



**IN THE UPPER TRIBUNAL**  
**IMMIGRATION AND ASYLUM**  
**CHAMBER**

**Case No: UI-2022-003668**  
**First-tier Tribunal No:**  
**EA/00475/2022**

**THE IMMIGRATION ACTS**

**Decision & Reasons Issued:**  
**On the 26 March 2023**

**Before**

**UPPER TRIBUNAL JUDGE CANAVAN**

**Between**

**THE SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Appellant

**and**

**FRANCESKO BERCAKA**

Respondent

**Representation:**

For the appellant: Mr E. Tufan, Senior Home Office Presenting Officer  
For the respondent: Mr A. Alam, instructed by Direct Access

**Heard at Field House on 14 November 2022**

**DECISION AND REASONS**

1. For the sake of continuity, I shall refer to the parties as they were before the First-tier Tribunal although technically the Secretary of State is the appellant in the appeal before the Upper Tribunal.
2. The appellant (Mr Bercaka) appealed the respondent's (SSHD) decision dated 24 August 2021 to refuse to grant leave to remain under the EU Settlement Scheme as the family member (dependent brother-in-law) of a

relevant EEA national. The appeal was brought under The Immigration (Citizens' Rights Appeals) (EU Exit) Regulations 2020 ('the CRA Regulations 2020').

3. First-tier Tribunal Judge Louveaux ('the judge') allowed the appeal in a decision sent on 06 July 2022. The judge noted that the appellant made an application for leave to remain on 28 May 2021. The appellant was said to be dependent on his brother-in-law and had been a member of his household since March 2020. The judge's reasoning is relatively brief, so it is easier to quote his key findings:

'12. I find, and Mr Shrestha did not dispute, that Appendix EU does not provide for dependent extended family members of relevant EEA citizens to apply under the EU Settlement Scheme from within the UK after 31 December 2020 unless they hold a 'relevant document'.

...

14. However, the Appellant made his application whilst Regulation 8 of the EEA Regulations 2016 was still in force.

15. The EEA Regulations 2016 were revoked with effect from 11pm on 31 December 2020 by the Immigration and Social Security Co-ordination (EU Withdrawal) Act 2020. However, Regulation 3 of The Citizens Rights (Application Deadline and Temporary Protection) EU Exit Regulations 2020 provides for a grace period under which various of the EEA Regulations 2016 continued to have effect up until 30 June 2021 inclusive; by virtue of Regulation 5(g) of The Citizens Rights (Application Deadline and Temporary Protection)(EU Exit) Regulations 2020, that includes Regulation 8 of the EEA Regulations 2016 (with modifications).

16. Article 18(1)(o) of the Withdrawal Agreement imposes a duty on the Respondent to help applicants prove their eligibility and avoid any errors or omissions in their applications and a duty to give applicants the opportunity to furnish supplementary evidence and to correct any deficiencies, errors or omissions.

17. Given that, the Respondent is and was plainly of the view that the Appellant did not and could not meet the requirements of the EU Settlement Scheme, whereas, arguably, he could meet the requirements of Regulation 8 of the EEA Regulations 2016, I find that the Respondent was under a duty to contact the Appellant to notify him of that fact and either deal with his application as if it had been made under the EEA Regulations 2016 or give the Appellant the opportunity to re-submit the application under the EEA Regulations 2016.

18. Accordingly, the appeal is allowed. It remains for the Respondent to consider the Appellant's application of 26 May 2021 under the EEA Regulations 2016.

4. The Secretary of State applied for permission to appeal to the Upper Tribunal on the ground that the judge erred in finding that the appellant came within the personal scope of Article 10 of the Withdrawal Agreement

when he had not applied for facilitation of entry nor had he been facilitated entry by way of the issuing of a 'relevant document' (residence card issued under the EEA Regulations 2016) before 31 December 2020.

5. The arguments put forward on behalf of the parties are a matter of record and will be summarised, where relevant, when I make my findings.

### **Legal framework**

6. European Union ('EU') law relating to rights of free movement made an important distinction between the rights of residence of 'family members' and those of 'other family members' (aka 'extended family members') of an EEA national who exercised rights under the EU Treaties in the United Kingdom on or before 31 December 2020.
7. A person who qualified as a family member under Article 2(2) of The Citizens' Rights Directive (2004/38/EC) ('the CRD 2004') had an automatic right of residence. A family member had a right of residence whether they were issued with a family permit or a residence card or not.
8. Any other family member who did not fall within the definition in Article 2(2) did not have an automatic right of residence. Any other family member needed to meet the requirements of Article 3(2). A person was required to apply for entry or residence to be facilitated by the host Member State in accordance with national legislation. The host Member State would undertake an extensive examination of the person's personal circumstances and had to justify any denial of entry or residence.
9. The United Kingdom negotiated an agreement with the European Union, which set out the arrangements for its withdrawal. The Withdrawal Agreement (2019/C 384 I/01) ('the WA') recognised that it was necessary to protect the rights of Union Citizens and United Kingdom nationals and their respective family members where they had exercised free movement rights before the agreed date. The WA was implemented in domestic law through the combination of The European Union (Withdrawal) Act 2018 ('the EUW Act 2018') and The European Union (Withdrawal Agreement) Act 2020 ('the EUWA Act 2020').
10. Article 4 of the WA made clear that the provisions of Union law applicable in the agreement shall have the same legal effects in the United Kingdom as they do within the Union and its Member States. Persons would be able to rely directly on the provisions contained in the Agreement which met the conditions for direct effect under Union law.
11. Article 5 of the WA made clear that the United Kingdom shall take all appropriate measures to ensure fulfilment of the obligations arising from the Agreement and should refrain from any measures which could jeopardise the attainment of the objectives of the Agreement.
12. Article 10 of the WA sets out the persons who come within the personal scope of the Agreement. It includes Union citizens who exercised their right to reside in the United Kingdom in accordance with Union law before the end of the transition period and who continue to reside here thereafter.

It also applies to their family members provided they satisfy at least one of several conditions.

13. Two systems ran parallel to one another in the run up to the United Kingdom's exit from the European Union on 31 December 2020.

**(i) EU law**

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 Immigration (European Economic Area) Regulations 2016 ('the EEA Regulations 2016').

A right of appeal against a decision to refuse to issue a family permit or a residence card arose under the EEA Regulations 2016. The available ground of appeal was that the decision appealed against breached the appellant's right under the EU Treaties in respect of entry into or residence in the United Kingdom.

**(ii) Domestic law**

The EU Settlement Scheme was designed as a mechanism to grant leave to remain under domestic law to those who could establish that they were residing in the United Kingdom under EU law at the end of the transition period when their rights of residence came to an end.

A right of appeal against a decision to refuse leave to enter or remain under the immigration rules arises under The Immigration (Citizens' Rights Appeals) (EU Exit) Regulations 2020 ('the CRA Regulations 2020'). The available grounds of appeal are:

- (a) 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;
- (b) 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).

14. The 'grace period' set out in The Citizens' Rights (Application Deadline and Temporary Protection) Regulations 2020 ('CRAD Regulations 2020') was an extension of the period in which those exercising rights under EU law on or before 31 December 2020 could apply for leave to remain under the EU Settlement Scheme. It was an extension of the time to make an application and not an extension of time to establish rights of residence under EU law. Rights of free movement for European citizens and their family members came to an end on 31 December 2020. The CRAD Regulations 2020 made transitional provisions for applications for residence status made under the EEA Regulations 2016 before 31

December 2020. Certain aspects of the EEA Regulations 2016 continued to apply until the application was finally determined (although a person could only be granted leave to remain after 31 December 2020).

15. Appendix EU of the immigration rules and Articles 10(2) and (3) of the Withdrawal Agreement gave effect general principles of EU law by requiring a person who was not a family member within the meaning of Article 2(2) of the CRD 2004 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.
16. In *Batool and others (other family members: EU exit)* [2022] UKUT 219 (IAC) the Upper Tribunal analysed the relevant legal framework and highlighted the distinction between the rights of family members and the need for other family members to be facilitated entry under EU law. The Upper Tribunal also considered the terms of Appendix EU, which required other family members to have been issued with a 'residence document' (as defined) before the end of the transition period. The Upper Tribunal concluded that other family members who had not applied for facilitation of entry and residence before 23.00hrs on 31 December 2020 could not rely on the immigration rules or the WA to succeed in an appeal under the CRA Regulations 2020. Such a person did not have a right to have an application made for leave to remain under the immigration rules (domestic law) to be treated as an application for facilitation of entry or residence as an other family member (EU law).
17. In *Celik (EU Exit; marriage; human rights)* [2002] UKUT 220 (IAC) the Upper Tribunal considered the position of those who were in a durable relationship with an EEA national before 23.00hrs on 31 December 2020. Again, the Upper Tribunal concluded that those persons did not have any substantive rights under the WA if they had not applied for facilitation of entry of residence before the end of the transition period. Where a person had not established a substantive right, they could not invoke the concept of proportionality in Article 18(1)(r) WA or the principle of fairness to succeed in an appeal under the CRA Regulations 2020.

### **Decision and reasons**

18. Mr Alam acknowledged that it was difficult for him to go behind the reported decisions in *Batool* and *Celik*. He sought to distinguish the facts in *Batool*, but to no material end as the applicable legal principles remain the same.
19. The appellant's immigration history is unclear. There is no evidence to indicate when he entered the UK or whether he was ever granted leave to enter or remain. He said that he was financially dependent on his brother and his brother's EEA national wife and had lived with them since March 2020. Despite claiming to be a dependent relative he did not apply for facilitation of his entry or residence by way of an application for a residence card made under the EEA Regulations 2016 before 31 December 2020.

20. The judge erred in finding that the grace period in the CRAD Regulations 2020 somehow extended the period in which residence rights could be established. The United Kingdom exited the European Union on 31 December 2020. At that point all rights of residence under EU law came to an end. The grace period extended the time in which a person could make an application for leave to remain under the immigration rules relating to the EU Settlement Scheme. The CRAD Regulations 2020 also made provision for applications made under the EEA Regulations 2016 before 31 December 2020 to be finally determined although in practice a person could only be granted leave to remain under domestic law if their application was determined after 31 December 2020. However, rights of residence under EU law still needed to have been established before 31 December 2020.
21. The facts of this case come within the principles of EU law identified in *Batool* and *Celik*. The appellant did not acquire rights of residence as a 'family member' before the end of the transition period because his entry and residence as an 'other family member' had not been facilitated by the issuing of a residence card, nor had he made an application for facilitation of entry or residence before the end of the transition period on 31 December 2020. He failed to make the right application at the right time.
22. Having failed to establish that any EU rights were engaged before the end of the transition period the judge erred in finding that the decision to refuse leave to remain under the EU Settlement Scheme engaged the WA. The appellant did not meet the requirements of Article 10(2) or 10(3) because he had never sought to establish any EU rights before the relevant date. The WA made clear that the purpose of the Agreement was to provide protection for Union citizens and their respective family members (as defined) only where they had 'exercised free movement rights before a date set in this Agreement'. That date was 31 December 2020.
23. The WA set out a proportionate scheme to achieve the stated aim of protecting existing rights of residence at the end of the transition period. The EUSS and the WA made clear that other family members either (i) needed to have been facilitated entry or residence by the issuing of an EU residence document; or (ii) had at least applied for facilitation of entry or residence by the end of the transition period. The appellant satisfied neither of these criteria.
24. For the reasons given above, the First-tier Tribunal decision involved the making of an error of law. The decision is set aside, is remade, and the appeal must be dismissed for the same reasons.

## 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 20 January 2023  
Upper Tribunal Judge Canavan

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### 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