



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

Appeal Number: UI-2024-001919
First-tier Case Number: EU/50856/2023

THE IMMIGRATION ACTS

**Decision & Reasons
Promulgated**

On 4th of July 2024

Before

DEPUTY UPPER TRIBUNAL JUDGE WOODCRAFT

Between

**MR JANITHA MUDIYANSELAGE
(Anonymity order not made)**

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr Z Malik KC, Counsel instructed by Chancery solicitors
For the Respondent: Mr N Wain, Home Office Presenting Officer

DECISION AND REASONS

Heard at Field House on 25 June 2024

The Appellant

1. The appellant is a citizen of Sri Lanka born on 7 June 1985. He appeals with leave against a decision of Judge of the First-tier Tribunal Davies dated 4 April 2024 who dismissed the appellant's appeal against a decision of the respondent dated 23 January 2023. That decision in turn refused the appellant's application for leave to remain under the EU Settlement Scheme and Appendix EU of the Immigration Rules. The

appeal was lodged under the Immigration (Citizen's Rights Appeals) (EU Exit) Regulations 2020 on the basis that the respondent's decision breached the appellant's rights under the Withdrawal Agreement.

The Appellant's Case

2. The Appellant was issued with a residence card on 31 May 2014 as the durable partner of an EEA citizen, Maria Aseniso, who was exercising Treaty right in the United Kingdom. The relationship broke down, Ms Aseniso returned to Spain and the appellant's residence card was revoked on 21 May 2016, that is before the specified date of 31 December 2020. The appellant argues that he comes within the category of persons referred to in Article 10(2) of the Withdrawal Agreement. This is because he satisfies the two conditions set out in the article, namely that his stay in this country was facilitated by the issue of the residence card in 2014 and he continues to reside here. His application should therefore, he says, have been granted by the respondent.

The Legal Background

3. Article 3 of Directive 2004/38/EC provides:

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

"2. Without prejudice to any right to free movement and residence the persons concerned may have in their own right, the host Member State shall, in accordance with its national legislation, facilitate entry and residence (*my emphasis*) for the following persons....

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

4. Article 10(2) of the Withdrawal Agreement provides:

"Persons falling under points (a) and (b) of Article 3(2) of Directive 2004/38/EC whose residence was facilitated (*my emphasis*) 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".

5. The meaning of the word "facilitate" was considered by the Grand Chamber in **Secretary of State for the Home Department v Rahman [2012] EUECJ C-83/11 [2013] QB 249**. At [21], the Grand Chamber held that although:

“Article 3(2) of Directive 2004/38 does not oblige the Member States to accord a right of entry and residence to persons who are family members, in the broad sense, dependent on a Union citizen, the fact remains, as is clear from the use of the words ‘shall facilitate’ in Article 3(2), that that provision imposes an obligation on the Member States to confer a certain advantage, compared with applications for entry and residence of other nationals of third States, on applications submitted by persons who have a relationship of particular dependence with a Union citizen”.

6. At [22], the Grand Chamber added that the Member State, in order to meet this obligation, shall “make it possible for persons envisaged in the first subparagraph of Article 3(2) to obtain a decision on their application that is founded on an extensive examination of their personal circumstances and, in the event of refusal, is justified by reasons.”

The Decision at First Instance

7. At [20] of the determination the judge set out the issue which he needed to decide. This was whether the appellant could bring himself within article 10 of the Withdrawal Agreement. At [21] onwards the judge set out his findings and reasons. He held that the issue of the residence card to the appellant was a facilitation of the appellant’s residence in the United Kingdom. However from 31 May 2016 the appellant no longer had a right under the 2004 directive to be in the United Kingdom because his residence card had been revoked. He did not have a retained right because he and Ms Aseniso had never been married.
8. The appellant had argued that it was enough for the appellant to have been facilitated at a date in the past and to have continued to reside in the United Kingdom since then. The argument was that if it was intended that the act of facilitation should continue until 31 December 2020 then the withdrawal agreement would have said so. The appellant argued that in accordance with article 31 of the Vienna Convention on international treaties one could not read into a treaty such as the Withdrawal Agreement something which was not there.
9. The judge however took the view that the appellant needed to be able to retain a right of residence which meant that he had to have a right of residence in the first place that could be retained. He therefore needed to have the right to reside in the United Kingdom as at 31 December 2020 in order to benefit from article 10 (2). The appellant could not do this because of the revocation of the residence card which had happened in the interim and therefore the application appeal fell away.
10. The judge referred to the head note of the Upper Tribunal decision in **Celik [2022] UKUT 00220.** : “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.” The judge interpreted the definition of the phrase “being facilitated” as applying in another situation to the facts of the instant case before him. As the appellant was not being facilitated by the specified date he could not bring himself within article 10 of the Withdrawal Agreement and the judge dismissed the appeal.

The Onward Appeal

11. The principal ground on which the appellant appealed this decision was that the First-tier Tribunal had in effect inserted into Article 10(2) of the Withdrawal Agreement an extra condition which the appellant had to meet which was not there and which the First-tier had no power to insert. It now read that persons who came within the directive:

... 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 and the facilitation continued until the end of the transition period 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.

12. The significance of the use of the expression “shall retain their right of residence” was that once residence was acquired through facilitation and provided that the appellant continued to live in United Kingdom after 31 December 2020 his right of residence was retained. Given that the Appellant met the two conditions in Article 10(2) of the Withdrawal Agreement, he also met the definition of “family members” in Article 9 of that Agreement. Consequently, he had residence rights under Article 13(3) of the Withdrawal Agreement. The Secretary of State’s decision to refuse his application was in breach of those rights.
13. On 1 May 2024 the First-tier Tribunal granted permission to appeal on the grounds that it was arguable that the judge had materially erred in the interpretation of the Withdrawal Agreement.

The Hearing Before Me

14. In consequence of the grant of permission the matter came before me to determine whether there was a material error of law in the decision of the First-tier Tribunal such that it fell to be set aside. As the issue in dispute was a narrow one of construction, I indicated at the conclusion of the hearing that if there was a material error I would allow the appellant’s appeal against the respondent’s decision. If there was not the decision at first instance would stand.
15. In oral submissions counsel argued that the judge had misconstrued article 10(2). There were two conditions: (i) that the appellant’s residence

had been facilitated and (ii) that the appellant continued to reside in United Kingdom. The appellant satisfied both conditions. The judge had added a third condition which did not exist. The guidance relied on by the respondent in his skeleton argument could not be relied upon in the interpretation of an international treaty. The guidance rewrote article 10(2).

16. I asked counsel to clarify the meaning of the phrase in article 10(2) “whose residence was facilitated by the host state in accordance with its national legislation (my emphasis). Might this not mean that if the appellant was no longer residing in accordance with national law, in this case because his residence card had been revoked that residence was no longer being facilitated therefore he could no longer come within the meaning of article 10? Counsel replied that the answer to this point was in the use of the word was in article 10, that is whose residence was facilitated at some point in the past. The article did not say that facilitation was continuing or that the appellant was being facilitated. Thus the appellant did not have to show that residence was being facilitated at the end of the transition period.
17. Article 10(2) said that the applicant must continue to reside, it did not say reside lawfully or reside with a residence card, counsel argued. **Celik** provided no answer as the facts of this case were different to those in that case. The First-tier judge had placed weight on the expression “retained”. That merely meant to keep. If the appellant could meet the two conditions set out in article 10 he would keep what had been facilitated. If appellant fell within the provisions of 10(2) he met the eligibility criteria.
18. In reply the presenting officer relied on the respondent’s skeleton argument which pointed to the earlier decision of Judge of the First-tier Tribunal Ruddick dated 9 July 2019 who found that the residence card had been properly revoked under regulation 18 (7) (c) of the EEA Regulations . The appellant ceased to have a right to reside under the EEA regulations on 14 April 2016 when his partner left the United Kingdom to return to Spain. No further leave or retained rights of residence were established. The appellant’s residence had not been facilitated prior to the end of the transition period. The appellant’s facilitation had been undone as he was not lawfully resident under national law through a residence card.
19. The right to reside under national law for a family member was through a residence card valid at the end of the transition period. The guidance referred to, (see paragraph 15 above) was issued by the EU Commission, not the respondent. Article 10(2) covered extended family members who have resided in the host state by the end of the transition period by virtue of their relationship to an EU citizen exercising free movement rights. As the appellant’s Spanish partner left to go to Spain, the appellant was not residing in United Kingdom by the end of the transition

period by virtue of his relationship with Ms Aseniso. It was clear from the Commission's guidance that the basis of the residence must continue up until the end of the transition period for there to be facilitation.

20. The Court of Appeal (on appeal from the Upper Tribunal) in **Celik [2023] EWCA Civ 921** held at paragraph 26 that *"Article 10(2) included extended family members whose residence in the United Kingdom had been facilitated in accordance with domestic law before the end of the transition period"*. The article applied where an application was made and residence facilitated before the end of the transition period. On that basis the First-tier was correct to find that the appellant needed to have residence facilitated on the specified date of 31 December 2020.

Discussion and Findings

21. The key issue in this case which both parties accept is a very narrow one is what is the implication of the word "facilitating" used in article 10(2) of the Withdrawal Agreement. In brief the appellant argues that facilitating is a one off exercise, something is done by the host state to facilitate residence and thereafter the applicant must continue to reside in the host state. The respondent argues that facilitation is not a one-off act it is a process and has to be continuing until the end of the transition period in order that an applicant could continue to reside in the United Kingdom with the benefit of the provisions of article 10. Under the appellant's definition of facilitating the fact that the residence card was subsequently revoked because the appellant no longer came within the definition of an extended family member was irrelevant because the appellant had already satisfied the first of the two conditions set out in article 10 by the revocation. His residence was facilitated before the end of the transition period.
22. The respondent interprets that concept very differently. He says that an applicant must be residing in accordance with national law at the end of the transition period by virtue of their relationship with the EU citizen. This appellant could not do so because his relationship with the EU citizen had broken down by then.
23. Although much attention has been paid to the use of the phrase "facilitated" in article 10 a further important phrase in article 10 is "in accordance with the host state's national legislation", the Court of Appeal refers to "domestic legislation". Once an individual is not residing in the host state in accordance with the national legislation that person no longer has the protection of article 10. What this means is that far from saying that the revocation of the residence card is irrelevant, it is in fact of key importance in this case. Once the appellant's residence card was revoked he no longer had the right to remain in United Kingdom. He was thus no longer being facilitated to reside here.

24. This is not to insert a third condition into the withdrawal agreement which is not already there as is contended by the appellant. It is to point out that a person wishing to have the benefit of article 10 must be in the United Kingdom lawfully. The role of the host state is to facilitate residence but there must be an expectation that in return the person facilitated will reside lawfully in the United Kingdom that is to say in accordance with national legislation, the phrase used in the article. This appellant did not reside in accordance with domestic legislation for the reasons already set out.
25. The appellant's argument is that facilitation occurs once and he relies on the use of the past tense "was facilitated", see paragraph 16 above. The application for residence was facilitated by the grant of a residence card as is generally accepted in this case. Had the appellant continued to reside in accordance with the terms and conditions of that residence card this case would never have arisen. Unfortunately that situation did not happen, the appellant's relationship broke down and he found himself in a situation where he was no longer complying with the terms of the residence card. When it was revoked the appellant lost his right to reside. The act of facilitation is a procedural exercise which the United Kingdom is bound by treaty to comply with. However advantageous the procedure is, it does not change substantive law which still applies and which decides who is and who is not able to reside lawfully in the United Kingdom (and see the respondent's submission at paragraph 18 above).
26. If a person is not here lawfully they may be liable for removal. They cannot continue to live here regardless of their lack of status, as the appellant appears to argue. I reject the argument that facilitation is a one off exercise which once carried out enables an appellant to remain in the United Kingdom regardless of their status. It is a procedural exercise but an appellant must continue to abide by domestic legislation. For these reasons I do not find a material error of law in the First-tier determination and I dismiss the appellant's onward appeal.

Notice of Decision

The decision of the First-tier Tribunal did not involve the making of an error of law and I uphold the decision to dismiss the Appellant's appeal

Appellant's appeal dismissed

I make no anonymity order as there is no public interest to do so.

Signed this 3rd day of July 2024

.....
Judge Woodcraft

Deputy Upper Tribunal Judge