



IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2022-005292

First-tier Tribunal No: EA/02547/2022

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On 24 January 2025

Before

UPPER TRIBUNAL JUDGE McWILLIAM
UPPER TRIBUNAL JUDGE O'BRIEN

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MANDEEP SINGH

Respondent

Representation:

For the Appellant: Mr E Tufan, Senior Home Office Presenting Officer

For the Respondent: Mr E Nicholson of Counsel, instructed by Lawman Solicitors

Heard at Field House on 14 November 2024

DECISION AND REASONS

1. For the sake of convenience we shall refer to the parties as they were in the First-tier Tribunal.
2. The appellant is a national of India born on 10 May 1987. The respondent appeals, with the permission of First-tier Tribunal Judge Landes on 30 September 2022, against the decision of First-tier Tribunal Judge Dineen ('the judge'), following a hearing at Hatton Cross on 22 July 2022, to allow the appellant's appeal against the respondent's decision on 15 February 2022 to refuse his application for pre-settled status under the EU Settlement Scheme (EUSS), per Appendix EU of the Immigration Rules (IR).

Factual Background

3. There is no dispute as to the material facts in this case, which in brief are as follows. The appellant is a citizen of India present in the United Kingdom without leave (save for any which might arise or have arisen out of his relationship with

Ms Colimao, with which we deal below). Ms Colimao is a Portuguese national. They began cohabiting on 27 January 2019 and have been in a durable relationship since then. Ms Colimao was granted settled status under the EUSS on 17 October 2019. The appellant did not make any application under the EEA Regulations. He made an application under Appendix EU after exit date as Ms Colima's durable partner. The couple subsequently married on 24 June 2022.

4. We have not been told of the date of the application made by the appellant and it is not disclosed in the documents before us or those before the judge; however, it is uncontroversial that it predates 30 June 2021.
5. The application was refused by the respondent on the basis that the appellant did not satisfy the requirements of the Appendix EU. In particular, the appellant did not have a family permit or residence card as a durable partner of an EEA citizen nor was there evidence that the durable partnership continued to subsist. The refusal notice informed the appellant of his right to appeal against the decision under the Immigration (Citizens' Rights Appeals) (EU Exit) Regulations 2020 ('the EUSS Appeal Regulations'), and the grounds on which he could appeal: that the decision was not in accordance with the EUSS rules; or that it breached any rights he had under the Withdrawal Agreement (or the corresponding agreements for the EFTA and Switzerland).
6. The appellant appealed on or around 28 February 2022 on the grounds that the decision was not in accordance with the IR, and also complained that refusal breached his human rights.

The decision of the First-tier Tribunal

7. The hearing before the First-tier Tribunal took place only 3 days after promulgation of Celik (EU exit; marriage; human rights) [2022] UKUT 00220 (IAC) which was subsequently considered and upheld by the Court of Appeal in Celik v SSHD [2023] EWCA Civ 921. It does not appear from the decision that Celik was cited to the judge.
8. The judge briefly recited the procedural history and summarised the parties' cases before setting out his findings. The relevant paragraphs of his decision are as follows:
 10. It was submitted that the appellant comes within the provisions of Regulation 3 of the Citizens' Rights (Application of deadline, etc) Regulations 2020, as a result of which his relationship with his wife is shown to be durable.
 11. The respondent relied on the case as contained in the notice of refusal referred to above.
 12. I find, as argued by Counsel and set out in paragraph 4 of his skeleton argument, that the appellant's application was made before the cut off date of 30/06/20, and that in consequence his relationship with his wife is a durable relationship within regulation 8(5) of the EEA regulations 2016, and is to be treated as such for the purposes of appendix EA (sic) to the Immigration Rules."

The Grounds of Appeal

9. The respondent's grounds in short are that the judge failed properly to consider the provisions of Appendix EU. The appellant could not succeed as a spouse because his marriage had taken place after the specified date and he was not in

possession of a relevant document. The judge's finding that the couple's relationship was durable was irrelevant. The case was on all fours with Celik. The judge erred in referring to the Immigration (European Economic Area) Regulations 2016 (the EEA Regulations 2016) and had failed to give any or any adequate reasons for why the decision was not in accordance with the IR.

The Rule 24 Response and Rule 25 Reply

10. In his rule 24 response, the appellant noted that the basis for allowing his appeal was the judge's acceptance that he satisfied regulation 3 of the Citizens' Rights (Application of deadline and Temporary Protection) Regulations 2020 ('the Grace Period Regulations'), a matter with which he said the respondent took no issue. The appellant submitted that the relevant issue before the judge was whether he satisfied the requirements of regulation 8(5) of the EEA Regulations immediately before completion day. He submitted that the judge was entitled to find that the appellant did satisfy that condition.
11. In her rule 25 reply, the respondent relied on her original grounds of appeal. She submitted that the appellant had apparently relied on only one ground of appeal before the judge: that the decision was not in accordance with Appendix EU. That ground was hopeless. The Grace Period Regulations were irrelevant to whether an individual satisfied Appendix EU. Even if the appellant could establish that he was a 'relevant person' for the purposes of the Grace Period Regulations, he had not applied for a residence card before the end of the transition period, and so the Grace Period Regulations did not assist him.

The Parties' Oral Submissions

12. At the hearing, Mr Tufan relied on the grounds of appeal and the respondent's rule 25 reply. He further submitted that the appellant had made no application under the EEA Regulations and so the judge's findings under those Regulations were irrelevant. The appellant's presence in the United Kingdom had not been nor was it in the process of being 'facilitated' when the present application was made. It did not, therefore, matter whether the appellant was a relevant person under the Grace Period Regulations; he could not succeed under Appendix EU or the Withdrawal Agreement (per Celik).
13. In turn, Mr Nicholson relied on his skeleton argument before the judge, the rule 24 response and a skeleton argument prepared for the Upper Tribunal, which he supplemented orally. In short, he argued that the sole question for the judge to have decided was whether the appellant was in a durable relationship with Ms Colimao prior to IP completion day (the end of the transition period). If so, the Grace Period Regulations applied and his appeal fell to be allowed. Put simply, the appellant was a relevant person under the Grace Period Regulations, the Grace Period Regulations were made to give effect to the United Kingdom's obligations under the Withdrawal Agreement, and a failure to grant him leave to remain was therefore a breach of his rights under the Withdrawal Agreement.
14. Mr Nicholson did not have a copy of the appellant's notice and grounds of appeal to the First-tier Tribunal and so could not confirm if the appellant had (as suggested by the respondent) appealed only on the grounds that the decision was not in accordance with the EUSS rules. We have subsequently been able to obtain a copy of the grounds, and they accord with what we have been told. He conceded that the appellant had not met the requirements of Appendix EU and so could not have succeeded on that ground of appeal. However, Mr Nicholson

submitted that, had the point been taken and if necessary, he would have applied for permission to amend his grounds of appeal to plead a breach of the Withdrawal Agreement, and it was clear from his decision that the judge would have given permission.

15. Mr Nicholson also submitted that the Grace Period Regulations extended for the appellant his right to appeal under regulation 36 of the EEA Regulations. Again, even if this had not expressly been raised in the original grounds of appeal and if that point had been taken at the time, it was clear from the judge's decision that an amendment application would have been successfully made. However, after discussion, Mr Nicholson conceded that the respondent's refusal of the appellant's EUSS application had not been an 'EEA decision' as defined in regulation 2 of the EEA Regulations. Consequently, he accepted that the appellant had no right of appeal under those Regulations, even as a relevant person under the Grace Period Regulations.

Legal Framework

Free Movement Across the European Union and the 2016 EEA Regulations

16. The rights of free movement across the European Union of its citizens (and others to ensure that that right can be enjoyed effectively) are governed by Directive 2004/38/EC of the European Parliament and of the Council of 29th April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the member States ('the Citizens' Rights Directive'). The 2016 EEA Regulations implemented the Citizens' Rights Directive in the United Kingdom, replacing the earlier 2006 EEA Regulations and giving effect to subsequent rulings of the Court of Justice of the European Union.

17. In addition to the rights of Union citizens and family members as defined in article 2(2), the Citizens' Rights Directive provides for a host member state to facilitate the entry and residence in accordance with its national legislation of certain dependent family members and a Union citizen's durable partner (article 3(1)(a) and (b) respectively). These classes of individual fell under the definition of 'extended family member' in regulation 8 of the 2016 EEA Regulations. A 'durable partner' was defined in Regulation 8(5) as follows:

"(5) A person satisfies the conditions of this paragraph if the person is a partner of an EEA national (other than a civil partner) and can prove to the decision maker that he is in a durable relationship with the EEA national."

18. An Entry Clearance Officer had a discretion to grant ('may issue') a family permit under Regulation 12(5) permitting the extended family member to join an EU national residing in the United Kingdom if certain conditions were satisfied and if 'in all the circumstances it appears to the Entry Clearance Officer appropriate to issue the EEA family permit'. Furthermore, the respondent had a discretion to issue a residence card, valid for five years, under Regulation 18(4) to an extended family member. That Regulation provided so far as material that:

"(4) The Secretary of State may issue a residence card to an extended family member on application if –
 (a) the application is accompanied or joined by a valid passport;
 (b) the relevant EEA national is a qualified person or an EEA national with a right of permanent residence under regulation 15; and
 (c) in all the circumstances it appears to the Secretary of State appropriate to issue the residence cards".

The Withdrawal Agreement

19. As noted in the preamble to the Withdrawal Agreement, its objective was ‘to ensure an orderly withdrawal of the United Kingdom from the Union’. It required the United Kingdom to make provision for the preservation beyond the end of the transition period of the rights of those who had hitherto had rights of entry and residence in the United Kingdom under the various EU and associated treaties, ‘RECOGNISING that it is 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, and to ensure that their rights under this Agreement are enforceable and based on the principle of non- discrimination...’ (per the preamble recitations).
20. Part Two of the Withdrawal Agreement deals with citizens’ rights and is divided into two titles. The bulk of the provisions relevant to this appeal were detailed comprehensively by the Court of Appeal in Celik at [25-28]:

“25. Part Two of the Withdrawal Agreement is headed “Citizens’ Rights”. Title I deals with general provisions. Title II deals with rights and obligations including those related to residence and residence documents. Title I deals with general provisions. Article 9 provides certain definitions. In particular, it defines “family member” for the purposes of determining who falls within Article 10 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, that is other dependent relatives and those in a durable partnership with an EU national, are not family members within the definition.

‘26. Article 10 of the Withdrawal Agreement defines the persons who fall within the scope of the Agreement. Article 10(1) includes, amongst other people, Union citizens who had exercised their right to reside in the United Kingdom. Article 10(1) (e) included their family members residing in the United Kingdom in accordance with Union law before the end of the transition period and who continued to reside there thereafter. 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. 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 Part Two of the Withdrawal Agreement. That provision dealt with persons who had made an application before the end of the transition period but where the decision granting the right to reside was made after the end of the transition period. Article 10 provides, in full, as follows:

“Personal scope

1. Without prejudice to Title III, this Part shall apply to the following persons:
 - (a) 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 continue to reside there thereafter;
 - (b) United Kingdom nationals who exercised their right to reside in a Member State in accordance with Union law before the end of the transition period and continue to reside there thereafter;

(c) Union citizens who exercised their right as frontier workers in the United Kingdom in accordance with Union law before the end of the transition period and continue to do so thereafter;

(d) United Kingdom nationals who exercised their right as frontier workers in one or more Member States in accordance with Union law before the end of the transition period and continue to do so thereafter;

(e) family members of the persons referred to in points (a) to (d), provided that they fulfil one of the following conditions:

(i) they resided in the host State in accordance with Union law before the end of the transition period and continue to reside there thereafter;

(ii) they were directly related to a person referred to in points (a) to (d) and resided outside the host State before the end of the transition period, provided that they fulfil the conditions set out in point (2) of Article 2 of Directive 2004/38/EC at the time they seek residence under this Part in order to join the person referred to in points (a) to (d) of this paragraph;

(iii) they were born to, or legally adopted by, persons referred to in points (a) to (d) after the end of the transition period, whether inside or outside the host State, and fulfil the conditions set out in point (2)(c) of Article 2 of Directive 2004/38/EC at the time they seek residence under this Part in order to join the person referred to in points (a) to (d) of this paragraph and fulfil one of the following conditions:

— both parents are persons referred to in points (a) to (d);

— one parent is a person referred to in points (a) to (d) and the other is a national of the host State; or

— one parent is a person referred to in points (a) to (d) and has sole or joint rights of custody of the child, in accordance with the applicable rules of family law of a Member State or of the United Kingdom, including applicable rules of private international law under which rights of custody established under the law of a third State are recognised in the Member State or in the United Kingdom, in particular as regards the best interests of the child, and without prejudice to the normal operation of such applicable rules of private international law;

(f) family members who resided in the host State in accordance with Articles 12 and 13, Article 16(2) and Articles 17 and 18 of Directive 2004/38/EC before the end of the transition period and continue to reside there thereafter.

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.

4. Without prejudice to any right to residence which the persons concerned may have in their own right, the host State shall, in accordance with its national legislation and in accordance with point (b) of Article 3(2) of Directive 2004/38/EC, facilitate entry and residence for the partner with whom the person referred to in points (a) to (d) of paragraph 1 of this Article has a durable relationship, duly attested, where that partner resided outside the host State before the end of the transition period, provided that the relationship was durable before the end of the transition period and continues at the time the partner seeks residence under this Part.

5. In the cases referred to in paragraphs 3 and 4, the host State shall undertake an extensive examination of the personal circumstances of the persons concerned and shall justify any denial of entry or residence to such persons.”

‘27. Title II of Part Two deals with rights and obligations. Chapter one of that Title deals with rights related to residence and residence documents. Articles 13 and 15 deal with the right of Union nationals and their family members to reside in the United Kingdom (or of a United Kingdom national to reside in a Member State). 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 may be because such rights are granted under domestic law not EU law.

‘28. 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.

For persons who have the right to commence residence after the end of the transition period in the host State in accordance with this Title, the deadline for submitting the application shall be 3 months after their arrival or the expiry of the deadline referred to in the first subparagraph, whichever is later.

A certificate of application for the residence status shall be issued immediately;

.....

(d) where the deadline for submitting the application referred to in point (b) above is not respected by the persons concerned, the competent authorities shall assess all the circumstances and reasons for not respecting the deadline and shall allow those persons to submit an application within a reasonable

further period of time if there are reasonable grounds for the failure to respect the deadline;

(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;

.....

(j) 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. With regard to the condition of sufficient resources as concerns family members who are themselves Union citizens or United Kingdom nationals, Article 8(4) of Directive 2004/38/EC shall apply;

.....

(o) the competent authorities of the host State shall help the applicants to prove their eligibility and to avoid any errors or omissions in their applications; they shall give the applicants the opportunity to furnish supplementary evidence and to correct any deficiencies, errors or omissions;

.....

(r) the applicant shall have access to judicial and, where appropriate, administrative redress procedures in the host State against any decision refusing to grant the residence status. The redress procedures shall allow for an examination of the legality of the decision, as well as of the facts and circumstances on which the proposed decision is based. Such redress procedures shall ensure that the decision is not disproportionate.”

21. Also material for the purposes of this appeal are Articles 18(2) and (3), which provide:

“2. During the period referred to in point (b) of paragraph 1 of this Article and its possible one year extension under point (c) of that paragraph, all rights provided for in this Part shall be deemed to apply to Union citizens or United Kingdom nationals, their respective family members, and other persons residing in the host State, in accordance with the conditions and subject to the restrictions set out in Article 20.

‘3. Pending a final decision by the competent authorities on any application referred to in paragraph 1, and pending a final judgment handed down in case of judicial redress sought against any rejection of such application by the competent administrative authorities, all rights provided for in this Part shall be deemed to apply to the applicant, including Article 21 on safeguards and right of appeal, subject to the conditions set out in Article 20(4).”

The Grace Period Regulations

22. As observed in Celik at [29-30], the United Kingdom chose to create a new residence status, and adopted for that purpose Appendix EU, setting out the arrangements for granting limited or indefinite leave to remain in the case of EU nationals and their family members. This route, the EUSS, was available from 30 March 2019.
23. The 2016 EEA Regulations were revoked on 31 December 2020 by the Immigration and Social Security Co-ordination (EU Withdrawal) Act 2020.
24. From 30 March 2019 until the end of the transition period on 31 December 2020, an EU national or a family member could apply under either the 2016 EEA Regulations for a registration certificate or a residence card or for limited or indefinite leave under the EUSS if he or she qualified under the scheme.
25. Thereafter, EU nationals, family members and extended family members could not apply for a registration certificate or a residence card under regulation 18 of the Regulations; however, applications made before the end of the transition period would still continue to be considered and, if appropriate, granted after the end of the transition period.
26. Nevertheless, it was necessary to ensure that individuals wishing to apply under the EUSS were able to do so for a period of no less than 6 months after the end of the transition period (per Article 18(1)(b) of the Withdrawal Agreement) and also that those who were enjoying free movement rights in the United Kingdom prior to the end of the Transition Period continued to do so until the end of the deadline, or until final determination of an outstanding EUSS application (per Articles 18(2) and (3)). It was for these purposes (plus the preservation of access to eligible benefits and services) that the Grace Period Regulations were made.

As section 2 of the Explanatory Memorandum to the Grace Period Regulations states:

“2. Purpose of the instrument

2.1 This instrument comes into force at the end of the transition period on 31 December 2020 and gives effect to aspects of the EU Withdrawal Agreement, the EEA EFTA Separation Agreement and the Swiss Citizens’ Rights Agreement (“the Agreements”) concerning the residence rights of EEA citizens and their family members. In particular, it specifies the deadline of 30 June 2021 for an application to the EU Settlement Scheme (“the Scheme”) for UK immigration status by EEA citizens and their family members who are resident in the UK by the end of the transition period.

2.2 For those EEA citizens who are lawfully resident in the UK by virtue of free movement law immediately before the end of the transition period, and who do not yet have status under the Scheme, and for their relevant family members, this instrument saves their existing residence rights in the UK. Provision is also made for those who are not physically in the UK at that point in time but are to be treated as resident in the UK under the Agreements.

2.3 The instrument also makes provision to preserve access to benefits and services (subject to eligibility). It does so for the period from 31 December 2020 to 30 June 2021 (referred to in the instrument as “the grace period”), once, subject to agreement by Parliament, free movement to the UK is ended by the Immigration and Social Security Co-ordination (EU Withdrawal) Bill (“the Bill”). The protections provided for in the instrument also apply where an individual makes an application to the Scheme before the deadline, but the application has not been finally determined by the deadline.”

27. The deadline for making an application under the EUSS is set in regulation 2 of the Grace Period Regulations as the end of 30 June 2021. Regulation 3 provides amongst other things for the continuing lawful residence in the United Kingdom of EEA nationals and their family members who were doing so immediately before (or who had had a right of permanent residence at any point in the 5 years prior to) the end of the transition period, and regulation 4 for such individuals who then make an in-time application under the EUSS. Regulation 3 does so by providing that certain provisions of the 2016 EEA Regulations continued to apply during the grace period between the end of the transition period and the application deadline, and regulation 4 for them to continue until final determination (the grant or exhaustion of appeal rights) of an in-time application under the EUSS.

28. Regulation 3 of the Grace Period Regulations in full provides as follows:

“3.— Grace period

(1) This regulation has effect if the EEA Regulations 2016 are revoked on IP completion day (with or without savings).

(2) The provisions of the EEA Regulations 2016 specified in regulations 5 to 10 continue to have effect (despite the revocation of those Regulations) with the modifications specified in those regulations in relation to a relevant person during the grace period.

(3) The provisions specified in regulation 11 apply in relation to a relevant person during the grace period as if any reference to the EEA Regulations 2016 or any provision of those Regulations are to the Regulations or provision of the Regulations as continued in effect and modified by regulations 5 to 10.

(4) The enactments specified in regulation 12 apply in relation to a relevant person during the grace period with the modifications specified in that regulation.

(5) For the purposes of this regulation—

- (a) the grace period is the period beginning immediately after IP completion day and ending with the application deadline;
- (b) a person is to be treated as residing in the United Kingdom at any time which would be taken into account for the purposes of calculating periods when the person was continuously resident for the purposes of the EEA Regulations 2016 (see regulation 3);
- (c) a person who does not have the right to reside in the United Kingdom permanently is to be treated as having such a right if the person had a right of permanent residence in the United Kingdom under those Regulations (see regulation 15) and who, immediately before IP completion day, has been absent from the United Kingdom for a continuous period of 5 years or less (disregarding any period of absence before the person acquired the right of permanent residence).

(6) In this regulation—

"EEA document" means—

- (a) an EEA family permit issued under regulation 12 of the EEA Regulations 2016;
- (b) a registration certificate issued under regulation 17 of those Regulations, or
- (c) a residence card issued under regulation 18 of those Regulations;

"family member" —

- (a) has the same meaning as in paragraph (1) of regulation 7 of the EEA Regulations 2016 (read with paragraph (2) of that regulation) as those Regulations had effect immediately before IP completion day, and
- (b) includes an extended family member within the meaning of regulation 8 of those Regulations as they had effect immediately before IP completion day if that person—
 - (i) immediately before IP completion day satisfied the condition in regulation 8(5) of those Regulations (durable partner), or
 - (ii) holds a valid EEA document (regardless of whether that document was issued before or after IP completion day);

"relevant family member", in relation to a person ("P"), means a family member who—

- (a) was a family member of P immediately before IP completion day;
- (b) is P's child and—
 - (i) the child's other parent is a relevant person or has leave to enter or remain in the United Kingdom by virtue of residence scheme immigration rules;
 - (ii) the child's other parent is a British citizen;
 - (iii) P has sole or joint rights of custody of the child in the circumstances set out in the last point of Article 10(1)(e)(iii) of the withdrawal agreement or the last point of Article 9(1)(e)(iii) of the EEA EFTA separation agreement, or
 - (iv) P falls within Article 10(1)(e)(iii) of the Swiss citizens' rights agreement (children of beneficiaries of that agreement);
- (c) becomes a family member of P after IP completion day by virtue of being issued with an EEA document (see paragraph (b)(ii) of the definition of "family member"), or
- (d) is the spouse or civil partner of P and P is a national of Switzerland;

"relevant person" means a person who does not have (and who has not, during the grace period, had) leave to enter or remain in the United Kingdom by virtue of residence scheme immigration rules and who—

- (a) immediately before IP completion day—

- (i) was lawfully resident in the United Kingdom by virtue of the EEA Regulations 2016, or
- (ii) had a right of permanent residence in the United Kingdom under those Regulations (see regulation 15), or
- (b) is not a person who falls within sub-paragraph (a) but is a relevant family member of a person who immediately before IP completion day—
 - (i) did not have leave to enter or remain in the United Kingdom by virtue of residence scheme immigration rules, and
 - (ii) either—
 - (aa) was lawfully resident in the United Kingdom by virtue of the EEA Regulations 2016, or
 - (bb) had a right of permanent residence in the United Kingdom under those Regulations (see regulation 15).

29. The provisions specified in regulations 7 to 12 are not relevant to this appeal. Regulation 9 ('Provisions relating to appeals') specifies regulations 35 to 42 of, and Schedule 2 to, the EEA Regulations, thus preserving appeal rights under the EEA Regulations. However, given Mr Nicholson's proper concession that the respondent's decision was not an EEA decision as defined in regulation 2 of the EEA Regulations, it is not necessary to consider the effect of regulation 9 in any further detail.
30. Regulation 5 ('Provisions relating to definitions etc.') specifies amongst other things: regulation 7 of the EEA Regulations (the definition of 'family member') (regulation 5(f)); and regulation 8 of the EEA Regulations (the definition of 'extended family member') with the modification that paragraph (8)(c) were omitted (regulation 5(g)). The latter modification removes the requirement that an extensive examination of the personal circumstances of the applicant, if required under the EEA Regulations, must include examination of whether an EEA national would be deterred from exercising their free movement rights if the application was refused.
31. Regulation 5 also specifies amongst other things the definition in regulation 2 of the EEA Regulations of 'EEA decision' with certain modifications (regulation 5(a)(iii)); however, none of those modifications alters the fact that the respondent's decision did not meet the definition. None of the remaining provisions specified by regulation 5 are relevant to this appeal.
32. Regulation 6 ('Provisions relating to residence rights') specifies amongst other things regulation 13 ('Initial right of residence'), regulation 14 ('Extended right of residence') and regulation 15 ('Permanent right of residence') of the EEA Regulations, save for modifications irrelevant to non-deportation cases. None of the remaining provisions specified by regulation 6 are relevant to this appeal.
33. Consequently, the effect of the Grace Period Regulations (insofar as they are relevant to the present appeal) is that the deadline for making an application under the EUSS was the end of 30 June 2021 (regulation 2(a)) and a relevant person with residence rights under the EEA Regulations would continue to reside lawfully in the United Kingdom during the grace period and thereafter for the period during which the individual's EUSS application remained outstanding (including any period in which he could make an in-time appeal and, if necessary in-time onward appeals).
34. The Grace Period Regulations do not, however, prescribe that an EUSS application should succeed if someone is a relevant person as defined in those Regulations, nor indeed do they prescribe the way in which such an EUSS

application should be considered (save that it should be treated as in time if made before the end of the grace period). Those are matters decided solely by reference to Appendix EU (or Appendix EU FP if an application for entry clearance), subject to the appeal rights provided by the EUSS Appeal Regulations.

EUSS Appeals

35. Pursuant to regulation 3(1)(c) of the EUSS Appeal Regulations, a person may appeal against a decision made on or after exit day not to grant any leave to enter or remain in the United Kingdom in response to their relevant application. The term “relevant application” is defined in regulation 3(2)(a) thus:

“(2) In this regulation, “relevant application” means an application for leave to enter or remain in the United Kingdom made under residence scheme immigration rules—

(a) on or after exit day, or

(b) before exit day if a decision is made on that application on or after 8th May 2023.”

36. Regulation 8 prescribes the grounds on which such an appeal must be brought. They are that the decision breaches any right which the appellant has by virtue of the relevant provisions of the Withdrawal Agreement (or corresponding agreements regarding the EEA, EFTA or Switzerland) (regulation 8(2)), and/or that the decision was not in accordance with Appendix EU or Appendix EU FP (regulation 8(3)).

37. Regulation 8 is subject to regulation 9 (‘Matters to be considered by the relevant authority’), which provides for the making of and response to a statement under s120 of the Nationality, Immigration and Asylum Act 2002 (which might also give rise to grounds of appeal of the type listed in s84 of that Act), the consideration of matters relevant to the substance of the decision appealed against and for the respondent’s consent to be required to consider a ‘new matter’. However, it is not said that regulation 9 is of relevance in this appeal. In particular, it is not said that any of the s84 grounds of appeal arise in this appeal (notwithstanding the reference to human rights in the First-tier grounds of appeal).

Error of Law

38. It is not in issue that the appellant’s application was made (and decided) under Appendix EU. Although the precise date of the application has not been stated, it is not in issue that the application was made after exit day (11pm on 31 January 2020). It was therefore a ‘relevant application’ as defined in regulation 3(2)(a) of the EUSS Appeal Regulations.

39. Consequentially, the appellant had a right of appeal to the First-tier Tribunal against the respondent’s refusal pursuant to regulation 3(1)(c). However, the only grounds of appeal available to the appellant against the respondent’s refusal of his EUSS application were that the decision breached his rights under the Withdrawal Agreement and/or was not in accordance with Appendix EU. The judge did not, however, identify the grounds of appeal relied upon, let alone remind himself of the grounds available to the appellant.

40. The judge did not deal at all with whether the decision breached the appellant's rights under the Withdrawal Agreement (unsurprisingly, given that it was not a ground of appeal raised by the appellant). As for the only other available ground, the judge does appear to have concluded that the application ought to have been allowed under Appendix EU. However, the reason given is that the appellant was in a durable relationship within regulation 8(5) of the EEA Regulations and so was to be treated as such for the purposes of Appendix EU.
41. Regulation 8(5) of the EEA Regulations merely requires that the person in question is able to prove to the decision-maker that they are the partner of and in a durable relationship with an EEA national. However, the definition of 'durable partner' under Appendix EU (per Annex 1 to that Appendix) also requires that the person holds a relevant document as the durable partner of relevant EEA citizen, or has applied for such a document which was subsequently issued on that basis. That was not the case, as Mr Nicholson properly concedes.
42. Consequently, the judge's decision to allow the appeal under Appendix EU involved the making of an error of law, and we set his decision aside.

Remaking

43. There is no dispute as to the material facts in this case and so we go on to remake the decision ourselves.
44. The appellant was a durable partner of Ms Calimao, and therefore an extended family member of her pursuant to regulation 8(5) of the 2016 EEA Regulations. It is the appellant's case that he is a relevant person under the Grace Period Regulations, that the Grace Period Regulations were made to give effect to the United Kingdom's obligations under the Withdrawal Agreement, and that a failure to grant him leave to remain is therefore a breach of his rights under the Withdrawal Agreement. Quite properly, he does not argue that he satisfies the requirements of Appendix EU, accepting that he has never had nor ever applied for a relevant document.
45. As noted above, the appellant appealed to the First-tier Tribunal on the grounds that refusal was not in accordance with the EUSS rules (Appendix EU). He did not at that point argue that refusal was a breach of the Withdrawal Agreement. However, implicit in any application under the EUSS is the assertion not only that refusal would be contrary to the scheme rules but also that it would be a breach of the applicant's rights under the Withdrawal Agreement. It matters not that the respondent failed to address expressly in her refusal letter the latter point; she necessarily considered the facts upon which the argument is advanced. Her silence constitutes consideration of the matter per Ayoola (previously considered matters) [2024] UKUT 143 (IAC). The case as now put is not, therefore, a new matter as defined in regulation 9 of the EUSS Appeal Regulations and the respondent's consent is not required for us to consider the point. Furthermore, Mr Tufan did not argue that any prejudice would be caused to the respondent by our doing so.
46. As it is, after taking Mr Nicholson to the relevant provisions of Regulation 3 of the Grace Period Regulations, he accepted that they put him in some difficulty.

47. The appellant was a durable partner of Ms Colimao, and therefore an extended family member of her pursuant to regulation 8(5) of the EEA Regulations, immediately before IP completion day. That was the unchallenged finding of the judge, with which we agree, and was sufficient for him to meet the definition of 'family member', and thus 'relevant family member' of Ms Colimao, under Regulation 3 of the Grace Period Regulations.
48. However, the appellant was only entitled under the 2016 EEA Regulations to be treated as a family member of Ms Colimao whilst he satisfied the conditions to be an extended family member, had been issued with an EEA family permit, a registration certificate or a residence card, and that document remained in force. The appellant had no such document and so was not himself entitled to reside in the United Kingdom under regulation 14(2) of the EEA Regulations (or otherwise under those Regulations). Consequently, as Mr Nicholson conceded, the appellant was not himself lawfully resident in the United Kingdom immediately before IP completion day by virtue of the EEA Regulations, and so did not meet definition (a) of 'relevant person' in reg 3(6) of the Grace Period Regulations.
49. Instead, Mr Nicholson's argument was that the appellant met definition (b) of 'relevant person', which concerns the residence status of Ms Colimao. However, to meet definition (b) of 'relevant person', Ms Colimao must not only have been lawfully resident in the United Kingdom immediately before IP completion day by virtue of the EEA Regulations (or have had a right of permanent residence under those Regulations) but also must not at that date have had leave to enter or remain under the EUSS. Of course, Ms Colimao did have such leave, having been granted settled status on 17 October 2019.
50. The appellant is not therefore a relevant person under the Grace Period Regulations. However, even if he had been, it would have been of no assistance to him.
51. We did not hear any persuasive argument explaining how the decision breaches the Withdrawal Agreement. The Grace Period Regulations simply reflect the obligations on the United Kingdom in respect of articles 18 (1)(b) and 18(2). As observed in Celik at [29-30], the United Kingdom chose to create a new residence status, and adopted for that purpose Appendix EU, setting out the arrangements for granting limited or indefinite leave to remain in the case of EU nationals and their family members. This route, the EUSS, was available from 30 March 2019. The only right afforded to the applicant by the Withdrawal Agreement and implemented by the Grace Period Regulations was the right for an EUSS application made by the end of 30 June 2021 (6 months beyond the IP) to be accepted as having been made in time (Regulation 2(a)).
52. The applicant's EUSS application was accepted as in time and considered in accordance with Appendix EU. That is all that was required by the Grace Period Regulations. No other basis has been advanced for why the decision breached the appellant's rights under the Withdrawal Agreement, nor do we consider that there is such a basis. Without wishing to rehearse Celik, suffice to say the appellant is not facilitated and outside the scope of the Withdrawal Agreement. Consequently, that ground of appeal must also fail.
53. It is not in issue that the respondent's decision was not an EEA decision as defined in Regulation 2 of the 2016 EEA Regulations and so he did not have any right of appeal under those Regulations as saved in the Grace Period Regulations.

Notice of Decision

54. The judge's decision involved the making of an error of law and is set aside to be re-made in the Upper Tribunal.
55. The appeal is dismissed.

Sean O'Brien

Judge of the Upper Tribunal
Immigration and Asylum Chamber

22 January 2025