement Scheme or "EUSS" as it is often referred to. It is the scheme which provides for the residence status and documentation envisaged by Article 18 of the Withdrawal Agreement. The rules are complex. Paragraph EU11 of appendix EU deals with applications for indefinite leave to remain as a relevant EEA citizen or that citizen's family member (sometimes referred to as "settled status"). EU14 of Appendix EU deals with applications for limited leave to remain by such persons (sometimes referred to as "pre-settled status"). For present purposes it is only necessary to describe paragraph EU14.

24. EU14 provides that an applicant is eligible for the grant of limited leave if he is, amongst other things, a person who can satisfy the Secretary of State, "by the required evidence of family relationship", that he meets one of two conditions. One condition includes establishing that they are a family member which is defined to include dependent relative (i.e. a dependant of the sponsoring person or a member of the sponsor's household). The required evidence is a "relevant document" which, in turn, is defined as including "a family permit, registration certificate, residence card, or document certifying permanent residence issued under the 2016 Regulations".

Appeals

25. A right of appeal against, amongst other things, the refusal of an application to grant leave to enter or remain in the United Kingdom was granted by Regulation 3 of the Immigration (Citizens' Rights Appeals) (EU Exit) Regulations 2020 (SI 2020/61) ("the Appeal Regulations"). There are two grounds of appeal set out in Regulation 8 of the Appeal Regulations, namely that (1) the decision breached any right conferred under, amongst other things, Chapter 1 of Title II of Part Two of the Withdrawal Agreement (which includes decisions on applications for the grant of a residence status under Article 18) and (2) the decision was not in accordance with the rules in Appendix EU to the Immigration Rules. The first ground of appeal is the relevant one here.

THE FACTUAL BACKGROUND

Mr Vasa

26. Mr Leonard Vasa was born on 24 February 2004. He is a national of Albania (although born in Greece). His father is a national of Albania. His older brother, Lauren Vasa, was born on 13 June 1993 and is a national of Greece. It appears that Mr Vasa's father and Mr Leonard Vasa lived in Greece. Mr Lauren Vasa lived in Greece with them until he moved to the United Kingdom in June 2018. The witness statements filed in these proceedings indicate that Mr Lauren Vasa sent money to his father and his brother in Greece.

27. On 13 September 2020, Mr Vasa, who was then aged 16, his father and his brother went physically to the British border controls at the Gare du Nord, in Paris. There is no evidence of what was said to, or by, the immigration officer at the UK border control in Paris. In any event, Leonard Vasa's passport was stamped with the words "Admitted to the United Kingdom under the Immigration (EEA) Regulations 2016". The passport bore a second stamp bearing the words "Immigration Officer 13 September 2020 Paris".

28. Mr Vasa physically travelled to the United Kingdom. He has, it seems, lived in the United Kingdom with his brother at an address in London since then. On 15 September 2020, Mr Vasa made an application under the Settlement Scheme. At that stage, he was, of course, only 16 and did not, we understand, have the benefit of legal advice. That request was refused by letter dated 23 October 2020. The letter noted that Mr Vasa had stated that he was a dependent relative of an EEA citizen, Lauren Vasa, but he had not provided sufficient evidence to confirm this. The reasons were:

> "The required evidence of family relationship for a dependent relative of a relevant EEA citizen, where the dependent relative does not have a documented right of permanent residence, is a valid family permit or residence card issued under the EEA Regulations ….. as the dependent relative of that EEA citizen and evidence which satisfies the Secretary of State that the relationship continues to subsist. Home Office records do not show that you have been issued with a family permit or residence card under the EEA Regulations as a relative of an EEA national, who was dependant of the EEA national or of their spouse or civil partner, a member of their household or in strict need of their personal care on serious health grounds, and

> you have not provided a relevant document issued on this basis by any of the islands.
>
> In order to meet the definition of a dependent relative as set out in Annex 1 of Appendix EU to the Immigration Rules, you need to demonstrate that you are a relative of your sponsor as claimed and that you hold a valid relevant document".

29. Mr Vasa did not have a family permit allowing entry to the United Kingdom as he had been admitted by the immigration officer who stamped his passport. He was told he could apply for a residence card and was told, amongst other things, how to make such an application. He did not want a residence card under the 2016 Regulations; he wanted pre-settled or settled status under the new residence status, the Settlement Scheme, created by Appendix EU. The letter told him that he had three options (1) he could make another application under the Settlement Scheme if he had additional information or evidence that showed that he met the requirements (2) he could apply for an administrative review of the decision or (3) he could appeal the decision.

30. In about February 2021, Mr Vasa obtained legal representation. On 17 March 2021, he applied again under the Settlement Scheme. That application was refused by letter dated 30 May 2021. The reasons were essentially the same as to those given in relation to the earlier refusal, namely that Mr Vasa did not possess the required evidence of a family relationship for a dependent relative of an EEA citizen, namely a family permit or residence card issued under the 2016 Regulations.

31. Mr Vasa appealed to the First-tier Tribunal ("the FTT"). The decision of the FTT records that Mr Vasa's legal representative submitted that the "issue to be determined is whether the appellant's stamp in his passport is sufficient evidence for the purposes of Appendix EU" or, in the alternative, that Mr Vasa should succeed under Article 10 of the Withdrawal Agreement. The FTT dismissed Mr Vasa's appeal. Its essential reasoning was expressed as follows:

> "31. However the application the appellant has made is under Appendix EU where he is required to have a valid residence card or family permit to meet the requirements for settled status. A family permit or residence card would set out the period for which the card was valid. The appellant's stamp does not. On that basis, I find that the stamp in the appellant's passport cannot be equivalent to or equal to a family permit or residence card for the purposes of Appendix EU."

32. Mr Vasa appealed on the basis that extended family members were within Article 10(2) of the Withdrawal Agreement if their residence had been facilitated before the end of the transition period and the FTT had erred in finding that the entry stamp was insufficient to bring him within the scope of the Withdrawal Agreement.

33. The Upper Tribunal allowed Mr Vasa's appeal. The essential reasoning was that the Upper Tribunal considered that Mr Vasa had been issued with a residence card under Article 10 of the Directive by the Greek authorities. Consequently, he was not required to have entry clearance in the form of a family permit issued under the 2016

Regulations. That appears from the following passage of the Upper Tribunal's reasoning:

> "35… The appellant had already been facilitated entry and residence in Greece as a dependent 'other family member'. As a family member with a residence card issued under Article 10 [of the Directive], and by virtue of Article 5(2), the appellant was not required to obtain a family permit under the EEA Regulations 2016 to be admitted to the UK."

34. It is agreed between the parties that that element of the reasoning of the Upper Tribunal is factually flawed. The Greek residence card that Mr Vasa had was not issued under Article 10 of the Directive and did not, of itself, entitle Mr Vasa to be admitted to the United Kingdom. The Secretary of State appealed against the decision of the Upper Tribunal on the grounds set out below.

Mr Hasanaj

35. Mr Hasanaj is a national of Albania born on 16 January 1983. He has a sister, Enilda Hasanaj, who is an Italian national. She has two young children who are also Italian citizens. Mr Hasanaj has a document issued by the Italian authorities called a permesso di soggiorno per stranieri or foreigners' permit of stay. Neither Mr Hasanaj nor his sister have made witness statements in these proceedings and they did not give oral evidence before the FTT at the hearing of their appeal. There is, therefore, little evidence about the facts. So far as one can glean from the documents and the findings made by the FTT the position is as follows.

36. The FTT found that Mr Hasanaj had been living with his sister and her children in Italy. By "living with his sister" I understand that the FTT to have found that Mr Hasanaj had been living in the same house as his sister (in Italy) not, as Ms Smyth submitted, that they each lived in Italy.

37. Mr Hasanaj, and his sister and her daughters arrived at Stansted airport in the United Kingdom on 26 March 2019. Again, there is no evidence about what was said to, or by, the immigration officer at the border control at Stansted. Mr Hasanaj's passport was stamped "Admitted to the United Kingdom under the Immigration (EEA) Regulations 2016" and a second stamp said "Immigration Officer 26 March 2019." Mr Hasanaj physically entered the United Kingdom. The FTT further found, on the basis of the documentary evidence provided, that he remained a dependent family member of his sister after coming to the United Kingdom.

38. On 29 June 2021, Mr Hasanaj applied for pre-settled or settled status under the Settlement Scheme. Applications for the new residence status granted under that scheme had to be made within 6 months of the end of the transition period, i.e. by the end of 30 June 2021 (see Article 18(1)(b) of the Withdrawal Agreement). By letter dated 5 January 2022, the Secretary of State refused Mr Hasanaj's application. The reasons were:

> "You state that you are a dependent relative (sibling) of a relevant EEA citizen, ENILDA HASANAJ. However, you

> have not provided sufficient evidence to confirm this. The reasons for this are explained below.
>
> The required evidence of family relationship for a dependent relative of a relevant EEA citizen, where the dependent relative does not have a documented right of permanent residence, is a valid family permit or residence card issued under the EEA Regulations ….. as the dependent relative of that EEA citizen and evidence which satisfies the Secretary of State that the relationship continues to subsist.
>
> Home Office records do not show that you have been issued with a family permit or residence card under the EEA Regulations as a relative of an EEA national who was a dependant of the EEA national or of their spouse or civil partner, a member of their household or in strict need of their personal care on serious health grounds, and you have not provided a relevant document issued on this basis by any of the islands.
>
> Careful consideration has been given as to whether you meet the eligibility requirements for pre-settled status under the EU Settlement Scheme. The relevant requirements are set out in rule EU14 of Appendix EU to the Immigration Rules.
>
> However, for the reasons already explained above, you have not provided sufficient evidence to confirm that you are a dependent relative of a relevant EEA citizen. Therefore, you do not meet the requirements for pre-settled status on this basis".

39. Mr Hasanaj did not have a family permit admitting him to the United Kingdom as he had been admitted by immigration officers at Stansted airport. He did not have a residence card as he had been living in the United Kingdom after being admitted by the immigration officer at Stansted. He could not apply for a family permit or a residence card at the time that he made his application under the Settlement Scheme in June 2021 as the 2016 Regulations had been revoked earlier. Unless he was able to rely upon the decision of the immigration officer admitting him and stamping his passport accordingly, he would not be able to demonstrate that he was entitled to be granted pre-settled status under the Settlement Scheme.

40. Mr Hasanaj appealed to the FTT against the decision of the Secretary of State. It allowed the appeal essentially for the following reasons:

> "I therefore conclude that the requirements of EU14 in respect of pre-settled status is met, and therefore the appeal should be allowed. In the alternative, under Paragraph 10(2) of the Withdrawal Agreement, it is stated that an appellant shall retain his right of residence in the host site in accordance with this part of the Directive, provided they continue to reside in the host state thereafter. His residence was facilitated before the

> end of the transition period, in that he was admitted to the UK on 26 March 2019 pursuant to the 2016 Regulations, as evidenced by the stamp in his passport. He has therefore retained a right of residence pursuant to Article 10(2) of the Withdrawal Agreement. In any event, under Article 18(1)(r) there should be redress procedure to ensure that any decision is not disproportionate".

41. The Secretary of State appealed against that decision to the Upper Tribunal. At paragraph 24, the Upper Tribunal identified the question as whether Mr Hasanaj could rely directly on the Withdrawal Agreement and, as it put it, "stretch the natural language of 'facilitated' to include a person who has been admitted at port and taken no subsequent steps to obtain residence in the UK under the 2016 Regulations". The Upper Tribunal answered that question as follows:

> "28. In order to benefit from the additional rights granted by the Withdrawal Agreement and Appendix EU, the claimant would have had to take positive steps asking the Secretary of State to facilitate his residence rights under the EEA Regulations under the EEA Regulations before 31 December 2020. He did not do so and therefore, applying [the decision of the Upper Tribunal in] *Celik,* the claimant is not a person entitled to the benefit of the EUSS and no question of proportionality arises."

42. The Upper Tribunal therefore dismissed the appeal. Mr Hasanaj appeals against that decision.

THE GROUNDS OF APPEAL AND THE ISSUES

43. In *Secretary of State for the Home Department v Vasa*, the Secretary of State has permission to appeal on two grounds, namely:

> "Ground 1
>
> 1. The Upper Tribunal wrongly decided that the Respondent fell within Art. 10(2) of the Withdrawal Agreement ("WA") by virtue of a stamp placed in his passport, indicating that he had been "Admitted to the United Kingdom under the Immigration (EEA) Regulations 2016".
>
> 2. In reaching that conclusion, the Upper Tribunal made one or more of the following errors:
>
>   a. It wrongly concluded that the respondent had been issued with a residence card in Greece pursuant to Article 10 of Directive 2004/38/EC ("the Directive").
>
>   b. It wrongly concluded that, if the Respondent had been issued with such a card, that entitled him to be admitted to the UK pursuant to Article 5(2) of the Directive.

> c. Even if the Upper Tribunal was right in relation to a. and b. above, it wrongly concluded that such admission to the UK meant that the Respondent's residence had been "facilitated by the [UK] in accordance with its national legislation in accordance with Article 3(2)" of the Directive, for the purposes of Article 10(2) of the WA. Such facilitation could only have occurred if the Respondent had applied for, and been granted, the relevant documentation under the Immigration (European Economic Area) Regulations 2016.
>
> Ground 2
>
> 3. The Upper Tribunal failed to identify how, even if the Respondent did fall within Art. 10(2) of the WA, the decision under appeal breached the Respondent's rights under the WA. Absent identification of such a breach, the appeal could not succeed."

44. By a respondent's notice, Mr Vasa seeks to uphold the Upper Tribunal's decision on different or additional grounds namely because:

> "a finding that the Immigration Officer's entry of the Respondent to the UK did not amount to facilitation of entry and consequently excluding [Mr Vasa] from the scope of the Withdrawal Agreement/EU Settlement Scheme would be disproportionate in the circumstances. It was reasonable for [Mr Vasa] and his EEA national sponsor to assume that he would qualify for pre-settled status on account of the stamp of his passport without making further applications for a residence document under Directive 2004/38."

45. It is accepted that the Upper Tribunal made the errors referred to in ground 1(a) and (b). The first issue, therefore, is whether the Upper Tribunal erred in wrongly concluding that Mr Vasa's residence had been facilitated within the United Kingdom for the purposes of Article 10(2) of the Withdrawal Agreement or whether facilitation would only occur if Mr Vasa had applied for and been granted the relevant documentation under the 2016 Regulations (essentially, the issues in ground 1(c) of the grounds of appeal and the substance of the respondent's notice). The second issue is whether the Secretary of State's decision to refuse his application under the EU Settlement Scheme involved a breach of any rights he had under the Withdrawal Agreement (Ground 2 of the grounds of appeal).

46. In *Hasanaj v Secretary of State for the Home Department*, Mr Hasanaj was initially granted permission to appeal on two grounds which, essentially, reflect the issue that arises in Mr Vasa's case, namely,

> "Ground 1: error of law in finding that facilitation of entry and residence is not facilitation of residence for the purposes of the Withdrawal Agreement.

> Ground 2: conflating facilitation of entry and residence with an application for facilitation of residence."

47. Mr Hasanaj was also granted permission to amend his appellant's notice, in the light of the intervention by the AIRE Centre, to add the following third ground of appeal:

> "Ground 3.
>
> The Upper Tribunal erred in law in failing to consider and assess that the process by which the First Appellant was issued with an entry stamp in his passport must be treated as an application to facilitate entry under national law under Article 10(3) of the Withdrawal Agreement and Article 3(2) of the Citizen's Rights Directive 2004/38/EC."

48. The principal issues that arise in both appeals and need to be determines therefore are:

(1) whether the actions of an immigration officer allowing Mr Vasa and Mr Hasanaj to come to the United Kingdom amounted to facilitation of residence within the meaning of Article 10(2) of the Withdrawal Agreement; and if so,

(2) whether refusal of pre-settled status under the EU Settlement Scheme would involve a breach of rights of Mr Vasa and Mr Hasanaj under the Withdrawal Agreement?

49. It is convenient to take both issues together. It is also right to note that the arguments made on behalf of the Secretary of State, and Mr Vasa and Mr Hasanaj, and the intervention by the Aire Centre ranged well beyond the confines of the appeal, and the issues that actually fall to be determined in this case.

THE SUBMISSIONS

50. Ms Sabic KC, with Ms Doerr, for Mr Vasa, submitted that facilitation within the meaning of Article 10(2) of the Withdrawal Agreement could be achieved in more than one way. It was not the case that residence would have been facilitated only if Mr Vasa had applied for a family permit or a residence card under the 2016 Regulations. In the present case, the admission of Mr Vasa to the United Kingdom by an immigration officer at the border amounted to facilitation of residence for the purpose of Article 10(2) and satisfied the evidential requirement of Article 18(1)(1)(iv) of the Withdrawal Agreement. Even if the immigration officer's decision to admit Mr Vasa was erroneous, or outside the powers conferred by the 2016 Regulations, his admission to the United Kingdom was in fact facilitation of residence and satisfied the requirements of Article 10(2). Ms Sabic relied upon the decisions of the Divisional Court in *R v Secretary of State for the Home Department, ex p. Ram* [1979] 1 WLR 148, and *R v Secretary of State for Home Affairs, ex p. Baidiki* reported in the Times, May 4, 1977 and (1977) 121 Sol. Journal 443. Ms Sabic submitted that, even if the stamps in the passport did not amount to facilitation of residence, then, alternatively, Mr Vasa must have, or be treated as having, been granted leave to remain pursuant to section 4 of the Immigration Act 1971 ("the 1971 Act"). In that context, Ms Sabic very properly referred to *R v Secretary of State for the Home Department, ex p. Bagga* [1991] 1 QB 485 where the Court of Appeal considered that a date stamp alone did

not amount to the giving of indefinite leave to remain pursuant to section 4 of the 1971 Act.

51. Mr Metzer KC, with Ms Saifolahi, for Mr Hasanaj made essentially the same argument in relation to the meaning of facilitation.

52. Ms Smyth, with Ms Jackson, for the Secretary of State, submitted that the words "facilitated" and "facilitation" in Article 10(2) and (3) of the Withdrawal Agreement are terms of art in European Union law. They require that the person have made an application under the national legislation implementing Article 3(2) of the Directive. That legislation was the 2016 Regulations. Neither Mr Vasa nor Mr Hasanaj had made any applications for entry or residence under the 2016 Regulations. The stamp placed by the immigration officer in each of their passports did not amount to facilitation of their residence. Consequently, Ms Smyth submitted that the Secretary of State had been right to refuse their applications under the Settlement Scheme as they did not have the relevant evidence (a family permit or residence card issued under the 2016 Regulations) and did not therefore fall within the scope of the Withdrawal Agreement and had no rights under that Agreement.

53. Further, Ms Smyth submitted that the immigration officers had no power to admit Mr Vasa or Mr Hasanaj to the United Kingdom under the 2016 Regulations or had acted mistakenly in doing so. Given that the admission of Mr Vasa and Mr Hasanaj was the result of a mistake or an error of law on the part of the immigration officers concerned, that could not constitute facilitation of residence within the meaning of Article 10(2) of the Withdrawal Agreement. Ms Smyth rebutted the suggestion that there was evidence of some systematic use of these stamps in cases of the present kind. The Secretary of State informed the Court through counsel that he was only aware of five cases, being cases which have led to proceedings in the First-tier Tribunal or the Upper Tribunal.

54. Ms Smyth told the Court that the stamps in question were intended for use in cases where a non-EEA family member (within the meaning of Article 2 of the Directive) of an EEA national exercising their rights under EU law to reside in the UK presented themselves at a border without a family permit (the use of which was not mandatory) and satisfied the immigration officer that they were eligible to be admitted. She submitted that the stamps were wrongly used in these two cases though it was not possible on the available evidence to establish how the mistake had occurred. What should have happened according to the relevant guidance to immigration officers is that Mr Vasa and Mr Hasanaj should have been refused entry and told to make the appropriate application.

55. Finally, Ms Smyth submitted that Mr Vasa and Mr Hasanaj had only been admitted to the United Kingdom. That meant only that they could enter the United Kingdom. Admission did not confer any right of residence. On any basis, she submitted that Mr Vasa and Mr Hasanaj were unlawful immigrants as they had no lawful right to reside in the United Kingdom.

56. Mr de la Mare KC, with Ms Asanovic and Mr Sellwood, for the interveners, the AIRE Centre, made submissions on the assumption that the Secretary of State succeeded in establishing that Mr Hasanaj's residence had not been facilitated by the immigration officer admitting him at Stansted Airport. In those circumstances, Mr de la Mare

submitted that the process by which Mr Hasanaj presented himself to the immigration officer at Stansted airport in March 2019, and sought to be allowed to come to and live in the United Kingdom, should be treated as an application for facilitation of residence within the meaning of Article 10(3) of the Withdrawal Agreement. Proportionality and other principles of EU law still applicable after the transition period required the Secretary of State to enable Mr Hasanaj to perfect his application, i.e. to treat Mr Hasanaj as having applied for a family permit or residence card before the revocation of the 2016 Regulations. That application had not been determined and the Secretary of State was required to determine it.

ANALYSIS

57. The starting point is to consider what the immigration officers did at the border at the Gare du Nord in the case of Mr Vasa and at Stansted airport in the case of Mr Hasanaj. On any reasonable interpretation of the available evidence, Mr Vasa and Mr Hasanaj presented themselves at the border, wanting, to express it neutrally, to be allowed to come and live in the United Kingdom with their brother or sister respectively (who were both nationals of EU member states). The respective immigration officers took decisions to admit Mr Vasa and Mr Hasanaj. Those decisions were recorded or evidenced by the stamps in their passports. They were, as the stamps recorded, "Admitted to the United Kingdom under the Immigration (EEA) Regulations 2016". Those were decisions taken by a public official.

58. The next question is what rights or benefits did the decisions confer upon Mr Vasa and Mr Hasanaj? That is a question as to what, given the context, a reasonable person would understand the decision of the immigration officers to mean. I am satisfied that, in context, considered objectively, a reasonable person would understand the stamps to record a decision that Mr Vasa and Mr Hasanaj were each allowed to come into the United Kingdom and live there with their respective relative who was a national of an EU member state.

59. I reject the submission of Ms Smyth that the immigration officers only admitted Mr Vasa and Mr Hasanaj in the sense that they were allowed to enter into the United Kingdom (i.e. board the Eurostar train and travel to London in Mr Vasa's case or pass through the border controls at Stansted airport in Mr Hasanaj's case) but did not allow them to stay in the United Kingdom thereafter. First, it is unrealistic to suggest that the purpose of granting admission was to let Mr Vasa and Mr Hasanaj into the United Kingdom – but that they had to leave immediately as they had no right to stay there. Secondly, the context was one where individuals wished to be allowed to travel to the United Kingdom and live there with relatives. The words in the stamp are "Admitted to the UK under the Immigration (EEA) Regulations". The reasonable, objective, interpretation of what the decision of the immigration officers meant was that Mr Vasa and Mr Hasanaj were allowed to come to the United Kingdom and live there with their brother and sister respectively as they were persons considered eligible to do so. For these purposes, it is not relevant whether the immigration officers were mistaken as to the facts (for example, whether or nor Mr Vasa was dependent on his brother, or whether or not Mr Hasanaj was a member of his sister's household). Nor does it matter whether the immigration officers made errors of law as to the scope of their powers. For present purposes, the issue is what, reasonably and objectively, do the decisions of the immigration officers mean. They mean, in my judgment, that Mr Vasa and Mr Hasanaj were being allowed to come and live in the United Kingdom.

Put another way, using different language, they were allowed to enter and reside in the United Kingdom.

60. Ms Smyth submitted that the immigration officers cannot have been giving Mr Vasa and Mr Hasanaj the right to reside for ever in the United Kingdom. I accept that it might have been difficult to determine when, precisely, the rights granted by the immigration officers came to an end. Admission was not specifically limited by date, i.e. the stamps in the passport did not say that Mr Vasa and Mr Hasanaj were admitted for a particular period. The likelihood is that, objectively interpreted, they were admitted to the United Kingdom for so long as they satisfised the substantive requirements for such persons to be eligible to be in the United Kingdom under the 2016 Regulations, i.e. so long as they were dependent on, or members of the household of, the relevant EU national. In the event, it is not necessary to decide this as the Secretary of State did not at any stage seek to revoke the grant of admission on the grounds that it had come to an end or expired. Rather, the legal framework changed with the departure of the United Kingdom from the European Union and the creation of a new residence status. The issue that has to be decided is how the admission of Mr Vasa and Mr Hasanaj to the United Kingdom falls to be addressed under the Withdrawal Agreement.

61. The position in that regard is relatively straightforward. The stamps in Mr Vasa's and Mr Hasanaj's passports do not constitute relevant documents as defined by the provisions of the Appendix EU. They were not in fact family permits issued under regulation 12 of the 2016 Regulations, nor a residence card issued under Regulation 18, or a registration certificate issued under Regulation 17. Mr Vasa and Mr Hasanaj had not applied for such documents. No decision was made to grant any such applications for such documents. The stamps in the passports do not therefore satisfy the requirements of Annex 1 of Appendix EU.

62. That, however, is not the end of the matter. There is the question of their rights under the Withdrawal Agreement. Article 10(2) brings family members (defined by Article 3 of the Directive) within the scope of the Withdrawal Agreement if they are persons "whose residence was facilitated by the host state in accordance with its national legislation before the end of the transition period". That is what happened in the present case. Mr Vasa's and Mr Hasanaj's residence were facilitated by the acts of the immigration officers. They were admitted to the United Kingdom, pursuant to decisions taken by public officials, that is, they were allowed to come to and reside in the United Kingdom. They fall within the scope of Article 10(2). They did not have any rights derived from EU law to reside in the United Kingdom (as they were not nationals of an EEA member state nor were they direct family members of such nationals, within the meaning of Article 2 of the Directive). But, if the United Kingdom chose (as it did) to create a new residence status, then Article 18(1)(l)(iv) of the Withdrawal Agreement provides for that status to be granted to extended family members (as defined by Article 3 of the Directive) on production of identity documents and "a document issued by the relevant authority in the host state in accordance with Article 3(2) of Directive 2004/38", i.e. the document facilitating their residence in the United Kingdom. That document was, in the present case, the stamps placed in the passports by the immigration officers.

63. In those circumstances, refusal by the Secretary of State to accept the document issued by the relevant national authorities did amount to a breach of the rights of Mr

Vasa and Mr Hasanaj under Article 18(1)(l)(iv) of the Withdrawal Agreement. Their appeals against the decision to refuse their applications under the Settlement Scheme should therefore have been allowed.

64. Ms Smyth made other submissions. First, she submitted that Article 10(2) of the Withdrawal Agreement referred to residence being facilitated in accordance with national legislation in accordance with Article 3(2) of the Directive. Article 18(1)(l)(iv) referred to documents issued in accordance with Article 3(2) of the Directive. Ms Smyth submitted that the national legislation adopted to implement Article 3(2) of the Directive was the 2016 Regulations and the stamps here were not issued in accordance with those regulations. It is also right to note that the Upper Tribunal in *Allaraj v Secretary of State for the Home Department* [2023] UKUT 002777 appeared to have accepted a similar argument in paragraph 57 of its judgment in that case.

65. I do not consider that that approach does reflect a proper interpretation of Article 10 of the Withdrawal Agreement. The reference to national legislation reflects the fact that extended family members (those falling within Article 3 of the Directive and as defined by regulation 8 of the 2016 Regulations) did not derive rights of residence from EU law but from national law. The reference to "in accordance with its national legislation", and "a document issued by the relevant national authorities in the host state in accordance with Article 3(2)" are simply a recognition that the legal act or decision conferring the right to reside will be one taken under national law. Articles 10(2) and 18(1)(l)(iv) of the Withdrawal Agreement were not seeking to introduce a requirement that individuals seeking to continue rights granted prior to the end of the transition period had to demonstrate that those rights had been granted under national legislation which had, as a matter of domestic law, been properly interpreted and applied. There is no reason why the Withdrawal Agreement (which concerns the position of family members of EEA nationals the United Kingdom, and family members of UK nationals in other member states) would be concerned with ensuring that domestic legislation was in place and had been properly applied. Rather, the focus of the Withdrawal Agreement was that rights under EU law (for EU nationals and their family members as defined by Article 2 of the Directive) were protected after the end of the transition period and, similarly, that rights granted by relevant national authorities acting under national law (in the case of family members as defined by Article 3 of the Directive) were also protected where a new residence status was created as contemplated by Article 18 of the Withdrawal Agreement.

66. It is also right to note that reliance was placed by Ms Smyth on certain words used at paragraph 61 of my judgment in *Celik*. The context there was that the appellant in that case submitted that having legislation such as the 2016 Regulations in force was sufficient to amount to "facilitation" for the purposes of Article 10(2) and (3) of the Withdrawal Agreement. That argument was rejected and the ratio of the decision is that there must be an individual application and decision on that application as appears from paragraph 60 and the final sentence of paragraph 61. Paragraph 61 of the judgment, and the references to decisions being taken under the relevant national legislation, were not addressed to the issue that arises in this case.

67. Ms Smyth also submitted that the stamps in the passport were only declaratory of rights that a person has and, as Mr Vasa and Mr Hasanaj had no rights under the 2016 Regulations, the stamps were not sufficient to confer rights. Ms Smyth relied upon the decision of the Court of Justice of the European Union in Case C-184/16 *Petrea v*

Ypourgou Esoterikon Kai Dioikitikis Anasygrotsis [2017] ECR 684. It is correct, and well established in the case law, that where rights are derived from EU law itself, documents evidencing those EU law rights are declaratory of the EU law rights. That was the position in relation to Mr Petrea who was a Romanian national and therefore an EU citizen. His rights derived from EU law. But here, we are dealing with extended family members who have no rights to reside derived from EU law itself. They derive any such rights from national law and the decisions of the relevant national authorities. The issue in this case concerns the effect of the decisions of the immigration officers in the present case and how, if at all, those decisions are to be accommodated within the framework created by the Withdrawal Agreement.

68. Finally, Ms Smyth sought to argue that the decisions of the immigration officers were legally flawed as they were made on an erroneous factual basis or an error as to the scope of their powers. The decisions in question were the decision to admit Mr Vasa to the United Kingdom on 13 September 2020 and to admit Mr Hasanaj on 26 March 2019. Those decisions have never been challenged and they have never been quashed or declared unlawful (nor has the Secretary of State sought to revoke the decisions). Decisions of public bodies are presumed to be valid and to produce legal effects unless and until quashed. As Lord Radcliffe observed in *Smith v East Elloe RDC* [1956] AC 736 at 739 a decision or act:

> "bears no brand of invalidity upon its forehead. Unless the necessary proceedings are taken at law to establish the cause of invalidity and to get it quashed or otherwise upset, it will remain as effective for its ostensible purpose as the most impeccable of orders."

69. That is the present case. The decisions of the immigration officers have never been challenged. They remained in place and continued to produce legal effects. The effect in the present case is that the decisions facilitated Mr Vasa's and Mr Hasanaj's residence in the United Kingdom and that, in turn, provided the basis for their claims to the new residence status created by the Settlement Scheme.

70. For completeness, I note that there are occasions when questions of the validity of decisions can arise in collateral proceedings, for example, where a person is charged with breach of regulations and it is contended that the regulations are invalid so that the individual has a defence to the criminal charge: see *Boddington v British Transport Police* [1999] AC 143. This is not such a case. The issue here concerns an appeal against the refusal by the Secretary of State to grant pre-settled status to Mr Vasa on 30 May 2021 and Mr Hasanaj on 5 January 2022, and whether those decisions accorded with their rights under the Withdrawal Agreement. It is neither necessary nor appropriate to permit the Secretary of State on the appeals against those decisions to seek to challenge the lawfulness, or correctness, of earlier decisions by immigration officers or to impugn the basis upon Mr Vasa and Mr Hasanaj had resided in the United Kingdom since September 2020 and March 2019 respectively.

Ancillary Matters

71. In the circumstances is it not necessary to consider in detail the alternative submission made by Ms Sabic that, if the Secretary of State were entitled now to challenge the lawfulness of the decision of the immigration officer in Mr Vasa's case, he was

granted leave to remain pursuant to section 4 of the 1971 Act. I do not, however, consider that, on the facts, the immigration officer was purporting to grant leave pursuant to that Act. The stamp in the passport does not refer to "leave to enter", the words used to connote allowing a person to enter pursuant to section 4 of the 1971 Act. Rather the words used were "admitted" and the source of the authority, rightly or wrongly, is said to be the 2016 Regulations.

72. Similarly, as Mr Hasanaj had his residence facilitated by the immigration authorities under Article 10(2) of the Withdrawal Agreement, it is not necessary to consider in detail ground 3 of Mr Hasanaj's grounds of appeal or Mr de la Mare's submissions as to what the position would be under Article 10(3) of the Withdrawal Agreement. I doubt that going to the border control and requesting admission to the United Kingdom would be sufficient to constitute the making of an application. Rather, the position is as outlined by this Court in *Siddiqa v Entry Clearance Officer and others* [2024] EWCA Civ 248. Where a person seeks admission from outside the United Kingdom, the Secretary of State is entitled to require the use of particular application forms for seeking the grant of an EEA family permit to enter the United Kingdom. The Secretary of State would not be required to treat going to a border control and asking for admission as, or as akin to, an application for an EEA family permit authorising admission to the United Kingdom.

CONCLUSION

73. In the present appeals, immigration officers decided to admit Mr Vasa and Mr Hasanaj to the United Kingdom, that is they decided to allow them to enter the United Kingdom and reside here with family members who were EU nationals resident in the United Kingdom. Those decisions amounted to the facilitation of residence by the relevant national authorities. On an application under the Settlement Scheme, the Secretary of State was required to accept the stamps in their passports as evidencing the decision to admit Mr Vasa and Mr Hasanaj to the United Kingdom. The refusal to do so involved a breach of their rights under Article 18(1)(l)(iv) of the Withdrawal Agreement. I would therefore uphold the decision of the Upper Tribunal to allow the appeal in Mr Vasa's case, albeit on different grounds. I would allow the appeal in Mr Hasanaj's case.

LADY JUSTICE NICOLA DAVIES

74. I agree.

LORD JUSTICE UNDERHILL

75. I also agree.