



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

Appeal Number: UI-2022-003872
(EA/02358/2022)

THE IMMIGRATION ACTS

**Heard at Field House
On 28 November 2022**

**Decision & Reasons Promulgated
On 13 March 2023**

Before

UPPER TRIBUNAL JUDGE CANAVAN

Between

LEONARD VASA

Appellant

And

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the appellant: Ms E. Doerr, instructed by Sarker Solicitors
For the respondent: Ms A. Ahmed, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellant appealed the respondent's decision dated 30 May 2021 to refuse to grant leave to remain under the EU Settlement Scheme as the family member (dependent brother) of a relevant EEA national. The appeal was brought under The Immigration (Citizens' Rights Appeals) (EU Exit) Regulations 2020 ('the CRA Regulations 2020').
2. First-tier Tribunal Judge Moffatt ('the judge') dismissed the appeal in a decision sent on 12 July 2022. The judge noted the chronology of events. The appellant entered the UK on 13 September 2020 with an immigration

stamp placed in his passport by UK juxtaposed immigration control in Paris [28]. The stamp stated: 'Admitted to the United Kingdom under the Immigration (EEA) Regulations 2016'. Underneath this endorsement was an immigration entry date stamp for 13 September 2020. The judge inferred that the appellant's Greek residence card was likely to have been used to demonstrate that the appellant was the family member of an EEA national [30]. The residence permit issued by the Greek authorities stated that it was issued on 01 January 2020 and was valid until 20 October 2020. On the face of the document, the type of permit was stated to be as a 'Family Member'.

3. In contrast, the judge noted that the appellant's father had a family permit vignette in his passport, issued on 08 July 2020, with the same date of entry stamp. The judge concluded that this document would meet the requirement of the immigration rules for a 'relevant document' contained in Annex 1 of Appendix EU [30].
4. The evidence contained in the Home Office bundle before the First-tier Tribunal indicated that the appellant made an earlier application for leave to remain under the EU Settlement Scheme shortly after his arrival in the UK. The application was refused in a decision dated 23 October 2020 because 'the 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'.
5. The judge considered Article 10 of the Withdrawal Agreement (2019/C 384 I/01) ('WA') and Article 2 of the Citizen's Rights Directive (2004/38/EC) ('CRD 2004') but concluded that the appellant did not meet the requirements for entry or residence as a family member because he was not a spouse, partner, or a direct dependent relative in the ascending or descending line [34].
6. The appellant applied for permission to appeal to the Upper Tribunal on the following grounds:
 - (i) The First-tier Tribunal erred in finding that extended family members were generally excluded from the WA. Extended family members fell within the scope of Article 10(2) if entry or residence had been facilitated before the end of the transition period.
 - (ii) The First-tier Tribunal erred in finding that the entry stamp was insufficient to bring the appellant within the scope of the WA. It was argued that the stamp in the appellant's passport was a 'family permit' granting admission to the UK under the EEA Regulations 2016. The judge erred in failing to appreciate that the appellant was facilitated entry by this mechanism.
 - (iii) The decision did not accord with general principles of EU law and was disproportionate.

7. The submissions made at the hearing are a matter of record. In summary, Ms Doerr repeated the main points made in the grounds of appeal. In response, Ms Ahmed argued that the decision did not involve the making of an error of law. The stamp in the appellant's passport was not facilitation of entry because regulation 11(3) of The Immigration (European Economic Area) Regulations 2016 ('the EEA Regulations 2016') stated that a stamp should not be placed in the passport of a person who was being admitted under the regulations.

Legal Framework

The Citizens' Rights Directive

8. European Union ('EU') law relating to rights of free movement made an important distinction between the rights of residence of 'family members' and those of 'other family members' (aka 'extended family members') of an EEA national who exercised rights under the EU Treaties in the United Kingdom on or before 31 December 2020.
9. A person who qualified as a family member under Article 2(2) of the CRD 2004 had an automatic right of residence. Under Article 6(2) family members of a Union citizen had a right of residence for up to three months without condition or any formalities other than the requirement to hold a valid identity card or passport. Under Article 7 family members accompanying or joining a Union citizen had a right of residence for more than three months provided that the Union citizen continued to exercise Treaty rights. Recital 13 and Article 9 provided for the issuing of residence cards to family members who were not nationals of a Member State if their planned period of residence was for longer than three months.
10. Recital 8 and Article 5(2) made clear that family members who were not nationals of a Member State and who were in the possession of a residence card issued under Article 10 were exempted from a visa requirement. Article 5(3) stated that the host Member State should not place an entry or exit stamp in the passport of family members who are not nationals of a Member State if they presented a residence card provided for in Article 10.
11. Any other family member who did not fall within the definition in Article 2(2) did not have an automatic right of residence. Any other family member needed to meet the requirements of Article 3(2). A person was required to apply for entry or residence to be 'facilitated' by the host Member State in accordance with national legislation. The host Member State would undertake an extensive examination of the person's personal circumstances and had to justify any denial of entry or residence.
12. Article 10 set out the requirements for family members of a Union citizen who were not nationals of a Member State to be issued with a residence card recognising a right of residence. In addition to the requirement to produce a passport and evidence of the relationship with the EEA national

exercising rights of free movement, the provisions relating to other family members were:

- (i) In cases falling under Article 3(2)(a) (other family members) a Member State required a document issued by the relevant authority in the country of origin or the country from which the person was arriving certifying that they were dependants or members of the household of the Union citizen, or proof of the existence of serious health grounds which strictly required the personal care of the of the family member by the Union citizen.
 - (ii) In cases falling under Article 3(2)(b) a Member State required proof of the existence of a durable relationship with the Union citizen.
13. In *SSHD v Rahman & Others* [2012] EUECJ C-83/11 (05 September 2012); [2013] QB 249, the Court of Justice of the European Union ('CJEU') reiterated that Article 3(2) CRD 2004 did not oblige a Member State to accord a right of residence to other family members [21]. It highlighted that Article 10(2)(e) required family members referred to in Article 3(2) of the Directive to present a document issued by the relevant authority in the country of origin or a document from the country from which they are arriving certifying that they are dependants of the Union citizen [30].
 14. In the case of *R (McCarthy) v SSHD* C-202/13 (18 December 2014) Mrs McCarthy Rodriguez was a Columbian national who was married to a British/Irish national. The couple lived in Spain, where Mrs McCarthy Rodriguez had been issued with a residence card as a family member under Article 10 CRD 2004. The CJEU found that Article 35 of the Directive did not permit a Member State to require, in pursuit of an objective of general prevention of abuse, family members who are not nationals of a Member State who hold a valid residence card issued under Article 10, to be in possession of an entry permit, such as a family permit issued under the EEA Regulations 2006, to be able to enter its territory. Measures taken under Article 35 to refuse, terminate or withdraw a right conferred by the Directive must be based on an individual examination of the case.
 15. In *Kaur v Secretary of State for the Home Department* [2020] EWCA Civ 98 the Court of Appeal found that the decision in *McCarthy* had no bearing in a '*Surinder Singh*' case where a British citizen and his non-EEA national wife were found to have abused the principle by moving to Bulgaria for a brief period solely to circumvent the requirements of the UK immigration rules.

The Immigration (European Economic Area) Regulations 2016

16. The EEA Regulations 2016 were said to transpose the CRD 2004 into domestic law. The provisions must be read in a way that conforms to EU law: see *Marleasing S.A v LA Comercial Internacional de Alimentacion S.A.* [1992] 1 CMLR 305, *Ghaidan v Godin-Mendoza* [2004] UKHL 30,

Vodafone 2 v Revenue and Customs Commissioners [2009] EWCA Civ 446 and *Swift (trading as A Swift Move) v Robertson* [2014] 1 WLFR 3438.

17. At the date when the appellant entered the United Kingdom on 13 September 2020, the relevant part of regulation 11 of the EEA Regulations 2016 relating to the 'right of admission' for family members of an EEA national stated:
- (2) A person who is not an EEA national must be admitted to the United Kingdom if that person is—
 - (a) a family member of an EEA national and produces on arrival a valid passport and qualifying EEA State residence card, provided the conditions in regulation 23(4) (family member of EEA national must accompany or join EEA national with right to reside) are met;
 - ...
 - (3) An immigration officer must not place a stamp in the passport of a person admitted to the United Kingdom under this regulation who is not an EEA national if the person produces a residence card, a derivative residence card, a permanent residence card or a qualifying EEA State residence card.
18. The interpretation section contained in regulation 2 defined the term 'residence card' as a card issued under regulation 18 of the EEA Regulations 2016. A 'qualifying EEA State residence card' was defined as 'a valid document issued under Article 10 of Council Directive 2004/38/EC ... by any EEA State (except Switzerland) to a non-EEA family member of an EEA national as proof of the holder's right of residence in that State.'
19. At the relevant time regulation 23(4) stated:
- (4) A person is not entitled to be admitted to the United Kingdom as the family member of an EEA national under regulation 11(2) unless, at the time of arrival—
 - (a) that person is accompanying the EEA national or joining the EEA national in the United Kingdom; and
 - (b) the EEA national has a right to reside.

Exit from the European Union

20. Rights of free movement in the United Kingdom for European citizens and their family members came to an end when the United Kingdom exited the European Union on 31 December 2020 at 23.00hrs ('Implementation Period Completion Day').
21. The United Kingdom negotiated an agreement with the European Union, which set out the arrangements for its withdrawal. The WA recognised that it was necessary to protect the rights of Union Citizens and United Kingdom nationals and their respective family members where they had

exercised free movement rights before the agreed date. The WA was implemented in domestic law through the combination of The European Union (Withdrawal) Act 2018 ('the EUW Act 2018') and The European Union (Withdrawal Agreement) Act 2020 ('the EUWA Act 2020').

22. Article 4 of the WA made clear that the provisions of Union law applicable in the agreement shall have the same legal effects in the United Kingdom as they do within the Union and its Member States. Persons would be able to rely directly on the provisions contained in the Agreement which met the conditions for direct effect under Union law.
23. Article 5 of the WA made clear that United Kingdom shall take all appropriate measures to ensure fulfilment of the obligations arising from the Agreement and should refrain from any measures which could jeopardise the attainment of the objectives of the Agreement.
24. Article 10 of the WA sets out the persons who come within the personal scope of the Agreement. It includes Union citizens who exercised their right to reside in the United Kingdom in accordance with Union law before the end of the transition period and who continue to reside there thereafter.
25. Article 10 also applies to family members provided they satisfy at least one of several conditions. In the case of family members, they needed to have resided in the host State in accordance with Union law before the end of the transition period and continued to reside there (Article 10(1)(e)(i)). In the case of other family members, they needed to have been facilitated entry by the host State in accordance with its national legislation or to have applied for facilitation of entry before the end of the transition period and continued to reside there (Article 10(2)-(3)).
26. Two systems ran parallel to one another in the run up to the United Kingdom's exit from the European Union on 31 December 2020.

(i) EU law

Applications could continue to be made to recognise existing rights of residence or to facilitate entry or residence under EU law. The mechanism for considering such an application under national legislation was an application made under the EEA Regulations 2016.

A right of appeal against a decision to refuse to issue a family permit or a residence card arose under the EEA Regulations 2016. The available ground of appeal was that the decision appealed against breached the appellant's right under the EU Treaties in respect of entry into or residence in the United Kingdom.

(ii) Domestic law

The EU Settlement Scheme was designed as a mechanism to grant leave to remain under domestic law to those who could establish that they were residing in the United Kingdom under EU law at the end of the transition period when their rights of residence came to an end.

A right of appeal against a decision to refuse leave to enter or remain under the immigration rules arises under The CRA Regulations 2020. The available grounds of appeal are:

- (a) that the decision breaches any right which the appellant has by virtue of the WA, EEA EFTA Separation Agreement, or the Swiss Citizens' Rights Agreement;
- (b) the decision is not in accordance with the provision of the immigration rules by virtue of which it was made, is not in accordance with the residence scheme immigration rules, is not in accordance with section 76(1) or (2) of the 2002 Act (revocation of ILR) or is not in accordance with section 3(5) or (6) of the 1971 Act (deportation).

27. The 'grace period' set out in The Citizens' Rights (Application Deadline and Temporary Protection) Regulations 2020 ('the CRAD Regulations 2020') was an extension of the period in which those exercising rights under EU law on or before 31 December 2020 could apply for leave to remain under the EU Settlement Scheme. It was an extension of the time to make an application and not an extension of time to establish rights of residence under EU law. Rights of free movement for European citizens and their family members came to an end on 31 December 2020. The CRAD Regulations 2020 made transitional provisions for applications for residence status made under the EEA Regulations 2016 before 31 December 2020. Certain aspects of the EEA Regulations 2016 continued to apply until the application was finally determined (although a person could only be granted leave to remain after 31 December 2020).
28. Appendix EU of the immigration rules gave effect to the general principles of EU law set out in the WA by requiring a person who was not a family member within the meaning of Article 2(2) CRD 2004 to have applied for or to have been facilitated entry or residence as an other family member in accordance with national legislation. However, Articles 10(2) and (3) of the Withdrawal Agreement only required a person to show that residence had been 'facilitated by the host State in accordance with its national legislation' or that an application had been made for facilitation of entry or residence before the end of the transition period.
29. In *Batool and others (other family members: EU exit)* [2022] UKUT 219 (IAC) the Upper Tribunal analysed the relevant legal framework and highlighted the distinction between the rights of family members and the need for other family members to be facilitated entry under EU law. The Upper Tribunal also considered the terms of Appendix EU, which required other family members to have been issued with a 'residence document'

(as defined) before the end of the transition period. The Upper Tribunal concluded that other family members who had not applied for facilitation of entry and residence before 23.00hrs on 31 December 2020 could not rely on the immigration rules or the WA to succeed in an appeal under the CRA Regulations 2020. Such a person did not have a right to have an application made for leave to remain under the immigration rules (domestic law) to be treated as an application for facilitation of entry or residence as an other family member (EU law).

30. In *Celik (EU Exit; marriage; human rights)* [2002] UKUT 220 (IAC) the Upper Tribunal considered the position of those who were in a durable relationship with an EEA national before 23.00hrs on 31 December 2020. Again, the Upper Tribunal concluded that those persons did not have any substantive rights under the WA if they had not applied for facilitation of entry of residence before the end of the transition period. Where a person had not established a substantive right, they could not invoke the concept of proportionality in Article 18(1)(r) WA or the principle of fairness to succeed in an appeal under the CRA Regulations 2020.

Decision and reasons

31. The appellant is an Albanian citizen. He produced the following evidence:
- (i) A copy of Laouren/Lauren Vasa's passport information page and a Family Status Certificate as evidence to show that his brother was likely to be a Greek citizen;
 - (ii) A copy of a letter from the Home Office dated 09 September 2019 granting Laouren/Lauren Vasa limited leave to remain under the EU Settlement Scheme;
 - (iii) Various documents such as birth certificates and family registration certificates, which indicated that the appellant was related to his brother, and parents, as claimed;
 - (iv) A copy of a 'family member' residence permit in the appellant's name issued by the Greek authorities, which was valid from 01 January 2020 to 20 October 2020;
 - (v) A copy of the appellant's Albanian passport endorsed with a stamp stating: 'Admitted to the United Kingdom under the Immigration (EEA) Regulations 2016' and a UK immigration date stamp from Paris dated 13 September 2020;
 - (vi) A copy of his father's passport endorsed with an entry clearance vignette stating 'EU Settlement Scheme Family Permit' valid from 08 July 2020 to 08 January 2021. The vignette was stamped with a UK immigration date stamp from Paris dated 13 September 2020;

- (vii) A copy of a letter from the Home Office dated 29 October 2020 granting the appellant's father limited leave to remain under the EU Settlement Scheme;
- (viii) Bank statements and other documents indicating that the appellant's brother had been working in the UK.
32. Having set out the legal framework relating to entry and residence of non-EEA nationals before 31 December 2020, it becomes clear that the arguments put forward on behalf of the appellant have merit.
33. The use of the term 'family permit' in the EEA Regulations 2016 (EU law) and in the EU Settlement Scheme (domestic law) can lead to confusion. The term has a different legal status depending on the context.
34. In comparing the documentation relating to the appellant and his father it appears that the judge wrongly concluded that the vignette in his father's passport was a 'relevant document' for the purpose of Appendix EU, when it was not. As defined in Annex 1 of Appendix EU a 'relevant document' is a family permit issued under the EEA Regulations 2016. The vignette in his father's passport was a 'family permit' issued under Appendix EU (family permit) from outside the UK, which operated as entry clearance under domestic law. It was not a relevant document for the purpose of Appendix EU. The appellant's father had already been given leave to enter under the EU Settlement Scheme and was granted a further period of leave to remain when he applied shortly after his arrival in the UK.
35. None of the witness statements explain why the appellant's father applied for entry clearance and the appellant did not. Nevertheless, the evidence indicates that the appellant and his father travelled to the UK together on 13 September 2020. 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 CRD 2004, 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.
36. It is reasonable to infer that the immigration officer at the juxtaposed controls in Paris considered the documentation produced by the appellant and was satisfied that he should be admitted under the EEA Regulations 2016 as an accompanying or joining family member of an EEA national who was exercising rights of free movement in the UK. Although I was not referred to relevant Border Force guidance for immigration officers, I find that it is reasonable for an expert tribunal to take judicial notice of the fact that it has been common practice for many years for some form of stamp to be placed in the passports of non-EEA visa nationals, who would otherwise require entry clearance, to indicate that they have been admitted to the UK under EU law.
37. Ms Ahmed argued that regulation 12(1) of the EEA Regulations 2016 stated that only an entry clearance officer could issue a family permit.

Although she accepted that the stamp in the appellant's passport showed that he had been 'admitted' to the UK, she argued that regulation 11(3) indicated that the stamp could not be viewed as facilitation of entry of an other family member and was not capable of meeting the requirement for a 'relevant document' issued under the EEA Regulations 2016.

38. The stamp in the appellant's passport did not purport to be a grant of leave to enter under domestic immigration law. The stamp did not purport to impose conditions or any specific period of stay. The stamp did not purport to be a family permit issued under the EEA Regulations 2016, which would normally be issued by a UK entry clearance officer at an entry clearance post by way of a vignette in a person's passport. However, the stamp did clearly indicate that the appellant had been admitted pursuant to EU law. Although the CRD 2004 states that an entry stamp shall not be placed in a passport, the CJEU in *McCarthy* made clear that the key prohibition is on requiring a family member to obtain an 'entry visa' when they can produce a residence card issued by another Member State.
39. The stamp in the appellant's passport was not a 'family permit' issued under the EEA Regulations 2016 and did not have any of the characteristics of an 'entry visa'. The simply indicated the basis upon which he was admitted and confirmed the date of admission. It is helpful for a non-EEA national family member who might otherwise be required to obtain entry clearance to show, if asked, that they have been admitted on a lawful basis albeit without the need for an entry visa.
40. The confusion in this case appears to have arisen because of an incorrect assumption that all family members need to be issued with a family permit under the EEA Regulations 2016 before they could be facilitated entry to the UK. When the provisions contained in the Directive are analysed, it is clear that before 31 December 2020 the facilitation of entry and residence of an other family member could be achieved by more than one route.
 - (i) A non-EEA national family member who was joining or accompanying an EEA national family member in the UK could have been issued with a family permit by an entry clearance post in their country of origin;
or
 - (ii) A non-EEA national family member who was accompanying or joining an EEA national family member in the UK who had already been issued with a residence card recognising a right of residence as a family member by another Member State under Article 10 could have been admitted without the need for an entry visa. Thereafter they would have had a right of residence without conditions or any formalities, other than the requirement to hold a valid identity card or passport, for up to three months before needing to apply for a residence card.
41. It seems that shortly after his arrival in the UK, and most likely at the same time as his father, the appellant applied for leave to remain under the EU

Settlement Scheme. As an other family member the immigration rules required evidence by way of the issuing of a 'relevant document' under the EEA Regulations 2016 but did not appear to make provision for those who were lawfully admitted to the UK with residence cards issued under Article 10 by other Member States. I have not been referred to any other aspect of Appendix EU that might cover this scenario.

42. The issue was not canvassed at the hearing, but it is arguable that, having been issued with a residence card in Greece, the appellant might have been admitted as a family member, but even if he was technically admitted as an other family member, it is difficult to see how his admission 'under the EEA Regulations 2016' could have been anything other than facilitation of entry under EU law.
43. Although the appellant could not meet the requirement to show that he had a 'relevant document' as defined in Annex 1 of Appendix EU he could rely on Article 10 of the WA. The purpose of the WA is clear. It is intended to protect the rights of Union Citizens and their respective family members where they had exercised free movement rights before the agreed date. The appellant was admitted to the UK and was remaining in the UK on a lawful basis at the date when he made the first application under the EU Settlement Scheme. Even though he made a second application during the grace period, it does not change the fact that his entry was facilitated by admission under EU law before 31 December 2020. His circumstances therefore engaged the operation of the WA.
44. For the reasons given above, I conclude that the First-tier Tribunal decision involved the making of an error of law because the judge failed to appreciate, most likely because the argument was not made, that a family permit was not required for the appellant to be facilitated entry to the UK in circumstances where he had been issued a residence card as a family member in Greece and had been admitted under EU law by an immigration officer at the port.
45. It is not necessary to conduct a further hearing to remake the decision. It is clear from the reasons already given why the WA is engaged in this case. For these reasons, I conclude that the decision breached a right that the appellant had by virtue of the WA.

DECISION

The First-tier Tribunal decision involved the making of an error on a point of law

The appeal is ALLOWED under the CRA Regulations 2020

Signed M. Canavan Date 20 January 2023
Upper Tribunal Judge Canavan

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