



UT Neutral citation number: [2023] UKUT 00277 (IAC)

Allaraj (EEA EFMs; admission; IO's stamps)

Upper Tribunal
(Immigration and Asylum Chamber)

Heard at Field House

THE IMMIGRATION ACTS

Heard on 19 July 2023
Promulgated on 4 October 2023

Before

THE HON. MRS JUSTICE HILL DBE
UPPER TRIBUNAL JUDGE BLUNDELL

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

ELSON ALLARAJ

Respondent

Representation:

For the Appellant: Peter Deller, Senior Presenting Officer

For the Respondent: Qaseem Ahmed, instructed by Norton Folgate Solicitors

- (1) *Under Directive 2004/38/EC, the entry and residence of other (or extended) family members was to be facilitated by EU Member States. Pursuant to that duty, Member States were required to ensure that their national legislation contained criteria which enabled such persons to obtain a decision on their application for entry or residence which was founded on an extensive examination of their personal circumstances. In exercising that wide discretion, the Secretary of State created the Immigration (European Economic Area) Regulations 2016, which were prescriptive when it came to the making and consideration of applications by other family members.*
- (2) *The 2016 Regulations required that applications for family permits were considered by Entry Clearance Officers and that applications for registration certificates and residence cards were considered by the Secretary of State. Immigration Officers were not able to consider applications for those documents, or to issue them.*

- (3) *An extended family member who had applied for and been issued with a family permit, registration certificate or residence was, by regulation 7(3), to be treated as a family member provided that the relevant conditions continued to be satisfied and the document remained in force. A person to whom regulation 7(3) applied could be lawfully admitted to the United Kingdom by an Immigration Officer under regulation 11.*
- (4) *A person who claimed to be an extended family member and to whom regulation 7(3) did not apply, could not be lawfully admitted by an Immigration Officer under the Regulations. Where an Immigration Officer stamped the passport of an extended family member "Admitted to the United Kingdom under the Immigration (EEA) Regulations 2016", he did so without lawful authority unless regulation 7(3) applied.*
- (5) *A stamp applied in such circumstances is of no legal effect in an appeal under the Immigration (Citizens' Rights Appeals) (EU Exit) Regulations 2020. It is neither a family permit nor a residence card. It is not a relevant document for the purposes of the Residence Scheme Immigration Rules and is not evidence that the person's residence was facilitated by the United Kingdom for the purposes of Article 10(2) or (3) of the Withdrawal Agreement.*

DECISION AND REASONS

Introduction

1. This appeal concerns a stamp which was placed in Mr Allaraj's passport by an Immigration Officer at the juxtaposed control in Coquelles, France on 5 December 2020. It stated that he was:

"Admitted to the United Kingdom under the Immigration (EEA) Regulations 2016"
2. The stamp was placed there because the Immigration Officer was satisfied that Mr Allaraj was in a durable relationship with an EEA national. A judge of the First-tier Tribunal reached the same conclusion about the relationship and allowed Mr Allaraj's appeal against the Secretary of State's subsequent decision to refuse his application for pre-settled status under the EU Settlement Scheme. The Secretary of State appealed against that conclusion.
3. The Secretary of State contended that the judge had failed to consider whether his finding about the relationship entitled Mr Allaraj to any relief on the only two grounds of appeal which were available to him in an appeal of this nature. The Upper Tribunal (UTJ Frances and DUTJ Davey) allowed the Secretary of State's appeal. It found that the judge had failed to consider whether Mr Allaraj held a 'relevant document', so as to entitle him to succeed under the Immigration Rules or whether his residence was being facilitated before the United Kingdom's withdrawal from the European Union, so as to bring him within the personal scope of the Withdrawal Agreement. It ordered that the decision on the appeal should be remade in the Upper Tribunal following a further hearing.
4. The Secretary of State's submission, in broad outline only at this stage, is that the stamp was not a relevant document and that it could not indicate that Mr Allaraj's residence was ever facilitated. She submits that the Immigration Officer had no power to admit him to the United Kingdom under the Immigration (European Economic Area) Regulations 2016 ("the EEA Regulations" and that the placing of the stamp in the passport was *ultra vires* the powers conferred upon him.

5. We are told that there are many other similar cases concerning what Mr Deller described as ‘a stamp which is regularly encountered, but the use of which is shrouded in mystery’. Regardless of the conclusions we reach on this appeal, we record at the outset our clear view that this is a most unsatisfactory state of affairs which has placed people such as Mr Allaraj in a position which is characterised by a lack of legal certainty which is anathema to an orderly system of immigration control.

Background

6. Mr Allaraj is an Albanian national who was born on 25 January 1999. He entered the United Kingdom as an Unaccompanied Asylum-Seeking Child in 2013. He achieved a number of qualifications in a range of subjects. He learned how to speak English and worked in construction. His asylum claim was refused and he remained unlawfully thereafter. In January 2020, he met a Czech national called Tereza Gojicova and a relationship began. They started living together later that year and subsequently became engaged.
7. On 5 December 2020, Mr Allaraj and his fiancée arrived at Coquelles. They had travelled from the Czech Republic by coach, having spent some time with Ms Gojicova’s family. They sought entry to the United Kingdom. There is a reasonably detailed account of what followed in a contemporaneous note which was made at the port. Mr Allaraj was given a notice by ‘BFO N.Culver’ which required him to submit to further investigation. We should note that BFO stands for ‘Border Force Officer’. That role does not feature in the Immigration Acts but we understood it to be common ground before us that this Border Force Officer was a person appointed as an Immigration Officer under paragraph 1 to Schedule 2 to the Immigration Act 1971.
8. Further checks made by the Immigration Officer revealed Mr Allaraj’s prior unlawful residence in the UK. Mr Allaraj was recorded as ‘seeking entry to the UK today as a family member of an EU/EEA national’. He and his fiancée were interviewed separately. They gave precisely identical accounts of their lives together, stating, for example, that she had a tattoo of a heart on her left foot and that she had an eight year old dog called Gloria. They both stated that Mr Allaraj enjoyed playing football and running but that he did not support a football team. The Immigration Officer was (understandably) satisfied that ‘the passengers are in a genuine relationship’. He recorded what happened next in the following way:

After presenting the above facts to HO T.Shone and P.Ballard the passenger was granted admission to the UK under EEA Regulations ... Passenger released from detention with Care and Custody and allowed to proceed.
9. Mr Allaraj and his fiancée therefore proceeded on their way and resumed living together in a rented flat near Croydon. The next significant event was that Ms Gojicova was granted pre-settled status under the Settlement Scheme on 15 January 2021.
10. Mr Allaraj applied for leave to remain under the EU Settlement Scheme on 15 May 2021. His application was promptly acknowledged by the Secretary of State on the same day.
11. The couple married in Walthamstow on 4 August 2021. They had intended to do so previously but had been unable to do so because of the restrictions imposed by the pandemic.

The Secretary of State's Decision

12. The Secretary of State refused Mr Allaraj's application on 22 December 2021. The basis upon which she did so may be summarised as follows:
- (i) Mr Allaraj did not hold a relevant document as the durable partner of a relevant EEA citizen; and
 - (ii) Whilst it was accepted that Mr Allaraj met the criteria to provide alternative evidence of being a durable partner, the evidence provided was insufficient to show that the relationship was durable before 31 December 2020 or that it had continued thereafter.

Proceedings on Appeal

13. As we have already recorded, the appellant's appeal to the First-tier Tribunal was allowed. Judge Farrelly concluded that the 'key issue' was whether the relationship was durable. Because he was satisfied that it was, he allowed the appeal. As we have also recorded, the Upper Tribunal concluded that the First-tier Tribunal had erred in law by failing to consider whether the finding it had made entitled Mr Allaraj to succeed on the grounds of appeal which were available to him.
14. The Upper Tribunal directed that the parties should file and serve skeleton arguments addressing, in particular, the issues of (i) whether the stamp in Mr Allaraj's passport was a relevant document; and (ii) whether the stamp and the decision of the Immigration Officer which prompted it amounted to the facilitation of residence which brought Mr Allaraj within the personal scope of the Withdrawal Agreement.

Submissions

15. In his skeleton argument on behalf of the Secretary of State, Mr Deller made submissions which might properly be summarised in the following way:
- (i) The FtT had failed to consider whether Mr Allaraj's relationship was durable when set against the domestic 'rule of thumb' (2 years' cohabitation);
 - (ii) Mr Allaraj does not fall within the personal scope of Article 10(2) or (3) of the Withdrawal Agreement because he had never applied for or received facilitation of residence in accordance with Article 3(2) of Directive 2004/38/EC;
 - (iii) The request to enter the UK at Coquelles was not an application for a family permit or a residence card since it did not comply with regulation 21;
 - (iv) As the fiancé of a Czech national, Mr Allaraj was not the family member of an EEA national. He was only conceivably an extended family member, and the Regulations and the published guidance which related to family members were irrelevant;
 - (v) There was no power in the 2016 Regulations for an Immigration Officer to admit such a person under those Regulations and the stamp was accordingly *ultra vires* the powers conferred upon the officer by the Regulations;

- (vi) The only proper use of the stamp in question was for an Immigration Officer to admit a direct family member who did not hold a valid document issued under the Regulations;
 - (vii) Since the Immigration Officer was acting outside his powers in admitting Mr Allaraj under the EEA Regulations, cases such as *R v SSHD ex parte Ram* [1979] 1 WLR 148 were of no application;
 - (viii) The Immigration Officer's error was unfortunate and the Secretary of State apologised for it but it could not properly have led Mr Allaraj to believe that he was entitled to remain in the UK indefinitely;
 - (ix) Since Mr Allaraj had no demonstrable right under the Immigration Rules or the Withdrawal Agreement, his appeal fell to be dismissed.
16. In his oral submissions, Mr Deller maintained that the stamp in Mr Allaraj's passport was neither a relevant document nor evidence of facilitation of residence. The stamp had been placed in the passport erroneously and it seemed that this had happened in a number of cases. Mr Allaraj was not the direct family member of an EEA national on 5 December 2020; he was her fiancé, which did not bring him within Article 2(2) of the Directive. The distinction between direct and other family members had been highlighted by the CJEU in *Rahman v Secretary of State for the Home Department* (Case C-83/11); [2013] QB 249. Even if the Immigration Officer had concluded that Mr Allaraj was the durable partner of an EEA national, he was not empowered to issue a family permit or a residence card. The former could only be issued by an Entry Clearance Officer, the latter by the Secretary of State. In each case, it was necessary for the officer in question to undertake an extensive examination of the personal circumstances. It was clear, Mr Deller submitted, that Mr Allaraj had not made an application for a family permit or a residence card in the manner specified in regulation 21.
17. Mr Deller submitted that enquiries within the Home Office suggested that the stamp had been brought into being so as to enable Immigration Officers to admit those who should benefit from the judgment of the CJEU in *McCarthy v SSHD* (C-202/13); [2015] 2 CMLR 13. There was no relevant provision in the Regulations, however, and the stamp was therefore wrong (even in those cases) to suggest that admission had been under the EEA Regulations. The Secretary of State could not shed light on the number of cases in which the stamp might have been used erroneously but it was seemingly in use across the country.
18. Mr Deller submitted that the skeleton argument for Mr Allaraj conflated the role of an Entry Clearance Officer and an Immigration Officer. The two had distinct roles, however, and that distinction was recognised in the Regulations and the Secretary of State's policy guidance. The reality was that an Immigration Officer could not lawfully have done what was done in this case. Whilst it was accepted by the Immigration Officer that Mr Allaraj was in a durable relationship with his fiancée, there was no facilitation of residence. Mr Allaraj could not satisfy the Immigration Rules and he had no rights under the Withdrawal Agreement. Neither the guidance nor the Freedom of Information ("FOI") response mentioned by his opponent were of any assistance; the latter clearly referred to those who were already in possession of a family permit on arrival in the United Kingdom.
19. The skeleton argument for Mr Allaraj was settled by Mr Jafar of counsel. He submitted, in summary, that the stamp in Mr Allaraj's passport was a family permit, lawfully issued by the Immigration Officer at the border, after extensive questioning of Mr Allaraj and his then fiancée. It was submitted that Mr Allaraj was able to satisfy the requirements of the Immigration Rules

as such and that his appeal fell to be allowed on that basis. Alternatively, the stamp showed that Mr Allaraj's residence was being facilitated by the respondent at the point of the UK's withdrawal from the EU.

20. Mr Jafar's skeleton concluded with an observation that the Secretary of State's department was either 'functioning in a wholly incompetent manner' or 'feigning ignorance of her own actions, policies, rules and procedures'. The truth of the matter was revealed by a response to a Freedom of Information ("FOI") request.
21. In his oral submissions for Mr Allaraj, Mr Ahmed felt unable to advance any of the arguments made in the skeleton argument. He asked us to note that it had been accepted by the FtT that the relationship was durable and that there had been no challenge to that finding. Mr Ahmed accepted in terms that the stamp in the passport was not a family permit. He accepted that there was a distinction between an Entry Clearance Officer and an Immigration Officer and that only the former could issue a family permit.
22. Mr Ahmed submitted that the stamp was a residence card issued by the Secretary of State, however. He based that submission on the contemporaneous notes kept at the border, which showed that the matter had been referred to officers with the designation 'HO'. Mr Ahmed submitted that these letters showed that the Home Office had taken the ultimate decision and that the stamp was a residence card issued under regulation 18. We asked both advocates whether this was correct. Judge Blundell queried whether 'HO' necessarily stood for 'Home Office' or whether it might instead stand for 'Higher Officer', a term which had replaced 'Chief Immigration Officer' internally. Mr Ahmed was unable to address that question. Mr Deller made enquiries over the short adjournment.
23. On resuming, Mr Deller confirmed on instructions that Chief Immigration Officers and His Majesty's Inspectors were now known as Higher Officers and Senior Officers respectively. The officers named in the minute (Ballard and Shone) were Higher Officers at the port. We invited him to confirm this in writing. We also asked the parties for any submissions which they wished to make in writing on the question of whether an Immigration Officer (or Border Force Officer) was empowered to take decisions which were specifically entrusted in the EEA Regulations to either an Entry Clearance Officer or the Secretary of State.
24. We duly received short further written submissions from Mr Deller and Mr Allaraj's solicitors. Mr Deller confirmed the status of the two officers named in the minute. He was not able in the time available to shed any light on the question we have summarised immediately above. Mr Allaraj's solicitors were not able to gainsay the Secretary of State's submissions about the status of the officers. Nor were they able to offer any assistance on the question summarised immediately above. They underlined, however, the unsatisfactory nature of the situation in which Mr Allaraj found himself, having trusted the Immigration Officers to perform their roles in accordance with the law.

Legal Framework

25. In order to minimise the length of this decision, we have appended the relevant provisions at Annex 1.

Analysis

26. Mr Allaraj's appeal was brought against the Secretary of State's decision to refuse his application for leave to remain under Appendix EU of the Immigration Rules. An appeal against such a decision may only be brought on the grounds of appeal set out in regulation 8 of the Immigration (Citizens' Rights Appeals) (EU Exit) Regulations 2020 ("the 2020 Regulations"). The grounds of appeal applicable to Mr Allaraj's case were, firstly, that the decision breached any right which he had under the relevant provisions of the Withdrawal Agreement and, secondly, that the decision was not in accordance with the residence scheme Immigration Rules.
27. In order to decide whether the Secretary of State's decision was in breach of the relevant provisions of the Withdrawal Agreement or not in accordance with the Immigration Rules, it is first necessary to consider what status, if any, he enjoyed under EU Law and under the EEA Regulations prior to the end of the Implementation Period which followed the UK's exit from the European Union. That period came to an end at 11pm on 31 December 2020: "IP Completion Day."

Mr Allaraj's Position Before IP Completion Day

28. Directive 2004/38/EC ("The Citizens' Rights Directive") draws a clear distinction between the rights enjoyed by EEA nationals and their direct family members, on the one hand, and their extended family members, on the other. The distinction was examined and explained by the Grand Chamber of the CJEU in *Rahman v SSHD*. The Grand Chamber noted, at [19], that the European legislature had

"...drawn a distinction between a Union citizen's family members as defined in Article 2(2) of Directive 2004/38, who enjoy, as provided for in the directive, a right of entry into and residence in that citizen's host Member State, and the other family members envisaged in Article 3(2) of the directive, whose entry and residence has only to be facilitated by that Member State."

29. The Grand Chamber went on to hold that Member States were not required to grant every application for entry or residence by such 'other family members'. Member States were instead required to ensure that their national legislation contained criteria which enabled such persons to obtain a decision on their application for entry or residence which was founded on an extensive examination of their personal circumstances. It underlined the wide discretion conferred upon Member States when selecting those criteria but stated that the criteria had to be consistent with the normal meaning of the term 'facilitate', and the words relating to dependence in Article 3(2), and must not deprive that provision of its effectiveness.
30. Mr Allaraj is not an EEA national and he was not the spouse of an EEA national before IP Completion Day. He and his wife married in Walthamstow in August 2021. At the end of the Implementation Period, therefore, they were engaged but not married. It is beyond argument that a fiancé does not fall within the definition of a family member in Article 2(2) of the Citizens' Rights Directive. When he presented himself to the Immigration Officer on 5 December 2020, he was at most the durable partner of an EEA national under Article 3(2)(b) of that Directive.
31. In exercising the wide discretion conferred by the Directive, the Secretary of State created national legislation which was prescriptive when it came to the making and the consideration of applications by other family members such as Mr Allaraj. The Immigration (European

Economic Area) Regulations 2016 (which were revoked, subject to saving provisions, on 31 December 2020) were prescriptive in the following ways:

- (i) An extended family member was entitled to apply for a family permit under regulation 12, a registration card under regulation 17, or a residence card, under regulation 18;
- (ii) An application for those documents (amongst others) was to be made online, by post or in person using the specified application form unless there were circumstances beyond the applicant's control which rendered them unable to do so: regulation 21;
- (iii) An Entry Clearance Officer had a discretion under regulation 12(4) to issue a family permit to an extended family member where it appeared appropriate in all the circumstances to do so;
- (iv) The Secretary of State had a discretion under regulation 17(5) to issue a registration certificate to an extended family member where it appeared appropriate in all the circumstances to do so;
- (v) The Secretary of State had a discretion under regulation 18(4) to issue a residence card to an extended family member where it appeared appropriate in all the circumstances to do so; and
- (vi) Whether the application was for a family permit, a registration certificate or a residence card, it was for the Secretary of State to undertake an extensive examination of the personal circumstances of the applicant: regulations 12(5), 17(6) and 18(5) refer.

32. Regulation 11 governed the right of admission to the United Kingdom. Notably, that provision makes express reference to the role of the Immigration Officer. Equally notably, it makes no reference to the admission of extended family members. The reason for that is to be found in regulation 7(3). Where an extended family member has been issued with a family permit, registration certificate or residence, he must be treated as a family member provided that he continues to satisfy the relevant conditions in regulation 8 and the family permit (etc) remains in force. Where no such document has been issued by an Entry Clearance Officer or the Secretary of State, an Immigration Officer has no power to admit an extended family member, whether under regulation 11 or any other part of those Regulations.
33. We note two other features of regulation 11 before summarising our conclusions. Firstly, regulation 11(3) prohibited an Immigration Officer from placing a stamp in the passport of a non-EEA national admitted to the UK under that regulation if the person produced a residence card, derivative residence card, permanent residence card or qualifying EEA state residence card. The omission of a family permit from that list of documents is notable and we can see no reason why an Immigration Officer could not stamp the passport of a non-EEA national family permit holder to show that they had been admitted to the UK under the Regulations.
34. Secondly, we note that regulation 11(4) required an Immigration Officer to take certain steps before refusing admission to a person who fails to produce a document mentioned in regulation 11(1) or (2). The Immigration Officer must provide every reasonable opportunity for the document to be obtained by, or brought to, that person. He must also 'allow that person to prove by other means' that he falls within one of the four categories set out. The second category is 'a family member of an EEA national with a right to accompany that EEA national or join that EEA national in the United Kingdom'. This is significant for two reasons. It shows that an

Immigration Officer may admit the family member of an EEA national even if they do not have a family permit (etc), provided that they can prove their status by other means. It also shows, by omission, that no such facility was available to extended family members; an extended family member who presented to an Immigration Officer without a family permit or residence card was not to be treated as a family member to whom this dispensation applied.

35. We therefore conclude that the correct analysis of the distinct roles of the Entry Clearance Officer, the Secretary of State and the Immigration Officer is as contended by Mr Deller. The Regulations do not use the terms 'Entry Clearance Officer', 'Immigration Officer' and 'Secretary of State' interchangeably. Each has a clearly delineated role within the framework provided by the Regulations. An Entry Clearance Officer is, by regulation 2, a person responsible for the grant or refusal of entry clearance. The Secretary of State's functions include the consideration of applications made from within the United Kingdom and to undertake the 'extensive examination' required by regulation 12(5) and 18(5). Immigration Officers featured on fifteen occasions in the Regulations, performing specifically defined functions such as those we have detailed in regulation 11. It is clear that the Secretary of State did not, when making the Regulations, confer upon Immigration Officers the power to consider applications for family permits or residence cards. (For the sake of completeness, we should note that there is nothing before us to suggest that the Secretary of State delegated her powers, or those given to Entry Clearance Officers, to Immigration Officers (in contrast to the lawful delegation of deportation decisions to Immigration Inspectors considered in *R v SSHD ex parte Oladehinde* [1991] 1 AC 254). Given the way in which the Regulations are framed, it would have been surprising if she had done so.)
36. Whether or not the absence of such a power is inconsistent with the normal meaning of the word 'facilitate' and whether it deprived Article 3(2) of its effectiveness are not questions which arise in the context of this appeal. As we have explained at [26] above, the grounds upon which this appeal may be brought are narrowly circumscribed and arguments such as those are not justiciable in such an appeal. Had we been able to consider such questions, however, we would have inclined to the view that the absence of such a power was wholly in accordance with the duty imposed by Article 3(2).
37. Given the extensive examination which must take place before those who are accepted to be extended family members are granted a family permit or residence card, there was every reason for the Secretary of State to conclude that such applications should not be presented to an Immigration Officer at a port of entry. As was made clear in *Rahman v SSHD*, the Secretary of State's obligation was to ensure that the national legislation contained criteria which enabled extended family members to obtain a decision on their application for entry or residence. In stipulating the means by which an extended family member was to make such applications, and in stipulating the specific personnel who were to consider those applications, it seems to us that the Secretary of State formulated national legislation which did not deprive Article 3(2) of its effectiveness. For the avoidance of doubt, the views expressed in the latter half of this paragraph are necessarily obiter.
38. The position, in summary, is as follows. The Regulations required that applications for family permits were considered by Entry Clearance Officers and that applications for registration certificates and residence cards were considered by the Secretary of State. Immigration Officers were not able to consider applications for those documents, or to issue them. An extended family member who had applied for and been issued with a family permit, registration certificate or residence was, by regulation 7(3), to be treated as a family member provided that the relevant conditions continued to be satisfied and the document remained in force. A person

to whom regulation 7(3) applied could be lawfully admitted to the United Kingdom by an Immigration Officer under regulation 11. A person who claimed to be an extended family member and to whom regulation 7(3) did not apply, could not be lawfully admitted by an Immigration Officer under the Regulations.

39. It is within this framework that we must examine the actions of the Immigration Officer at Coquelles on 5 December 2020.
40. There is a suggestion in the Immigration Officer's note that he might have considered Mr Allaraj to be a direct family member, but he was not. As we have seen, he could only have claimed to be an extended family member by asserting that he was in a durable relationship with an EEA national. Whilst an Immigration Officer had the discretion we have considered above, to admit a direct family member who did not produce a family permit or other such document, no such discretion was conferred in respect of extended family members.
41. Mr Allaraj had never made an application for a family permit or for a residence card in a manner which complied with regulation 21. Whilst regulation 21 permitted such an application to be made in person, the general rule was that such an application was still to be made using the specified form. Mr Allaraj is not said to have asserted any circumstances beyond his control which rendered him unable to apply in writing.
42. More fundamentally, however, it is clear for the reasons that we have set out that an application for a family permit is to be considered by an Entry Clearance Officer and an application for a residence card is to be considered by the Secretary of State (as a non-EEA national, Mr Allaraj could not have been issued with a registration certificate). It follows from that analysis that we reach the clear conclusion that the Immigration Officer had no power to admit Mr Allaraj 'under the EEA Regulations 2016' on 5 December 2020. Mr Allaraj was not an extended family member to whom regulation 7(3) applied and the Regulations conferred no power on the Immigration Officer to admit him.
43. The guidance cited in Mr Jafar's skeleton argument is of no assistance, referring as it does to the consideration of applications for family permits by Entry Clearance Officers. As we have explained, Mr Allaraj's application was not for a family permit and it was not considered by an Entry Clearance Officer. Mr Deller is correct in his submission that the skeleton argument seeks impermissibly to conflate the distinct roles of Entry Clearance Officer and Immigration Officer.
44. The FOI response cited in Mr Jafar's skeleton argument is also of no assistance, referring as it does to stamps placed by Border Force Officers 'in the passport of a Family Permit holder'. We have considered at [33] above the ability of an Immigration Officer to place a stamp in the passport of a family permit holder. The FOI response goes no way at all to establishing that a Border Force Officer might issue a family permit by stamping the passport.
45. As we have recorded, Mr Ahmed did not seek to persuade us that Mr Deller's submissions in these respects were wrong. His submission was, instead, that the decision to admit Mr Allaraj was not a decision taken by an Immigration Officer. In reliance on the letters 'HO' in the minute created by the Immigration Officer, he submitted that the decision had actually been taken by the Secretary of State or by a person properly delegated by her to take such a decision.
46. With respect to Mr Ahmed, that rather tentatively made submission is unsustainable. As was made clear by Mr Deller and accepted by Mr Allaraj's solicitors in post-hearing submissions, the letters 'HO' in this context refer to the grade of the Immigration Officers in question. The

matter was referred by a Border Force Officer to two Higher Officers, who both considered (wrongly) that they had the power to admit Mr Allaraj to the United Kingdom under the EEA Regulations. The minute provides no basis for concluding that the case was referred to a decision maker authorised by the Secretary of State to consider applications for a residence card.

47. In our judgment, therefore, the position under the Immigration (EEA) Regulations 2016 was quite clear. An Immigration Officer had no power under those Regulations to consider an application for a family permit or a residence card and had no power under the Regulations to admit an extended family member to the UK where that person did not hold such a document.
48. With some encouragement from the Upper Tribunal, Mr Deller suggested that the stamp which was used in this case was brought into being to ensure that Immigration Officers were able to act in accordance with the judgment of the CJEU in *McCarthy v SSHD*. On reflection, we think it is preferable not to engage in further speculation on the point. What matters for the purpose of this decision is our clear conclusion that an Immigration Officer had no power to admit Mr Allaraj under the Regulations.
49. As Mr Deller submitted, that conclusion marks the difference between this case and cases such as *R v SSHD ex parte Ram* [1979] 1 WLR 148, in which an Immigration Officer had mistakenly, but with lawful authority, stamped the applicant's passport to show that he had indefinite leave to enter. The applicant – who had relied on the stamp while remaining in the UK and setting up a business here – had not been lawfully detained by a subsequent Immigration Officer and his application for a writ of *habeus corpus* was granted accordingly. Here, in contrast, the Immigration Officer was not acting with lawful authority when he purportedly admitted Mr Allaraj to the United Kingdom.
50. It follows from the above that Mr Allaraj held neither a family permit nor a residence card under the EEA Regulations on 5 December 2020 or thereafter. Having reached that conclusion, we turn to consider Mr Allaraj's situation with reference to the two grounds of appeal which are available to him under the 2020 Regulations.
51. We will consider those questions with reference to the decision of the Court of Appeal in *Celik v SSHD* [2023] EWCA Civ 921. That judgment was handed down on 31 July 2023, after the conclusion of argument in this appeal. Neither party has sought permission to make submissions on that judgment and we did not consider it necessary to invite the parties to do so, given the Court of Appeal's substantial endorsement of the Upper Tribunal's decision: [2022] UKUT 220 (IAC).

The First Ground – the Withdrawal Agreement

52. Amongst many other things, the Withdrawal Agreement governs the rights of EU nationals and their family members to continue to reside in the United Kingdom following the departure of the United Kingdom from the European Union and the end of a transition period on 31 December 2020. Article 10 of the Withdrawal Agreement defines the persons who fall within its personal scope for those purposes. It has never been suggested that Mr Allaraj might conceivably fall within Article 10(1) or (4). Insofar as he has previously relied upon the Withdrawal Agreement, the focus has been on Article 10(2)-(3), which provide that the following categories of person fall within scope of the Agreement:

(2) Persons falling under points (a) and (b) of Article 3(2) of Directive 2004/38/EC whose residence was facilitated by the host State in accordance with its national

legislation before the end of the transition period in accordance with Article 3(2) of that Directive shall retain their right of residence in the host State in accordance with this Part, provided that they continue to reside in the host State thereafter.

(3) Paragraph 2 shall also apply to persons falling under points (a) and (b) of Article 3(2) of Directive 2004/38/EC who have applied for facilitation of entry and residence before the end of the transition period, and whose residence is being facilitated by the host State in accordance with its national legislation thereafter.

53. At [6] of his skeleton argument, Mr Deller submitted that Mr Allaraj does not fall under Article 3(2)(b) of the Directive because his relationship did not meet the UK's definition of 'durability' by the end of the transition period. Lewis LJ made reference to that definition, and to the guidance within which it was to be found, at [17] of his judgment in *Celik v SSHD*. The guidance suggested that a relationship would be considered durable if it was established by evidence that the couple had cohabited for two years, but it was accepted that there might be circumstances in which a relationship was considered to be durable in the absence of such cohabitation. Mr Deller referred to this as a 'rule of thumb', borrowing from (although not citing) the expression used by the Upper Tribunal in *YB (EEA reg 17(4) - proper approach) Ivory Coast* [2008] UKAIT 00062; [2009] Imm AR.
54. We consider this submission to be made too belatedly. No reference was made to the rule of thumb before the FtT. The judge in the FtT concluded that the relationship was a durable one. The Secretary of State's grounds of appeal to the Upper Tribunal contained no complaint that the judge had failed to consider the rule of thumb. Nothing in the decision of Upper Tribunal Judge Frances and Deputy Upper Tribunal Judge Davey suggests that there was any attempt by the Senior Presenting Officer then representing the Secretary of State to seek permission to amend the grounds. There is nothing in the Upper Tribunal's decision which suggests any legal flaw in that particular conclusion which justified it being set aside. The first attempt to revisit that finding was in Mr Deller's skeleton, which was filed and served less than 48 hours before the hearing. We accept Mr Ahmed's submission, therefore, that the finding made by the FtT in this respect should remain undisturbed.
55. At [7]-[14] of his skeleton argument, however, Mr Deller submitted that Mr Allaraj was in any event unable to satisfy the remaining aspects of either Article 10(2) or (3). Mr Ahmed did not attempt to make a submission to the contrary and we consider that he was correct not to do so. Given the absence of counter argument on the point, we propose to explain our conclusions fairly briefly.
56. As Lewis LJ stated at [60] of *Celik v SSHD*, Articles 10(2) and (3) deal with situations in which the residence of an individual is facilitated by the host state *in accordance with its national legislation*. Article 10(2) applies where an application has been made and residence facilitated before the end of the transition period. Article 10(3) applies where an application was made before the end of the transition period but only granted, and residence facilitated, after the end of that period.
57. Mr Allaraj's residence was not facilitated by the UK in accordance with its national legislation before the end of the transition period. As we have seen, Mr Allaraj was not granted a family permit or a residence card before IP Completion Day. There was no extensive examination of his personal circumstances by a relevant official before that point in time. In order to establish that his residence was facilitated before the end of the transition period, Mr Allaraj was required to demonstrate that such an examination had taken place and that the relevant official had

decided in the exercise of their discretion to issue the document sought. Since none of those steps had occurred, he is not within the scope of Article 10(2). The placing of the stamp in the passport on 5 December 2020 could not amount to facilitation of residence and was beyond the lawful authority of the Immigration Officer for the reasons we have already given.

58. Nor is Mr Allaraj able to show that he is within the scope of Article 10(3). As Mr Deller submitted, he made no application for facilitation of residence before the end of the transition period. Such an application could, in the case of an extended family member, only be made to an Entry Clearance Officer or the Secretary of State and regulation 21 contained general requirements for the form of such an application. Whilst it is clear that Mr Allaraj sought admission to the UK under EU Law when he presented himself to the Immigration Officer on 5 December 2020, that application was not made in accordance with the applicable provisions of national legislation and cannot amount to an application which engages Article 10(3). In any event, Article 10(3) is to be read as a whole and cannot be met unless an application has been made before the end of the transition period and granted after that date: *Celik v SSHD* refers, at [95].
59. Mr Allaraj is therefore unable to bring himself within the scope of Article 10(2) or (3). We should perhaps note that he would also not have been able to bring himself within the scope of Article 10(1)(e) for the reasons given at [53]-[57] of *Celik v SSHD*: Mr Allaraj was not the family member of an EU national before the end of the transition period and he was not residing in the UK in accordance with Union Law before the end of the transition period.
60. In the circumstances, Mr Allaraj is unable to succeed on the ground that the respondent's decision breached a relevant right conferred under the Withdrawal Agreement. He is not within the personal scope of that Agreement.

The Second Ground – Residence Scheme Immigration Rules

61. We have set out at the start of this decision the basis upon which the Secretary of State concluded that Mr Allaraj was unable to meet the requirements of Appendix EU of the Immigration Rules. There was no attempt before us to submit orally or in writing that the First-tier Tribunal's finding of fact as to the durability of the relationship was dispositive of the appeal in Mr Allaraj's favour; it was implicitly accepted in Mr Jafar's skeleton that it was for Mr Allaraj to show that he held a relevant document as the durable partner of an EEA national.
62. Mr Allaraj cannot satisfy the requirements of paragraphs EU11 or EU14 of Appendix EU of the Immigration Rules for the same reasons that Mr Celik was not able to do so. Drawing on what was said by Lewis LJ at [35] and [68] of *Celik v SSHD*, the position is as follows.
63. Mr Allaraj was not a family member at the material time. His marriage took place months after IP Completion Day. He was not a durable partner within the meaning of Annex 1 to Appendix EU because he did not have a relevant document (a family permit or a residence card), as required by those Rules. And, despite the stamp placed in his passport by an Immigration Officer on 5 December 2020, Mr Allaraj was present in the UK unlawfully because the Immigration Officer had no power to admit him to the UK under the EEA Regulations. Even if he was in a durable relationship with an EU national before 31 December 2020, that relationship was not evidenced by the grant of a relevant document as defined in the Immigration Rules.
64. In the circumstances, Mr Allaraj is not able to establish that the respondent's decision was not in accordance with the Residence Scheme Immigration Rules. It follows that we will remake

the decision on his appeal by dismissing it on both grounds of appeal which are available to him.

Postscript

65. We have considerable sympathy with Mr Allaraj. There is nothing before us to suggest that he has acted in anything other than good faith. He understandably thought that the Immigration Officer had the power to admit him to the United Kingdom and he is said to be distressed by the submissions now made by the Secretary of State to the contrary. It is a wholly unsatisfactory situation, as Mr Deller acknowledged before us.
66. There are other cases in which this wholly unsatisfactory state of affairs has occurred, and Immigration Officers have placed similar stamps in the passports of extended family members who could not be admitted to the UK under the Regulations. At least three such cases have been before the Upper Tribunal to our knowledge. One of those cases - *GH (Albania) v SSHD* - was drawn to the Upper Tribunal's attention by the Government Legal Department in advance of this hearing. *GH (Albania)* was decided by a panel of the Upper Tribunal under reference UI-2022-003053. The appellant was subsequently granted permission to appeal to the Court of Appeal under reference CA-2023-000371. The Secretary of State submitted that this appeal should be adjourned to await the Court of Appeal's decision. That application was refused in advance of the hearing, in light of the need for the Upper Tribunal to express a concluded view on the issues, given the number of cases in which these issues are arising. We should record that Mr Deller, who only assumed conduct of the case at the eleventh hour following the refusal of that adjournment request, did not renew the application. Given that permission to appeal to the Court of Appeal was only granted at the end of June, we would have refused any such application had it been made.
67. Nothing we have said in this decision is intended to suggest that Mr Allaraj or any other litigant in a similar situation might not have alternative means of recourse against the Secretary of State or the Immigration Officer for the unlawful stamping of the passport and the difficulties which it has caused. Our decision is confined to considering the effect of those actions in an appeal of this nature.

Notice of Decision

The decision of the FtT having been set aside, we remake the decision on the appeal by dismissing it.

M.J. Blundell

Judge of the Upper Tribunal
Immigration and Asylum Chamber

3 October 2023

ANNEX 1

LEGAL FRAMEWORK

Agreement on the withdrawal of the United Kingdom and Great Britain and Northern Ireland from the European Union and the European Autonomic Energy Community

ARTICLE 10

Personal scope

1. Without prejudice to Title III, this Part shall apply to the following persons:
 - (a) Union citizens who exercised their right to reside in the United Kingdom in accordance with Union law before the end of the transition period and continue to reside there thereafter;
 - (b) United Kingdom nationals who exercised their right to reside in a Member State in accordance with Union law before the end of the transition period and continue to reside there thereafter;
 - (c) Union citizens who exercised their right as frontier workers in the United Kingdom in accordance with Union law before the end of the transition period and continue to do so thereafter;
 - (d) United Kingdom nationals who exercised their right as frontier workers in one or more Member States in accordance with Union law before the end of the transition period and continue to do so thereafter;
 - (e) family members of the persons referred to in points (a) to (d), provided that they fulfil one of the following conditions:
 - (i) they resided in the host State in accordance with Union law before the end of the transition period and continue to reside there thereafter;
 - (ii) they were directly related to a person referred to in points (a) to (d) and resided outside the host State before the end of the transition period, provided that they fulfil the conditions set out in point (2) of Article 2 of Directive 2004/38/EC at the time they seek residence under this Part in order to join the person referred to in points (a) to (d) of this paragraph;
 - (iii) they were born to, or legally adopted by, persons referred to in points (a) to (d) after the end of the transition period, whether inside or outside the host State, and fulfil the conditions set out in point (2)(c) of Article 2 of Directive 2004/38/EC at the time they seek residence under this Part in order to join the person referred to in points (a) to (d) of this paragraph and fulfil one of the following conditions:
 - both parents are persons referred to in points (a) to (d);

- one parent is a person referred to in points (a) to (d) and the other is a national of the host State; or
 - one parent is a person referred to in points (a) to (d) and has sole or joint rights of custody of the child, in accordance with the applicable rules of family law of a Member State or of the United Kingdom, including applicable rules of private international law under which rights of custody established under the law of a third State are recognised in the Member State or in the United Kingdom, in particular as regards the best interests of the child, and without prejudice to the normal operation of such applicable rules of private international law;
- (f) family members who resided in the host State in accordance with Articles 12 and 13, Article 16(2) and Articles 17 and 18 of Directive 2004/38/EC before the end of the transition period and continue to reside there thereafter.
2. Persons falling under points (a) and (b) of Article 3(2) of Directive 2004/38/EC whose residence was facilitated by the host State in accordance with its national legislation before the end of the transition period in accordance with Article 3(2) of that Directive shall retain their right of residence in the host State in accordance with this Part, provided that they continue to reside in the host State thereafter.
 3. Paragraph 2 shall also apply to persons falling under points (a) and (b) of Article 3(2) of Directive 2004/38/EC who have applied for facilitation of entry and residence before the end of the transition period, and whose residence is being facilitated by the host State in accordance with its national legislation thereafter.
 4. Without prejudice to any right to residence which the persons concerned may have in their own right, the host State shall, in accordance with its national legislation and in accordance with point (b) of Article 3(2) of Directive 2004/38/EC, facilitate entry and residence for the partner with whom the person referred to in points (a) to (d) of paragraph 1 of this Article has a durable relationship, duly attested, where that partner resided outside the host State before the end of the transition period, provided that the relationship was durable before the end of the transition period and continues at the time the partner seeks residence under this Part.
 5. In the cases referred to in paragraphs 3 and 4, the host State shall undertake an extensive examination of the personal circumstances of the persons concerned and shall justify any denial of entry or residence to such persons.

**DIRECTIVE 2004/38/EC OF THE EUROPEAN PARLIAMENT
AND OF THE COUNCIL**

Article 2

Definitions

1. "Union citizen" means any person having the nationality of a Member State;
2. "Family member" means:
 - (a) the spouse;
 - (b) the partner with whom the Union citizen has contracted a registered partnership, on the basis of the legislation of a Member State, if the legislation of the host Member State treats registered partnerships as equivalent to marriage and in accordance with the conditions laid down in the relevant legislation of the host Member State;
 - (c) the direct descendants who are under the age of 21 or are dependants and those of the spouse or partner as defined in point (b);
 - (d) the dependent direct relatives in the ascending line and those of the spouse or partner as defined in point (b);
3. "host Member State" means the Member State to which a Union citizen moves in order to exercise his/her right of free movement and residence.

Article 3

Beneficiaries

1. This Directive shall apply to all Union citizens who move to or reside in a Member State other than that of which they are a national, and to their family members as defined in point 2 of Article 2 who accompany or join them.
2. Without prejudice to any right to free movement and residence the persons concerned may have in their own right, the host Member State shall, in accordance with its national legislation, facilitate entry and residence for the following persons:
 - (a) any other family members, irrespective of their nationality, not falling under the definition in point 2 of Article 2 who, in the country from which they have come, are dependants or members of the household of the Union citizen having the primary right of residence, or where serious health grounds strictly require the personal care of the family member by the Union citizen;
 - (b) the partner with whom the Union citizen has a durable relationship, duly attested.

The host Member State shall undertake an extensive examination of the personal circumstances and shall justify any denial of entry or residence to these people.

IMMIGRATION (CITIZENS' RIGHTS APPEALS) (EU EXIT) REGULATIONS 2020**Reg. 3.-" Right of appeal against decisions relating to leave to enter or remain in the United Kingdom made by virtue of residence scheme immigration rules**

- (1) A person ("P") may appeal against a decision made on or after exit day-"
 - (a) to vary P's leave to enter or remain in the United Kingdom granted by virtue of residence scheme immigration rules 2 , so that P does not have leave to enter or remain in the United Kingdom,
 - (b) to cancel P's leave to enter or remain in the United Kingdom granted by virtue of residence scheme immigration rules,
 - (c) not to grant any leave to enter or remain in the United Kingdom in response to P's relevant application, or
 - (d) not to grant indefinite leave to enter or remain in the United Kingdom in response to P's relevant application (where limited leave to enter or remain is granted, or P had limited leave to enter or remain when P made the relevant application).
- (2) In this regulation, "*relevant application*" means an application for leave to enter or remain in the United Kingdom made under residence scheme immigration rules on or after exit day.

...

Reg. 8 - Grounds of appeal

- (1) An appeal under these Regulations must be brought on one or both of the following two grounds.
- (2) The first ground of appeal is that the decision breaches any right which the appellant has by virtue of-"
 - (a) [Chapter 1, or Article 24(2), 24(3), 25(2) or 25(3) of Chapter 2] , of Title II [, or Article 32(1)(b) of Title III,] of Part 2 of the withdrawal Agreement,
 - (b) (b) [Chapter 1, or Article 23(2), 23(3), 24(2) or 24(3)], of Title II [, or Article 31(1)(b) of Title III,] of Part 2 of the EEA EFTA separation Agreement, or
 - (c) (c) Part 2[, or Article 26a(1)(b),] of the Swiss citizens' rights Agreement.
- (3) The second ground of appeal is that-"
 - (a) where the decision is mentioned in regulation 3(1)(a) or (b) or 5, it is not in accordance with the provision of the immigration rules by virtue of which it was made;
 - (b) where the decision is mentioned in regulation 3(1)(c) or (d), it is not in accordance with residence scheme immigration rules;
 - (c) where the decision is mentioned in regulation 4, it is not in accordance with section 76(1) or (2) of the 2002 Act (as the case may be);
 - (d) where the decision is mentioned in regulation 6, it is not in accordance with section 3(5) or (6) of the 1971 Act (as the case may be) [;]

IMMIGRATION (EUROPEAN ECONOMIC AREA) REGULATIONS 2016**Reg 7 - "Family member"**

- (1) In these Regulations, "family member" means, in relation to a person ("A") –
 - (a) A's spouse or civil partner;
 - (b) A's direct descendants, or the direct descendants of A's spouse or civil partner who are either –
 - (i) aged under 21; or
 - (ii) dependants of A, or of A's spouse or civil partner;
 - (c) dependent direct relatives in A's ascending line, or in that of A's spouse or civil partner.
- (2) Where A is a student residing in the United Kingdom otherwise than under regulation 13 (initial right of residence), a person is not a family member of A under paragraph (1)(b) or (c) unless –
 - (a) in the case of paragraph (1)(b), the person is the dependent child of A or of A's spouse or civil partner; or
 - (b) A also falls within one of the other categories of qualified person mentioned in regulation 6(1).
- (3) A person ("B") who is an extended family member and has been issued with an EEA family permit, a registration certificate or a residence card must be treated as a family member of A, provided –
 - (a) B continues to satisfy the conditions in regulation 8(1A), 8(2), (3), (4) or (5); and
 - (b) the EEA family permit, registration certificate or residence card remains in force.
- (4) A must be an EEA national unless regulation 9 applies (family members and extended family members] of British citizens).

Reg 8 - "Extended family member"

- (1) In these Regulations "extended family member" means a person who is not a family member of an EEA national under regulation 7(1)(a), (b) or (c) and who satisfies a condition in paragraph (1A), (2), (3), (4) or (5).
- (1A) The condition in this paragraph is that the person –
 - (a) is under the age of 18;
 - (b) is subject to a non-adoptive legal guardianship order in favour of an EEA national that is recognised under the national law of the state in which it was contracted;
 - (c) has lived with the EEA national since their placement under the guardianship order;
 - (d) has created family life with the EEA national; and
 - (e) has a personal relationship with the EEA national that involves dependency on the EEA national and the assumption of parental responsibility, including legal and financial responsibilities, for that person by the EEA national.
- (2) The condition in this paragraph is that the person is –
 - (a) a relative of an EEA national; and
 - (b) residing in a country other than the United Kingdom and is dependent upon the EEA national or is a member of the EEA national's household; and either –

- (i) is accompanying the EEA national to the United Kingdom or wants to join the EEA national in the United Kingdom; or
 - (ii) has joined the EEA national in the United Kingdom and continues to be dependent upon the EEA national, or to be a member of the EEA national's household.
- (3) The condition in this paragraph is that the person is a relative of an EEA national and on serious health grounds, strictly requires the personal care of the EEA national [F22or the spouse or civil partner of the EEA national].
- (4) The condition in this paragraph is that the person is a relative of an EEA national and would meet the requirements in the immigration rules (other than those relating to entry clearance) for indefinite leave to enter or remain in the United Kingdom as a dependent relative of the EEA national.
- (5) The condition in this paragraph is that the person is the partner (other than a civil partner) of, and in a durable relationship with, an EEA national [F23or the child (under the age of 18) of that partner], and is able to prove this to the decision maker.
- (6) In these Regulations, "relevant EEA national" means, in relation to an extended family member –
- (a) referred to in paragraph (2), (3) or (4), the EEA national to whom the extended family member is related;
 - (b) referred to in paragraph (5), the EEA national who is the durable partner of the extended family member.
- (7) In paragraphs (2), (3) and (4)], "relative of an EEA national" includes a relative of the spouse or civil partner of an EEA national F25....
- (8) Where an extensive examination of the personal circumstances of the applicant is required under these Regulations, it must include examination of the following –
- (a) the best interests of the applicant, particularly where the applicant is a child;
 - (b) the character and conduct of the applicant; and
 - (c) whether an EEA national would be deterred from exercising their free movement rights if the application was refused.

[...]

Reg 11 - Right of admission to the United Kingdom

- (1) An EEA national must be admitted to the United Kingdom on arrival if the EEA national produces a valid national identity card or passport issued by an EEA State.
- (2) A person who is not an EEA national must be admitted to the United Kingdom if that person is –
- (a) a family member of an EEA national and produces on arrival a valid passport and qualifying EEA State residence card, provided the conditions in regulation 23(4) (family member of EEA national must accompany or join EEA national with right to reside) are met; or

- (b) a family member of an EEA national, a family member who has retained the right of residence, a person who meets the criteria in paragraph (5) or a person with a right of permanent residence under regulation 15 and produces on arrival –
 - (i) a valid passport; and
 - (ii) a valid EEA family permit, residence card, derivative residence card or permanent residence card.

- (3) An immigration officer must not place a stamp in the passport of a person admitted to the United Kingdom under this regulation who is not an EEA national if the person produces a residence card, a derivative residence card, a permanent residence card or a qualifying EEA State residence card.

- (4) Before an immigration officer refuses admission to the United Kingdom to a person under this regulation because the person does not produce on arrival a document mentioned in paragraph (1) or (2), the immigration officer must provide every reasonable opportunity for the document to be obtained by, or brought to, the person or allow the person to prove by other means that the person is –
 - (a) an EEA national;
 - (b) a family member of an EEA national with a right to accompany that EEA national or join that EEA national in the United Kingdom;
 - (c) a person who meets the criteria in paragraph (5); or
 - (d) a family member who has retained the right of residence or a person with a right of permanent residence under regulation 15.

- (5) The criteria in this paragraph are that a person (“P”) –
 - (a) previously resided in the United Kingdom under regulation 16(3) and would be entitled to reside in the United Kingdom under that regulation were P in the country;
 - (b) is accompanying an EEA national to, or joining an EEA national in, the United Kingdom and P would be entitled to reside in the United Kingdom under regulation 16(2) were P and the EEA national both in the United Kingdom;
 - (c) is accompanying a person (“the relevant person”) to, or joining the relevant person in, the United Kingdom and –
 - (i) the relevant person is residing, or has resided, in the United Kingdom under regulation 16(3); and
 - (ii) P would be entitled to reside in the United Kingdom under regulation 16(4) were P and the relevant person both in the United Kingdom;
 - (d) is accompanying a person who meets the criteria in sub-paragraph (b) or (c) (“the relevant person”) to the United Kingdom and –
 - (i) P and the relevant person are both –
 - (aa) seeking admission to the United Kingdom in reliance on this paragraph for the first time; or
 - (bb) returning to the United Kingdom having previously resided there pursuant to the same provisions of regulation 16 in reliance on which they now base their claim to admission; and
 - (ii) P would be entitled to reside in the United Kingdom under regulation 16(6) were P and the relevant person there; or
 - (e) is accompanying a British citizen to, or joining a British citizen in, the United Kingdom and P would be entitled to reside in the United Kingdom under regulation 16(5) were P and the British citizen both in the United Kingdom.

- (6) Paragraph (7) applies where –

- (a) a person (“P”) seeks admission to the United Kingdom in reliance on paragraph (5)(b), (c) or (e); and
 - (b) if P were in the United Kingdom, P would have a derived right to reside under regulation 16(8)(b)(ii).
- (7) Where this paragraph applies a person (“P”) must only be regarded as meeting the criteria in paragraph (5)(b), (c) or (e) where P –
- (a) is accompanying the person with whom P would on admission to the United Kingdom jointly share care responsibility for the purpose of regulation 16(8)(b)(ii); or
 - (b) has previously resided in the United Kingdom pursuant to regulation 16(2), (4) or (5) as a joint primary carer and seeks admission to the United Kingdom in order to reside there again on the same basis.
- (8) But this regulation is subject to regulations 23(1), (2), (3) and (4) and 31.
- (9) A person is not entitled to be admitted by virtue of this regulation where that person is subject to a decision under regulation 23(6)(b) (removal decision).

Reg 12 – Issue of EEA Family Permit

- (1) An entry clearance officer must issue an EEA family permit to a person who applies for one if the person is a family member of an EEA national and –
- (a) the EEA national –
 - (i) is residing in the United Kingdom in accordance with these Regulations; or
 - (ii) will be travelling to the United Kingdom within six months of the date of the application and will be an EEA national residing in the United Kingdom in accordance with these Regulations on arrival in the United Kingdom; and
 - (c) the family member will be accompanying the EEA national to the United Kingdom or joining the EEA national there.
- (2) An entry clearance officer must issue an EEA family permit to a person who applies and provides evidence demonstrating that, at the time at which the person first intends to use the EEA family permit, the person –
- (a) would be entitled to be admitted to the United Kingdom because that person would meet the criteria in regulation 11(5); and
 - (b) will (save in the case of a person who would be entitled to be admitted to the United Kingdom because that person would meet the criteria for admission in regulation 11(5)(a)) be accompanying to, or joining in, the United Kingdom any person from whom the right to be admitted to the United Kingdom under the criteria in regulation 11(5) is derived.
- (3) An entry clearance officer must issue an EEA family permit to –
- (a) a family member who has retained the right of residence; or
 - (b) a person who is not an EEA national but who has acquired the right of permanent residence under regulation 15.
- (4) An entry clearance officer may issue an EEA family permit to an extended family member of an EEA national (the relevant EEA national) who applies for one if –
- (a) the relevant EEA national satisfies the condition in paragraph (1)(a);
 - (b) the extended family member wants to accompany the relevant EEA national to the United Kingdom or to join that EEA national there; and

- (c) in all the circumstances, it appears to the entry clearance officer appropriate to issue the EEA family permit.
- (5) Where an entry clearance officer receives an application under paragraph (4) an extensive examination of the personal circumstances of the applicant must be undertaken by the Secretary of State and if the application is refused, the entry clearance officer must give reasons justifying the refusal unless this is contrary to the interests of national security.
- (5A) An EEA family permit issued under this regulation may be issued in electronic form.
- (6) An EEA family permit issued under this regulation must be issued free of charge and as soon as possible.
- (7) But an EEA family permit must not be issued under this regulation if the applicant or the EEA national concerned is not entitled to be admitted to the United Kingdom as a result of regulation 23(1), (2) or (3) or falls to be excluded in accordance with regulation 23(5).
- (8) An EEA family permit must not be issued under this regulation to a person (“A”) who is the spouse, civil partner or durable partner of a person (“B”) where a spouse, civil partner or durable partner of A or B holds a valid EEA family permit.

[...]

Re 17 - Issue of registration certificate

- (1) The Secretary of State must issue a registration certificate to a qualified person immediately on application and production of –
 - (a) a valid national identity card or passport issued by an EEA State; and
 - (b) proof that the applicant is a qualified person.
- (2) In the case of a worker, confirmation of the worker’s engagement from the worker’s employer or a certificate of employment is sufficient proof for the purposes of paragraph (1)(b).
- (3) The Secretary of State must issue a registration certificate to an EEA national who is the family member of a qualified person or of an EEA national with a right of permanent residence under regulation 15 immediately on application and production of –
 - (a) a valid national identity card or passport issued by an EEA State; and
 - (b) proof that the applicant is such a family member.
- (4) The Secretary of State must issue a registration certificate to an EEA national who is a family member who has retained the right of residence on application and production of –
 - (a) a valid national identity card or passport; and
 - (b) proof that the applicant is a family member who has retained the right of residence.
- (5) The Secretary of State may issue a registration certificate to an extended family member not falling within regulation 7(3) who is an EEA national on application if –
 - (a) the application is accompanied or joined by a valid national identity card or passport;
 - (b) the relevant EEA national is a qualified person or an EEA national with a right of permanent residence under regulation 15; and
 - (c) in all the circumstances it appears to the Secretary of State appropriate to issue the registration certificate.

- (6) Where the Secretary of State receives an application under paragraph (5) an extensive examination of the personal circumstances of the applicant must be undertaken by the Secretary of State and if the application is refused, the Secretary of State must give reasons justifying the refusal unless this is contrary to the interests of national security.
- (7) A registration certificate issued under this regulation must state the name and address of the person registering and the date of registration.
- (8) A registration certificate is –
 - (a) proof of the holder’s right to reside on the date of issue;
 - (b) no longer valid if the holder ceases to have a right to reside under these Regulations;
 - (c) invalid if the holder never had a right to reside under these Regulations.
- (9) This regulation is subject to regulations 24 (refusal to issue or renew and revocation of residence documentation) and 25 (cancellation of a right of residence).

Reg 18 - Issue of residence card

- (1) The Secretary of State must issue a residence card to a person who is not an EEA national and is the family member of a qualified person or of an EEA national with a right of permanent residence under regulation 15 on application and production of –
 - (a) a valid passport; and
 - (b) proof that the applicant is such a family member.
- (2) The Secretary of State must issue a residence card to a person who is not an EEA national but who is a family member who has retained the right of residence on application and production of –
 - (a) a valid passport; and
 - (b) proof that the applicant is a family member who has retained the right of residence.
- (3) On receipt of an application under paragraph (1) or (2) and the documents that are required to accompany the application the Secretary of State must immediately issue the applicant with a certificate of application for the residence card and the residence card must be issued no later than six months after the date on which the application and documents are received.
- (4) The Secretary of State may issue a residence card to an extended family member not falling within regulation 7(3) who is not an EEA national on application if –
 - (a) the application is accompanied or joined by a valid passport;
 - (b) the relevant EEA national is a qualified person or an EEA national with a right of permanent residence under regulation 15; and
 - (c) in all the circumstances it appears to the Secretary of State appropriate to issue the residence card.
- (5) Where the Secretary of State receives an application under paragraph (4) an extensive examination of the personal circumstances of the applicant must be undertaken by the Secretary of State and if the application is refused, the Secretary of State must give reasons justifying the refusal unless this is contrary to the interests of national security.
- (6) A residence card issued under this regulation is valid for –
 - (a) five years from the date of issue; or

(b) in the case of a residence card issued to the family member or extended family member of a qualified person, the envisaged period of residence in the United Kingdom of the qualified person,
whichever is the shorter.

- (7) A residence card –
- (a) must be called “Residence card of a family member of a Union citizen”;
 - (b) is proof of the holder’s right to reside on the date of issue;
 - (c) is no longer valid if the holder ceases to have a right to reside under these Regulations;
 - (d) is invalid if the holder never had a right to reside under these Regulations.
- (8) This regulation is subject to regulations 24 and 25.

[...]

Reg 21 - Procedure for applications for documentation under this Part and regulation 12

- (1) An application for documentation under this Part, or for an EEA family permit under regulation 12, must be made –
- (a) online, submitted electronically using the relevant pages of www.gov.uk; or
 - (b) by post or in person, using the relevant application form specified by the Secretary of State on www.gov.uk.
- (2) All applications must –
- (a) be accompanied by the evidence or proof required by this Part or regulation 12, as the case may be, as well as that required by paragraph (5), within the time specified by the Secretary of State on www.gov.uk; and
 - (b) be complete.
- (3) An application for a residence card or a derivative residence card must be submitted while the applicant is in the United Kingdom.
- (4) When an application is submitted otherwise than in accordance with the requirements in this regulation, it is invalid and must be rejected.
- (4A) An application for documentation under this Part, or for an EEA family permit under regulation 12, is invalid where the person making the application is subject to a removal decision made under regulation 23(6)(b), a deportation order made under regulation 32(3) or an exclusion order made under regulation 23(5).]
- (5) Where an application for documentation under this Part is made by a person who is not an EEA national on the basis that the person is or was the family member of an EEA national or an extended family member of an EEA national, the application must be accompanied **F61...** by a valid national identity card or passport in the name of that EEA national.
- (6) Where –
- (a) there are circumstances beyond the control of an applicant for documentation under this Part; and
 - (b) as a result, the applicant is unable to comply with the requirements to submit an application online or using the application form specified by the Secretary of State,

the Secretary of State may accept an application submitted by post or in person which does not use the relevant application form specified by the Secretary of State.

[...]

Reg 29 - Person claiming right of admission

- (1) This regulation applies to a person who claims a right of admission to the United Kingdom under regulation 11 as—
 - (a) a person, not being an EEA national, who—
 - (i) is a family member of an EEA national;
 - (ii) is a family member who has retained the right of residence;
 - (iii) has a derivative right to reside;
 - (iv) has a right of permanent residence under regulation 15; or
 - (v) is in possession of a qualifying EEA State residence card;
 - (b) an EEA national, where there is reason to believe that the EEA national may be a person to whom regulation 23(1), (2), (3) or (4) applies; or
 - (c) a person to whom regulation 41 applies (temporary admission to submit case in person).
- (2) A person to whom this regulation applies is to be treated as if that person were a person seeking leave to enter the United Kingdom under the 1971 Act for the purposes of paragraphs 2, 3, 4, 7 and 16 to 18A of Schedule 2 to the 1971 Act (administrative provisions as to control on entry etc)(19), except that—
 - (a) the reference in paragraph 2(1) to the purpose for which the immigration officer may examine any persons who have arrived in the United Kingdom is to be read as a reference to the purpose of determining whether the person is to be granted admission under these Regulations;
 - (b) the references in paragraphs 3, 7 and 16(1) to a person who is, or may be, given leave to enter are to be read as references to a person who is, or may be, granted admission under these Regulations; and
 - (c) a medical examination is not to be carried out under paragraph 2 or paragraph 7 as a matter of routine and may only be carried out within three months of the person's arrival in the United Kingdom.
- (3) For so long as a person to whom this regulation applies is detained under the powers conferred by Schedule 2 to the 1971 Act, or granted bail under Schedule 10 to the 2016 Act whilst liable to be detained under the powers conferred by Schedule 2 to the 1971 Act, the person is deemed not to have been admitted to the United Kingdom.

IMMIGRATION RULES HC395**Appendix EU**

[..]

Persons eligible for limited leave to enter or remain as a relevant EEA citizen or their family member, as a person with a derivative right to reside or with a Zambrano right to reside or as a family member of a qualifying British citizen

EU14. The applicant meets the eligibility requirements for limited leave to enter or remain where the Secretary of State is satisfied, including (where applicable) by the required evidence of family relationship, that, at the date of application, condition 1 or 2 set out in the following table is met:

Condition Is met where:

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- | | |
|-------|--|
| 1. | <p>(a) The applicant is:</p> <ul style="list-style-type: none"> (i) a relevant EEA citizen; or (ii) a family member of a relevant EEA citizen; or (iii) a family member who has retained the right of residence by virtue of a relationship with a relevant EEA citizen; or (iv) a person with a derivative right to reside; or (v) a person with a Zambrano right to reside; and <p>(b) The applicant is not eligible for indefinite leave to enter or remain under paragraph EU11 of this Appendix solely because they have completed a continuous qualifying period of less than five years; and</p> <p>(c) Where the applicant is a family member of a relevant EEA citizen, there has been no supervening event in respect of the relevant EEA citizen</p> |
| <hr/> | |
| 2. | <p>(a) The applicant is:</p> <ul style="list-style-type: none"> (i) a family member of a qualifying British citizen; or (ii) a family member who has retained the right of residence by virtue of a relationship with a qualifying British citizen; and <p>(b) The applicant was, for any period in which they were present in the UK as a family member of a qualifying British citizen relied upon under sub-paragraph (c), lawfully resident by virtue of regulation 9(1) to (6) of the EEA Regulations (regardless of whether in the UK the qualifying British citizen was a qualified person under regulation 6 of the EEA Regulations); and</p> <p>(c) The applicant is not eligible for indefinite leave to enter or remain under paragraph EU12 of this Appendix solely because they have completed a continuous qualifying period in the UK of less than five years</p> |
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Appendix EU - Annex 1 - Definitions

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|-----------------|--|
| durable partner | <p>(a) the person is, or (as the case may be) for the relevant period was, in a durable relationship with a relevant EEA citizen (or, as the case may be, with a qualifying British citizen or with a relevant sponsor), with the couple</p> |
|-----------------|--|
-

having lived together in a relationship akin to a marriage or civil partnership for at least two years (unless there is other significant evidence of the durable relationship); and

(b)(i) the person holds a relevant document as the durable partner of the relevant EEA citizen (or, as the case may be, of the qualifying British citizen or of the relevant sponsor) for the period of residence relied upon; for the purposes of this provision, where the person applies for a relevant document (as described in sub-paragraph (a)(i)(aa) or (a)(ii) of that entry in this table) as the durable partner of the relevant EEA citizen or, as the case may be, of the qualifying British 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; or

(ii) where the person is applying as the durable partner of a relevant sponsor (or, as the case may be, of a qualifying British citizen), or as the spouse or civil partner of a relevant sponsor (as described in sub-paragraph (a)(i)(bb) of the entry for 'joining family member of a relevant sponsor' in this table), and does not hold a document of the type to which sub-paragraph (b)(i) above applies, and where:

(aa) the date of application is after the specified date; and

(bb) the person:

(aaa) was not resident in the UK and Islands as the durable partner of a relevant EEA citizen (where that relevant EEA citizen is their relevant sponsor) on a basis which met the entry for 'family member of a relevant EEA citizen' in this table, or, as the case may be, as the durable partner of the qualifying British citizen, at (in either case) any time before the specified date, unless (in the former case):

- the reason why they were not so resident is that they did not hold a relevant document as the durable partner of that relevant EEA citizen for that period; and

- they otherwise had a lawful basis of stay in the UK and Islands for that period; or

(bbb) was resident in the UK and Islands before the specified date, and one of the events referred to in sub-paragraph (b)(i) or (b)(ii) of the entry for 'continuous qualifying period' in this table has occurred and after that event occurred they were not resident in the UK and Islands again before the specified date; or

(ccc) was resident in the UK and Islands before the specified date, and the event referred to in sub-paragraph (a) of the entry for 'supervening event' in this table has occurred and after that event occurred they were not resident in the UK and Islands again before the specified date,

the Secretary of State is satisfied by evidence provided by the person that the partnership was formed and was durable before (in the case of a family member of a qualifying British citizen as described in sub-paragraph (a)(i)(bb) or (a)(iii) of that entry in this table) the date and time of withdrawal and otherwise before the specified date; and

(c) it is, or (as the case may be) for the relevant period was, not a durable partnership of convenience; and

(d) neither party has, or (as the case may be) for the relevant period had, another durable partner, a spouse or a civil partner with (in any of those

circumstances) immigration status in the UK or the Islands based on that person's relationship with that party

in addition, to meet condition 6 in the table in paragraph EU11 of this Appendix (or condition 3 in the table in paragraph EU11A), the above requirements are to be met with reference to the period immediately before the death of the relevant EEA citizen (or, as the case may be, of the relevant sponsor) rather than to the date of application

[...]

family member of a relevant EEA citizen	<p>a person who does not meet the definition of 'joining family member of a relevant sponsor' in this table, and who has satisfied the Secretary of State, including by the required evidence of family relationship, that they are (and for the relevant period have been), or (as the case may be) for the relevant period (or at the relevant time) they were:</p> <p>(a) the spouse or civil partner of a relevant EEA citizen, and:</p> <p>(i) the marriage was contracted or the civil partnership was formed before the specified date; or</p> <p>(ii) the applicant 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 application), and the partnership remained durable at the specified date; or</p> <p>(b) the durable partner of a relevant EEA citizen, and:</p> <p>(i) the partnership was formed and was durable before the specified date; and</p> <p>(ii) the partnership remains durable at the date of application (or it did so for the relevant period or immediately before the death of the relevant EEA citizen); or</p> <p>(c) the child or dependent parent of a relevant EEA citizen, and the family relationship existed before the specified date; or</p> <p>(d) the child or dependent parent of the spouse or civil partner of a relevant EEA citizen (as described in sub-paragraph (a) above), and the family relationship existed before the specified date; or</p> <p>(e) the dependent relative, before the specified date, of a relevant EEA citizen (or of their spouse or civil partner, as described in sub-paragraph (a) above) and the dependency (or, as the case may be, their membership of the household or their strict need for personal care on serious health grounds) continues to exist at the date of application (or did so for the period of residence relied upon)</p>
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in addition, where the applicant does not rely on meeting condition 1, 3, or 6 of paragraph EU11 of this Appendix, or on being a family member who has retained the right of residence by virtue of a relationship with a relevant EEA citizen, the family relationship continues to exist at the date of application
