Neutral Citation Number: [2024] EWCA Civ 248

Case No: CA-2023-001050

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE UPPER TRIBUNAL
(Immigration and Asylum Chamber)
Hill J and UTJ Kebede

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 14/03/2024

Before :

LORD JUSTICE BAKER
LORD JUSTICE DINGEMANS
and
LADY JUSTICE ELISABETH LAING

- -

Between :

Tanjina Siddiqa	**Appellant**
- and -	
Entry Clearance Officer	**Respondent**
- and -	
The Independent Monitoring Authority for the Citizens' Rights Agreements	**Intervener**
- and -	
The Aire Centre & Here For Good	**Joint Interveners**

Michael Biggs and Michael West (instructed by **Lexwin Solicitors**) for the **Appellant**
Julia Smyth, Natasha Jackson and Paul Erdunast (instructed by **the Government Legal Department**) for the **Respondent**
Galina Ward KC and Charles Bishop (instructed by **Browne Jacobson LLP**) for the **Intervener**
Simon Cox and Parminder Saini (instructed by **Herbert Smith Freehills LLP**) for the **Joint Interveners**

Hearing dates: 8 & 9 February 2024

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Approved Judgment

This judgment was handed down remotely at 14.00 hrs on 14.03.24 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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Lord Justice Dingemans:

Introduction

1. This is the hearing of an appeal which raises issues about whether the decision by the Entry Clearance Officer (ECO) dated 25 January 2021 meant that the ECO and Secretary of State for the Home Department (the Secretary of State) have infringed the Agreement on the Withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community (the Withdrawal Agreement), and whether the First-tier Tribunal (Immigration and Asylum Chamber) (FTT) should have treated the appeal in this case as being under the Immigration (European Economic Area) Regulations 2016 (the 2016 Regulations).

2. The Withdrawal Agreement was given domestic legal effect by the European Union (Withdrawal Agreement) Act 2020, which amended the European Union (Withdrawal) Act 2018. The UK left the EU at 11pm on 31 January 2020. The transition period for which the Withdrawal Agreement provided, ended at 11pm on 31 December 2020.

3. The appellant, Tanjina Siddiqa, (Ms Siddiqa), who was born on 20 February 1994 and is aged 30 years, is a national of Bangladesh. Ms Siddiqa's brother, Md Moin Uddin (Mr Uddin) is a national of Bangladesh, and he became a national of Portugal and therefore an EU citizen. Mr Uddin moved to the UK and was granted leave to remain in the UK on 5 February 2020 under Part 1 of Appendix EU of the Immigration Rules, and Ms Siddiqa's and Mr Uddin's mother, who had joined Mr Uddin in Portugal, was also granted leave to enter the UK.

4. On 7 December 2020, some 24 days before the end of the transition period, an online application was made on behalf of Ms Siddiqa under the Appendix EU (Family Permit) of the Immigration Rules for an EU Settlement Scheme (EUSS) family permit to enter the UK. It was common ground that Ms Siddiqa did not qualify under the "EUSS family permit scheme" as at 7 December 2020, and her application was refused by the ECO. It was also common ground that Ms Siddiqa might have qualified under the 2016 Regulations for entry clearance under an "EEA family permit scheme". This would have depended on Ms Siddiqa showing that when she was in Bangladesh, she was dependent on her brother.

The effect of Ms Siddiqa's later entry to the UK

5. On 8 June 2023 Ms Siddiqa was in fact granted leave to enter the UK as a skilled worker up until 15 July 2026. As a consequence, Ms Siddiqa entered the UK on about 15 June 2023. The Secretary of State contended in writing that this meant that Ms Siddiqa's appeal is academic. Ms Siddiqa contended that if she had obtained status under the 2016 Regulations, she could have then obtained a different and better status than her status under the skilled worker visa route, which required her to remain in employment. Whether Ms Siddiqa would have obtained status under the 2016 Regulations depended on whether Ms Siddiqa was a dependant of Mr Uddin. The fact that Ms Siddiqa secured entry as a skilled worker some 2 and a half years later suggests that the Secretary of State might have made inquiries about whether Ms

Siddiqa was such a dependant, but Ms Siddiqa's case is that she was a student being funded by her brother.

6. By the end of the oral submissions it was common ground that the Court should deal with Ms Siddiqa's appeal on the merits. There was some reference to other appeals against decisions of the Secretary of State but none of the parties, or the interveners, were able to assist with how many appeals there were or whether any other appeals before the Tribunals raised the same issues as in this appeal. It seems likely that, if there are any such appeals, it will be a small number.

7. I agree that the Court should determine Ms Siddiqa's appeal. This is because if Ms Siddiqa is successful on her appeal then, subject to further decisions by the Secretary of State, it might have some beneficial effect on her status in the UK.

Relevant schemes

8. In broad terms the EUSS family permit scheme, which was introduced on 30 March 2019, covered "direct family members" (as well as "extended family members who had already been granted residence rights"). The EUSS family permit scheme was provided for by Appendix EU (Family Permit) of the Immigration Rules.

9. The EEA family permit scheme covered "extended family members" as well as direct family members. The difference between direct family members and extended family members was itself derived from Directive 2004/38 EC (known as the "Citizens' Rights Directive") which identified the two different categories of family members. Applications by extended family members such as Ms Siddiqa could not be made under this scheme after 31 December 2020.

10. As part of the orderly withdrawal of the UK from the EU provided for by the Withdrawal Agreement, in cases where an extended family member made an application under the EEA family permit scheme before 31 December 2020, it was for the UK to determine that application and, if it was granted, to facilitate the entry of that extended family member.

The Citizens' Rights Directive

11. As noted above the Citizens' Rights Directive created two different categories of family members. Article 2 of the Citizens' Rights Directive covered direct family members and article 3 covered extended family members.

12. Article 2 of the Citizens' Rights Directive covered family members who are spouses; registered partners; direct descendants who are either under 21 or who are dependants; and dependent direct relatives. These were referred to as direct family members. They were given the right to enter the UK, to remain for three months, and to reside for a longer period if relevant conditions were satisfied, see articles 6 and 7.

13. Article 3 of the Citizens' Rights Directive covered beneficiaries being other family members who were not covered by article 2 including dependants or members of the household of the Union citizen. These were referred to as extended family members. Article 3(2) provided:

> "Without prejudice to any right to free movement and residence the persons concerned may have in their own right, the host Member State shall, in accordance with its national legislation, facilitate entry and residence for the following persons:
>
> (a) any other family members, irrespective of their nationality, not falling under the definition in point 2 of 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."

14. The meaning of "facilitate" within article 3 of the Citizen's Rights Directive was considered by the Court of Justice of the European Union (CJEU) in *Rahman v Secretary of State for the Home Department* Case C-83/11 [2013] QB 249. Member states were given a wide discretion as to how to implement the terms of article 3, so long as this amounted to facilitation and there existed a judicial remedy to determine whether the criteria which the state had adopted were properly applied, see paragraphs 25 and 26 of *Rahman*. In *Banger v Secretary of State for the Home Department* (Case C-89/17) [2019] 1 WLR 845 the CJEU confirmed that under the Citizens' Rights Directive, member states were under an obligation to confer a certain advantage on applications submitted by the third-country nationals envisaged in that article, compared with applications for entry and residence by other nationals of third countries. A decision by a member state to refuse a residence authorisation to a third-country national partner in such circumstances had to be founded on an extensive examination of the applicant's personal circumstances and be justified by reasons, see paragraphs 37 to 41.

15. The extent of the judicial remedies available under the Citizens' Rights Directive were considered by the CJEU in *Chenchooliah v Minister for Justice and Equality* Case C-94/18; [2020] 1 WLR 1801.

16. In *Celik v Secretary of State for the Home Department* [2023] EWCA Civ 921; [2023] Imm AR 5 (*Celik*), Lewis LJ summarised the effect of article 3(2) of the Citizens' Rights Directive in paragraph 13. Lewis LJ identified that article 3(2) conferred a certain advantage on applications made by a person who had a relationship with Union citizens and that "any right to reside was granted by the member state in accordance with its national legislation …". The criteria used had to be consistent with the normal meaning of "facilitate" and "dependence" and could not deprive them of effectiveness. The applicant was entitled to a judicial remedy to ensure that national legislation remained within the limits set by the Citizens' Rights Directive.

17. Articles 15, 30 and 31 of the Citizens' Rights Directive provided for procedural safeguards and the rights to effective judicial appeals to establish rights.

The EUSS

18. The EUSS provided a basis for EEA citizens resident in the UK by the end of the transition period at 11 pm on 31 December 2020, and their family members, to apply for UK immigration status to enable them to remain in the UK after 30 June 2021. The EUSS was made pursuant to the Withdrawal Agreement, and the European Union (Withdrawal Agreement) Act 2020. The EUSS is set out in the Appendix EU to the Immigration Rules.

The 2016 Regulations

19. The Citizens' Rights Directive was given domestic effect by Regulations made in 2006 which were later replaced by the 2016 Regulations. The 2016 Regulations provided for the provision of EEA family permits and residence cards for direct family members, see regulations 7, 12 to 14 and regulation 18. The 2016 Regulations provided a discretion to the Secretary of State to permit the entry of extended family members in regulations 8 and 12(5). Applications for an EEA family permit or for a residence card had to be made pursuant to regulation 21 of the Regulations. This provided for applications to be made online or by post using the specified application form. In this appeal, the relevant application was made online. Regulation 21(4) provided that where an application was not made in accordance with the requirements of the regulations it was invalid.

20. A discretion was provided to the Secretary of State in regulation 21(6) of the 2016 Regulations to accept applications where circumstances beyond the control of the applicant meant that the applicant had not been able to comply with the requirements to submit the application using the form specified by the regulation or online. It has not been suggested on behalf of Ms Siddiqa that there were any such circumstances beyond her control in this case.

The online application form

21. As at 7 December 2020, an online applicant for entry to the UK as an extended family member could access the Gov.uk website. On the website there was a starting page which invited the applicant to select their language. There was then a page headed "Apply for a permit to join your EU or EEA family member in the UK" which identified the two types of family permit being "the EU Settlement Scheme family permit" and "the EEA family permit". The website stated that "the one you should apply for depends on your circumstances".

22. Under the EUSS family permit it was stated "Apply for the EU Settlement Scheme family permit if you're the close family member of an EEA or Swiss citizen and they have `settled' or `pre-settled' status … You must be a `close' family member, such as a spouse, civil partner, dependent child or dependent parent". Further guidance noted "If you're from outside the EEA and cannot apply for the EU Settlement scheme family permit, apply for the EEA family permit instead".

23. Under the EEA family permit it was stated "Apply for the EEA family permit if you're a close or extended family member of an EEA or Swiss citizen. You can be a close or `extended' family member – for example a brother, sister, aunt, uncle, cousin,

nephew or niece". Further guidance noted "You must be able to show that you're dependent on the EEA citizen or are a member of their household, or have a serious health condition and rely on them to care for you … Extended family members and unmarried partners are not guaranteed to get a permit. Your individual circumstances will be considered when you apply."

24. In *Batool and others (other family members: EU exit)* [2022] UKUT 219 (IAC) the Upper Tribunal (Immigration and Asylum Chamber) (UT) referred to the website at paragraph 71 and said: "The guidance on www.gov.uk, however, shows that the Secretary of State has been at pains to provide potential applicants with the relevant information, in a simple form, including highlighting the crucial distinction between "close family members" and "extended family members". That is a distinction which, as we have seen from the Directive and the case law, is enshrined in EU law. It is not a novel consequence of the United Kingdom's leaving the EU. It is, accordingly, not possible to invoke sub-paragraphs (e) and (f) of Article 18 as authority for the proposition that the respondent should have treated one kind of application as an entirely different kind of application".

25. There was further evidence about the workings of the online application form in a statement from Nathan Salmon of the Independent Monitoring Authority (IMA). The IMA was granted leave to intervene in the Court of Appeal. There was also a statement from Clive Peckover, a senior policy official in the EEA Citizens' Rights and Hong Kong Unit in the Migration and Borders group of the Home Office. It is not necessary to refer to the full details of the online form and guidance.

The application dated 7 December 2020 and refusal dated 25 January 2021

26. On the online form the "type of visa/application" applied for on behalf of Ms Siddiqa was "European Family Permit". The second witness statement from Mr Uddin shows that he completed the online application on behalf of Ms Siddiqa. There was a direction to: "Select the category you are applying for". The option selected was: "Close family member of an EEA or Swiss national with a UK immigration status under the EU settlement scheme. I confirm I am applying for an EU Settlement Scheme Family Permit". Mr Uddin's details were entered as Ms Siddiqa's sponsor. Documentation was provided to prove Ms Siddiqa's identity and that of her brother.

27. On 14 December 2020 Mr Uddin provided and uploaded a "letter of declaration" to accompany the application. The letter of declaration stated that he wished to invite his sister to come to the UK under a "European Family Permit Visa". The brother explained that Ms Siddiqa was financially dependent on him.

28. Ms Siddiqa's application was refused by the ECO in a refusal letter dated 25 January 2021. The letter recorded that Ms Siddiqa had made an application for an EUSS family permit on the basis that she was a "family member" of a relevant EEA citizen, under Appendix EU (Family Permit) to the Immigration Rules. The letter stated that Ms Siddiqa had not provided evidence that she was a family member (spouse; civil partner; child, grandchild or great grandchild under 21; dependent child, grandchild or great grandchild over 21; or dependent parent, grandparent, or great grandparent) of a relevant EEA citizen. Therefore Ms Siddiqa did not meet the eligibility requirements for an EUSS family permit. As already noted, it is common ground that Ms Siddiqa

did not meet the eligibility requirements for an EUSS family permit. This was because she was not a close family member.

The appeal to the FTT

29. Ms Siddiqa appealed to the FTT on the ground that she met the requirements for an EEA family permit, under regulation 8 of the 2016 Regulations. The appeal was brought on the basis that she was an "extended family member" financially dependent on an EEA citizen exercising treaty rights in the UK, and that the Secretary of State had an obligation under the Withdrawal Agreement to clarify with Ms Siddiqa what type of application she intended to make, and to enable her to apply for an EEA family permit.

30. There was before the FTT: the application form dated 7 December 2020; and Mr Uddin's letter of declaration dated 14 December 2020 together with birth and family certificates to show Mr Uddin's and Ms Siddiqa's relationship as brother and sister. Ms Siddiqa made a witness statement dated 15 November 2021 outlining her financial dependence on Mr Uddin because she was studying. Mr Uddin made a witness statement dated 17 November 2021 in support of the appeal.

31. There was a hearing on 24 November 2021. It was submitted on behalf of Ms Siddiqa that the Entry Clearance Officer (ECO) had an obligation to consider the application under the 2016 Regulations under domestic law, or under article 10(3) of the Withdrawal Agreement.

32. The appeal to the FTT was dismissed in a decision dated 9 December 2021. In the decision the FTT set out the background and summarised the respective contentions of the parties. The FTT found as a fact that Ms Siddiqa had applied under the EUSS family permit scheme, and confirmed that in the online form. The FTT recorded that no explanation for making that application had been provided by Ms Siddiqa. The FTT did not accept that there was a duty on the ECO to consider an application (for an EEA family permit) which had not been made. The guidance had made clear that there were two distinct applications that could have been made.

33. The FTT referred to article 18(1)(o) of the Withdrawal Agreement and found that Appendix EU of the Immigration Rules and the application process was consistent with the Withdrawal Agreement. This was because "the appellant was able to apply for an EEA family permit but for reasons unknown to the tribunal, the appellant selected the category of applying for an EUSS family permit and confirmed this in her application".

The appeal to the UT

34. Ms Siddiqa appealed to the Upper Tribunal (Immigration and Asylum Chamber) (UT). The appeal was heard on 18 January 2023 and the appeal was dismissed by the UT (Mrs Justice Hill and Upper Tribunal Judge Kebede) in a decision dated 10 February 2023.

35. The UT summarised the background, the proceedings in the FTT and the FTT decision, and the procedural history. This included the proliferation of grounds of appeal which included: whether the ECO and FTT were required to treat the EUSS

family permit application as an application under article 3(2) of the Citizens' Rights Directive; whether regulation 21 of the 2016 Regulations prevented the ECO and FTT from considering the application under the 2016 Regulations; and whether Ms Siddiqa could rely on articles 18(1)(o) and (r) of the Withdrawal Agreement. The appeal had been adjourned to enable the parties to deal with the new grounds and arguments.

36. The UT also admitted a second witness statement from Mr Uddin. This was dated 14 October 2022 and explained how Mr Uddin, who had made the online application for Ms Siddiqa with a friend, had considered Ms Siddiqa to be a close family member. It does not appear from the witness statement that Mr Uddin had looked at the definitions of close family member given as links under the application form.

37. The UT turned to deal with the grounds of appeal from paragraph 34 of the decision. The first issue was whether the ECO had made an "EEA decision" so as to trigger the right of appeal under the 2016 Regulations. The UT distinguished the decision of the UT in *ECO v Ahmed and others* UI-2022-002804 (*ECO v Ahmed*) where an application was found to have been made under the 2016 Regulations because the covering letter had asked the ECO to consider the applications under the 2016 Regulations, even though the applicants in that case had selected the drop down box for the EUSS family permit application. The UT found that the situation in this case was different because the covering letter did not refer to the 2016 Regulations and referred only to the European Family permit visa which was consistent with the EUSS family permit application box selected on behalf of Ms Siddiqa.

38. The UT considered that the FTT was right to find that there was no duty to consider application criteria other than those under which the application had been made. The UT considered that their decision was consistent with the decision of the UT in *Batool and others (other family members: EU exit)* [2022] UKUT 219 (IAC). The UT found that the ECO had not made an EEA decision for the purposes of regulation 2 of the 2016 Regulations.

39. The UT then turned to the second issue, namely whether Ms Siddiqa's application complied with regulation 21 of the 2016 Regulations. The UT recorded the Secretary of State's submission that the application was not a valid application because it did not comply with regulation 21(1)(a) of the 2016 Regulations, which required either an online application "using the relevant pages" of the "gov.uk" website or an application by post. Ms Siddiqa had made an online application on the wrong pages. The UT found that Ms Siddiqa had not made an application in accordance with regulation 21(1)(a).

40. The third main issue considered by the UT, which was raised in grounds 1 and 2 of the appeal to the UT, was whether articles 18(1)(o) and (r) of the Withdrawal Agreement required the Secretary of State to treat Ms Siddiqa's application as one made under the 2016 Regulations. It had been submitted on Ms Siddiqa's behalf that the Secretary of State should have allowed Ms Siddiqa to confirm whether she relied on the 2016 Regulations or the EUSS family permit scheme, or both. This was to enable her to "correct any deficiencies, errors or omissions". The Secretary of State and FTT should have been precluded from relying on a procedural deficiency that should have been remedied, in order to avoid infringing article 18(1)(r) of the Withdrawal Agreement.

41. The UT considered an argument raised by the Secretary of State to the effect that article 18(1) did not apply because Ms Siddiqa did not reside in the UK at the time of the application. There was an issue about whether a respondent's notice needed to have been served, but the UT permitted the argument to be advanced because of the importance of the issue to the appeal. The UT accepted that article 18 did apply because it was consistent with the purposes and objectives of the Withdrawal Agreement, because the personal scope provisions in articles 10(1)(e) and 10(3) applied to persons outside the UK, and because in *Batool* the UT had not suggested that article 18 was so limited.

42. The UT next considered whether Ms Siddiqa was entitled to rely on article 18. The UT found that a key part of Ms Siddiqa's case was that she had made an application under the 2016 Regulations when she had not, but assumed that Ms Siddiqa could rely on article 18. The UT then considered Ms Siddiqa's claim that the Secretary of State had breached articles 18(1)(o) and (r) by not considering the substance of Ms Siddiqa's application and by acting disproportionately.

43. The UT recorded that it was common ground that the Withdrawal Agreement had to be interpreted by considering its purposes, objects and context. The UT considered that the UT in *Batool* was right not to require the Secretary of State to treat one kind of application as an entirely different kind of application. The UT held, at paragraph 85 of the decision, that the guidance given by the Secretary of State meant that help had been provided to enable applicants to prove their eligibility and to avoid errors or omissions in their applications for the purposes of article 18(1)(o) of the Withdrawal Agreement. The appeal was dismissed.

The issues on this appeal

44. Ms Siddiqa appealed to this Court on three grounds, set out in grounds of appeal which were amended on 3 October 2023 following the decision of the Court of Appeal in *Celik*. In that case the Court of Appeal had addressed the situation of a Turkish national who had married an EU national after the end of the transition period. The Court of Appeal held that the appellant was not a family member because he had not married before the end of the transition period, and the appellant's residence was not being facilitated by a decision granting leave to remain made either before the end of the transition period or granted after the end of the transition period in response to an application made before the end of the transition period. The appellant did not have a residence card as required under the EUSS scheme. The Court of Appeal recorded in paragraph 97 that it did not need to decide whether "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 capable of falling within article 10(3) of the Withdrawal Agreement."

45. As already indicated there was some discussion about the numbers of persons who might be in a similar situation to Ms Siddiqa. There will be no new persons in Ms Siddiqa's position because the transitional provisions have long since expired. That said, Ms Siddiqa is entitled to a full and fair evaluation of the circumstances of her appeal.

46. With some refinements in the course of oral argument, the three issues raised by the grounds of appeal (which I have reordered) are: (1) whether the UT should have

found that the FTT was wrong to hold that the appellant had not appealed under the 2016 Regulations; (2) whether the UT erred in its interpretation and application of article 18(1)(o) of the Withdrawal Agreement; and (3) whether the UT erred in its interpretation and application of article 18(1)(r) of the Withdrawal Agreement and the procedural safeguards in article 21.

47. As already noted, leave to intervene in the Court of Appeal was granted to IMA. IMA is the statutory body responsible for monitoring and promoting the effective and adequate implementation of the application of Part 2 of the Withdrawal Agreement. IMA has brought proceedings in its own name where it has considered it necessary to do so, see *R(Independent Monitoring Authority) v Secretary of State for the Home Department* [2022] EWHC 3274 (Admin); [2023] 1 WLR 817. (*R(IMA)*) challenged the Secretary of State's decision to grant a form of limited leave to certain EU applicants resident in the UK. In this case IMA had not intervened either before the FTT or the UT.

48. On appeal IMA did not make submissions supporting Ms Siddiqa's grounds relying on article 18 of the Withdrawal Agreement, but submitted that a similar result might be obtained through the provisions of article 10(3) and article 10(5) of the Withdrawal Agreement.

49. The Aire Centre and Here for Good were also granted permission to make a joint intervention. They are charitable organisations concerned with, among other matters, free movement rights. The Aire Centre and Here for Good made submissions supporting IMA's submissions. There was no application to amend the grounds of appeal on behalf of Ms Siddiqa, but it is fair to note that Mr Biggs had referred to articles 10(3) and (5) to show that Ms Siddiqa was within the personal scope of the Withdrawal Agreement.

50. In these circumstances there was, by the conclusion of the hearing, a fourth issue to be addressed, namely whether the interveners' reliance on articles 10(3) and (5) of the Withdrawal Agreement meant that the appeal should be allowed on that basis.

51. I am very grateful to Michael Biggs on behalf of Ms Siddiqa, Julia Smyth on behalf of the Secretary of State, Galina Ward KC on behalf of IMA, and Mr Cox on behalf of the Aire Centre and Here for Good, and their respective legal teams, for all of their helpful written and oral submissions.

Some relevant provisions of European Union and domestic law

52. When the UK was a member of the European Union it was required to give effect to European Union law. The UK gave effect to European Union law by the European Communities Act 1972 and other domestic legislation. The UK left the European Union on 31 January 2020 and repealed the European Communities Act 1972 with effect from that date, as appears from the European Union (Withdrawal) Act 2018. There was, however, a transition period up to 31 December 2020 which was provided for by article 126 of the Withdrawal Agreement. European Union law continued to have effect in the UK until 31 December 2020 pursuant to article 127 of the Withdrawal Agreement, which was given domestic legal effect by the European (Withdrawal) Act 2018, as amended by the European Union (Withdrawal Agreement)

Act 2020. There are aspects of EU law which have been retained as domestic law, but they are not relevant to this appeal.

53. Relevant provisions of European Union law up until 31 December 2020 included articles 20 and 21 of the Treaty on the Functioning of the European Union (TFEU). These provided that nationals of member states of the European Union were to be citizens of the European Union and were to have the right to move freely and reside in other member states.

Relevant provisions of the Withdrawal Agreement

54. The Withdrawal Agreement was made in 2019 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 had exercised free movement rights before the end of the transition period.

55. There was no dispute about the proper approach to the interpretation of the Withdrawal Agreement. It is an international treaty. The relevant interpretative principles are contained in articles 31 and 32 of the Vienna Convention on the Law of Treaties 1969. The Withdrawal Agreement must be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its objects and purpose. The recitals, which it is not necessary to set out, provide identification of the object and purpose of the Withdrawal Agreement. Article 4 of the Withdrawal Agreement set out methods and principles relating to the effect, implementation and application of the Withdrawal Agreement, see generally *Secretary of State for Work and Pensions v AT* [2023] EWCA Civ 1307; [2024] CMLR 10.

56. During the course of submissions both sides made reference to guidance published by the European Commission on the Withdrawal Agreement. When asked whether the guidance had any formal status as an aid to interpreting the Withdrawal Agreement it was confirmed by both sides, after considering the position, that the guidance had no status in the interpretation of the Withdrawal Agreement. It was suggested that the guidance might be treated by the Court like a textbook. Analysis and arguments in a textbook might assist the Court in coming to its conclusions, in this case on the proper interpretation of the Withdrawal Agreement, but it does not have any other formal status as an aid to interpretation.

57. Part One of the Withdrawal Agreement, articles 1 to 8, dealt with objectives, principles and methods. Part Two dealt with citizens' rights. Part Two was divided into Title I, articles 9 to 12, which dealt with general provisions and Title II, articles 13 to 29, dealt with rights and obligations relating to residence. Title II was itself divided into three chapters, chapter one, articles 13 to 23 dealt with rights related to residence and residency documents, chapter two, articles 24 to 26 dealt with rights of workers and self-employed persons, and chapter three, articles 27 to 29 dealt with professional qualifications.

58. Article 10 of the Withdrawal Agreement is headed "personal scope" and provides:

"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;
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> (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."

59. Title II was titled "rights and obligations" and chapter I of Title II was headed "rights related to residence, residence documents". Article 13 was headed "residence rights". Article 14 was headed "right of exit and of entry". This article applied to applications for visas made by family members after the end of the transition period. Article 15 was headed "right of permanent residence".

60. Article 18, on which Mr Biggs on behalf of Ms Siddiqa placed great weight, was headed "issuance of residence documents" and provided:

"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;

(c) the deadline for submitting the application referred to in point (b) shall be extended automatically by 1 year where the Union has notified the United Kingdom, or the United Kingdom has notified the Union, that technical problems prevent the host State either from registering the application or from issuing the certificate of application referred to in point (b). The host State shall publish that notification and shall provide appropriate public information for the persons concerned in good time;

(d) where the deadline for submitting the application referred to in point (b) 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;

(g) the document evidencing the status shall be issued free of charge or for a charge not exceeding that imposed on citizens or nationals of the host State for the issuing of similar documents;

(h) persons who, before the end of the transition period, hold a valid permanent residence document issued under Article 19 or 20 of Directive 2004/38/EC or hold a valid domestic immigration document conferring a permanent right to reside in the host State, shall have the right to exchange that document within the period referred to in point (b) of this paragraph for a new residence document upon application after a verification of their identity, a criminality and security check in accordance with point (p) of this paragraph and confirmation of their ongoing residence; such new residence documents shall be issued free of charge;

(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) supporting documents other than identity documents, such as civil status documents, may be submitted in copy. Originals of supporting documents may be required only in specific cases where there is a reasonable doubt as to the authenticity of the supporting documents submitted;

(k) the host State may only require Union citizens and United Kingdom nationals 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(3) of Directive 2004/38/EC:

(i) where they reside in the host State in accordance with point (a) of Article 7(1) of Directive 2004/38/EC as workers or self-employed, a confirmation of engagement from the employer or a certificate of employment, or proof that they are self-employed;

(ii) where they reside in the host State in accordance with point (b) of Article 7(1) of Directive 2004/38/EC as economically inactive persons, evidence that they have sufficient resources for themselves and their family members not to become a burden on the social assistance system of the host State during their period of residence and that they have comprehensive sickness insurance cover in the host State; or

(iii) where they reside in the host State in accordance with point (c) of Article 7(1) of Directive 2004/38/EC as students, proof of enrolment at an establishment accredited or financed by the host State on the basis of its legislation or administrative practice, proof of comprehensive sickness insurance cover, and a declaration or equivalent means of proof, that they have sufficient resources for themselves and their family members not to become a burden on the social assistance system of the host State during their period of residence. The host State may not require such declarations to refer to any specific amount of resources.

With regard to the condition of sufficient resources, Article 8(4) of Directive 2004/38/EC shall apply;

(l) 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;

(m) the host State may only require family members who fall under point (e)(ii) of Article 10(1) or Article 10(4) of this Agreement to present, in addition to the identity documents referred to in point (i) of this paragraph, the following supporting documents as referred to in Articles 8(5) and 10(2) of Directive 2004/38/EC:

(i) a document attesting to the existence of a family relationship or of a registered partnership;

(ii) the registration certificate or, in the absence of a registration system, any other proof of residence in the host State of the Union citizen or of the United Kingdom nationals whom they are joining in the host State;

(iii) for spouses or registered partners, a document attesting to the existence of a family relationship or a registered partnership before the end of the transition period;

(iv) for direct descendants who are under the age of 21 or who are dependants and dependent direct relatives in the ascending line and those of the spouse or registered partner, documentary evidence that they were related to Union citizens or United Kingdom nationals before the end of the transition period and fulfil the conditions set out in point (c) or (d) of Article 2(2) of Directive 2004/38/EC relating to age or dependence;

(v) for the persons referred to in Article 10(4) of this Agreement, proof that a durable relationship with Union citizens or United Kingdom nationals existed before the end of the transition period and continues to exist thereafter;

(n) for cases other than those set out in points (k), (l) and (m), the host State shall not require applicants to present supporting documents that go beyond what is strictly necessary and proportionate to provide evidence that the conditions relating to the right of residence under this Title have been fulfilled;

(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;

(p) criminality and security checks may be carried out systematically on applicants, with the exclusive aim of

verifying whether the restrictions set out in Article 20 of this Agreement may be applicable. For that purpose, applicants may be required to declare past criminal convictions which appear in their criminal record in accordance with the law of the State of conviction at the time of the application. The host State may, if it considers this essential, apply the procedure set out in Article 27(3) of Directive 2004/38/EC with respect to enquiries to other States regarding previous criminal records;

(q) the new residence document shall include a statement that it has been issued in accordance with this Agreement;

(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.

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).

4. Where a host State has chosen not to require Union citizens or United Kingdom nationals, their family members, and other persons, residing in its territory in accordance with the conditions set out in this Title, to apply for the new residence status referred to in paragraph 1 as a condition for legal residence, those eligible for residence rights under this Title shall have the right to receive, in accordance with the conditions set out in Directive 2004/38/EC, a residence document, which may be in a digital form, that includes a statement that it has been issued in accordance with this Agreement."

61. Article 21 provided for the safeguarding of rights of appeal set out in the Citizens' Rights Directive.

62. In *R(IMA)* Lane J upheld a challenge by IMA, supported by the European Commission, to the Secretary of State's scheme implementing the Withdrawal Agreement so far as it related to those EU citizens who had a right of residence which had not yet become permanent, and who would have to make a further application after five years or they would lose their Withdrawal Agreement residence rights which were protected under article 13 of the Withdrawal Agreement. In the course of the judgment Lane J recorded submissions about article 18 of the Withdrawal Agreement and its effect. IMA, supported by the Commission, both contended that article 18 contemplated only one application, but that was disputed by the Secretary of State, see paragraph 114 of the judgment. Lane J analysed article 18 in the judgment and recorded that the UK had adopted a "constitutive", as opposed to "declaratory" scheme under article 18. For the purposes of article 18 a "constitutive" scheme meant that the rights in question must be conferred by the grant of residence status, rather than just adducing the underlying documentation to prove the right.

63. The Court of Appeal in *Celik* confirmed that an applicant who was an extended family member in a durable relationship was not covered by the definition of family member in article 9(a) of the Withdrawal Agreement and therefore could not satisfy the provisions of article 10(1)(e)(i). In paragraph 56 Lewis LJ stated that the principle of proportionality in article 18(1)(r) was not intended to lead to the conferment of residence status on people who would not otherwise have any rights to reside and as the applicant did not have such rights under article 10(1)(e)(i) it was not disproportionate to refuse him rights. In paragraph 61 Lewis LJ stated that articles 10(2) and (3) of the Withdrawal Agreement applied to persons whose residence has been facilitated, being a person whose status as an extended family member has been recognised.

64. In paragraph 95 of *Celik,* Lewis LJ rejected the submission made on behalf of IMA in that appeal to the effect that the fact that an application was made was sufficient to enable the appellant to fall within article 10(3) and to benefit from article 10(5) of the Withdrawal Agreement. Lewis LJ stated that "article 10(3) deals with persons who have applied for facilitation before that date but the decision facilitating residence comes after that date". In the present case IMA sought to distinguish this part of the judgment in *Celik* in written and oral submissions on the basis that it was not dealing with an application which did not comply with regulation 21 of the 2016 Regulations. It is right to say that Lewis LJ was not dealing with regulation 21 of the 2016 Regulations, but he was dealing with an application which had been made under the EUSS which did not comply with it. In my judgment this paragraph about the approach to articles 10(3) and (5) of the Withdrawal Agreement, which was agreed by Singh and Moylan LJJ, should be followed, and is right.

65. In these circumstances article 10(3) applied to a person "whose residence is being facilitated" namely a person who was an extended family member who had applied before the end of the transition period under national law "and, if granted such rights, those persons fall within the scope of Part Two of the Agreement". This meant that the extended family member had to apply under national law for "facilitation" before the end of the transition period. In the UK that meant an application under the EEA

family permit scheme. As appears below, Ms Siddiqa did not make such an application.

Whether the UT should have found that the FTT was wrong to hold that the appellant had not appealed under the 2016 Regulations (issue one)

66. Under domestic law, the strict application of rules is permissible, compare *Rhuppiah v Secretary of State for the Home Department* [2018] UKSC 58; [2018] 1 WLR 5536 at paragraphs 14 to 17. Applicants are expected to make the proper applications and the Secretary of State to determine them, it is not for the Secretary of State "to chase shadows" to see if the applicant intended to make a different application, see *R(Behary) v Secretary of State for the Home Department* [2016] EWCA Civ 702; [2016] 4 WLR 136 at paragraph 27. Similarly the Secretary of State is under no duty to see whether a successful application might have been made in the past. The role of the Secretary of State is to assess the application made, see *CS (Brazil) v Secretary of State for the Home Department* [2009] EWCA Civ 480; [2009] 2 FLR 933 at paragraphs 9-10 and *Macastena v Secretary of State for the Home Department* [2019] EWCA Civ 1558; [2019] 1 WLR 365 at paragraph 17.

67. In domestic law, if an application has purportedly been made under the EUSS family permit scheme when it is, as a matter of fact, another application it can be treated as such, compare *ECO v Ahmed*. In that case the applicants, who were brothers of an EU national with leave to remain in the UK, had gone to the starting web page for both EUSS family permit and EEA family permit applications. They had chosen the EUSS family permit drop box, when it was common ground that they could not satisfy those provisions, and put in a covering letter to the effect that they were making an application under the 2016 Regulations, for an EEA family permit, making reference to specific regulations in the 2016 Regulations. In those circumstances the FTT and the UT found that the applicants had in reality made an application under the 2016 Regulations. By contrast, in this case there was no such letter referring to the EEA family permit or the 2016 Regulations.

68. The UT considered the relevant regulations and noted that deciding what sort of application had been made was largely a factual decision, see paragraph 40 of the UT judgment. In this case both the FTT and UT found that the application made by or on behalf of Ms Siddiqa was an application for an EUSS family permit. This was not a particularly surprising finding given the options selected to complete the form submitted on behalf of Ms Siddiqa and I can identify no error of law which would permit this court to interfere with this finding of fact. This was not a case such as *ECO v Ahmed* where the FTT and UT found that an application under the 2016 Regulations had, in fact, been made. In these circumstances I would reject Mr Biggs' invitation to treat Ms Siddiqa as having made two applications, one under the EUSS family permit scheme and one under the EEA family permit scheme.

69. The EEA family permit scheme was set up in domestic law so that the UK could discharge its obligations to "facilitate" the entry of extended family members. The UK and other member states were given a wide discretion as to how to set up the scheme. I accept that the 2016 Regulations, giving effect to EU law, had to be construed consistently with EU law obligations, and that a departure from the strict and literal application of the words is permitted, see generally *Marleasing SA v LA Commercial Internacional de Alimentation SA* [1992] 1 CMLR 305 and *Vodafone 2 v*

Revenue and Customs Commissioners [2009] EWCA Civ 446; [2010] Ch 77 at paragraph 37.

70. I can see no basis for finding, as suggested on behalf of the Aire Centre and Here for Good, that the refusal of Ms Siddiqa's application in any way infringed her rights under the Citizens' Rights Directive. I accept that the fact that there was a wide discretion available to member states about how to implement the Citizens' Rights Directive did not entitle member states to undermine the rights granted. I do not accept the submission that the ECO was not entitled to treat Ms Siddiqa's application as an application under the EUSS family permit scheme. This is because there was a clear application form, with clear guidance, see *Batool*, and the application form under the EUSS family permit scheme was completed. This is a different situation from that in *Rehman (EEA Regulations 2016- specified evidence)* [2019] UKUT 195 (IAC) where a valid application had been made but a requirement to adduce evidence had not been met. That evidence was the sponsor's passport, which could not be produced for good reason. A requirement to produce documents beyond the requirements of the Citizens' Rights Directive or what was strictly necessary to establish the right of residence is not permissible.

71. In these circumstances Ms Siddiqa applied under the EUSS family permit scheme and her application was refused. As a matter of domestic law, an appeal relying on the EEA family permit scheme would fail, because that was not the application that was made by or on behalf of Ms Siddiqa. It is necessary to consider next whether a different result is achieved under the Withdrawal Agreement.

Whether the UT erred in its interpretation and application of article 18(1)(o) of the Withdrawal Agreement (issue two) and application of article 18(1)(r) of the Withdrawal Agreement (issue three)

72. Issues two and three raise issues about the applicability and effect of specific provisions of article 18 of the Withdrawal Agreement. In short, Mr Biggs, on behalf of Ms Siddiqa, submitted that article 18(1)(o) and article 18(1)(r) created enforceable obligations which could be relied on by Ms Siddiqa and which meant, in the particular circumstances of this case, that Ms Siddiqa's appeal should have been allowed and the Secretary of State directed to treat the initial application for an EUSS family permit as an application for an EEA family permit, and to determine that application as if back in January 2021. Ms Smyth, on behalf of the Secretary of State, submitted that, properly construed, article 18 had nothing to do with an application by an extended family member for either an EUSS family permit, which was bound to fail because Ms Siddiqa did not qualify, or for an application for an EEA family permit. This was because article 18 did not cover extended family members whose entry had not yet been facilitated and who could not therefore qualify for residence under article 18.

73. As already noted neither Ms Ward KC on behalf of IMA nor Mr Cox on behalf of the Aire Centre and Here for Good made submissions in support of Mr Biggs' grounds of appeal relying on the effect of article 18 of the Withdrawal Agreement.

74. All parties considered article 10 of the Withdrawal Agreement first, in order to determine whether Ms Siddiqa was within scope of the protections. I accept that an applicant, such as Ms Siddiqa, who was a family member of an "Union citizen who exercised their right to reside in the UK in accordance with Union law before the end

of the transition period and continue to reside there thereafter" (see article 10(1)(a)), such as Mr Uddin, falls within article 10(3) if they fall "under points (a) and (b) of article 3(2) of the 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 national legislation thereafter". Ms Siddiqa claimed to fall within article 3(2)(a) of the Citizens' Rights Directive because she was Mr Uddin's sister and was a dependant of Mr Uddin, and that would have been determined under an application under the EEA family permit scheme.

75. Although Ms Siddiqa did make an application under the EUSS family permit scheme, she did not make an application under the 2016 Regulations for an EEA family permit. This is for the detailed reasons given under issue (1) above. The FTT and UT assessed the application made by Ms Siddiqa in accordance with domestic law and found that the application was for an EUSS family permit and not for facilitation under article 3(2) of the Citizens' Rights Directive to which effect was given by the 2016 Regulations. The conclusion of the FTT and UT on this point, is, in my judgment, consistent with the approach of Union law. This is because Union law provides that it is for domestic law to determine how to give effect to the rights to facilitation set out in article 3(2) of the Citizens' Rights Directive, so long as the rights to facilitate and effectiveness are not removed, and this answers the point which it was not necessary to decide in *Celik*.

76. As appears above, article 10(5) of the Withdrawal Agreement provided that 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". Even if Ms Siddiqa fell within the scope of article 10(3), the ECO undertook an extensive examination to determine that Ms Siddiqa had not made an application under the EEA family permit scheme and 2016 Regulations, and did not qualify under the EUSS family permit scheme. In those circumstances, as both the FTT and UT found, the ECO had justified the denial of entry to Ms Siddiqa. If an application had been made in accordance with the domestic law of the UK under the 2016 Regulations for an EEA family permit, there would have been an extensive examination of the personal circumstances of Ms Siddiqa to determine whether she was, as she claimed, dependent on Mr Uddin.

77. I turn next to consider article 18 of the Withdrawal Agreement. I record that article 18 was within chapter 1 of Title II of the Withdrawal Agreement which is headed "rights and obligations relating to residence". As explained by Lane J in *R(IMA)* article 18 entitled the UK and member states to establish a "constitutive scheme" or a "declaratory scheme". The UK (and about half of the EU member states) elected to set up a constitutive scheme, whereby the rights in question must be conferred by the grant of residence status. (By contrast under a declaratory scheme the rights arise automatically on fulfilment of the conditions necessary for their existence).

78. Mr Biggs identified that there were provisions of article 18 which showed that it applied to applicants under article 3(2) of the Citizens' Rights Directive who were out of country. He relied on the provisions of article 18(1)(l)(i) and article 18(1)(l)(iv), both of which referred to the documents which the host state was entitled to require to be produced. Ms Smyth pointed out that although article 18(1) does expressly apply to those who fall under article 10(3), it is qualified by the words "and who reside in the host state", which Ms Siddiqa did not. Mr Biggs also relied on the provisions of

article 18(1)(m)(ii), which again referred to production of a registration certificate (or in default of a registration system the proof of residence). Ms Smyth relied on the fact that Ms Siddiqa did not fall within the category of persons within article 10(1)(e)(ii) or article 10(4).

79. Article 18(1) refers to the right of the host state to require Union citizens "who reside in its territory in accordance with the conditions set out in this Title, to apply for a new residence status", subject to the conditions set out in article 18(1)(a) to (r). As recorded in paragraph 62 above, there were competing submissions in *R(IMA)* about whether one or two applications could be required under the provisions of article 18, and that Lane J. held that Union citizens could not lose their rights if they did not make a second application after a 5-year period then set out in the EUSS scheme.

80. In my judgment the provisions of article 18, when properly interpreted, apply to extended family members whose entry has been facilitated under the EEA family permit scheme. Once that step under domestic law and the 2016 Regulations has been achieved, the successful applicant can apply for residence pursuant to article 18 of the Withdrawal Agreement under the relevant UK scheme. Ms Siddiqa was not such an applicant. This means that Ms Siddiqa cannot rely on the provisions of articles 18(1)(o) ("the host state shall help the applicants to prove their eligibility and to avoid any errors or omission in their applications; they shall give the applicants the opportunity to … correct any deficiencies, errors or omissions") and 18(1)(r) ("the applicant shall have access to judicial and, where appropriate, administrative redress procedures …") for the application that she made. I therefore consider that the Secretary of State was right not to accept that article 18 of the Withdrawal Agreement applied to the application made by Ms Siddiqa, and that IMA and the Aire Centre and Here for Good were also correct not to make separate submissions in support of Ms Siddiqa's grounds of appeal relying on article 18.

81. This conclusion means that it is not necessary to examine the UT's conclusion that the Secretary of State had discharged any obligations pursuant to article 18(1)(o) and (r) by providing a clear website with clear guidance.

The interveners' reliance on articles 10(3) and 10(5) of the Withdrawal Agreement (issue four)

82. I turn then to consider the arguments made on behalf of both IMA and the Aire Centre and Here for Good to the effect that the approach taken by the ECO to Ms Siddiqa's application, upheld by the FTT and UT, infringed articles 10(3) and (5) of the Withdrawal Agreement.

83. I have already referred to the structure of the Withdrawal Agreement. The specific rights and obligations relating to residence were set out in Title II of Part Two of the Withdrawal Agreement. Title I of Part Two of the Withdrawal Agreement, which covered articles 9 to 12, covered general provisions.

84. For the reasons set out above Ms Siddiqa, as a family member of Mr Uddin, an Union citizen who was exercising rights to reside in the UK, would fall within article 10(3), if she applied for facilitation of entry and residence under article 3(2)(a) of the Citizens' Rights Directive. As set out above, Ms Siddiqa did not make that application. This was similar to the situation of the applicant considered in paragraph

95 of *Celik.* As appears above, article 10(5) of the Withdrawal Agreement provided that 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". Again, as indicated above, the ECO undertook the investigation to determine that Ms Siddiqa had not made an application under the EEA family permit scheme and was able to justify denial of entry to Ms Siddiqa. If an application had been made in accordance with the domestic law of the UK under the 2016 Regulations for an EEA family permit, there would have been an extensive examination of the personal circumstances of Ms Siddiqa to determine whether she was dependent on Mr Uddin.

A result consistent with the Withdrawal Agreement

85. I have reflected to consider whether the result in this case is inconsistent with a fair and proper interpretation of the Withdrawal Agreement and the principles of proportionality, good administration and effectiveness. In my judgment the result is consistent. This is because Ms Siddiqa's rights arose under article 3(2) of the Citizens' Rights Directive and the Withdrawal Agreement. The right under the Citizens' Rights Directive was a right to require the member state to facilitate entry for extended family members, with a discretion given to the member state about how to implement the terms of article 3 of the Citizens' Rights Directive. That discretion was limited in accordance with Union law.

86. The Secretary of State had established a proper scheme to facilitate the entry of extended family members such as Ms Siddiqa under the 2016 Regulations. There were clear criteria to be applied to determine whether the application should be granted under the 2016 Regulations. There was also, on the website, clear guidance available for the making of the online application on behalf of Ms Siddiqa, see *Batool* at paragraph 71. It is fair to point out that Ms Siddiqa qualified, within 3 years of the refusal of her application under the EUSS family permit scheme, as a skilled worker migrant showing that she had the necessary skills to complete an online application form.

87. The fact that Ms Siddiqa did not make an application under the EEA Regulations meant that her application was refused. That was, in my judgment a proper response to the application made by Ms Siddiqa under the EUSS family permit scheme. Applications have been made before the end of the transition period which have failed, whereas other applications might have succeeded, and it is likely that this situation will occur in the future.

88. I agree that the effect of Ms Siddiqa making the application under the EUSS family permit scheme was more serious because the EEA family permit route ceased to exist after the end of the transition period, but the Withdrawal Agreement was to give effect to the UK's orderly departure from the EU, not to preserve those parts of EU law which the UK had decided should not continue to apply. The Withdrawal Agreement carefully identified what rights extended family members would have in the run up to the end of the transition period and what rights they would not have. I have not been able to identify a free standing right to convert Ms Siddiqa's application under the EUSS family permit scheme into another application under the 2016 Regulations, and reject IMA's submission that such a result is a triumph of form over substance. As it is Ms Siddiqa has obtained entry to the UK through another means. Ms Siddiqa will have rights under the domestic immigration system, as well as the Human Rights Act 1998, which has given domestic effect to the European Convention on Human Rights and Fundamental Freedoms.

Conclusion

89. For the detailed reasons set out above, in my judgment: (1) the FTT and UT were right to find that Ms Siddiqa had not made an application under the 2016 Regulations, and therefore any appeal under the 2016 Regulations was bound to fail; (2) and (3) article 18 of the Withdrawal Agreement did not apply to the application made by Ms

Siddiqa; and (4) the appeal does not succeed under the provisions of articles 10(3) and (5) of the Withdrawal Agreement.

90. I would therefore dismiss the appeal.

Lady Justice Elisabeth Laing:

91. I agree.

Lord Justice Baker:

92. I also agree.