Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: UI-2022-001911
(EA/11499/2021)

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
on 06 September 2022	**on 15 November 2022**

Before

UPPER TRIBUNAL JUDGE CANAVAN
DEPUTY UPPER TRIBUNAL JUDGE HARIA

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

ALEXANDRE CARVALHO GRANOSKI

Respondent

Representation:
For the appellant: Ms A. Ahmed, Senior Home Office Presenting Officer
For the respondent: Ms E. Atas, instructed by Khaneja Solicitors

DECISION AND REASONS

1. For continuity, we will refer to the parties as they were before the First-tier Tribunal although technically the Secretary of State is the appellant in the appeal to the Upper Tribunal.

2. The original appellant (Mr Carvalho Granoski) appealed the respondent's (SSHD) decision dated 02 May 2021 to refuse leave to remain under the immigration rules relating to the EU Settlement Scheme i.e. under domestic law.

3. The appeal was brought under The Immigration (Citizens' Rights Appeals) (EU Exit) Regulations 2020 ('the CRA Regulations 2020'). The available grounds of appeal are:

   (i) that the decision breaches any right which the appellant has by virtue of the Withdrawal Agreement ('WA'), EEA EFTA Separation Agreement or the Swiss Citizens' Rights Agreement;

   (ii) the decision is not in accordance with the provision of the immigration rules by virtue of which it was made, is not in accordance with the residence scheme immigration rules, is not in accordance with section 76(1) or (2) of the 2002 Act (revocation of ILR) or is not in accordance with section 3(5) or (6) of the 1971 Act (deportation).

4. First-tier Tribunal Judge Beg ('the judge') allowed the appeal in a decision sent on 18 January 2022. The Secretary of State did not send a representative to the hearing.

5. The judge heard evidence from the appellant, his sister, and her husband (said to be an Italian national). She considered the oral and documentary evidence. The judge stated that the key question was 'whether the appellant applied for facilitation of entry and residence before the end of the transition period (31 December 2020)' [15]. She went on to outline the provisions relating to 'other family members' contained in Article 3(2) of the Citizens' Directive (2004/38/EC) and 'extended family members' under regulation 8 of The Immigration (European Economic Area) Regulations 2016 ('the EEA Regulations 2016'). Both provisions relate to rights of entry and residence under the EU Treaties i.e. under European law [16]-[17]. The judge then referred to a series of cases relating to other family members under European law [18]-[22].

6. The judge accepted that the appellant lived with his sister and her husband in Brazil before they came to the UK and continued to live with them after they came to the UK on 04 December 2020. She concluded that the appellant was a prior and current member of the EEA sponsor's household but that he was not financially dependent [29]. The judge noted the concession made by the appellant's representative, that he was required to have a 'relevant document' facilitating entry and residence under EU law before 31 December 2020 to meet the requirements of Appendix EU [30].

7. Having found that the appellant did not meet the requirements of the immigration rules the judge turned to consider whether the decision breached any rights that the appellant might have by virtue of the Withdrawal Agreement. She made the following findings:

   > '31. Article 21 of the Withdrawal Agreement extends the 'safeguards' at Article 15 of the Citizens Directive – a right of appeal that includes an examination of legality and the facts and circumstances – to those coming within Article 10. This means that a third country applicant (i) has a right of appeal that enables him to rely directly on the withdrawal agreement (sic), and (ii) can

argue that he falls within its scope as an extended family member who entry to the United Kingdom was being "facilitated" (being considered, refused and then subject to appeal) prior to 31 December 2020.

32. I find that it was incumbent upon the respondent to have undertaken a full examination of the appellant's personal circumstances. His sister is his only surviving sibling. His parents are deceased. He entered the United Kingdom before the end of the transition period. His brother-in-law is a qualified person within the EU Settlement Scheme. As already indicated, I accept on the evidence that he lived with the sponsor in the same household in Brazil and continues to reside with him in the United Kingdom. All his family members have been granted leave to remain.

33. Article 10(2) of the Withdrawal Agreement indicates that the United Kingdom must facilitate his residence if he meets the requirements of Article 3(2)(a) of Directive 2004/38/EC. In conclusion I find that the respondent's decision in failing to facilitate his residence in accordance with the Directive is unlawful under the Immigration (CRA)(EU Exit) Regulations 2020.

8. The Secretary of State applied for permission to appeal to the Upper Tribunal on 01 February 2022. The grounds of appeal were not particularised with reference to the First-tier Tribunal decision, but made the following series of points relating to the legal framework:

(i) It was accepted that the appellant did not have a relevant document for the purpose of the immigration rules.

(ii) Residence for other family members under Article 3(2) was not 'directly held', but was facilitated by the host state under domestic legislation. The EEA Regulations 2016 was the mechanism by which consideration was given to whether entry should be facilitated by issuing a residence card. This is why only a person with a valid document and continuing eligibility was treated as a family member for the purpose of regulation 7(3).

(iii) The principle of facilitation by way of national legislation was reflected in the EU Settlement Scheme rules. A person could only benefit from Article 10(2) of the Withdrawal Agreement if entry had been facilitated by the issuing of a relevant document.

(iv) Article 10(3) of the Withdrawal Agreement extends Article 10(2) to people identified in Article 3(2)(a) and (b) of the Citizens' Directive who had applied for facilitation of entry before 31 December 2020. The appellant had not applied for facilitation of entry under the EEA Regulations 2016.

(v) Article 18 of the Withdrawal Agreement related to procedure. Article 18(1)(a) confirmed that '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.' The Secretary of State submitted that Article

18 related to eligibility under the Settlement Scheme itself and not for the preliminary status needed to meet the requirements of the scheme.

9. First-tier Tribunal Judge Rys-Davies granted permission to appeal in an order dated 21 April 2022 in the following terms:

> '2. There is merit in the Grounds. It is arguable that the Judge materially erred for the reasons pleaded therein, though in fairness to the Judge she would not have been assisted in her interpretation of the complex provisions of the Withdrawal Agreement and related rules by the Respondent's failure to attend the hearing.'

10. After permission was granted, a Presidential panel of the Upper Tribunal published the decision in *Batool and others (other family members: EU exit)* [2022] UKUT 219. The headnote reported the following points:

> *(1) An extended (oka other) family member whose entry and residence was not being facilitated by the United Kingdom before 11pm GMT on 31 December 2020 and who had not applied for facilitation of entry and residence before that time, cannot rely upon the Withdrawal Agreement or the immigration rules in order to succeed in an appeal under the Immigration (Citizens' Rights Appeals) (EU Exit) Regulations 2020.*
>
> *(2) Such a person has no right to have any application they have made for settlement as a family member treated as an application for facilitation and residence as an extended/other family member.*

11. At the hearing, Ms Ahmed relied on the decision in *Batool* and submitted that it supported the legal points made in the grounds of appeal. The appellant did not engage the Withdrawal Agreement because he had not applied for or been facilitated entry as an extended family member before the end of the transition period on 31 December 2020.

12. Ms Atas relied on the arguments put forward in her skeleton argument. In contrast to the grounds of appeal, which covered just over a single page, the skeleton argument made a long series of submissions running to 15 pages. The main points were:

    (i) The Secretary of State's pleadings were unparticularised and did not constitute grounds of appeal. The appeal should be dismissed on this basis.

    (ii) The failure to particularise grounds of appeal was 'aggravated' by the failure of the First-tier Tribunal judge to give reasons for granting permission. The appeal should be dismissed on this basis.

    (iii) A general assertion that the unparticularised grounds of appeal did not disclose an error of law.

(iv) A general assertion that if an error was found it was not material. The skeleton argument then responded to each paragraph in the grounds of appeal:

(a) In response to [8(i)] above, the first paragraph was not a ground of appeal;

(b) In response to [8(ii)-(iii)] above, having noted that the appellant did not hold a relevant document 'it is obvious that the judge recognised that this was an Article 10(3) appeal';

(c) In response to [8(iv)] above, it was not understood what the grounds meant. The judge made clear findings in relation to Article 3(2) of the Citizens' Directive with reference to the decision in *SSHD v Rahman & Others* [2012] EUECJ C-83/11 (05 September 2012); [2013] QB 249;

(d) In response to [8(v)] above, no submissions were made in relation to Article 18 of the Withdrawal Agreement by the appellant's representative at the First-tier Tribunal hearing. This paragraph was likely to have been drawn from submissions made in another case.

(v) The Upper Tribunal should not consider a 'new ground' based on the decision in *Batool* because it post-dated the First-tier Tribunal decision. A reference was made to a case called '*AZ*' but it did not include the citation. We find it reasonable to infer that it is likely to be a reference to the Upper Tribunal decision in *AZ (error of law: jurisdiction; PTA practice) Iran* [2018] UKUT 245 (IAC).

(vi) In any event, the respondent cannot succeed in this appeal because *Batool* was 'wrongly decided'. The effect of the decisions in *Batool* and *Celik (EU Exit; marriage; human rights)* [2002] UKUT 220 (IAC) would be 'to negate the very existence of a right of appeal. The right of appeal has to be real and effective as opposed to illusory.' The effect of Appendix EU is to 'wholly undermine the very essence of an effective redress procedure set out in Article 18(1)(r)' of the Withdrawal Agreement.

(vii) The Upper Tribunal in *Batool* was 'wrong' to find that there was adequate notice of the need to make dual applications.

Decision and reasons

Error of law

13. As the Upper Tribunal in *Batool* explained, two systems ran in parallel in the run up to the United Kingdom's exit from the European Union on 31 December 2020.

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

A right of appeal against a decision to refuse a residence card arose under the EEA Regulations 2016.

(ii) Second, the EU Settlement Scheme was designed as a mechanism to regularise the status of those who were remaining under EU law at the end of the transition period. This was a mechanism to grant leave to remain under domestic law when rights of free movement ceased. A right of appeal against a decision to refuse leave to enter or remain under the immigration rules arose under the CRA Regulations 2020.

14. As the Upper Tribunal in *Batool* explained, there has always been a distinction under EU law between the rights of residence of 'family members' and the need for 'other family members' to apply for entry or residence to be facilitated by the host state in accordance with national legislation i.e. other family members do not have an automatic right of residence.

15. In *Rahman*, the Court of Justice of the European Union (CJEU) reiterated that Article 3(2) did not oblige a Member State to accord a right of residence to other family members [21]. It highlighted that Article 10(2)(e) of the Citizens' Directive required family members referred to in Article 3(2) of the Directive to present a document issued by the relevant authority certifying that they are dependents of the European citizen [30].

16. As the Upper Tribunal in *Batool* explained, Appendix EU of the immigration rules and Articles 10(2) and (3) of the Withdrawal Agreement gave effect to this general principle by requiring a person who was not a family member within the meaning of Article 2(2) of the Citizens' Directive to have applied for or to have been facilitated entry or residence as an other family member by way of the issuing of a relevant document before the end of the transition period.

17. The Secretary of State failed to attend the First-tier Tribunal hearing to assist the judge to understand the complex legal framework put in place during the transition period leading up to the United Kingdom's exit from the European Union on 31 December 2020. If she had attended to make the submissions outlined in the grounds of appeal, the judge could have considered those arguments. The fact that the arguments have been put after the event by way of an appeal to the Upper Tribunal is highly unsatisfactory. At least one of the points, not raised by the original appellant, appears to have been 'cut and pasted' from another application.

18. However, when the grounds of appeal are analysed, the submissions made about the legal framework applicable to this appeal are supported by the decision in *Batool*. Although the grounds are generalised in nature, at their heart, is the submission that the judge applied the wrong legal framework relating to other family members. The application relates to the correct interpretation of the law.

19. The first four points made in the unnecessarily prolix response to the grounds of appeal make general and unparticularised assertions and

disclose a lack of understanding of the proper procedure and practice in the Upper Tribunal. It is a matter for the Upper Tribunal to consider whether grounds of appeal have merit. The failure of the First-tier Tribunal to give reasons for granting permission is immaterial. The rest of the assertions are themselves unparticularised.

20. The fact that the decision in *Batool* was published after permission was granted does not amount to a new ground of appeal. It clarifies the law relating to the interpretation of Appendix EU and the Withdrawal Agreement and sheds light on the arguments that had already been made in the grounds of appeal.

21. The last two points are even weaker. The arguments appear to be based on a mistaken assumption that other family members had automatic rights of residence under European law, when that has never been the case. They are also based on a mistaken assumption that an application for leave to remain under the immigration rules relating to the EU Settlement Scheme is the same as an application for facilitation of entry or residence under EU law, when it is not. The whole purpose of the EU Settlement Scheme was to transfer existing rights of residence for those who were already residing in the UK in accordance with European law into leave to remain under domestic law. The decision in *Batool* explains why other family members who had not applied for or been facilitated entry or residence by the issuing of a residence card could not succeed under the immigration rules or with reference to the Withdrawal Agreement. It is nonsense to suggest that the decision in *Batool* negates a right of appeal, it simply explains why some appellants might not succeed in an appeal brought under the CRA Regulations 2020.

22. The decision in *Batool* is a reported decision by a Presidential panel of the Upper Tribunal. Although it is not a starred decision that is strictly binding upon this panel, it is a decision that should be followed unless there is good reason not to do so. Much of the response to the grounds of appeal is generalised, immaterial, or repeats arguments that were considered and rejected in *Batool*. We find that no good reason has been given for us to depart from *Batool*. Unless it is successfully appealed, it is highly persuasive and should be followed. In any event, we agree with the Upper Tribunal's interpretation.

23. In light of the interpretation of the scheme outlined in *Batool*, we conclude that the First-tier Tribunal decision involved the making of an error of law. The judge was wrong in law to conclude that the appellant was a extended family member who had made an application to facilitate his entry or residence before 31 December 2020 and therefore engaged the Withdrawal Agreement. She was wrong to conclude that the Secretary of State should have treated the application as one for facilitation of entry or residence. In fact, the appellant had applied for leave to remain under domestic law and had not made an application for residence to be facilitated (Article 10(3) WA) nor had residence been facilitated by way of

the issuing of a residence document under European law (Article 10(2) WA).

24. We have some sympathy for applicants who might not have appreciated the difference between the two routes at the relevant time. However, the submission made on behalf of the original appellant that the system was unclear and was therefore 'unfair' was nothing more than a bare assertion. Having made the wrong application, it might seem unfair in general terms, but it is not arguable that it was unlawful in the absence of evidence to support such an assertion.

25. For the reasons given above, we conclude that the First-tier Tribunal decision involved the making of an error on a point of law and must be set aside. The First-tier Tribunal judge's factual findings relating to the nature and extent of the appellant's relationship with his sister and brother in law have not been challenged and are preserved.

Remaking

26. Ms Ahmed submitted that the decision should be remade and the appeal dismissed without the need for a further hearing based on the clear guidance given in *Batool*. Ms Atas submitted that if an error of law was found the decision should be remade by way of a further hearing, but did not explain why it was thought necessary.

27. It is at the discretion of the Upper Tribunal how to dispose of the appeal once an error of law has been found. In many cases it might be necessary to make further findings of fact to remake the decision and a further hearing will be required. It is not necessary to make further findings in this case because the factual findings relating to the appellant's family life have been preserved. The determination of the appeal relies on a correct interpretation of the legal framework relating to applications made under Appendix EU.

28. We have taken into account the overriding objective to determine appeals in a proportionate way. The legal arguments relating to the scheme of the immigration rules and the Withdrawal Agreement have been fully ventilated by the appellant's representative and have been rejected for the reasons given above. Given the nature of the legal issues involved in this case a further hearing would only serve as an opportunity to repeat the same arguments.

29. *Batool* has explained the distinction between an application for facilitation of entry and residence under the EEA Regulations 2016 (European law) and an application for leave to remain under the immigration rules relating to the EU Settlement Scheme (domestic law). It is a clear fact that the appellant did not make an application for facilitation of entry or residence before 31 December 2020. Having invited the views of the parties, we find that the appeal can be determined fairly and justly without a further hearing: see rule 34 of The Tribunal Procedure (Upper Tribunal) Rules 2008.

30. Thousands of people who were residing in the UK under European law needed to make applications to transfer their status to leave to remain under domestic law when the UK left the European Union. Other family members who did not have an automatic right of residence under European law needed to show that they had either applied for or had been facilitated entry or residence by the issuing of a relevant document before the UK left the European Union on 31 December 2020.

31. In this case, the evidence contained in the respondent's bundle indicates that the appellant was granted leave to enter the UK as a visitor on 04 December 2020. It is unclear whether the EEA sponsor also entered on that date because no copy of his passport has been provided. His Italian ID card was issued on 18 December 2020, after the appellant entered the UK. A copy of the receipt for the application for leave to remain under Appendix EU shows that it was made at the eleventh hour on 31 December 2020 at 22.03hrs (the Implementation Period Completion Day ending at 23.00hrs). There is no evidence to show that the appellant applied for or was facilitated residence as an extended family member under the EEA Regulations 2016 before 31 December 2020.

32. It has previously been accepted that the appellant did not have a relevant document for the purpose of paragraph EU14 of Appendix EU of the immigration rules. Following the decision in *Batool*, the appellant would have needed to make an application under the EEA Regulations 2016 before 31 December 2020 before Article 10(3) of the Withdrawal Agreement could be engaged. The issuing of a document facilitating residence was also a necessary requirement before Article 10(2) of the Withdrawal Agreement could be engaged.

33. The purpose of the scheme of the immigration rules and the Withdrawal Agreement is to transfer <u>existing</u> rights of residence under European law into leave to remain under domestic law. In the case of an other family member, such as the appellant, this meant that he needed to apply to facilitate his residence under European law <u>before</u> he would be eligible under Appendix EU or could engage the relevant parts of the Withdrawal Agreement.

34. The family decided to migrate to the UK at a very late stage. The appellant's brother in law decided to exercise rights of free movement only days or weeks before the UK exited from the European Union. Having waited until the last hour on the last day of the transition period, the appellant made the wrong application and did not give himself enough time to rectify the error. Whatever sympathy we might have for any difficulty he might have found in understanding the correct procedure is not sufficient to transform his mistake into a legal right that he does not have.

35. For the reasons given above, we conclude that the decision is in accordance with the relevant immigration rules under Appendix EU and does not breach any rights with reference to the Withdrawal Agreement.

DECISION

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

The appeal is dismissed under the CRA Regulations 2020

Signed M. Canavan Date 05 October 2022
Upper Tribunal Judge Canavan

NOTIFICATION OF APPEAL RIGHTS

1. A person seeking permission to appeal against this decision must make a written application to the Upper Tribunal. Any such application must be **received** by the Upper Tribunal within the **appropriate period** after this decision was **sent** to the person making the application. The appropriate period varies, as follows, according to the location of the individual and the way in which the Upper Tribunal's decision was sent:

2. Where the person who appealed to the First-tier Tribunal is **in the United Kingdom** at the time that the application for permission to appeal is made, and is not in detention under the Immigration Acts, the appropriate period is **12 working days (10 working days, if the notice of decision is sent electronically).**

3. Where the person making the application is in detention under the Immigration Acts**, the appropriate period is 7 working days (5 working days, if the notice of decision is sent electronically)**.

4. Where the person who appealed to the First-tier Tribunal is **outside the United Kingdom** at the time that the application for permission to appeal is made, the appropriate period is **38 days (10 working days, if the notice of decision is sent electronically).**

5. A "working day" means any day except a Saturday or a Sunday, Christmas Day, Good Friday or a bank holiday.

6. The date when the decision is "sent' is that appearing on the covering letter or covering email