Neutral Citation Number: [2023] EWCA Civ 921

Case No: CA-2022-002008

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE UPPER TRIBUNAL (IMMIGRATION AND ASYLUM CHAMBER)
THE HONOURABLE MR JUSTICE LANE AND UPPER TRIBUNAL JUDGES HANSON AND McWILLIAM
[2022] UKUT 00220 (IAC)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 31 July 2023

Before:

LORD JUSTICE MOYLAN
LORD JUSTICE SINGH
and
LORD JUSTICE LEWIS

- -

Between:

HALIL CELIK	**Appellant**
- and -	
SECRETARY OF STATE FOR THE HOME DEPARTMENT	**Respondent**
-and-	
(1) THE AIRE CENTRE **(2) HERE FOR GOOD** **(3) INDEPENDENT MONITORING AUTHORITY FOR THE CITIZENS' RIGHTS AGREEMENTS**	**Interveners**

- -
- -

Benjamin Hawkin and Jessica Smeaton (instructed by **TNA Solicitors**) for the **Appellant**
Julia Smyth and Natasha Jackson (instructed by the **Treasury Solicitor**) for the **Respondent**
Thomas de la Mare KC and Parminder Saini (instructed by **Herbert Smith Freehills**) for the **First and Second Interveners**
Galina Ward KC (instructed by **Independent Monitoring Authority for the Citizens' Rights Agreements Legal Directorate**) for the **Third Intervener**

Hearing dates: 4th and 5th July 2023

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Approved Judgment

This judgment was handed down remotely at 2pm on Monday 31 July 2023 circulation to the parties or their representatives by e-mail and by release to the National Archives.

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LORD JUSTICE LEWIS:

INTRODUCTION

1. This appeal concerns the provisions of the agreement on the withdrawal of the United Kingdom from the European Union ("the Withdrawal Agreement"). That Agreement governs the rights of EU nationals and their family members to continue to reside in the United Kingdom following the departure of the United Kingdom from the European Union and the end of a transition period on 31 December 2020.

2. In brief, the appellant, Halil Celik, is a Turkish national. He came to the United Kingdom in 2017 and claimed asylum. That claim was refused and an appeal dismissed. He remained in the United Kingdom unlawfully. He says that he met a Romanian national, Ms Ibram, in December 2019. They began a relationship. They began living together in February 2020, together with Ms Ibram's daughter by a previous relationship.

3. On 25 August 2020, the appellant applied for leave to remain on the basis that he was in a durable relationship with Ms Ibram. That application was refused on 2 March 2021. There was no appeal against the refusal of that application.

4. On 17 March 2021 the appellant applied for leave to remain as the spouse of Ms Ibram. The marriage in fact took place on 9 April 2021. That application was refused on 23 June 2021 on the grounds that the appellant was not married, and so was not a family member of an EU national, as at the end of the transition period on 31 December 2020. An appeal against that decision was dismissed by the First-tier Tribunal. The Upper Tribunal dismissed an appeal and upheld the First-tier Tribunal's decision.

5. The appellant appeals against the Upper Tribunal's decision on 12 grounds. In essence, he contends that he would have married Ms Ibram before 31 December 2020 but for the restrictions and delays that occurred during the Covid-19 pandemic. In those circumstances, he contends that the Upper Tribunal failed properly to interpret the Withdrawal Agreement and failed to recognise that he should be treated as having a right to reside as the spouse of an EU national. He further contends that the provisions of Article 18(1)(r) of the Withdrawal Agreement required decisions refusing residence status to be proportionate and it would be disproportionate to refuse him leave to remain given that he would have married before 31 December 2020 but for the pandemic. He also contends that the Upper Tribunal had failed to consider the impact of the Covid-19 pandemic, and had also made errors of domestic law in dismissing his appeal.

6. Two sets of interveners were granted permission to intervene. The first set of interveners were the Aire Centre and Here for Good who are charitable organisations concerned with free movement rights. The other intervener was the Independent Monitoring Authority for the Citizens' Rights Agreements which is the statutory body in the United Kingdom responsible for monitoring the implementation and application of Part Two of the Withdrawal Agreement. They did not seek to make submissions in relation to the appeal against the refusal of the second application for leave to remain, that is, the application made on 17 March 2021 on the basis that the appellant had married an EU national after the end of the transition period. Rather, they contended

that the first application, made in August 2020, should have been treated as an application to facilitate the residence of the appellant as a person in a durable relationship with an EU national within the meaning of Article 10(3) of the Withdrawal Agreement and should not have been refused without an extensive examination of the appellant's personal circumstances.

THE LEGAL FRAMEWORK

7. Whilst the United Kingdom was a member of the European Union, it was bound to give effect to European Union law including the law governing freedom of movement for EU nationals and their family members. The United Kingdom gave effect to European Union law by means of the European Communities Act 1972 ("the 1972 Act"). The United Kingdom left the European Union on 31 January 2020 and repealed the 1972 Act with effect from that date (see section 1 of European Union (Withdrawal) Act 2018 ("the 2018 Act")).

8. Article 126 of the Withdrawal Agreement provided that there would be a transition or implementation period which would end on 31 December 2020. Article 127 provided that European Union law was applicable to, and in, the United Kingdom during the transition period. That was given effect in domestic law by the provisions of section 1A of the 2018 Act. As a result the provisions of European Union law governing free movement continued to have effect within the United Kingdom until 11 p.m. on 31 December 2020.

9. It is important to identify the scope of the rights to reside of EU nationals and their family members in the period up to the end of the transition period and then to consider the provisions made for the continuation of those rights by the Withdrawal Agreement following that period.

The Period Prior to the End of the Transition Period

10. Articles 20 and 21 of the Treaty on the Functioning of the European Union ("the TFEU") provided that nationals of the European Union were to be citizens of the European Union and were to have the right to move and reside freely within the territory of Member States "subject to the limitations laid down in the Treaties and by measures adopted to give them effect". Articles 45 and 49 of the TFEU also specifically guaranteed the right of EU nationals to free movement for work and freedom of establishment. Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2002 ("the Directive") was the principal EU legislative measure dealing with the rights and limitations of EU nationals and their family members to reside in the United Kingdom.

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

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

> "2. Without prejudice to any right of free movement and residence the persons concerned may have in their own right, the host Member State shall, in accordance with its national legislation, facilitate entry and residence for the following persons:
>
> (a) any other family members, irrespective of their nationality, not falling within the definition in…Article 2 who, in the country from which they have come, are dependants or members of the household of the Union citizen having the primary right of residence, or where serious health grounds strictly require the personal care of the family member by the Union citizen;
>
> (b) the partner with whom the Union citizen has a durable relationship duly attested.
>
> The host Member State shall undertake an extensive examination of the personal circumstances and shall justify any denial of entry or residence to these people."

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

14. The provisions of the Directive were implemented by the Immigration (European Economic Area) Regulations 2016 ("the Regulations"). The Regulations recognised the right to enter and reside in the United Kingdom conferred on EU nationals and their family members (as defined in regulation 7 which reflected the provisions of Article 2 of the Directive). Such persons had to be given a family permit under regulation 12 to enter the United Kingdom. They had a right to reside recognised by

regulations 13, 14 and 15, and they had to be issued with a residence card under regulation 18.

15. Extended family members were defined in regulation 8 of the Regulations. They included certain dependent relatives and, material for present purposes, durable partners. 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."

16. 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 Secretary of State 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."

17. In summary, therefore, the Secretary of State could exercise the discretion to issue a residence card to a third country national (that is, someone who was not a national of the United Kingdom nor of an EU Member State) if she was satisfied that (a) the person was in a relationship with an EU national (b) that relationship was durable and (c) it was appropriate to issue a residence card. There was guidance indicating that a relationship would be considered "durable" if the applicant produced evidence of cohabitation for two years although the guidance indicated that there could be circumstances where the couple had not been in a relationship for two years but where the relationship would still be considered durable. An example given in the guidance was of a couple who had a child together, as evidenced by a birth certificate showing shared parentage, and evidence of living together.

18. An application for a residence card had to be made online or by post using a particular form: see regulation 21 of the Regulations. We were shown a copy of the form. We were told that it contained questions designed to elicit the information that the Secretary of State needed in order to determine if the applicant met the conditions for the grant of a residence card and to enable the Secretary of State to decide if it was appropriate to grant it.

The Provisions of the Withdrawal Agreement

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

20. The Withdrawal Agreement is structured in the following way. Part One deals with common provisions. Part Two deals with citizens' rights and is divided into different titles. Title I deals with general provisions. Title II deals with rights and obligations including those related to residence and residence documents.

21. Dealing first with Part One, Article 1 sets out the objective, namely that the Withdrawal Agreement:

> "sets out the arrangements for the withdrawal of the United Kingdom… from the European Union."

22. Article 2 provides definitions for the purpose of the Withdrawal Agreement. For present purposes, the material definition is that of "Union law" which includes the TFEU, and the Charter of Fundamental Rights of the European Union ("the Charter"), the general principles of European Union law and the acts adopted by the institutions of the Union.

23. Article 4 deals with the methods and principles relating to the effect, the implementation and the application of the Withdrawal Agreement. That provides (footnotes omitted) that:

> "1. The provisions of this Agreement and the provisions of Union law made applicable by this Agreement shall produce in respect of and in the United Kingdom the same legal effects as those which they produce within the Union and its Member States. Accordingly, legal or natural persons shall in particular be able to rely directly on the provisions contained or referred to in this Agreement which meet the conditions for direct effect under Union law.
>
> 2. The United Kingdom shall ensure compliance with paragraph 1, including as regards the required powers of its judicial and administrative authorities to disapply inconsistent or incompatible domestic provisions, through domestic primary legislation.
>
> 3. The provisions of this Agreement referring to Union law or to concepts or provisions thereof shall be interpreted and applied in accordance with the methods and general principles of Union law.
>
> 4. The provisions of this Agreement referring to Union law or to concepts or provisions thereof shall in their implementation

> and application be interpreted in conformity with the relevant case law of the Court of Justice of the European Union handed down before the end of the transition period.
>
> 5. In the interpretation and application of this Agreement, the United Kingdom's judicial and administrative authorities shall have due regard to relevant case law of the Court of Justice of the European Union handed down after the end of the transition period."

24. Article 5 is headed "Good Faith" and provides that:

> "The Union and the United Kingdom shall, in full mutual respect and good faith, assist each other in carrying out tasks which flow from this Agreement.
>
> They shall take all appropriate measures, whether general or particular, to ensure fulfilment of the obligations arising from this Agreement and shall refrain from any measures which could jeopardise the attainment of the objectives of this Agreement.
>
> This Article is without prejudice to the application of Union law pursuant to this Agreement, in particular the principle of sincere cooperation."

25. Part Two of the Withdrawal Agreement is headed "Citizens' Rights". 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. 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."

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

The United Kingdom Arrangements

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

31. EU14 deals, amongst other things, with persons eligible for limited leave to remain and provides that:

> "EU14. The applicant meets the eligibility requirements for limited leave to enter or remain where the Secretary of State is satisfied including (where applicable) by the required evidence of family relationship, that at the date of the application and in

> an application made by the required date, condition 1 or 2 set out in the following table is met."

32. Condition 1 is that the applicant is "a family member of a relevant EEA citizen". Annex 1 to Appendix EU provides a series of definitions. "The specified date" is defined as 11 p.m. on 31 December 2020. "Family member" is defined so far as material to this appeal as:

> "a person who does not meet the definition of 'joining family member of a relevant sponsor' in this table, and who has satisfied the Secretary of State, including by the required evidence of family relationship, that they are (and for the relevant period have been), or (as the case may be) for the relevant period (or at the relevant time) they were
>
> (a) the spouse or civil partner of a relevant EEA citizen and:
>
> (i) the marriage was contracted or the civil partnership formed before the specified date; or
>
> (ii) the applicant was the durable partner of the relevant EEA citizen before the specified date (the definition of 'durable partner' in this table being met before that date rather than at the date of application) and the partnership remained durable at the specified date; or
>
> (b) the durable partner of a relevant EEA citizen, and:
>
> (i) the partnership was formed and was durable before the specified date; and
>
> (ii) the partnership remains durable at the date of application….."

33. "Durable partner" is defined in the Annex, so far as material to this appeal, as:

> "(a) the person is, or (as the case may be) for the relevant period was, in a durable relationship with a relevant EEA citizen … with the couple having lived together in a relationship akin to marriage or civil partnership for at least two years (unless there is other significant evidence of the durable relationship); and
>
> (b) (i) the person holds a relevant document as the durable partner of the EEA citizen …"

34. A "relevant document" is defined as a family permit, registration certificate (neither of which is relevant to this appeal) or residence card issued under regulation 18 of the Regulations.

35. In short therefore, a person would be able to claim limited leave to remain as the family member of an EU national if (a) the person married an EU national before the

end of the transition period or (b) was in a durable relationship *and* that relationship was evidenced by the grant of a relevant document, including a residence card issued under regulation 18 of the Regulations. We have been provided with a copy of the application form used for applications for leave to remain under the EUSS and were told that that form only required the provision of the limited information required to establish whether the person was entitled to leave to remain under the provisions of the EUSS, that is, whether the applicant was in possession of one of the relevant documents.

36. In broad terms, 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 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 EUSS. A durable partner applying for leave to remain under the EUSS would, however, have to have been provided with a residence card under regulation 18 of the Regulations first as, otherwise, the person would not have the "relevant document" required by the provisions of EU14 of the Appendix.

37. The Regulations were revoked on 31 December 2020 by the Immigration and Social Security Co-ordination (EU Withdrawal) Act 2020. 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. Saving provisions were made, however, so that 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: see paragraph 4 of Schedule 3 to the Immigration and Social Security Co-ordination (EU Withdrawal) Act 2020 (Consequential, Saving Transitional and Transitory Provisions) (EU Exit) Regulations 2020.

Appeals

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

THE FACTS

The Appellant

39. The appellant is a Turkish national. He came to the United Kingdom in 2017 and claimed asylum. That claim was refused and an appeal dismissed. He remained in the United Kingdom unlawfully.

40. The appellant says that he met Ms Ibram, a Romanian national, via the internet in December 2019. They first met in person in January 2020. He says that they began living together, with Ms Ibram's daughter by a previous relationship, in about

February 2020. Ms Ibram was granted leave to remain under the EUSS on 10 March 2020 as an EU national resident in the United Kingdom.

The First Application

41. On 25 August 2020, the appellant applied for leave to remain in the United Kingdom as the unmarried partner of an EU national. We are told that he used the form provided online for persons applying for leave to remain under the EUSS. He also provided documents which included a water bill dated 24 February 2020 in his name at the address of the flat where Ms Ibram was the tenant. He also included a council tax bill for that property issued on 29 July 2020 showing Ms Ibram and the appellant as living at that property.

42. On 19 October 2020 the appellant was sent a certificate of application confirming receipt of his application under the EUSS and was told that he would be notified of the outcome of the application in due course.

43. On 2 March 2021, that application was refused. The reasons were that the appellant needed to have a relevant document (in this case a residence card issued under Regulation 18 of the Regulations) in order to satisfy the requirements of EU11 or EU14 of Appendix EU. The appellant did not have a relevant document and did not meet the requirements of the rules. The letter said that the application was being refused under rule EU6 (which provides that a valid application made under Appendix EU which does not meet the requirements for the grant of indefinite or limited leave to remain will be refused). The letter set out the next steps available to the appellant which included either seeking an administrative review or appealing under the Appeal Regulations. The appellant did not seek an administrative review of the decision. He did not appeal against the decision of 2 March 2021. The importance of this will become apparent below.

The Second Application

44. On 19 September 2020 the appellant asked Ms Ibram to marry him and she agreed. The appellant says that they would have married before 31 December 2020 but for the restrictions and delays arising from the Covid-19 pandemic which affected the United Kingdom from early 2020.

45. On 17 March 2021 (that is, after the end of the transition period) the appellant applied for leave to remain as the spouse of an EU national. We are told that he used the form provided online for persons applying for leave to remain under the EUSS. On 9 April 2021, the appellant and Ms Ibram were married. The appellant uploaded a copy of the marriage certificate on to his online application for leave to remain.

46. On 23 June 2021, the application was refused. It is that decision (and only that decision) which is the subject of the present proceedings. The decision letter states that the application was considered as an application for indefinite or limited leave to remain under rule EU11 and EU14 of Appendix EU to the Immigration Rules. In relation to indefinite leave, the letter said that the appellant had not provided sufficient evidence that he was a spouse of an EEA citizen prior to the specified date as defined in Annex 1 of Appendix EU (i.e. 2300 GMT on 31 December 2020) as the marriage certificate showed that the marriage took place on 9 April 2021. It explained that the

appellant did not qualify as a family member under rule EU11 on the alternative basis that he was the durable partner of an EU national as he had not provided the required document (in this case, a residence card under regulation 18 of the Regulations). The letter explained that the appellant did not qualify for limited leave under rule EU14 for essentially similar reasons.

The Appeal

47. The appellant appealed to the First-tier Tribunal against the decision of 23 June 2021. The First-tier Tribunal dismissed the appeal on 6 January 2022. The appellant appealed to the Upper Tribunal who dismissed the appeal on 18 July 2022. The Upper Tribunal held that the appellant did not fall within the provisions of the Withdrawal Agreement. He was not a family member within the meaning of Article 10(1)(e)(i) as he was not a spouse of an EU national who resided in the United Kingdom in accordance with EU law before the end of the transition period. He was not a person who fell within Article 10(2) as his residence had never been facilitated by the respondent before the end of the transition period. The rights of such family members arose only on their being provided with a family permit, registration certificate, or residence card under the Regulations and no such document had been issued. He did not fall within Article 10(3) as he had not made an application for the facilitation of residence or entry before the end of the transition period. The Upper Tribunal accepted that Article 18(1)(r) of the Withdrawal Agreement applied to an application for residence status. Article 18(1)(r) provided that a decision to refuse a residence status should not be disproportionate. In the present case, however, the applicant was not a person who was entitled to claim a residence status as envisaged by Article 18. In those circumstances, the refusal of a residence document was not disproportionate. The Upper Tribunal found that the decision was not otherwise a breach of EU law, the Directive or the Charter. The decision was in accordance with the relevant immigration rules. It was not unfair or a breach of any relevant principle of public law. For those reasons, the Upper Tribunal dismissed the appeal.

THE APPEAL

48. The appellant has permission to appeal on 12 grounds namely:

(1) The Upper Tribunal erred in law on the correct approach to interpretation of the Withdrawal Agreement.

(2) The Upper Tribunal erred in law in its analysis of Article 10 of the Withdrawal Agreement.

(3) The Upper Tribunal failed to take into account the effect of the Secretary of State's publicly available information for family members of EU citizens.

(4) The Upper Tribunal unreasonably found that the Appellant should have made an application as a durable partner under the Immigration (European Economic Area) Regulations 2016.

(5) The Upper Tribunal failed to properly consider the impact of the Covid-19 pandemic on the Appellant's and his partner's right and ability to marry.

(6) The Upper Tribunal failed to consider the legal effect of the Secretary of State's policies re: Covid-19.

(7) The Upper Tribunal erred in law in its approach to proportionality under Article 18(1)(r) of the Withdrawal Agreement.

(8) The Upper Tribunal was wrong to conclude that the Appellant could not succeed under Appendix EU of the Immigration Rules and/or that the Rules could not be interpreted or read down in accordance with their purpose and the relevant policies.

(9) The Upper Tribunal erred in law as to whether Article 7 and other rights in the Charter of Fundamental Rights have application in an appeal of this kind.

(10) The Upper Tribunal erred in law as to whether and how Article 8 of the ECHR can be relied on in an appeal of this kind and/or whether and how the impact of a refusal on an appellant's family members could be taken into account.

(11) The Upper Tribunal should have concluded that the definition of "durable partner" in Appendix EU of the Immigration Rules is discriminatory, contrary to Article 12 of the Withdrawal Agreement.

(12) The Upper Tribunal erred in its approach to the issue of fairness and/or public law.

GROUNDS 1, 5, 6 AND 7 – THE INTERPRETATION OF ARTICLE 10(1)(e) OF THE WITHDRAWAL AGREEMENT

49. It is helpful to deal with grounds 1, 5, 6 and 7 together. In relation to grounds 1, 5 and 6, Mr Hawkin submitted that the Withdrawal Agreement should be interpreted in a purposive, teleological, proactive, flexible and inclusive manner paying particular attention to its aim and purpose rather than its wording. Any interpretation should promote the objective of the Withdrawal Agreement and seek to avoid any unacceptable consequences. That obligation was reinforced by Article 5 of the Withdrawal Agreement which obliged the United Kingdom and the European Union to act in good faith and to take all appropriate measures to ensure fulfilment of the obligations arising under the Withdrawal Agreement. Mr Hawkin also relied on Article 32 of the Vienna Convention on the Law of Treaties which provides that recourse may be had to supplementary means for the interpretation of treaties where the meaning is ambiguous or would lead to manifestly absurd or unreasonable results. He also relied upon Article 13(4) of the Withdrawal Agreement which recognised that there could be a discretion which could be exercised in favour of the person concerned.

50. In that regard, Mr Hawkin submitted that the appellant would have married an EU national before the end of the transition period but for the restrictions and delays resulting from the Covid-19 pandemic. In light of the principles upon which he relied, Mr Hawkin submitted that Article 10(1)(e)(i) of the Withdrawal Agreement should be interpreted as meaning that the appellant fell within, or should be treated as falling within, the definition of a family member.

51. Further, in relation to ground 7, Mr Hawkin relied upon Article 18(1)(r) of the Withdrawal Agreement which required that any decision refusing residence status "is not disproportionate". He submitted that the Upper Tribunal was wrong to take the view that proportionality was unlikely to have any role to play when determining whether a person fell within Article 18 and was eligible for residence status. Rather, the position was that the appellant had suffered grave consequences as he had been refused leave to remain in the United Kingdom when the residence scheme in the EUSS had been intended to assist individuals such as him and the exclusion from the scheme was the result of external factors and government measures adopted to deal with the Covid-19 pandemic. In those circumstances, proportionality required the Upper Tribunal to consider all of the relevant factors relevant to his case.

52. Ms Smyth, for the respondent, submitted that the Withdrawal Agreement was an international treaty to which the Vienna Convention applied. Article 31 required the Withdrawal Agreement to be interpreted "in good faith in accordance with the ordinary meaning to given to the terms of the treaty in their context and in the light of its object and purpose". The Withdrawal Agreement set out the circumstances in which EU citizens, and members of their families, continued to be entitled to reside in the United Kingdom following the departure of the United Kingdom from the European Union and the end of the transition period. The requirement in Article 10(1)(e)(i) was that the person was the family member (here a spouse) of an EU national residing in the United Kingdom in accordance with EU law before the end of the transition period. There was no principle that required the Withdrawal Agreement to be interpreted to confer rights on persons who were not in fact married as at 31 December 2020 as if they were. That did not lead to manifestly absurd or unreasonable results. Rather that was the agreement that the United Kingdom and the European Union reached as to the appropriate scope of reciprocal protection for their nationals who were resident in an EU Member State or the United Kingdom respectively as at the end of the transition period. When the parties to the Withdrawal Agreement wished deadlines to be extended, they specifically provided for that as appeared from Article 18(1)(c). So far as proportionality was concerned, the Upper Tribunal was correct to find that that principle did not enable it to disapply the provisions in Article 10(1)(e)(i) and to provide that people who did not qualify under that provision should be treated as if they qualified.

Discussion and Conclusion

53. The starting point for consideration of these grounds is the terms of the Withdrawal Agreement, read in context, and having regard to the purpose of the Withdrawal Agreement. As is clear from the recitals and the provisions of Article 1, the Withdrawal Agreement was intended to set out the arrangements for the withdrawal of the United Kingdom from the European Union. As part of that process, the Withdrawal Agreement dealt with the rights of citizens and their families. Article 10 set out the persons to whom Part Two of the Withdrawal Agreement applied. They included in Article 10(1)(e) family members of EU nationals or United Kingdom nationals provided they fulfil one of the specified conditions. That included the condition in Article 10(1)(e)(i) that:

> "they resided in the host State in accordance with Union law before the end of the transition period and continue to reside there thereafter".

54. Family members are defined to include spouses or civil partners (but not persons in a durable relationship): see Article 9(a) of the Withdrawal Agreement. In order to be resident in accordance with EU law before the end of the transition period, such persons would have to have married (or contracted a civil partnership) before that date and be residing in the United Kingdom on the basis that they were the spouse or civil partner. The wording of Article 10(1)(e)(i) is clear. It does not include persons who married an EU national after the end of the transition period and who were not, therefore, residing in the UK as a spouse or civil partner in accordance with EU law at the end of the transition period. That reflects a rational agreement for the protection of UK and EU nationals, and their families who, in the words of the sixth recital, "have exercised free movement rights before a date set in this Agreement". The date set was the end of the transition period. On the ordinary meaning of the words in Article 10(1)(e)(i) read in context and having regard to the purpose underlying the Withdrawal Agreement, therefore, persons such as the appellant who marry after the end of the transition period do not fall within the scope of that provision.

55. The fact that persons did not, or could not, exercise free movement rights, or did not or could not marry, until after that date does not alter the meaning or purpose of the Withdrawal Agreement. That does not involve any breach of Article 5 of the Withdrawal Agreement. That is an obligation to act in good faith and to take all appropriate measures to ensure "fulfilment of the obligations arising from the agreement". The relevant obligation, in this context, is to ensure that family members defined to include spouses and civil partners of EU nationals (but not unmarried partners in a durable relationship) resident in the United Kingdom at the end of the transition period can continue to enjoy rights of residence after the end of the transition period. The United Kingdom is complying with that obligation. Article 32 of the Vienna Convention does not assist. That permits recourse to supplementary means of interpreting treaties where the interpretation resulting from the application of Article 31 leads to a meaning which is ambiguous or obscure (which is not the position here) or where that leads to "manifestly absurd or unreasonable results". Again, a treaty providing that those exercising certain rights at a particular date should continue to enjoy those rights after that date is not manifestly absurd or unreasonable. It is the agreement reached between the European Union and the United Kingdom as to the appropriate extent of reciprocal protection for their nationals. The fact that unforeseen events meant that certain people were not able to exercise those rights (even if as a result of events outside their control) before the set date does not lead to manifestly absurd or unreasonable results.

56. Further, the principle of proportionality, whether as a matter of general principle, or as given express recognition in Article 18(1)(r) of the Withdrawal Agreement, does not assist the appellant. Article 18(1)(r) is intended to ensure that decisions refusing the "new residence status" envisaged by Article 18(1) are not disproportionate. That status must ensure that EU citizens and United Kingdom nationals, and their respective family members and other persons may apply for a new residence status "which confers the rights under this Title". The principle of proportionality, in this context, is addressed to ensuring that the arrangements adopted by the United Kingdom (or a Member State) do not prevent a person who has residence rights under the Withdrawal Agreement being able to enjoy those rights after the end of the transition period. The principle of proportionality is not intended to lead to the conferment of residence status on people who would not otherwise have any rights to

reside. The appellant did not have any rights under Article 10(1)(e)(i) of the Withdrawal Agreement. The refusal to grant residence status is not therefore a disproportionate refusal of residence status which would have conferred rights already enjoyed under the Withdrawal Agreement. Rather, it is a recognition that the appellant did not have any such rights under Article 10(1)(e)(i).

57. Nor does Article 13(4) of the Withdrawal Agreement assist the appellant. Article 13 guarantees the rights of EU and UK nationals and their family members to reside in the host state. Article 13(4) provides that the host State cannot impose any limitations or conditions which would result in the loss of residence rights for such persons and provides that there will be no discretion (other than in favour of the person concerned) in applying the limitations and conditions provided for in Title II of Part Two of the Withdrawal Agreement. First, the appellant is not a person who has rights guaranteed by Article 13 and Article 13(4) does not apply to him. Secondly, and more significantly, Article 13(4) does not confer a discretion to depart from the terms of the Withdrawal Agreement or to extend the categories of persons entitled to rights under that Agreement. Rather, it acts to limit the use of discretion in applying limitations and conditions imposed by the Withdrawal Agreement.

GROUNDS 2 AND 3 – THE PROPER INTERPRETATION OF ARTICLE 10(2) AND (3) OF THE WITHDRAWAL AGREEMENT

58. Mr Hawkin submitted that the Upper Tribunal erred in its interpretation of Article 10(2) and (3) of the Withdrawal Agreement. He submitted that an application was "facilitated" for the purposes of those provisions if the relevant authorities had adopted a procedural mechanism in domestic law enabling the grant of rights of entry and residence. He submitted that the adoption of Appendix EU was of itself the facilitation of residence in accordance with national legislation. He submitted, therefore, that the appellant did fall within the scope of Article 10(2) or (3). Further, he submitted that the respondent's guidance prior to the end of the transition period did not refer to, or make sufficiently clear, the need for a durable partner to obtain a residence card under regulation 18 of the Regulations prior to applying for pre-settled status (i.e. limited leave to remain) under the EUSS.

59. Ms Smyth submitted that Article 10(2) and (3) required there to have been an application by an individual made before the end of the transition period which had either been granted before that date or had been granted subsequently. Further, she submitted that the guidance was not confusing and, in any event, that guidance could not result in the appellant being able to claim or enjoy rights under the Withdrawal Agreement which that Agreement did not confer.

Discussion and Conclusion

60. Articles 10(2) and (3) are dealing with situations where the residence of persons is facilitated by the host State in accordance with its legislation. Article 10(2) applies where an application has been made and residence facilitated before the end of the transition period. Article 10(3) applies where an application was made before the end of the transition period but only granted, and residence facilitated, after the end of that period.

61. The reference to residence being facilitated in Articles 10(2) and (3) means that a decision has been taken in relation to a particular individual under the relevant national legislation granting that individual a right to enter or reside in the relevant state. That interpretation reflects the language and purpose underlying Article 10(2) and (3) (and is also consistent with the provisions of the Directive on the position of extended family members discussed above). Article 10(2) refers to persons "whose residence was facilitated". Article 10(3) requires that a person "has applied" – i.e. that an individual has sought the right to enter or reside in the relevant state – and "whose residence is being facilitated" (i.e. the application has been granted and residence permitted). It is a means of ensuring that people who are not family members as defined but are extended family members (such as unmarried partners in a durable relationship) of EU nationals may apply for residence under national law and, if granted such rights, those persons fall within the scope of Part Two of the Agreement. The requirements are not satisfied simply because a state adopts national legislation under which residence may be facilitated.

62. Consequently, the mere fact that the United Kingdom had adopted national legislation under which persons could apply for and be granted residence rights did not mean that the appellant's residence had been facilitated. The position is that the appellant's residence was not, in fact, being facilitated by a decision granting leave to remain made before the end of the transition period or pursuant to an application made before that date but granted after it.

63. Nor can the domestic guidance which Mr Hawkin relied upon as being unclear or failing to give sufficient warning of the consequences of failing to apply for a residence card alter matters. That guidance, whether or not it was clear or ambiguous, cannot alter the meaning of Articles 10(2) or (3) (or Article 10(1)(e), or other provisions of the Withdrawal Agreement for that matter).

64. The appellant also submits, in paragraph 48 of his written skeleton argument, that if Article 10(2) or (3) requires that an application be made, then he would rely on his first application made on 25 August 2020 as being an application for the facilitation of residence within the meaning of Article 10(3). I deal separately with that question at paragraphs 82 to 98 below. It was not an argument that the appellant advanced before the First-tier Tribunal nor the Upper Tribunal.

GROUND 4 – APPLICATIONS UNDER THE REGULATIONS

65. Mr Hawkin submitted that the Upper Tribunal unreasonably found that the appellant should have applied under the Regulations for a residence card prior to the end of the transition period. Further, he submitted that the Upper Tribunal was wrong to treat the availability of that option as a reason why the refusal of the application was not disproportionate.

66. The short answer to this point is that the possibility of applying for a residence card under the Regulations was not the reason why the appeal against the application of 17 March 2021 failed. As explained above the appellant did not fall within the scope of Article 10(1)(e)(i) as he was not the spouse of an EU national, residing in the United Kingdom in accordance with EU law, before the end of the transition period. Any principle of proportionality did not alter that result. The reference in paragraphs 53 to 55 of the judgment of the Upper Tribunal to how applications for the facilitation of

entry and residence should have been made prior to the end of the transition period is not the reason why the appeal against the second application (made after the end of the transition period) failed. Whether or not applying for a residence card would have been an appropriate course of action for the appellant to have taken before the end of the transition period, it is not material to the reasons why the appellant's application made after that date failed. Similarly, the availability of that route prior to the end of the transition period was not the reason why the Upper Tribunal concluded that the refusal of the second application was not disproportionate.

GROUND 8 – THE PROPER INTERPRETATION OF APPENDIX EU

67. Mr Hawkin submitted that the Upper Tribunal erred in finding that the appellant did not meet the requirements of Appendix EU. He submitted that the Upper Tribunal should have read down the requirement that the appellant be a family member before 31 December 2020, or that he required a residence card to satisfy the requirements of being a durable partner, or that he did not have a lawful basis of stay.

Discussion and Conclusion

68. The Upper Tribunal was correct in deciding that the decision of 23 June 2021 was in accordance with the requirements of the rules in Appendix EU and rule EU11 and EU14 in particular. The fact is that the appellant was not a family member at the material time. He had not married an EU national before 11 p.m. on 31 December 2020. He was not a durable partner within the meaning of Annex 1 to Appendix EU as he did not have a residence card as required and he did not have a lawful basis of stay in the United Kingdom (he was in the United Kingdom unlawfully). The appellant did not qualify for leave to remain under Appendix EU. There is no obligation to interpret or "read down" the relevant rules to reach a different result.

GROUNDS 9 AND 10 – THE CHARTER AND THE CONVENTION

69. Mr Hawkin sought to rely upon Articles 7, 9 and 41 of the Charter. Article 7 guarantees the right to private and family life. Article 9 guarantees the right to marry. Article 41 provides that every person has the right to have his or her affairs handled impartially, fairly, and within a reasonable time. He also relied upon Article 8 of the Convention on the Protection of Human Rights and Fundamental Freedoms ("the Convention") which guarantees the right to respect for private and family life.

70. Mr Hawkin submitted that the Upper Tribunal was wrong to say that it could only have regard to the Charter to the extent that this was required by the Withdrawal Agreement. He submitted that the Upper Tribunal should have determined the dispute in accordance with the rights conferred by the Charter and the Convention.

Discussion and Conclusion

71. The short answer to this point is that the question on this appeal is whether the appellant was entitled under the terms of the Withdrawal Agreement to reside in the United Kingdom after the end of the transition period. That turns on the proper interpretation of Article 10(1)(e)(i) and whether the appellant was a family member an EU national before the end of the transition period. He was not. Articles 7, 9 and 41 of

the Charter do not require the Withdrawal Agreement to be interpreted as if he had a status, and was entitled to rights, which he did not have.

72. Similarly Article 8 of the Convention does not assist in interpreting the scope of the Withdrawal Agreement and determining the rights granted by that Agreement. Issues under Article 8 of the Convention may arise when the respondent is considering relevant decisions under the Immigration Rules. When taking such decisions, the respondent would be under a duty under section 6 of the Human Rights Act 1998 to act compatibly with any such rights. In fact, we were told that, subsequent to the Upper Tribunal hearing, the appellant did apply for leave under Appendix FM of the Immigration Rules and limited leave to remain was granted. The appellant at present remains with his wife in the United Kingdom. There does not, at present, appear to be any arguable case that there is any breach of Article 8 of the Convention.

GROUND 11 - DISCRIMINATION

73. Mr Hawkin submitted that the definition of "required evidence of family relationship" in Annex 1 to Appendix EU treats durable partners of an EU national differently from those of a British national or those from Northern Ireland. He submitted that the former were required to have a relevant document such as a residence card granted under the Regulations whereas durable partners of British nationals or those from Northern Ireland were not. He submitted that that involved discrimination contrary to Article 12 of the Withdrawal Agreement.

74. Ms Smyth submitted that the appellant was wrong in relation to the position with respect to durable partners of British nationals who have exercised their right to free movement and worked in a Member State. The definition of required evidence for such persons does include a requirement to have a relevant document. The position in relation to persons in Northern Ireland reflects the different position of such persons. Arrangements had been in place for some time regarding the immigration of family members of persons born in Northern Ireland who were British, Irish or dual British-Irish nationals. Such family members would not always have been able to obtain documents as an extended family member under the Regulations so were not required to produce such documents under Annex 1 to Appendix EU.

Discussion and Conclusion

75. By way of preliminary observation, the appellant, on this aspect of the case, is challenging the evidential requirements under the domestic rules, Appendix EU, which apply to those seeking to show they are durable partners of an EU national whereas it is said that those rules do not apply to people claiming to be durable partners of British nationals or of persons born in Northern Ireland. Mr Hawkin submitted that that involved a breach of Article 12 of the Withdrawal Agreement. He did not rely on any other provision of the Withdrawal Agreement or EU law or any provision of domestic law. Article 12 provides so far as material that "Within the scope of this Part", any discrimination on grounds of nationality shall be prohibited. The reference to "this Part" is a reference to Part One which, amongst other things, defines the scope of the persons within the Withdrawal Agreement. We did not receive submissions on how Article 12 applied to the evidential provisions of Appendix EU in this case. It is not, however, necessary to explore these issues. In general in this context, discrimination involves differential treatment of persons in a

materially analogous position which the respondent cannot justify. In this case there is no differential treatment on the facts so far as the first group of people (durable partners of British nationals) are concerned. The second group (durable partners of persons born in Northern Ireland) is not in a material analogous position to persons such as the appellant.

76. First, as Ms Smyth submitted, and as the Upper Tribunal found at paragraph 86 of its decision, the factual position is that durable partners of British nationals (who have exercised their right to work in an EU Member State and returned to the United Kingdom) do require a relevant document such as a residence card under the Regulations. Despite the arguments of the respondent, and the finding of the Upper Tribunal, Mr Hawkin advanced no reason to explain why that conclusion was wrong.

77. Secondly, I accept the submission of Ms Smyth that the position of relevant persons in Northern Ireland is materially different from EU nationals or British nationals not born in Northern Ireland. The requirements of Appendix EU reflect the different arrangements in place governing the immigration of family members of persons born in Northern Ireland. The appellant is not in a materially analogous position to such persons and there is no unlawful discrimination in relation to his position as compared with such persons. Again, Mr Hawkin has advanced no submission as to why that conclusion is wrong.

GROUND 12 – FAIRNESS AND PUBLIC LAW

78. Mr Hawkin submitted that the Upper Tribunal was wrong to take the view that fairness did not require that the appellant be treated as if he were a person who was a spouse of an EU national within Article 10(1)(e)(i) of the Withdrawal Agreement, relying again on the fact that the appellant would have married before the end of the transition period but for the Covid-19 pandemic. Alternatively, he submitted that it was unreasonable and arbitrary for the respondent not to make a specific policy allowance for such persons. Mr Hawkin showed us letters from organisations sent to the relevant minister which had requested such an exception to be made but the minister had refused.

79. Ms Smyth submits that it is not open to the appellant to challenge the refusal to make a policy exception in an appeal of the kind in issue here. Had he wished to do so he should have sought judicial review of the refusal. In any event refusal to make a policy exception was not unreasonable or arbitrary.

Discussion and Conclusion

80. First, the Withdrawal Agreement sets out the categories of persons who would continue to be entitled to rights of residence after the end of the transition period. They included persons who were married to an EU national and resident in the United Kingdom in accordance with EU law before the end of the transition period. They did not include persons such as the appellant who did not marry an EU national before that date and were not resident in the United Kingdom in accordance with EU law. There is no legitimate or principled basis upon which the appellant can contend that some principle of domestic law fairness requires that the rights conferred by the Withdrawal Agreement be extended to other categories of persons, such as the appellant, who were not granted rights by that Agreement. The appellant has not

identified any authority or principle to indicate that any concept of domestic law fairness could have such an effect.

81. Secondly, if the appellant had wished to make a challenge to the refusal to make an exception to the relevant rules for particular categories of persons, the appropriate way to do so would have been to bring a claim for judicial review of that refusal rather than seeking to raise the issue on an appeal against a decision refusing his application for leave to remain. He did not bring such a claim. In any event, it is simply not feasible to argue that the refusal to make an exception for categories of persons said to be unable to meet the requirements of the Withdrawal Agreement because of delays and restrictions arising out of Covid-19 is unlawful. The Withdrawal Agreement represents the settled agreement of the European Union and the United Kingdom as to who should be able to continue to have rights to reside after the departure of the United Kingdom from the European Union. That Agreement provided for a transition period. Persons who met certain requirements before the end of that period would continue to have rights to reside. Persons who did not meet those requirements by that date would not have such rights. The fact that the United Kingdom has decided not to make additional provisions under domestic law for persons who do not benefit from that Agreement cannot legitimately be described as "arbitrary and unreasonable" in the way in which those terms are used in domestic public law. Rather, that reflects a considered policy view on the part of the United Kingdom, reflecting its obligations under the Withdrawal Agreement. The role of a court is not to determine whether it would be desirable or undesirable to make such additional arrangements. Rather, the role of the court is to determine whether the decisions made are unlawful ones, that is, ones that the executive is not legally permitted to reach. There is no legitimate basis upon which the decision not to make arrangements to grant rights for persons not within the scope of the Withdrawal Agreement can be said to be unlawful in domestic law terms.

THE INTERVENERS' CASE

82. The two sets of interveners advanced a different case from that described above. They sought to challenge the decision of 2 March 2021 refusing the 25 August 2020 application. They did so on the basis that that application was, or should have been treated as, an application for a residence card under regulation 18 of the Regulations not as an application for leave to remain (or pre-settled status) under Appendix EU. Mr de la Mare KC, with Mr Saini, for the Joint Interveners and Ms Ward KC for the other intervener, submitted that the reality was that the appellant was applying to remain in the United Kingdom on the only basis then open to him, that is, as a durable partner of an EU national. The respondent should have treated that application as what, in substance, it was, namely an application for a residence card under regulation 18 of the Regulations. Further they submitted that EU principles of proportionality required the application to be treated in that way. Prior to leaving the European Union, the question of the nature of the application would not have been of practical significance. Even if the application had been refused for some reason, the person could have made another application. That was not possible after the end of the transition period. Further, the application here was made on 25 August 2020 and was not decided until 2 March 2021 – by which time it would have been too late for the appellant to make an application for a residence card as regulation 18 had been revoked. In all those circumstances, they submitted that it would be disproportionate

not to treat the 25 August 2020 application as an application for a residence and therefore as an application for facilitation of residence within the meaning of Article 10(3) of the Withdrawal Agreement. Mr de la Mare also submitted that under regulation 21 of the Regulations, an application not in the correct form or not containing all the required particulars would be invalid. That, he submitted, could also raise questions of the compatibility of that regulation with EU law if that were the basis for rejecting an application.

83. Mr de la Mare and Ms Ward submitted that if the 25 August 2020 application had been, or been treated as, an application for a residence card under the Regulations (rather than an application for leave to remain under Appendix EU), then that application would, or would have been treated as, "an application for facilitation of entry and residence" within the meaning of Article 10(3) of the Withdrawal Agreement. That would have required the respondent to undertake "an extensive examination of the personal circumstances of the persons concerned" as required by Article 10(5) to determine if the appellant was in a durable relationship with Ms Ibram. The failure to carry out that exercise meant that there had been a breach of the appellant's rights under the Withdrawal Agreement which could have been the subject of an appeal. They submitted that the ground of appeal in this case, which referred to an error on the part of the Upper Tribunal in its interpretation of Article 10, should be read as encompassing this argument.

84. Mr de la Mare and Ms Ward accept that that argument is not open to the appellant in relation to the application made on 17 March 2021. That too was an application for leave to remain made using the form available for applications under Appendix EU. However, Article 10(3) only applies where the person has "applied for facilitation of entry and residence before the end of the transition period". The second application was made on 17 March 2021, that is after the end of the transition period.

85. Mr de la Mare and Ms Ward recognised that the first application was not the subject matter of this appeal. The application was refused and no appeal against that refusal was brought. Ms Ward submitted that the refusal contained in the decision letter of 23 June 2021 should be read as a refusal of both the second application and a refusal following re-consideration of the first application. Mr de la Mare submitted that all that was necessary for Article 10(3) to apply was that the appellant had applied as a matter of fact and the application of 25 August 2020 should be treated as such an application and therefore Article 10(5) applied.

86. Mr Hawkin accepted that the appellant had not appealed against the decision of 2 March 2021 refusing the first application for leave to remain on the basis that he was the durable partner of an EU national. Rather, he had only appealed against the decision of 23 June 2021, refusing his second application made on 17 March 2021, on the basis that he was the spouse of an EU national. Mr Hawkin accepted that the appellant had not advanced any submissions to the First-tier Tribunal or the Upper Tribunal that the appellant's rights under Article 10(5) of the Withdrawal Agreement had been breached because there had not been a full examination of his application of 25 August 2020 based on the claim that he was in a durable relationship with Ms Ibram. Nevertheless, on the appeal to this Court, Mr Hawkin adopted the submission of Mr de la Mare and Ms Ward for the interveners.

87. Ms Smyth submitted that the argument was not open to the appellant or the interveners in relation to the 25 August 2020 application as that had been determined and there had been no appeal. She submitted that the argument was wrong in any event. There were two separate schemes in force. The first, under the Regulations, governed entry and residence prior to the end of the transition period. That required the respondent to be satisfied of a number of matters which would, in relation to the appellant, have required an application under the Regulations to consider whether he was in a relationship with Ms Ibram, whether that relationship was a durable one, and whether it was appropriate for the appellant to be granted a residence card. The form provided by the respondent for making such applications ensured that the respondent was provided with the information that she required to consider that application.

88. The second scheme was the EUSS, contained in Appendix EU, which established a new residence status as permitted by Article 18 of the Withdrawal Agreement. The only information that the respondent could require in cases falling within Article 10(2) and (3) was a "document issued by the relevant authority in the host State in accordance with Article 3(2)" of the Directive. That was the family permit, registration certificate or residence card issued under the Regulations. The new residence status, therefore, presupposed that an applicant falling within Article 10(2) or (3) had already applied, and been granted, residence status under the relevant domestic law before applying for the new residence status.

89. Further, Ms Smyth submitted that there was no obligation or requirement under domestic law, EU law or the Withdrawal Agreement that the respondent treat an application made via the form provided for those applying under the EUSS as it if were an application for a different status under a different scheme. Ms Smyth relied on the decision in *Macastena v Secretary of State for the Home Department* [2018] EWCA Civ 1558, [2019] 1 WLR 365 and *CS (Brazil) v Secretary of State for the Home Department* [2010] Imm. AR 1 as supportive of that submission.

Discussion and Conclusion

90. The question of whether an application for leave made under Appendix EU is, or is to be treated as, an application for a residence card under regulation 18 Regulations may, potentially, be an important question for some individuals. It is, however, neither necessary nor appropriate for that question to be answered on this appeal.

91. First, it is not necessary to answer this question in this appeal. The 25 August 2020 application, made on the basis that the appellant was in a durable relationship with Ms Ibram, had been refused. There was no appeal against that decision. The nature of that application, and whether or not it was, or should have been treated as, an application for a residence card and so capable of falling within Article 10(3) was not a matter that arose on this appeal. A decision on whether an application for leave to remain under Appendix EU was, or should have been treated, as an application for a residence card and so falling within Article 10(3) of the Withdrawal Agreement would not, therefore assist this appellant as he never appealed against the refusal of the first application. The second application could not be an application within the meaning of Article 10(3), however it is characterised, as it was made after the end of the transition period and could not fall within Article 10(3). The issue does not, therefore, arise for determination.

92. Secondly, it is not appropriate to seek to answer this question on this appeal. The appellant did not appeal to the First-tier Tribunal or the Upper Tribunal on the basis that the application he made should be treated as an application for a residence card. He did not seek to advance before those tribunals the arguments now advanced for the first time in this Court. The First-tier Tribunal and Upper Tribunal were not asked to, and did not, consider potentially relevant evidence such as the application form used in August 2020, or the type of form used for applications for residence cards under the Regulations. This Court does not, therefore, have the benefit of a judgment of the expert tribunal, following argument and consideration of relevant evidence, on this question. It would not be appropriate, or sensible, for this Court to decide an issue which does not arise in this appeal in these circumstances.

93. I also reject the submissions of Ms Ward and Mr de la Mare that the 25 August 2020 application is, in some way, still in place awaiting determination in accordance with Article 10(5) of the Withdrawal Agreement. The decision of 2 March 2021 on the 25 August 2020 application is clear. It says that the "application has been carefully considered" but does "not meet the requirements of the scheme" and the "application has therefore been refused". The rest of the letter explains the reasons why and sets out the next steps (requesting an administrative review or appealing). On any fair reading, that letter is a decision refusing the application of 25 August 2020.

94. I do not accept Ms Ward's submission that the 23 June 2021 letter was both a refusal of the second application and a re-consideration and refusal of the earlier application. The second decision deals with both marriage and whether the appellant was in a durable relationship because the rules governing family members under Appendix EU provide that a person may qualify as a family either by marriage or as a durable partner. The second decision letter, therefore, deals with the application of 17 March 2021 on those alternative bases: was the appellant a spouse of an EU national before the end of the transition period and, if not, could he qualify as a durable partner? The second decision letter was not, and could not fairly be read as, a re-consideration of the earlier refused application.

95. Nor do I accept Mr de la Mare's submission that if, as a matter of fact, an application was made, that was sufficient to enable the appellant to fall within Article 10(3) and so to benefit from Article 10(5) of the Withdrawal Agreement. First, Article 10(3) should be read as a whole and in the context of Article 10. Article 10(2) deals with persons whose residence was facilitated before the end of the transition period. Article 10(3) deals with persons who have applied for facilitation before that date but the decision facilitating residence comes after that date. In each case, the relevant provision of the Withdrawal Agreement is predicated on the fact that there has been an application which has been granted and residence has been facilitated. Secondly, that conclusion follows also from the wording of Article 10(3) itself. It deals with persons "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". It presupposes that (1) there has been an application made before the end of the transition which (2) has been granted albeit after that date. If an application is refused, the person's residence is not, thereafter, being facilitated by the host State in accordance with its legislation. There is, therefore, no scope for the appellant to rely on Article 10(5) as his application has been refused and there has been no appeal against that refusal. Further, the respondent

is not obliged to treat an appeal against a refusal of a second application made (in this case, on a different basis from the first application) as giving rise to any obligation to review the refusal of the earlier application. That is consistent with the approach of the Court of Justice of the European Union in cases such as Case C-184/16 *Petrea v Ypourgos Estoerikon kai Dioikitikis Anaysygrotisis* [2018] 1 WLR 2237 especially at paragraphs 57 to 65. Nor is regulation 21 of the Regulations relevant to this case. The first application was not refused because it failed to meet the requirements of the Regulations. It was refused because the appellant had not met the requirements of Appendix EU. There was no appeal against that decision. Further, the decision would still be valid unless it were set aside on appeal or quashed by a claim for judicial review, neither of which events has happened in this case.

96. I make two further observations for completeness. First, Ms Ward submitted that the decision of the Upper Tribunal in this case, and paragraphs 51 to 55 in particular, is being understood by other tribunals as a decision that an application for leave to remain made under the EUSS in Appendix EU cannot be, or be treated as, an application for a residence card under regulation 18 of the Regulations (and so is incapable of being an application for facilitation of entry or residence under Article 10(3)). As the statutory body responsible for monitoring the operation of the Withdrawal Agreement in the United Kingdom, Ms Ward's client would be concerned if that were thought to be the ratio of the decision of the Upper Tribunal in this case.

97. The decision of the Upper Tribunal in this case does not decide that question. There was no appeal against the first application, made on 25 August 2020, and it did not form part of the appeal put before the Upper Tribunal. The arguments put now in relation to the 25 August 2020 application were not put to the Upper Tribunal and it did not determine the nature of that application. Rather, the appeal was against the refusal of an application made on 17 March 2021. Whatever the nature of that later application, it cannot have been an application for facilitation within the meaning of Article 10(3) as such applications had to have been made by 11 p.m. on 31 December 2020 and the later application was made after that date. The Upper Tribunal did not have to decide whether or not an application for leave to remain under Appendix EU made before the end of the transition period was, or was to be treated as, an application for a residence card and capable of falling within Article 10(3) of the Withdrawal Agreement. The issue will need to be decided in a case in which it arises for decision on the facts.

98. Secondly, the appellant applies by an application notice dated 2 March 2023 to admit new evidence in the form of a further witness statement made by him on 27 February 2023. That witness statement repeats the appellant's position that he could not get married in 2020 due to the pandemic. Secondly, on the question of whether the appellant should have made an application under the Regulations, the appellant says that "I was not aware of this, and do not see how I could have qualified anyway as our relationship at the time was less than a year". The Court will not receive further evidence, that is evidence which was not before the court or tribunal below, unless it exercises its discretion to permit such evidence: see CPR 52.21. The principles governing the exercise of discretion are set out in cases such as *Terluk v Berezovsky* [2011] EWCA Civ 1534. The further witness statement does not satisfy those principles. In particular, the evidence would not have an important influence on the

appeal. So far as it refers to why the appellant did not marry before the end of the transition period, the appeal has proceeded on the basis that this was because of the restrictions and delays caused by the pandemic. Further evidence on that point is not needed in this case. The reference to the appellant being unaware of the possibility of applying for a residence card or not qualifying for one, cannot have an influence on this appeal as that is not an issue to be determined in this appeal. I would therefore refuse the application to admit the further witness statement of the appellant.

CONCLUSIONS

99. I would dismiss this appeal. The appellant was not a person who was a spouse of an EU national residing in the United Kingdom in accordance with EU law before the end of the transition period. He did not marry an EU national until 19 April 2021, that is after the end of the transition period on 31 December 2020. He did not, therefore, have any right under the Withdrawal Agreement to reside in the United Kingdom.

LORD JUSTICE SINGH

100. I agree.

LORD JUSTICE MOYLAN

101. I also agree.