IN THE COURT OF APPEAL (CIVIL DIVISION) **CA-2023-001050**

On appeal from the Upper Tribunal
(Immigration and Asylum Chamber
Hill J and UTJ Kebede

B E T W E E N:

TANJINA SIDDIQA

Appellant

- and -

ENTRY CLEARANCE OFFICER

Respondent

- and -

THE INDEPENDENT MONITORING AUTHORITY FOR THE CITIZENS' RIGHTS AGREEMENTS

Intervener

SKELETON ARGUMENT OF THE INDEPENDENT MONITORING AUTHORITY FOR THE CITIZENS' RIGHTS AGREEMENTS

INTRODUCTION

1. This is the skeleton argument of the Independent Monitoring Authority for the Citizens' Rights Agreements ("**the IMA**"), which was granted permission to intervene in this case by Lewis LJ on 10 November 2023. The Court is invited to read it alongside the witness statement of [redacted] the Head of Compliance and Inquiry at the IMA, for which permission was granted by the same order.

2. The IMA's core submission on this appeal, echoing the submissions that it made but which were not determined in *Celik v Secretary of State for the Home Department* [2023] EWCA Civ 921, is that Article 10(3) of the EU-UK Withdrawal Agreement ("**WA**"), which brings within the scope of the WA a person who applied for the facilitation of their entry and residence as an extended family member of an EEA national prior to the end of the transition period provided for under the WA, is engaged where an application has been made for leave to enter and remain on the basis of a

person's status as an extended family member. The obligation to treat such a person as being within the scope of the WA, and thus entitled in particular to an extensive examination of their personal circumstances before entry or residence is refused, cannot be avoided by resort to considerations of form over substance.

3. The IMA is the statutory body responsible for monitoring the implementation and application of Part 2 of the WA.[1] Part 2 of the WA 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.

4. 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 intervene in any legal proceedings 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. Further, the IMA also may bring an application for judicial review under paragraph 30(1)(a) of Sch 2 to the EUWAA.

5. The IMA previously intervened in the case of *Celik* in order to make submissions on the proper interpretation of Article 10(3) WA, which protects the rights of extended family members. As stated in the grant of permission to appeal in this case, the issue raised in *Celik* was materially similar, but the Court did not consider it or appropriate or necessary to determine it in that case. The purpose of the IMA's intervention in this appeal is accordingly, as in *Celik*, to address the proper interpretation of Article 10(3) of the WA.

THE ISSUE

6. The relevant factual background is as follows:

[1] These submissions focus on the WA since Ms Siddiqa's sponsor is 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 application is equally applicable to the equivalent provision in the SA.

(i) the Appellant is a national of Bangladesh, and her brother/sponsor is a dual Bangladesh and Portugal national living in the UK who was granted limited leave to remain ("**pre-settled status**" or "**PSS**") under Appendix EU to the Immigration Rules on 5 February 2020;

(ii) the Appellant, who at that time was living in Bangladesh[2], applied to join her brother in the UK on 7 December 2020;

(iii) the Appellant's application was completed on her behalf by her brother without legal assistance, via the Respondent's webpage entitled "apply from outside the UK to join EEA family member in the UK";

(iv) in the course of the application process, it appears that the Appellant's brother selected the dropdown menu option identifying the Appellant as "close family member of an EEA or Swiss national", and ticked a box to confirm that she was applying for an EU Settlement Scheme Family Permit;

(v) the Appellant's application was therefore made using the form which was intended for use by those applying to the EU Settlement Scheme ("**EUSS**") rather than under the Immigration (European Economic Area) Regulations 2016 (the "**2016 Regulations**") (see further below).

7. On 25 January 2021, the application was refused on the basis that the Appellant was not a "family member" of a relevant EEA citizen.

8. The Appellant's appeal against that decision was dismissed by the First-tier Tribunal (on 9 December 2021) and the Upper Tribunal (on 10 February 2023).

9. In summary, the UT relevantly decided:

(a) the Home Office had not made an "EEA decision" such as to trigger a right of appeal under the 2016 Regulations as the Home Office was not obliged to treat the application as one made under the 2016 Regulations rather than under the EU Settlement Scheme (paras 35 – 49);

[2] It appears that she has now been granted leave to enter the UK as a skilled worker migrant until 15 July 2026 and is currently residing in the UK. If her appeal is successful she would benefit from the procedures and residence rights guaranteed under the WA.

(b) in any event, if the Home Office was required to consider the application under the 2016 Regulations, the Appellant's application had not complied with regulation 21 of the 2016 Regulations, as she had not selected the right option on the website and nothing else in her application indicated that is what it was (paras 50 – 56);

(c) assuming without deciding that the Appellant is within personal scope of the WA (para 78), Arts 18(1)(o) and 18(1)(r) WA nonetheless did not require the Home Office to treat the application as one made under the 2016 Regulations because, following the decision in *Batool (other family members: EU exit)* [2022] UKUT 219 (IAC), as those provisions do not require the Home Office to treat an application as something that it was not stated to be, or to identify errors in it and then highlight them (para 84).

10. On 29 August 2023, Lewis LJ granted the Appellant permission to appeal to this Court. In granting permission, Lewis LJ said:

> "A materially similar issue was raised by the Interveners in *Celik v Secretary of State for the Home Department* [2023] EWCA Civ 921 but, for the reasons given in that judgment, it was not necessary nor appropriate to determine the issue in that case."

11. Following the order of Lewis LJ dated 10 November 2023, the Appellant has permission to appeal on three grounds as follows:

> "1. The Upper Tribunal was wrong to dismiss the second ground of appeal before it. In particular, it erred in its interpretation and/or in its application of article 18(1)(o) of 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 2019/C 384 I/01 ("the Withdrawal Agreement"). The Upper Tribunal should have accepted the submission that the appellant could rely upon this provision and that it had been breached by the respondent, so that the appeal before the First-tier Tribunal fell to be allowed under the Immigration (Citizens' Rights Appeals) (EU Exit) Regulations 2020 (S.I. 2020 No.61) ("the CRA Regulations").
>
> 1A. The Upper Tribunal was wrong to dismiss the second ground of appeal before it. It erred in its interpretation and/or in its application of article 18(1)(r) of the Withdrawal Agreement, and the requirement that the respondent act in accordance with the principle of proportionality more generally and the procedural safeguards specified by the Withdrawal Agreement, including by article 21 thereof. The Upper Tribunal should therefore have accepted that the appeal before the First-tier Tribunal fell to be allowed pursuant to the CRA Regulations on this basis.
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> 2. The Upper Tribunal was wrong to dismiss the first ground of appeal before it. It should have accepted that the First-tier Tribunal had materially erred in law by failing to appreciate the scope and nature of its jurisdiction. The First-tier Tribunal had assumed that the appellant had appealed only under the CRA Regulations. However, the appellant had also appealed under the 2016 Regulations (the relevant provisions in

> respect of this right of appeal being preserved by Schedule 3 to the Immigration and Social Security Co-ordination (EU Withdrawal) Act 2020 (Consequential, Saving, Transitional and Transitory Provisions) (EU Exit) Regulations 2020 (S.I. 2020 No. 1309)).”

LEGAL FRAMEWORK[3]

The position under EU law and the 2016 Regulations

12. 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.

13. By Article 7 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, a direct descendant under the age of 21 or dependent, or a dependent direct relative in the ascending line.

14. 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)(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”

15. Thus by Article 3(2)(a) dependent family members are included as “other family members”. 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.”*

16. In *Celik*, the Court of Appeal explained how Article 3(2) operates at §13:

> “Article 3(2) did not oblige a Member State to grant a right of entry and residence to extended family members, including durable partners, but only to facilitate entry and residence. Rather, Article 3(2) meant that Member States had to confer a certain

[3] For the Court’s benefit, it should be noted nothing in this section is affected by the Retained EU Law (Revocation and Reform) Act 2023, which does not apply to matters arising before the end of 2023 and in any event does not apply to “relevant separation agreement law” under section 7C of the European Union (Withdrawal) Act 2018, which includes the WA.

> advantage on applications made by persons who have a relationship with a Union citizen, as compared with applications for entry and residence by nationals of third states. Any right to reside was granted by the Member State in accordance with its national legislation and the Member State had a wide discretion as to the factors to be taken into account in deciding whether to grant a right to reside to an extended family member. The criteria used had to be consistent with the normal meaning of "facilitate" and "dependence" and could not deprive them of effectiveness, and the individual was entitled to a judicial remedy to ensure that the national legislation remained within the limits set by the Directive."

17. The rights of other or "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. The 2016 Regulations recognised the right to enter and reside in the United Kingdom conferred on EU nationals and their family members (as defined in regulation 7 which reflected the provisions of Article 2 of the Directive). Such persons had to be given a family permit under regulation 12 to enter the United Kingdom. They had a right to reside recognised by regulations 13, 14 and 15, and they had to be issued with a residence card under regulation 18.

18. Extended family members were defined in regulation 8, which included dependent relatives. An entry clearance officer had a discretion to grant ("*may issue*") a family permit under regulation 12(5) permitting the extended family member to join an EU national residing in the United Kingdom if certain conditions were satisfied and if "*in all the circumstances it appears to the entry clearance officer appropriate to issue the EEA family permit*".

19. Regulation 21 of the 2016 Regulations 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 they 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.

Provisions in Part 2 of the WA

20. 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 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.

21. 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"*.

22. 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 personal circumstances of the persons concerned and shall justify any denial of entry or residence to such persons"*, which reflects the wording of Art 3(2) CRD.

23. 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.

Domestic position at the time of the Appellant's application

24. The 2016 Regulations were revoked for all purposes with effect from 11pm on 31 December 2020[4], but various provisions including regulation 12 continue to apply[5] for the purposes of considering and, where appropriate, granting an application made before that time.

25. An EEA family permit issued under the 2016 Regulations did not under the domestic framework confer a right of residence following the end of the grace period permitted under the WA, i.e. by 30 June 2021. This was the consequence of the repeal of the 2016 Regulations when read with both:

(a) paragraph 3 of Schedule 3 to the Immigration and Social Security Co-ordination (EU Withdrawal) Act 2020 (Consequential, Saving, Transitional and Transitory Provisions) (EU Exit) Regulations 2020, which provides that (notwithstanding the repeal of the 2016 Regulations by virtue of Immigration and Social Security Co-ordination (EU Withdrawal) Act 2020 c. 20 Sch1(1) para2(2)):

> "Regulation 12 of the EEA Regulations 2016 (issue of EEA family permit), continues to apply for the purposes of considering and, where appropriate, granting an application for a family permit which was validly made in accordance with the EEA Regulations 2016 before commencement day.";

(b) and regulation 3 of the Citizens' Rights (Application Deadline and Temporary Protection) (EU Exit) Regulations 2020, which allowed for the continuation certain rights under the 2016 Regulations.

26. The relevant Immigration Rules in place on 7 December 2020 were those running from 1 December 2020 to 30 December 2020.[6] At that time, there was no provision under Appendix EU or Appendix EU (Family Permit) for a dependent relative of an EEA citizen granted leave to remain under the EU Settlement Scheme to apply for an entry

[4] See 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 Coordination (EU Withdrawal) Act 2020 (Commencement) Regulations 2020, "IP completion day" – i.e., the end of the transition period provided for under the WA.
[5] See paragraph 3 of Schedule 3 to the Immigration and Social Security Co-ordination (EU Withdrawal) Act 2020 (Consequential, Saving, Transitional and Transitory Provisions) (EU Exit) Regulations 2020
[6] The archived version of which is available at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/954843/Immigration_Rules_-_Archive_01-12-20.pdf.

clearance to come to the United Kingdom. While provision was made for family members and for durable partners, this did not extend to dependent relatives.

27. The Home Office continued, after 30 December 2020, to process EEA family permit applications made before 30 December 2020, but, from 30 June 2021, EEA family permits were no longer valid for travel to the UK, and the Home Office stopped issuing them. Neither was there any provision in the EUSS under which leave to remain could be granted to dependent relatives. The Home Office recognised that this created a lacuna[7] and therefore (on 1 November 2021) made a concession outside Appendix EU (Family Permit) in the EUSS family permit guidance,[8] and eventually also amended the Immigration Rules to render these individuals eligible, effective from 6 April 2022.[9] This, however, only applied to those who the Home Office had treated as having made an application for an EEA family permit under the 2016 Regulations.

28. Drawing all of these threads together:

    (a) In order to obtain leave to enter and then remain in the UK at any time after 30 December 2020 as the dependent relative of her brother, the Appellant was required to make an application under the EU Settlement Scheme, i.e. the new bespoke Brexit arrangements.

    (b) But in order to make an application for leave to remain under the EU Settlement Scheme, the Appellant was required not to make an application for the EUSS family permit arrangements which applied to the bespoke Brexit arrangements, but was rather required first to apply for the similarly named EEA family permit under the legacy 2016 Regulations before making the EUSS application. The Appellant thus was required to make two applications.

    (c) After 30 June 2021, the application under the 2016 Regulations would give no right to enter or reside in the UK, even though the WA required the same. Instead, from 1 November 2021, an application under the 2016 Regulations

[7] See the email at exhibit NS4.
[8] Available at https://webarchive.nationalarchives.gov.uk/ukgwa/20211101173912mp_/https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1030145/EU_Settlement_Scheme_Family_permits.pdf page 11.
[9] Statement of Changes in Immigration Rules dated 15 March 2022 HC 1118 available at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1061106/E02724891_-_Immigration_Rules_changes_-_HC_1118__Web_Accessible_.pdf.

would in practice, under a concession, have actually been considered against the requirements for an EUSS family permit (as well as under the requirements of the 2016 Regulations).

(d) Thus it is instructive to consider what would have happened if the Appellant had made the correct application on 7 December 2020, namely an application for an EEA family permit. In that scenario, rather than being summarily dismissed in January 2021, it is at least possible her application would not have actually been considered substantively by the Home Office until after 30 June 2021. At that point in time, as set out above, her application would have fallen to be considered under the concession arrangements which required consideration against the EUSS family permit rules. In other words, an application under the 2016 Regulations could have led to a grant of an EUSS family permit, which is the type of entry clearance which the Appellant in this case did apply for.

(e) Despite this, the fact that confusion on the Appellant's part led her to apply for an EUSS family permit as a first step, rather than making the intermediate application under the 2016 Regulations on the form designated by the Home Office for that purpose, has led to her application being refused in its entirety.

SUBMISSIONS

29. 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 under Article 10(3). This requires consideration also of whether the way in which the application arrangements set out above have operated in this case are consistent with the UK's duties under the WA.

30. In summary, the IMA submits that the Appellant is someone who *"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"* (Art 10(3)), and that consequently Article 10(5) WA requires that there be extensive examination and justification of any refusal; i.e. that the application be resolved on its merits so that if the Appellant was entitled to be recognised as an extended family member that is confirmed and a document issued that

would enable her application under Appendix EU (and thus the current appeal) to succeed.

31. First, 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 (IMA) v Secretary of State for the Home Department* [2023] 1 WLR 817 at §131. In *Secretary of State for Work and Pensions v AT* [2023] EWCA Civ 1307 at §85, this Court accepted the submission of the IMA that it was important when interpreting Article 13 of the WA to ask how it would be construed and applied in an EU court and then to ensure that the same result applied in the UK. The same ought to apply to the other articles in Part II. In *AT* the Court expanded on the correct approach to the interpretation of the WA at §80:

> "I have already referred at paragraph [49] above to the recital to the Agreement which makes clear that it reflected an "overall balance of benefits, rights and obligations". No easy assumptions can be made as to what each party was negotiating for or as to which negotiating positions were compromised by either the UK or the EU in order to seal a final deal. The task of this Court is narrow and technical. It is to examine the scope and effect of the Agreement to determine whether, applying normal principles of international law (as set out in Articles 31 and 32 of the Vienna Convention on the Law of Treaties ("the Vienna Convention")), provisions of EU law have been given effect as international law which have then become domestic law. The Agreement must be construed in good faith. The ordinary meaning must be given to its terms in their context and in the light of their object and purpose taking into account only relevant and admissible secondary sources. A court will take into account any special rules of construction and implementation the parties have agreed upon and included in the instrument in question. When Article 31 of the Vienna Convention attaches weight to the "object and purpose" of the instrument this is not an invitation to delve into the minefield of negotiating objectives as a substitute for focusing upon the "text as a source for determining the parties' intentions": See Al Malki v Reyes [2019] AC 735 at paragraph [11]. The duty of this court is not therefore to work out whether, in the hurly burly of negotiations, the UK or the EU got a better or worse deal in any particular respect and then to adjust the interpretation of the Agreement accordingly. Insofar as the lodestars to construction urged upon the Court by the SSWP are found in the text of the Agreement itself, in inferences properly to be drawn from the language used, or in admissible external sources, then of course they are relevant, but not otherwise."

32. Similarly, Lane J held in *R (IMA) v SSHD* at §132:

> "...In interpreting the WA, what the parties meant may need to be considered against the relevant background, which is part of the "context" mentioned in article 31 of the Vienna Convention. In the present case, that background is EU law, which applied to the United Kingdom whilst it was a member (and for a period thereafter)...."

33. Second, consequently, it is important when interpreting Art 10(3) to understand the context behind its parent provision in the CRD. Recital (6) of the CRD provides:

> "In order to maintain the unity of the family in a broader sense and without prejudice to the prohibition of discrimination on grounds of nationality, the situation of those persons who are not included in the definition of family members … and who therefore do not enjoy an automatic right of entry and residence in the host member state, should be examined by the host member state on the basis of its own national legislation, in order to decide whether entry and residence could be granted to such persons, taking into consideration their relationship with the Union citizen or any other circumstances, such as their financial or physical dependence on the Union citizen."

34. This was explained further by AG Bot in his opinion in *SSHD v Rahman* [2013] QB 249 at §36:

> "36. the right to family reunification is understood as the corollary to the right of free movement for the Union citizen, based on the principle that the latter may be dissuaded from moving from one member state to another if he cannot be accompanied by the members of his family. Family reunification thus enjoys indirect protection by reason of the potential impairment of the effectiveness of Union citizenship.
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> 37. According to recital (6) in the Preamble to Directive 2004/38, the second objective of article 3(2) of that Directive is to promote family unity. The movement of members of the family of the Union citizen is therefore not exclusively protected as a right derived from the right of free movement enjoyed by the Union citizen, since it also enjoys protection through the right to the maintenance of family unity in a broader sense."

35. Third, while the focus in the courts below and in other cases has been on whether the relevant application fits within the domestic framework which the government has specified for applications for facilitation and residence, it is important to recognise there is an a priori question as to the nature of the duty on the government under Art 10(3). There is in this context a need to understand how the CJEU has interpreted Art 3(2) CRD. In *SSHD v Rahman*, the CJEU explained Art 3(2) CRD in the following terms:

> "21 Whilst it is therefore apparent that Article 3(2) of Directive 2004/38 does not oblige the Member States to accord a right of entry and residence to persons who are family members, in the broad sense, dependent on a Union citizen, the fact remains, as is clear from the use of the words 'shall facilitate' in Article 3(2), that that provision imposes an obligation on the Member States to confer a certain advantage, compared with applications for entry and residence of other nationals of third States, on applications submitted by persons who have a relationship of particular dependence with a Union citizen.
>
> 22 In order to meet that obligation, the Member States must, in accordance with the second subparagraph of Article 3(2) of Directive 2004/38, make it possible for persons envisaged in the first subparagraph of Article 3(2) to obtain a decision on their application that is founded on an extensive examination of their personal circumstances and, in the event of refusal, is justified by reasons.

> 23 As is clear from recital 6 in the preamble to Directive 2004/38, it is incumbent upon the competent authority, when undertaking that examination of the applicant's personal circumstances, to take account of the various factors that may be relevant in the particular case, such as the extent of economic or physical dependence and the degree of relationship between the family member and the Union citizen whom he wishes to accompany or join.
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> 24 In the light both of the absence of more specific rules in Directive 2004/38 and of the use of the words 'in accordance with its national legislation' in Article 3(2) of the directive, **each Member State has a wide discretion as regards the selection of the factors to be taken into account. None the less, the host Member State must ensure that its legislation contains criteria which are consistent with the normal meaning of the term 'facilitate' and of the words relating to dependence used in Article 3(2), and which do not deprive that provision of its effectiveness.**
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> 25 Finally, even though, as the governments which have submitted observations have correctly observed, the wording used in Article 3(2) of Directive 2004/38 is not sufficiently precise to enable an applicant for entry or residence to rely directly on that provision in order to invoke criteria which should in his view be applied when assessing his application, **the fact remains that such an applicant is entitled to a judicial review of whether the national legislation and its application have remained within the limits of the discretion set by that directive**" (emphasis added).

36. It is important to recognise what the "discretion" to set national legislation refers to. The discretion relates to the facilitation of residence following an application for entry or residence. The "wide discretion" does not relate to the procedure of the application itself.

37. Fourth, the discretion afforded to the parties to the WA within Article 10(3) is also circumscribed and underpinned by general principles of EU law, including the principles of proportionality and good administration. General principles are applicable to the WA by virtue of Article 4(3) WA which 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."* This is confirmed in *AT v SSWP* at §85-87.

38. AG Bot in *Rahman* expanded in more detail on the limitations he would impose on the margin of discretion under Art 3(2) CRD at §§67-77:

> "69. the national measure at issue must not have the effect of unjustifiably impeding the exercise by the Union citizen of his right of free movement and residence within the territory of the member states... such a serious impediment would exist if it were established that the Union citizen was forced to leave the territory of the host member state or even, a fortiori, to leave the territory of the European Union altogether...
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> 70. Second, the margin of discretion enjoyed by the member states is limited by the obligation to respect the right to private and family life, enshrined in article 7 of the Charter, which, by virtue of the first sub-paragraph of article 6(1)EU, has acquired the same legal value as the Treaties"

Those limitations are also reflective of the general principles of EU law. Notably, AG Bot drew a direct link to the protection of the right of family life in this context and the general principles of EU law: at §71. This includes the need for limitations on the right to family life to be "in accordance with the law" (in the wider sense in which that term is understood as importing rule of law considerations in public law and human rights): §73. That necessitates a consideration of matters of legal certainty and good administration.

39. Fifth, the scope of the margin of discretion afforded to Member States as recognised in *Rahman* must necessarily be informed by the context in which it falls to be applied. The question of whether a requirement to use a particular form failing which an application is simply considered invalid – is within the permissible scope of that discretion does not in practice arise under the CRD, because an applicant who is refused can simply make a fresh application using the correct form or providing the required information or documents. That is not possible here because Article 10(3) only applies retrospectively to those who had applied prior to the ending of free movement. That context must inform the consideration of whether the requirement is a proportionate one that can properly be said to be consistent with the normal meaning of the term "facilitate".

40. Sixth, Article 41 of the Charter of Fundamental Rights of the European Union, which provides for the right for a person "*to have his or her affairs handled impartially, fairly and within a reasonable time by the institution and bodies of the Union"*, reflects a general principle of good administration in EU law applicable to Member States when they are implementing that law, and therefore also to the interpretation of Article 10(3) of the WA. In this context, and having regard both to the disproportionate consequence of an application made before the end of the transition period being deemed invalid if not made in the correct form, and the complexity of the law in this area, dealing with the application fairly requires an applicant to be afforded the opportunity to complete or correct an application for facilitation of entry and residence where the consequence would otherwise be that the protection of the WA is lost entirely.

41. Seventh, the WA context also includes the need to read Article 18 WA alongside Article 10. The UT appeared to proceed on the basis that the scope of Article 10(3) was only a gateway to the reliance on Article 18 WA. It is the IMA's submission that the two

articles must be read together: Article 18 informs the proper interpretation of Article 10. This matter was considered in *Celik* in the UT, which held at paragraph 62:

> "The parties to the Withdrawal Agreement must have intended that an applicant, for the purposes of sub-paragraph (r), must include someone who, upon analysis, is found not to come within the scope of Article 18 at all; as well as those who are capable of doing so but who fail to meet one or more of the requirements set out in the preceding conditions."

42. Some nuance now needs to be applied to this in light of what the Court of Appeal said at para 56 of its decision:

> "Further, the principle of proportionality, whether as a matter of general principle, or as given express recognition in Article 18(1)(r) of the Withdrawal Agreement, does not assist the appellant. Article 18(1)(r) is intended to ensure that decisions refusing the "new residence status" envisaged by Article 18(1) are not disproportionate. That status must ensure that EU citizens and United Kingdom nationals, and their respective family members and other persons may apply for a new residence status "which confers the rights under this Title". The principle of proportionality, in this context, is addressed to ensuring that the arrangements adopted by the United Kingdom (or a Member State) do not prevent a person who has residence rights under the Withdrawal Agreement being able to enjoy those rights after the end of the transition period. The principle of proportionality is not intended to lead to the conferment of residence status on people who would not otherwise have any rights to reside. The appellant did not have any rights under Article 10(1)(e)(i) of the Withdrawal Agreement. The refusal to grant residence status is not therefore a disproportionate refusal of residence status which would have conferred rights already enjoyed under the Withdrawal Agreement. Rather, it is a recognition that the appellant did not have any such rights under Article 10(1)(e)(i)."

43. This, however, appears to be focused on the fact that the appellant in *Celik* could not be said to be within the personal scope of the WA at all because he was not married prior to the end of the transition period and any application for facilitation made before the end of the transition period had not been successful or appealed. The Court of Appeal recognised at paragraph 29 that *"Article 18(1)(l) expressly deals with the document that may be required of extended family members falling within Article 10(2) and (3) when they apply for the new residence status. The implication is that the new residence status will be available to extended family members falling within the scope of the Withdrawal Agreement"*. If para 56 is to be read as restricting the applicability of Art 18 where an individual is outside personal scope, then para 29 would not make sense.

44. Eighth, unlike in *Celik*[10], the decision under appeal here was made in response to an application made before IP completion day by which the Appellant clearly asserted that

[10] The appellant in *Celik* is seeking permission to appeal from the Supreme Court.

she had the required relationship with the EEA sponsor at the time she applied and before IP completion day. She recognises that she can only be an extended family member. She knows she must fall within Article 10(3). It would appear that her error was she thought the form she was applying on was the correct form for such an extended family member. The IMA submits there is therefore an air of unreality in the suggestion in the Upper Tribunal's judgment below at §46 that the Home Office could not have known that the Appellant intended to apply under the 2016 Regulations. What is obvious on the face of the documentation is that the Appellant's ultimate goal was to obtain residence under the EU Settlement Scheme: there is no other reason to make the EUSS family permit application. The Appellant obviously would have intended to take all necessary procedural steps in order to obtain residence under the EU Settlement Scheme. If that required instead making an application under the EEA family permit route, then there is no reason to think she would not have done so. If the substance of her application was that she should be granted leave to remain in the UK as the extended family member of her brother, it is difficult to see how as a matter of the ordinary meaning of the words that was not an application for facilitation of her residence in that capacity.

45. Finally, it is recognised that in *Batool v SSHD* [2022] UKUT 219 (IAC), [2022] Imm AR 1382 the UT held 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.[11] The issue in that case however 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 was not made on the basis that the Appellant is a close family member: as set out above, she recognises she can only be recognised as an extended family member.

46. It also does not appear that the UT in *Batool* received detailed submissions on the matters set out above, namely 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

[11] Permission to appeal the decision in *Batool* was refused by Andrews LJ.

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.

47. It follows in the IMA's submission that a person who made an application for an EUSS family permit 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 he has the relevant information and documents from an applicant in order to conduct that examination; but he 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.

The decision in *Celik*

48. In the Court of Appeal in *Celik* at paras 90 – 98 the court considered the submissions of the IMA in that case which raised some similar points as those pursued here. At para 95, the court said:

> "First, Article 10(3) should be read as a whole and in the context of Article 10. Article 10(2) deals with persons whose residence was facilitated before the end of the transition period. Article 10(3) deals with persons who have applied for facilitation before that date but the decision facilitating residence comes after that date. In each case, the relevant provision of the Withdrawal Agreement is predicated on the fact that there has been an application which has been granted and residence has been facilitated. Secondly, that conclusion follows also from the wording of Article 10(3) itself. It deals with persons "who have applied for facilitation of entry and residence before the end of the transition period" and "whose residence is being facilitated by the host State in accordance with its national legislation thereafter". It presupposes that (1) there has been an application made before the end of the transition which (2) has been granted albeit after that date. If an application is refused, the person's residence is not, thereafter, being facilitated by the host State in accordance with its legislation."

49. This reasoning is not applicable to the Appellant's case here for the following reasons:

(a) First, one has to read the rest of this paragraph as a whole. The last sentences make clear that the court was *not* considering the situation of an application which does not comply with regulation 21 of the 2016 Regulations ("*Nor is regulation 21 of the Regulations relevant to this case.*") The court also here

focuses on the fact the appellant had not met the requirements of Appendix EU rather than of the 2016 Regulations. By contrast, the focus of the court in the present case is not on whether or not the Appellant meets the substantive requirements of the 2016 Regulations or the EU Settlement Scheme.

(b) Second, this paragraph has to be read in context of the submission explained at paragraph 93, which is what it is addressing. This is in relation to the role of Article 10(5). It is about a subtly different point.

(c) Third, this paragraph has to be read subject to what is said at paragraph 90, namely that it was not considered necessary or appropriate for the court to consider whether an application for leave made under Appendix EU is, or is to be treated as, an application for a residence card. This is also reflected at paragraphs 96-97, where the court makes clear that the UT decision in *Celik* should not be taken as authority for the proposition that an application for leave to remain made under the EUSS in Appendix EU cannot be, or be treated as, an application for a residence card under regulation 18 of the Regulations. As is said at the end of para 97, *"[t]he issue will need to be decided in a case in which it arises for decision on the facts"*. Further, as set out above, Lewis LJ (who gave the Court's judgment in *Celik*) when granting permission to appeal in this case noted that the point did not arise on the facts on *Celik*.

(d) Fourth, and finally, this section is obiter and, to the extent it contradicts the IMA's submissions set out above, the Court is respectfully invited not to follow it.

50. The IMA therefore submits that the Appellant should be treated as having made an application falling within Art 10(3) WA and so should not be excluded for having used the wrong application form.

CONCLUSION

51. The IMA accordingly submits that a person who has made an application for leave to remain as a dependent relative 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 her case on its merits rather than automatic refusal on the basis that she has made the wrong type of application.

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30 November 2023