



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

Appeal Number: UI-2022-003053
on appeal from EA/00724/2022

THE IMMIGRATION ACTS

**Heard at Field House
On 7 November 2022**

**Decision & Reasons Promulgated
On 11 December 2022**

Before

**UPPER TRIBUNAL JUDGE GLEESON
DEPUTY UPPER TRIBUNAL JUDGE JUSS**

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

**MR GENTJAN HASANAJ
[NO ANONYMITY ORDER]**

Respondent

Representation:

For the appellant: Mr Esen Tufan, a Senior Home Office Presenting Officer
For the respondent: Ms Sanaz Saifollahi of Counsel, instructed by Gulbenkian
Andonian Solicitors

DECISION AND REASONS

1. The Secretary of State appeals with permission from the decision of the First-tier Tribunal allowing the claimant's appeal against her decision on 5 January 2022 to refuse him settlement as the extended family member of a relevant EEA citizen pursuant to the Immigration (Citizens' Rights Appeals) (EU Exit) Regulations 2020) and Appendix EU to the Immigration Rules HC 395 (as amended). The claimant is a citizen of Albania.
2. **Mode of hearing.** The hearing today took place face to face.

Background

3. The sponsor is the claimant's sister. She is a divorcee who is a female head of household, with two daughters, both still minors. On 26 March 2019, the claimant entered the UK with his sister and his nieces, all of whom are Italian citizens. Their relationship is confirmed by DNA evidence.
4. The claimant then had an Italian residence card. On entry to the UK, his passport was stamped 'Admitted to the UK under the Immigration (EEA) Regulations 2016'. That is not disputed.
5. The claimant took no further steps under the EEA Regulations and has remained in the UK since March 2019.

First-tier Tribunal decision

6. The First-tier Judge found that on entry the claimant had satisfied Regulation 8(2) of the 2016 Regulations and qualified as either a direct family member or an extended family member, by reference to Appendix EU.

7. The decision concluded:

"10. 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 [applicant] shall return his right of residence in the host state 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 procedures to ensure that any decision is not disproportionate. "

8. The First-tier Tribunal allowed the appeal.
9. The Secretary of State appealed to the Upper Tribunal.

Permission to appeal

10. The grounds of appeal asserted that the First-tier Judge had materially erred in law by conflating the admission of the claimant to the UK in March 2019 with having 'facilitated residence' as the extended family member of his EEA national sister. He had never sought facilitated residence in accordance with the requirements of Article 3.2 of Directive 2004/38/EC and did not hold any document confirming his continuing lawful residence under EU law.

11. As the claimant had never had facilitated residence under national legislation, he did not fall within the personal scope of the Withdrawal Agreement: Article 10(1)(e) of the Withdrawal Agreement stated that beneficiaries of the Agreement were only those who could show that on the specified date (30 December 2020) they were residing in the UK in accordance with EU law.
12. This claimant was not a beneficiary of the Withdrawal Agreement on that basis, and the full range of judicial redress provided for in Article 18(1)(r) was not available to him, including the requirement to show that removal would be disproportionate. There was no conceivable breach of Withdrawal Agreement rights in this claimant's circumstances.
13. Permission to appeal was granted on the basis that the First-tier Judge had erred by conflating the admission of the claimant to the UK in March 2019 with facilitated residence here as an extended family member:
 - “... 3. It is arguable that although the [claimant's] entry into the UK was facilitated, in the absence of a residence document, that his residence was not, and that the [claimant] should have applied in the UK for facilitation of residence. The [Secretary of State] asserts that the [claimant] did not make such an application.
 4. It follows from that arguable misdirection that the judge then erred in finding that the [claimant] came within the scope of the Withdrawal Agreement, which is predicated on the [claimant's] residence in the UK having been facilitated in accordance with national legislation.”

Rule 24 Reply

14. The claimant filed a Rule 24 Reply, which is prolix. In short, the claimant contends that the First-tier Judge applied the law correctly and that the grounds of appeal are a 'repackaged disagreement of facts dressed up as errors of law': see *Secretary of State for the Home Department v Joseph* [2022] UKUT 218 (IAC).
15. That is the basis on which this appeal came before the Upper Tribunal.

Upper Tribunal hearing

16. For the Secretary of State, Mr Tufan said that the Italian residence permit which the claimant possessed entitled him to enter the UK freely under EU free movement rules, but only for 3 months. He was required to regularise his residence in the UK after that, which he had not done.
17. The Secretary of State would rely on the decision of the Upper Tribunal in *Celik* [2022] UKUT 220 (IAC) at [52]. Although that paragraph lacked some clarity - the reference to Regulations 7(3) and 7(5) of the EEA Regulations cannot be right, as there is no Regulation 7(5) - properly understood it was clear that 'facilitated' could apply only to those whose *residence* had been facilitated by the issue of a residence permit.

18. For the claimant, Ms Saifolahi relied on her skeleton argument. After setting out the applicable law and recent case law, at [15]-[20] Ms Saifolahi argued that the claimant was indeed a person whose residence was facilitated by the host state in accordance with at 3(2) of Directive 2004/38/EC and that he therefore retained his right of residence as provided by Article 10 of the Withdrawal Agreement.
19. The Upper Tribunal should find that in granting the claimant entry and residence in the UK under the EEA Regulations in 2019, the Secretary of State must have examined and found him to be an extended family member, part of the same household as the EEA national in Italy and/or dependent upon her, following what was required to be an extensive examination of his personal circumstances: see *Secretary of State for the Home Department v Banger (Citizenship of the European Union - Right of Union citizens to move and reside freely within the territory of the European Union - Judgment)* [2018] EUECJ C-89/17 (12 July 2018).
20. Any decision made on a subsequent residence application was declaratory only. The claimant's failure to make such an application was neutral in these proceedings.
21. The skeleton argument continued:
 - "19. There is a lacuna within Appendix EU and in the definition of 'relevant document' for those who have been granted entry into the UK under the EEA Regulations at port and as such, who have been recognised as extended family members by the [Secretary of State]. Alternatively, the [Secretary of State] ought to have facilitated the [claimant's] residence through Appendix EU, applying Article 18(d), (e) and (r) of the Withdrawal Agreement.
 20. The [claimant] is an extended family member of an EEA national and he fell within the ambit of the Withdrawal Agreement. As such, the decision of the First-tier Tribunal does not contain any material errors of law and should stand."
22. In oral argument, Ms Saifolahi maintained her position that the claimant's entry in March 2019 was sufficient to amount to facilitation, and that therefore the claimant was in scope under the Withdrawal Agreement and refusal to grant him EUSS settled status was disproportionate and contrary to Article 18(1)(r) of the Agreement. The Tribunal should be prepared to find that the Secretary of State must have applied the EEA Regulations on entry, as she would have done had the applicant made an application for a residence card thereafter. The meaning of 'facilitation' required no more than the entry stamp which the applicant possessed.
23. Ms Saifolahi said that the entry stamp was an EUSS decision in accordance with the Rules, giving rights under the Withdrawal Agreement. She conceded that the EUSS rules specified relevant documents, and that the documents specified did not include a grant of entry on EEA grounds. There was a lacuna within the EUSS scheme in UK law and the Tribunal should consider the refusal to be 'Withdrawal Agreement

disproportionate', as set out in her more extensive arguments in the skeleton argument.

Analysis

24. It is implicit in Ms Saifolahi's contentions that the natural language of Appendix EU, in which the prescribed documents are clearly set out, does not avail her. The question therefore is whether the claimant can rely directly on the Withdrawal Agreement and 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.
25. We have considered the assistance which we can derive from *Banger*. *Banger* is an unregistered partner case, not an extended family member case. The provision on which the claimant relies, Article 3(2) of Directive 2004/38, merely requires the provision of an in-country right of appeal or other means of challenge to the refusal of an EEA residence card. This claimant made no application for a residence card and the guidance in *Banger* does not assist him in relation to the much more specific provision in the Withdrawal Agreement.
26. We are guided by the decision of the Presidential panel in *Celik* (EU exit, marriage, human rights) [2022] UKUT 220 (IAC) (19 July 2022), the judicial headnote of which summarises its guidance as follows:

"(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."

We understand that there has been an application to the Court of Appeal challenging the decision in *Celik*. However, permission has not yet been granted, and the application may not be successful even if permission is granted. *Celik* remains good law today.

27. We have considered whether the EEA Regulations 2016 stamp on the claimant's passport in March 2019 amounts to 'facilitation' of residence under the Withdrawal Agreement. We do not accept the claimant's

contention that it does: it is at best facilitation of *entry* to the UK. If an entry stamp amounted to facilitation of residence, most of the remaining provisions in the 2016 Regulations would have been otiose.

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 before 31 December 2020. He did not do so and therefore, applying *Celik*, the claimant is not a person entitled to the benefit of the EUSs and no question of proportionality arises.
29. Accordingly, we find that the First-tier Judge fell into error in allowing the appeal. We set aside the decision of the First-tier Tribunal and substitute a decision dismissing the appeal.

DECISION

30. For the foregoing reasons, our decision is as follows:

The making of the previous decision involved the making of an error on a point of law.

We set aside the previous decision.

We remake the decision by dismissing the appeal.

Signed [Judith AJC Gleeson](#)
2022

Date: 7 November

Upper Tribunal Judge Gleeson