IN THE COURT OF APPEAL (CIVIL DIVISION) **CASE NO: CA/2022/002008**
ON APPEAL FROM:
THE UPPER TRIBUNAL (IMMIGRATION AND ASYLUM CHAMBER)
LANE J (PRESIDENT), UTJ HANSON, UTJ MCWILLIAM

***B E T W E E N*:**

MR HALIL CELIK

Appellant

-and-

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

-and-

THE AIRE CENTRE

-and-

HERE FOR GOOD

Joint Interveners

-and-

THE INDEPENDENT MONITORING AUTHORITY FOR THE CITIZENS' RIGHTS AGREEMENTS

Intervener

SKELETON ARGUMENT OF THE INTERVENER

References in the form [**CB/xx**] and [**SB/xx**] are to page number xx in the core and supplementary bundles respectively. This skeleton argument will be updated with references to page numbers in the final bundles as soon as those are available.

INTRODUCTION

1. This is the skeleton argument of the Independent Monitoring Authority for the Citizens' Rights Agreements ("**the IMA**"), which has been granted permission to intervene in this appeal by an Order of Moylan LJ made on 21 June 2023 [**CB/xx**].

2. The IMA is the statutory body responsible for monitoring the implementation and application of Part 2 of the EU-UK Withdrawal Agreement ("**WA**")[1]. Part 2 of the WA is entitled "*Citizens' Rights*". It confers residence and related rights on EU citizens who were residing in the UK in accordance with Union law at the end of the transition period and their family members, as well as reciprocal rights on UK citizens and their family members who were residing in an EU Member State in accordance with Union law at the end of the transition period.

3. By Article 159(1) WA the UK was required to establish an independent authority in respect of Part 2 with powers equivalent to the European Commission. The IMA was duly established, and given powers of intervening in legal proceedings, by s.15 and Schedule 2 to the European Union (Withdrawal Agreement) Act 2020 ("**EUWAA**"). Paragraph 30(1)(b) of Sch 2 to the EUWAA provides for the IMA's power to, if it considers it appropriate to do so in order to promote the adequate and effective implementation or application of Part 2 of the WA and SA, intervene in any legal proceedings.

4. The Appellant in this case is the husband of an EU citizen who has been granted limited leave to remain under Appendix EU to the Immigration Rules. [redacted] As this was after the end of the transition period provided for in the WA, the Appellant is required, in order to obtain leave to remain in the United Kingdom under the relevant provisions of Appendix EU to the Immigration Rules, to show that he was the "durable partner" of his wife prior to the end of the transition period. The Respondent's position is that, because he did not make an application to be recognised as a durable partner under the Immigration (European Economic Area) Regulations 2016 ("**the 2016 Regulations**") his application falls to be refused [**CB/xx**]. That reasoning was upheld by the Upper Tribunal ("**UT**") [**CB/xx**].

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[1] These submissions focus on the WA since Mr Celik is a durable partner of an EU national and it is therefore this particular agreement that is of relevance to the present case. However, the IMA has equivalent powers in relation to Part 2 of the EEA EFTA Separation Agreement ("**SA**") and the reasoning in this skeleton argument is equally applicable to the equivalent provision in the SA.

5. The Appellant has been granted permission to appeal by Order of Andrews LJ [**CB/xx**] on twelve grounds [**CB/xx**], which include that the UT erred in law in its analysis of Article 10 WA. The IMA's submissions are confined to the narrow issue of the proper interpretation of Article 10 WA.

6. Article 10 WA protects the rights of durable partners, and other extended family members. In particular, by a combination of Article 10(3) and (5), a person who has applied for facilitation of entry and residence as an extended family member prior to the end of the transition period is entitled to an extensive examination of their personal circumstances to determine whether they met the conditions for facilitation of residence at that time, and are thus entitled to a continued right of residence under the WA.

7. The IMA supports the conclusion reached by the Joint Interveners in their skeleton argument [**CB/xx**] that a person who made an application for leave to remain as a durable partner (or other extended family member) under Appendix EU before the end of the transition period must be treated as having made an application falling within Article 10(3) WA and thus attracting the protection of that Article, and the rights granted by it.

LEGAL FRAMEWORK

8. It is necessary first to understand the position under Directive 2004/38/EC ("**the Citizens' Rights Directive**" or "**CRD**"), and the 2016 Regulations that implemented the CRD in the UK.

9. By Article 7 of the CRD, all Union citizens have the right of residence in other Member States for a period of longer than three months if they are workers, self-employed, self-sufficient or students, or if they are family members accompanying a Union citizen who falls into one of those categories as defined. A "family member" for the purposes of the CRD is, as set out in Article 2(2), a spouse, registered (civil) partner, direct descendants under the age of 21 or dependent, and dependent direct relatives in the ascending line.

10. Other family members and unmarried partners do not have the right of residence under Article 7, but Article 3(2) of the CRD provides that the host Member State shall, in accordance with national legislation, facilitate entry and residence for certain categories of family member and, by Article 3(2)(b), "*the partner with whom the Union citizen has*

a durable relationship, duly attested." The concluding words of Article 3(2) require that "*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*."

11. As set out in the Joint Interveners' skeleton argument, the rights of extended family members under the CRD are constitutive not declaratory – that is, they are subject to a process of application and recognition and cannot be asserted without having gone through that process. In the UK, this was provided for under the 2016 Regulations as they applied until 11pm on 31 December 2020[2]:
    (i) by regulation 8(5), a person who was the partner of, and in a durable relationship with, an EEA national, and was able to prove this to the decision maker, was included within the definition of "extended family member";
    (ii) by regulation 18(4) an extended family member of an EEA national who was a qualified person as defined in regulation 6 (essentially, a person with a direct right of residence under Article 7 of the CRD) could apply for a residence card and the SSHD was then required to undertake, as required by Article 3 of the CRD, an extensive examination of the personal circumstances of the applicant and to give reasons justifying any refusal of the application;
    (iii) Regulation 21 required that an application under that Part of the Regulations, including for a residence card under regulation 18(4), had to be made online using the relevant pages of gov.uk or by post or in person using a specified application form. Applications were required to be accompanied by evidence and if they did not comply with the requirements of the regulation would be treated as invalid and rejected. There was a discretion under regulation 18(6) to accept an application other than in the specified form where this was caused by circumstances beyond the control of the applicant.

12. The rights of extended family members are protected under the WA through Articles 10(2) and (3). By Article 10(2) WA, persons falling within Article 3(2) of the CRD "*whose residence was facilitated by the host State in accordance with its national legislation before the end of the transition period…shall retain their right of residence in the host State*": an extended family member who had applied for and been granted a

[2] After which they were revoked subject to saving provisions as set out at paragraph 14 below.

residence card under the 2016 Regulations would therefore retain a right of residence under Article 10(2) WA, subject to the need to make an application under Appendix EU as permitted by Article 18 WA.

13. Article 10(3) WA covers the position of extended family members who had not been granted a residence card under the 2016 Regulations before the end of the transition period. They are also entitled to the right of residence conferred by Article 10(2) WA provided that they have "*applied for facilitation of entry and residence before the end of the transition period*" and their residence "*is being facilitated by the host State in accordance with its national legislation thereafter*".

14. Article 10(5) WA further requires that, in the cases referred to in Article 10(3) and (4), "*the host State shall undertake an extensive examination of the person circumstances of the persons concerned and shall justify any denial of entry or residence to such persons.*"

15. Article 18 WA permits host States to require that applications are made for a new residence status conferring the rights provided for under Title II of Part 2, subject to the conditions laid down in Article 18. Although Article 10 WA is in Title I of Part 2, and therefore not strictly within the opening words of Article 18, there is reference in Article 18(1)(l) to the requirements for applications made by persons falling within Articles 10(2) and (3): it is clearly envisaged, therefore, that any constitutive scheme established under Article 18 will also apply to those with rights of residence under Article 10.

16. The 2016 Regulations were revoked for all purposes by paragraph 2 of Schedule 1 to the Immigration and Social Security Co-ordination (EU Withdrawal) Act 2020, which has effect by section 1 of that Act. By section 9 of that Act, Part 1 (including section 1) was to come into force on such day as the Secretary of State may by regulations appoint, and the appointed day was, by regulation 4 of the Immigration and Social Security Co-ordination (EU Withdrawal) Act 2020 (Commencement) Regulations 2020, "IP completion day" – i.e., the end of the transition period provided for under the WA.

17. The revocation of the 2016 Regulations has effect subject to savings including in the Citizens' Rights (Application Deadline and Temporary Protection) (EU Exit) Regulations 2020 ("**the ADTP Regulations**"). The ADTP Regulations provide in regulation 2 for an application deadline of 30 June 2021 for applications under Article 18 (and Article 17 in

the SA). Regulation 3 of the ADTP Regulations further provides for a "grace period" if the 2016 Regulations are revoked on IP completion day – which, as set out above, they were – during which the provisions specified in regulations 5-10 continue to have effect as modified in relation to a relevant person. The following definitions apply for the purposes of regulation 3 of the ADTP Regulations:

(i) The grace period is the period beginning immediately after IP completion day and ending with the application deadline, i.e. 31 December 2020 to 30 June 2021;
(ii) A relevant person is a person who does not have (and has not during the grace period had) leave to enter or remain under Appendix EU and who was lawfully resident immediately before IP completion day by virtue of the 2016 Regulations, or who is a family member of such a person;
(iii) Family member for these purposes includes, by regulation 3(6)(b)(i) of the ADTP Regulations, an extended family member who immediately before IP completion day satisfied the condition in regulation 8(5) of the 2016 Regulations, i.e. the definition of "durable partner" as set out at paragraph 9(i) above.

18. The specified provisions of the 2016 Regulations that continue to have effect as modified by the ADTP Regulations include regulations 8 (see regulation 5(g) of the ADTP Regulations), 12 (regulation 6(b) of the ADTP Regulations) and 21 (regulation 6(g)).

19. Regulation 12 of the 2016 Regulations, which provided for EEA family permits, was modified to include extended family members satisfying the condition in regulation 8(5), i.e. durable partners, within the definition of those eligible for a family permit; and regulation 21 was modified so as to apply only to applications under regulation 12.

20. The net result of those provisions is that a person who was able to satisfy the definition of durable partner before IP completion date was able to apply for an EEA family permit during the grace period, relying on regulations 12 and 21 of the 2016 Regulations as continued in force by the ADTP Regulations; but only if the relevant person (i.e., the EEA national durable partner) did not themselves already have leave under Appendix EU. The Appellant in this case would not have been able to benefit from those provisions because his wife was granted leave under Appendix EU before the start of the grace period.

21. In any event, an EEA family permit issued under the 2016 Regulations would not under the domestic framework confer a right of residence following the end of the grace period, i.e. 30 June 2021: that required an application under Appendix EU, which is the provision made by the UK following its decision to implement a constitutive scheme as permitted by Article 18 WA. So far as relevant to the present case:

(i) Paragraph EU14.1(a)(ii) provides for eligibility for limited[3] leave to enter or remain for a person who is a family member of a relevant EEA citizen;

(ii) "Family member" for these purposes is defined in Annex 1 to Appendix EU as including a person who is the spouse or civil partner of a relevant EEA citizen and, where the marriage was not contracted before the specified date (which is defined as 11pm on 31 December 2020), "*was the durable partner of the relevant EEA citizen before the specified date (the definition of "durable partner" in this table being met before that date rather than at the date of the of application)*";

(iii) "Durable partner" is defined as (a) being in a durable relationship with a relevant EEA citizen with the couple having lived together in a relationship akin to marriage unless there is other significant evidence of a durable relationship and (b) "*the person holds a relevant document as the durable partner of the relevant EEA citizen…for the period of residence relied upon; for the purposes of this provision, where the person applies for a relevant documents as the durable partner of the relevant EEA citizen…before the specified date and their relevant document is issued on that basis after the specified date, they are deemed to have held the relevant document since immediately before the specified date*";

(iv) "Relevant document" means "*a family permit, registration certificate, residence card…issued by the UK under the EEA Regulations on the basis of an application made under the EEA Regulations before (in the case where the applicant is not a dependent relative, of a family permit) 1 July 2021, and otherwise before the specified date (or, in any case, a letter from the Secretary of State, issued after 30 June 2021, confirming their qualification for such a document, had the route not closed after 30 June 2021)*";

[3] For applicants who are not eligible for indefinite leave to remain under EU11 because they have not completed a five-year qualifying period: see EU14.1(b)

(v) The "relevant EEA national" for the purposes of an application under paragraph EU14 is an EEA national who has resided continuously in the UK since before the specified date. It is a feature of the scheme implemented by Appendix EU that EU citizens were not required to have been qualifying persons for the purposes of the 2016 Regulations in order to be eligible for leave under Appendix EU.

22. Drawing all of these threads together:
    (i) Had the Appellant married his wife before the specified date for the purposes of Appendix EU, i.e. 31 December 2020, he would have been eligible for leave under paragraph EU14.1 as her family member, as that definition includes a spouse where the marriage took place before the specified date;
    (ii) Because they did not marry before that date, he additionally has to satisfy the requirement of having been a durable partner before that date;
    (iii) The definition of durable partner requires holding a relevant document, which in terms includes a family permit issued under the 2016 Regulations on the basis of an application made during the grace period, i.e. before 1 July 2021;
    (iv) An application made during the grace period would not however satisfy the requirement to hold a relevant document for a period before the specified date; this would require an application to have been made before that date.

23. The Appellant therefore cannot succeed under Appendix EU unless he falls to be treated as having made an application for a relevant document under the 2016 Regulations prior to 31 December 2020 – and this is consistent with Article 10(3) of the WA, which provides protection for those who applied for facilitation of entry and residence before the end of the transition period.

24. The question that arises is therefore whether the application made by the Appellant under Appendix EU before the end of the transition period is, on a proper interpretation of the WA, to be treated as an application for facilitation of entry and residence. If it is, then Article 10(5) WA requires that it be the subject of extensive examination and justification of any refusal; i.e. that it be resolved on its merits so that if the Appellant was entitled to be recognised as a durable partner that is confirmed and a document issued that would enable his application under Appendix EU (and thus the current appeal) to succeed.

SUBMISSIONS ON INTERPRETATION OF ARTICLE 10(3) WA

25. Article 4(3) WA provides that "*The provisions of this Agreement referring to Union law or to concepts or provisions thereof shall be interpreted and applied in accordance with the methods and general principles of Union law.*"

26. The concept of an application for facilitation of entry or residence in Article 10(3) WA is a concept taken directly from Article 3(2) CRD, which is self-evidently and as defined in Article 2(a)(iii) WA a provision of Union law. It must therefore be interpreted and applied in accordance with EU legal concepts, as confirmed by Lane J in *R (on the application of the Independent Monitoring Authority for the Citizens' Rights Agreements) v Secretary of State for the Home Department* [2023] 1 WLR 817 at [131].

27. The obligation under Article 3(2) CRD is for a Member State, in accordance with its national legislation, to facilitate entry and residence. The relevant national legislation in the case of the UK was the 2016 Regulations, which required that the application was made on a particular form at pain of being invalid and bound to be refused. That does not however answer the question of whether an application was made at all. As the Joint Interveners point out (paragraph 23.1 [**CB/xx**]), prior to the UK's exit from the EU the question of the date on which an application had been made would not arise in such stark terms: an applicant who was refused a residence card could simply make a fresh application using the correct form or providing the required information or documents[4]. It does not however follow that they were to be treated as not having previously applied. The fact that an application is invalid and falls to be rejected does not mean that no application has been made.

28. The UT has held, in a decision against which Andrews LJ has refused permission to appeal (see paragraph of reasons accompanying the grant of permission in this case [**CB/xx**]), that there is no right to have an application for settlement as a family member treated as an application for facilitation and residence as an extended or other family member: *Batool v SSHD* [2022] UKUT 00219 (IAC). The issue in that case however

[4] And it was the date of issue of the residence card, not the date of application that was relevant for an application for permanent residence: see the decision of this Court in *Secretary of State for the Home Department v Aibangbee* [2019] EWCA Civ 339

appears to have been that the applications had been made on the basis that the appellants were family members as defined in Article 2 CRD, rather than as extended family members (see [66]). In this case, by contrast, the application made by the Appellant prior to the end of the transition period can only have been on the basis that he was a durable partner – as is confirmed by the content of the letter refusing that application [**SB/xx**]. If the substance of his application was that he should be granted leave to remain in the UK as the durable partner of his (now) wife, it is difficult to see how as a matter of the ordinary meaning of the words that was not an application for facilitation of his residence in that capacity.

29. It also does not appear that the UT in *Batool* received submissions on the requirement to interpret Article 10(3) WA consistently with the general EU law principles of proportionality or good administration. If it did, it is difficult to understand how it could have concluded that the Respondent was entitled to determine applications "*by reference to what an applicant is specifically asking to be given*", when that turns on a distinction as impenetrable to a layperson as the difference between a residence card under the 2016 Regulations and leave to remain under Appendix EU. In functional terms, both are applications for recognition of the right to reside in the UK as the durable partner/extended family member of an EU citizen.

30. It follows in the IMA's submission that a person who made an application for leave to remain as a durable partner before the end of the transition period is within the scope of Article 10(3) WA and is entitled to an extensive examination of their individual circumstances before their application for facilitation of residence is refused. The Secretary of State is of course entitled – indeed required – to ensure that she has the relevant information and documents from an applicant in order to conduct that examination; but she cannot refuse to do so simply on the basis that the applicant did not adopt the correct form of application. To do so would be to impermissibly elevate form over the substance of the rights conferred by the WA.

CONCLUSION

31. The IMA accordingly supports the submissions of the Joint Interveners on the interpretation of the WA, to the effect that a person who has made an application for leave

to remain as a durable partner made before the end of the transition period falls within Article 10(3) of the WA and is accordingly entitled by virtue of Article 10(5) to a detailed consideration of his case on its merits rather than automatic refusal on the basis that he has made the wrong type of application.

GALINA WARD KC

Landmark Chambers

22 June 2023