IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2022-005322

First-tier Tribunal No: EA/03543/2022

THE IMMIGRATION ACTS

Decision & Reasons Issued:

On 15th of January 2025

Before

UPPER TRIBUNAL JUDGE JACKSON

Between

TAJAMAL HAZOOR RANDHAWA
(NO ANONYMITY ORDER MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr S Karim of Counsel, instructed by the Whitefield Solicitors Ltd
For the Respondent: Ms J Isherwood, Senior Home Office Presenting Officer

Heard at Field House on 5 November 2024

DECISION AND REASONS

1. In a decision promulgated on 12 September 2023, an error of law was found in the decision of First-tier Tribunal Judge Cruthers promulgated on 1 July 2022 in which the Appellant's appeal against the decision to refuse his application under the EU Settlement Scheme (the EUSS) dated 1 March 2022 was dismissed. A copy of that decision is annexed below and the contents of which will not be repeated. This is the re-making of the Appellant's appeal, following a stay behind the Court of Appeal's decision in Vasa & Hasanaj v Secretary of State for the Home Department [2024] EWCA Civ 777.

2. The Appellant is a national of Pakistan, born on 1 April 1975, who made an application on 26 January 2022 under the EUSS for pre-settled status as the dependent relative of an EU citizen. He had previously arrived in the United Kingdom on 19 December 2019 with his brother, Mr Mohammad Akmal, the

"Sponsor", from Italy, where he held a Residence Card as the Family member of a Union citizen. The Sponsor was granted pre-settled status on 7 April 2020. The Appellant had made previous applications under the EUSS on 20 February 2020, 16 October 2020, 28 December 2020 and 30 June 2021; all of which were refused by the Respondent.

3. The Respondent refused the most recent application the basis that there was insufficient evidence that the Appellant was the family member of a relevant EU citizen, specifically that he did not have an EEA Residence Card or EEA Family Permit as such. The application was therefore refused under paragraphs EU11 and EU14 of Appendix EU to the Immigration Rules.

Legal framework

4. Appendix EU to the Immigration Rules sets out eligibility for indefinite leave to enter or remain in paragraph EU11 and for limited leave to enter or remain in paragraph EU14. Both paragraphs, inter alia, require a person to be a 'family member of a relevant EEA citizen', which so far as relevant, is defined in Annex 1 as follows:

> *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:*
>
> *(a) …*
>
> *(b) …*
>
> *(c) …*
>
> *(d) …*
>
> *(e) the dependent relative, before the specified date, of a relevant EEA citizen (or of their spouse or civil partner …) 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)*
>
> *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.*

5. In turn, a 'dependent relative' is further defined in paragraph (a)(i)(bb) as a person who is, or for the relevant period was, a dependent of the sponsoring person, a member of their household or in strict need of their personal care on serious health grounds; and, "*(b) holds a relevant document as the dependent relative of their sponsoring person for the period of residence relied upon …".* A 'relevant document' is, in essence, defined as a family permit, registration certificate, residence card, document certifying permanent residence, permanent residence card or derivative residence card issued by the UK under the Immigration (European Economic Area) Regulations 2016.

6. The relevant history and legal framework in relation to the EU Withdrawal Agreement, as well as its legal effect (including as against the provisions of Appendix EU) has been comprehensively set out in cases such as Celik v Secretary of State for the Home Department [2023] EWCA Civ 921; Vasa & Hasanaj; AT v Secretary of State for the Home Department [2023] EWCA Ci 1307; and R (Ali) v Secretary of State for the Home Department [2024] EWCA Civ 1546. I do not repeat the now well established background and principles set out therein and set out below only the key relevant provisions of the EU Withdrawal Agreement for the purposes of this appeal.

7. The personal scope of the EU Withdrawal Agreement is set out, for present purposes, in Articles 9 and 10 of the same. Therein, family members are defined in Article 9(a) as persons who fall within Article 10 and are (i) family members of UK nationals as defined in Article 2(2) of Directive 2004/38/EC of the European Parliament and Council (the "Directive") and, (ii) persons other than those defined in Article 3(2) of the Directive whose presence is required by Union citizens or United Kingdom nationals in order not to deprive those Union citizens of United Kingdom nationals of a right of residence granted by Part 2 of the EU Withdrawal Agreement.

8. Article 10 provides, so far as relevant, as follows:

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) …

(c) …

(d) …

(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)(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 in in points (a) to (d) of this paragraph;

(iii) …

(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 thereafter.

2. Persons falling under points (a) and (b) of Article 3(2) of Directive 2004 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. *…*

5. *In cases referred in 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 and residence to such persons.*

9. Article 2 of the Directive defines a family member as the spouse; civil partner; direct descendants under the age of 21 or dependents of the spouse/civil partner; and dependent direct relatives in the ascending line and those of their spouse/civil partner. Article 3(2) of the same requires the host Member State, in accordance with its national legislation, to 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 dependents 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.

10. The remaining relevant provision of the Withdrawal Agreement to this appeal is Article 18, which provides that the United Kingdom or member states may choose to provide for a new residence status which confers the rights guaranteed by Title II of Part Two of the same and which is evidenced by a new document. For the reasons set out in Vasa & Hasanaj, although Title II does not confer any specific right on extended family members of EU nationals to reside in the United Kingdom after the end of the transition period (such rights being granted under domestic law only), the Withdrawal Agreement proceeds on the basis that such persons will be able to rely on rights recognised by domestic law after the end of the transition period and Article 18 itself makes provision for, for example, documentary requirements for extended family members applying for new residence status.

11. The Appellant places specific reliance on Article 18(1)(j), (n), (o) and (r) of the Withdrawal Agreement, which provide as follows:

1. *The host State may require Union citizens or United Kingdom nationals, their respective family members and other persons, who reside in its territory in accordance with conditions set out in this Title, to apply for a new residence status which confers the rights under this Title and a document evidencing such status which may be in a digital form.*

   Applying for such a residence status shall be subject to the following conditions:

   …

(j) supporting documents other than identity documents, such as civil status documents, may be submitted in copy. Originals of supporting documents may be required only in specific cases where there is reasonable doubt as to the authenticity of the supporting documents submitted;

…

(n) for cases other than those set out in points (k), (l) and (m), the host State shall not require applicants to present supporting documents that go beyond what is strictly necessary and proportionate to provide evidence that the conditions relating to the right of residence under this Title have been fulfilled;

(o) the competent authorities of the host State shall help the applicants prove their eligibility and to avoid any errors or omissions in their applications; they shall give the applicants the opportunity to furnish supplementary evidence and to correct any deficiencies, errors or omissions;

…

(r) the applicant shall have access to judicial and, where appropriate, administrative redress procedures in the host State against any decision refusing to grant the residence status. The redress procedures shall allow for an examination of the legality of the decision, as well as of the facts and circumstances on which the proposed decision is based. Such redress procedures shall ensure that the decision is not disproportionate.

12. A number of the provisions of the Immigration (European Economic Area) Regulations 2016 (the "EEA Regulations") are also relevant insofar as they relate to family members, admission to the United Kingdom, and initial right of residence; which provide:

Family member

7.-(1) …

(2) …

(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.

…

Right of Admission to the United Kingdom

11.-(1) …

(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 23(4) (family member of EEA national must accompany or join EEA national with right to reside) are met; or

(b) …

(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.

…

Initial right of residence

13.-(1) An EEA national is entitled to reside in the United Kingdom for a period not exceeding three months beginning on the date of admission to the United Kingdom provided the EEA national holds a valid national identity card or passport issued by an EEA State.

(2) A person who is not an EEA national but is a family member who has retained the right of residence or the family member of an EEA national residing in the United Kingdom under paragraph (1) is entitled to reside in the United Kingdom provided that person holds a valid passport.

…

The appeal

The witness evidence

13. In his first written statement, signed and dated 21 June 2022, the Appellant states that he came to the United Kingdom from Italy with his brother in December 2019 and made an application for pre-settled status in the United Kingdom on 22 January 2022. He was issued with a visa in Italy as the dependant family member of his brother and had lived with him as his dependent since February 2017.

14. The Appellant does not work in the United Kingdom as he has no permission to do so and no national insurance number. He is totally reliant on the Sponsor for all of his daily needs. The Sponsor has taken care of the Appellant as part of a joint family system after their father died. He normally receives around £100 a month in to his bank account, sometimes more if needed and the Sponsor pays for the utility bills and rent.

15. In a second written statement, signed and dated 8 October 2024, the Appellant states that he moved to the United Kingdom on 12 December 2019 with his brother. The Appellant had been issued with an Italian Residence Card as the Family member of a Union citizen and with an Italian ID card.

16. The Appellant entered the United Kingdom through Manchester airport with his brother. When he left Italy, an exit stamp was placed in his passport. On arrival, the Immigration Officer having scanned his passport and Italian Family Permit said “You can go” and no stamp was placed in his passport.

17. The remainder of the statement repeats matters contained in the first statement.

18. The Appellant attended the oral hearing, confirmed his details and gave evidence through a Court appointed Urdu interpreter. He stated that the Sponsor gives him £10 or £20 on a weekly basis and if he needs money, he just takes it or if he wants to buy something, either the Sponsor buys for him or he gives him the money for it, sometimes through an online transfer to his Monzo account and sometimes in cash. The Appellant says his bank statements are available from 2019. When asked about an entry on his bank statement on 27 August 2021 saying "£100 test", the Appellant stated that this was not a one off and he receives money on a regular basis. He couldn't recall exactly what this particular transfer was for, it may have been for shopping or a religious purpose or festival.

19. At the Appellant's address, he states that he lives with his brother, the Sponsor, and his brother's daughter. The Appellant's nephew is in Pakistan studying there. The Appellant has his own room in the house.

20. The Appellant was asked about his boarding card and who wrote 'visa ok' on it. He stated that this was inserted by a Ryanair immigration person at the time of boarding his flight in Italy. The Appellant confirmed this was not a member of airline staff but an immigration officer. When asked for confirmation that this happened as the Appellant was boarding the plane, he stated that there is only one place at the airport where immigration happens. After you enter the airport, you go through security and then the next desk is for passports, immigration and visas.

21. I asked for further clarification about when the 'visa ok' was written on the Appellant's boarding pass and by whom. He stated that this was when he left Italy, it was written by an immigration person, but then said he could not say for sure whether it was by a member of airplane staff or by an immigration officer, but it was basically a servant of the government who did it.

22. When the Appellant arrived in the Untied Kingdom, he was not asked any questions by an immigration officer as to why he was coming. The person simply took his passport and that of his brother, which was scanned and he handed up his Italian Residence Card and Italian ID.

23. In his first written statement, signed and dated 21 June 2022, Mr Mohammad Akmal, the Sponsor, states that he has been working in the United Kingdom with an annual salary of around £21,600. He and the Appellant have lived together in the same household in Pakistan, in Italy and now in the United Kingdom. The Sponsor remains responsible for the family home in Pakistan following his father's death. The Appellant remains entirely dependent on the Sponsor for all of his financial needs.

24. In a second written statement, signed and dated 8 October 2024, Mr Akmal, gave the same details as the Appellant as to living together in Italy and their arrival to the United Kingdom; as well as his dependency and regular support.

25. The Sponsor has worked full-time in the United Kingdom since his arrival, with an annual income of £23,236.01.

26. The Sponsor attended the oral hearing and gave oral evidence through a court appointed Urdu interpreter. Although the Sponsor confirmed the details given on

his statement, it then transpired that the address was wrong and he had moved over a month before the statement was made on 1 September 2024. The Sponsor had no evidence (beyond something on his phone) of his new address, of which he was unsure, he said he could not remember it. The Sponsor stated he had lived at the same old and new address as the Appellant, with a change of address details given to the solicitors (including a water bill) and he had been told the address had been changed.

27. At the Sponsor's current address, he initially stated that he only lived with the Appellant. When asked if there was anyone else living there, he stated that his daughter and son also live there. He and the Appellant both have their own room and the Sponsor's son and daughter, aged 27 and 20 or 21 share a room. The Sponsor stated that his son works nights and their room is big, his daughter goes to university during the day; both are in the United Kingdom.

28. The Sponsor had not provided any bank statements or other documents for 2023 or 2024 as he was told the earlier statements up to 2022 were enough.

29. The Sponsor was asked about the same bank statement entry on 27 August 2021 stating 'test' and it was suggested that this was evidence that it was not genuine financial support. The Sponsor stated that he has his brother's name on other entries, this may have been a mistake and he gives money to the Appellant as a matter of routine, usually in to his account but occasionally in cash as well. The Appellant is not financially supported by anyone else, although he may receive money from a friend.

30. As to the Appellant's boarding pass, the Sponsor stated that when they went to the airport, the staff checked as to how they could travel and re-checked their passports and family visa documents. The Appellant was allowed to stay in Italy because of the Sponsor, he got his visa because of him. The Sponsor was entitled to take his brother with him to the United Kingdom and when this was all checked, it was written on the ticket 'ok' and 'visit' after which they were allowed to proceed. The Sponsor did not say anything as to whether it was a visit or a permanent move to the United Kingdom. The boarding pass was checked when they went to the plane at the time of boarding, not when they checked in. Neither the Appellant nor the Sponsor were asked any questions by immigration officials, only their documents were checked. The Sponsor did not tell anyone why they were coming to the United Kingdom and no stamps were placed in his passport.

The documentary evidence

31. The documentary evidence includes a range of materials, not all of which it is necessary to refer to individually (such as documents confirming identity and family relationship, and payslips, concerning matters which are not in dispute), but all have been taken into account. I refer to the key documents below.

- The Appellant's boarding pass for flight FR3219 on 12 December 2019, which handwritten on the top says *"visa ok at gate".*

- Copy of the Appellant's and Sponsor's passports, Italian ID cards and the Appellant's Italian Residence Card as a Family member of a Union citizen (with English translations of the Appellant's documents provided at the hearing).

- HSBC bank statements for the Sponsor dated between February 2020 and May 2022, showing payments out of varying amounts between £10 and £300 to the Appellant (some references include 'test', some refer to 'personal' and some to 'brother').

- Monza bank statements for the Appellant dated between February 2020 and June 2022 which show payments in from the Sponsor and others.

- Joint utility bills for the Appellant and the Sponsor, dated 28 May 2020 and 22 November 2021.

Closing submissions

32. On behalf of the Respondent, Ms Isherwood submitted that this appeal should be dismissed, relying on the rule 24 responses already submitted (including on the withdrawal of the earlier legally erroneous concession) and further oral submissions. Ms Isherwood distinguished the case of Vasa & Hasanaj on the basis that this Appellant had not in fact ever had his entry and residence in the United Kingdom facilitated and he was not therefore within the personal scope of the Withdrawal Agreement. Specifically, the Appellant had entered the United Kingdom in 2019 but had not been given a stamp in his passport and there is no evidence of the Immigration Officer making any specific decision at that point. The Appellant's evidence as to his passport and documents being checked and a handwritten comment on his boarding pass (on which the evidence was not consistent as to who did this or when) does not assist in establishing that an Immigration Officer in the United Kingdom made any decision to admit his entry or residence in the United Kingdom and there was nothing to suggest that either the Appellant or the Sponsor had made their intentions clear that they wished to come to the United Kingdom to reside here.

33. In respect of the claim as to dependency, Ms Isherwood submitted that the evidence at the appeal raised serious doubts as to whether the Appellant and the Sponsor were now living in the same household and whether the Appellant was dependent on the Sponsor. The Appellant and the Sponsor gave different addresses in their respective witness statements and gave inconsistent evidence about who they lived with. Further, there was no up to date evidence of any financial support, despite the opportunity for further evidence to be submitted prior to the hearing. As to the earlier bank statements provided, it was submitted that the two accounts do not show corresponding transfers and the reference to 'test' was evidence that these were not genuine transfers.

34. On the evidence, Ms Isherwood submitted that the Appellant had not established that he was either financially dependent on the Sponsor, nor a member of his household. As such, whether or not the Appellant had a relevant document, he would not meet the requirements of Appendix EU as he is not dependent on nor a member of the household of the Sponsor. Ms Isherwood stated that although the definition in Annex 1 to Appendix EU referred to dependency at the date of application, the relevant date on appeal was that and date of hearing. In any event, Ms Isherwood submitted that the Appellant had not established dependency or membership of the same household at the date of application either given that the bank statements did not match; there was evidence of other financial support to both the Appellant and the Sponsor from third parties and there was doubt as to whether the Sponsor was financially able to support the Appellant at that time.

35. On behalf of the Appellant, Mr Karim adopted his skeleton argument and made further oral submissions. In relation to dependency, it was submitted that the Appellant and the Sponsor had given largely consistent and straightforward evidence without exaggeration or embellishment that they had lived together in Italy since 2017 and in the United Kingdom since 2019, with regular financial support and therefore dependency. The Appellant had been issued with a residence card in Italy as a family member and there had been no material separation of the two since 2017. There has been no suggestion that the Appellant is working or was supported from elsewhere. The issue of dependency has to be assessed only at the date of application. No later or up to date evidence was submitted as this was not necessary.

36. Mr Karim submitted that the core issue in the present appeal was as to whether the Appellant's entry and residence to the United Kingdom had been facilitated. He submitted that the decision in Vasa & Hasanj applied with equal cogency to the present appeal, such that it should be allowed under Articles 10(3) and 18 of the EU Withdrawal Agreement, with reference to Articles 3(2) and 10 of the Directive and the EEA Regulations. All material evidence in the current case also points to the Appellant having been permitted entry to the United Kingdom for the purposes of residence as he would otherwise need entry clearance as a visitor (as he is a visa national). The lack of a stamp in the Appellant's passport was also consistent with his permitted entry and an obligation not to stamp a passport in Regulation 11(3) of the EEA Regulations and if it was for a visit, he would have had to have a stamp stating that. In the alternative, the handwritten note on the Appellant's passport was, so far as necessary, akin to a 'stamp' in the passport. Further, on entry, the Appellant would have had an initial right of residence as a family member pursuant to Regulation 13 of the EEA Regulations and Regulation 7(3) would have treated him as a family member for so long as he had a residence card and continued to meet the conditions as one.

37. The Appellant's position was said to have also been supported by Article 10 of the Directive which provided for a document issued by another Member State certifying that they are dependents or members of the household of the Union citizen (or proof of existence of serious health grounds strictly requiring the personal care of the family member) to be sufficient for facilitation of admission to another state. It is also supported by the Respondent's own policy guidance which now states that from 1 January 2021, a person can no longer use an Article 10 or 20 residence card issued by another EEA member state to travel to the United Kingdom with an EEA family member or to join them in the United Kingdom.

Findings and reasons

38. This appeal raises a number of issues to consider in turn, starting practically with the Respondent's application to withdraw a concession and then in terms of remaking the appeal, the three key issues are whether (i) the Appellant meets the requirements of Appendix EU; (ii) whether the Appellant is within the personal scope of the EU Withdrawal Agreement, specifically, whether his entry and residence to the United Kingdom had been facilitated and as such whether the refusal of his application would be in breach of Article 18 of the same; and (iii) whether the Appellant had established that he was either dependent on or a member of the household of the Sponsor in the United Kingdom, which in turn requires consideration of the relevant date upon which this requirement has to be met.

39. Starting with the Respondent's application to withdraw the concession previously made (by the Home Office Presenting Officer before the First-tier Tribunal) that the EEA document issued by the Italian authorities and was evidence of facilitation of residence under the EU Withdrawal Agreement. That was based on a mistake and could not, as a matter of ordinary construction, satisfy the requirements of Appendix EU to the Immigration Rules. At the time of the latest hearing, there was no specific objection on behalf of the Appellant opposing the withdrawal of the concession and no specific submissions were made on this issue.

40. The Court of Appeal gave consideration to the issue of withdrawal of a concession in Secretary of State for the Home Department v Akram Davoodipanah [2004] EWCA Civ 106, setting out the following principle:

> *22. It is clear from the authorities that where a concession has been made before an adjudicator by either party the Tribunal can allow the concession to be withdrawn if it considers that there is good reason in all the circumstances to take that course … Obviously if there will be prejudice to one of the parties if the withdrawal is allowed that will be relevant and matters such as the nature of the concession and the timing may also be relevant, but it is not essential to demonstrate prejudice before an application to withdraw a concession can be refused. What the Tribunal must do is to try and obtain a fair and just result. In the absence of prejudice, if a presenting officer has made a concession which appears in retrospect to be a concession which he should not have made, then justice will require that the Secretary of State be allowed to withdraw that concession before the Tribunal. But, as I have said, everything depends on the circumstances, and each case must be considered on its own merits.*

41. Further to this, in NR (Jamaica) v Secretary of State for the Home Department [2009] EWCA Civ 856, Lord Justice Goldring, having referred to the principle set out above, added:

> *12. As Kennedy LJ makes clear, the Tribunal may in its discretion permit a concession to be withdrawn if in its view there is good reason in all the circumstances for that course to be taken. Its discretion is wide. Its exercise will depend on the particular circumstances of the case before it. Prejudice to the applicant is a significant feature. So is its absence. Its absence does not however mean that an application to withdraw a concession will invariably be granted. Bad faith will almost certainly be fatal to an application to withdraw a concession. In the final analysis, what is important is that as a result of the exercise of discretion the Tribunal is enabled to decide the real areas of dispute on their merits so as to reach a result which is just both to the appellant and the Secretary of State.*

42. In the present appeal, the Appellant has been on notice of the Respondent's position as to the concession since July 2023 and there is no identified prejudice to the Appellant of it being withdrawn in the context of a remaking of his appeal at this time, such that there is no unfairness in the withdrawal. In any event, the concession was plainly wrong as a matter of law given the clear and unambiguous wording of the definition of 'relevant document' in Annex 1 to Appendix EU of the Immigration Rules. The application to withdraw the concession is granted.

43. In terms of the substance, I return to the three key issues identified above. The first issue is as to Appendix EU. Neither party suggested that the Appellant met the requirements of paragraphs EU11 or EU14 of the same, or the relevant definitions contained within the Annex relevant to those requirements. In particular, regardless of the issue of dependency or membership of the same household (the need for which overlaps between Appendix EU and the EU Withdrawal Agreement), the Appellant could not satisfy the rules as he did not have a 'relevant document' as defined and required. He had never even applied for such a document from the United Kingdom authorities. The Appellant's appeal under the Immigration Rules is therefore dismissed.

44. The second issue is whether in the alternative, the Appellant falls within the personal scope of the EU Withdrawal Agreement and if so, whether he benefits from any of the provisions therein, in particular in Article 18. In summary, the Appellant relies on the Court of Appeal decision in Vasa & Hasanaju and submits that his claim is on all fours with that case both as to personal scope and that his appeal should be allowed under one of the provisions of Article 18. The Respondent however distinguishes the facts of that case and submits that it does not assist the Appellant as his entry and residence to the United Kingdom has not been facilitated and there is no document (even as construed more broadly than the definition in Appendix EU) evidencing such a decision. It is therefore necessary to consider the decision in Vasa & Hasanaj in more detail.

45. The background facts in the cases of Vasa & Hasanaj were different to those in the current appeal in that (i) neither of those appellants had been issued with a Residence Card as a family member in another EU member state (unlike the present Appellant); and (ii) both had, on passport checks for arrival to the United Kingdom, had a stamp placed in their respective passports that said *"Admitted to the United Kingdom under the Immigration (EEA) Regulations 2016"* with a further stamp stating 'Immigration Officer' and the date/location.

46. The starting point for consideration of those appeals in the Court of Appeal was what the individual Immigration Officers did in those two cases and whether that amounted to facilitation of entry and residence in the United Kingdom. It was found that on any reasonable interpretation, the appellants presented themselves at the border wanting to be allowed to come and live in the United Kingdom with their EEA national family member and that decisions were taken to admit both to the United Kingdom. Those decisions would be reasonably understood to allow the appellants to come to the United Kingdom and live with their respective family member [58]. The position was considered to be relatively straightforward; albeit that the stamps in the passport did not constitute a relevant document for the purposes of Appendix EU as they were not a family permit, nor a residence card, nor a registration certificate (none of which had ever been applied for). The Court of Appeal went on to separately consider the position under the EU Withdrawal Agreement as follows:

> *62. That, however, is not the end of the matter. There is the question of their rights under the Withdrawal Agreement. Article 10(2) brings family members (defined by Article 3 of the Directive) within the scope of the Withdrawal Agreement if they are persons "whose residence was facilitated by the host state in accordance with its national legislation before the end of the transition period". That is what happened in the present case. Mr Vasa's and Mr Hasanaj's residence were facilitated by the acts of the immigration officers. They were admitted to the United Kingdom, pursuant to decisions taken by public officials, that is, they were allowed to come to*

and reside in the United Kingdom. They fall within the scope of Article 10(2). They did not have any rights derived from EU law to reside in the United Kingdom (as they were not nationals of an EEA member state nor were they direct family members of such nationals, within the meaning of Article 2 of the Directive). But, if the United Kingdom chose (as it did) to create a new residence status, then Article 18(1)(l)(iv) of the Withdrawal Agreement provides for that status to be granted to extended family members (as defined by Article 3 of the directive) on production of identity documents and "a document issued by the relevant authority in the host state in accordance with Article 3(2) of Directive 2004/38", i.e. the document facilitating their residence in the United Kingdom. That document was, in the present case, the stamps placed in the passports by the immigration officers.

63. In those circumstances, refusal by the Secretary of State to accept the document issued by the relevant national authorities did amount to a breach of the rights of Mr Vasa and Mr Hasanaj under Article 18(1)(l)(iv) of the Withdrawal Agreement. Their appeals against the decision to refuse their applications under the Settlement Scheme should therefore have been allowed.

47. The Appellant also relies specifically on paragraph 65:

65. I do not consider that that approach does reflect a proper interpretation of Article 10 of the Withdrawal Agreement. The reference to national legislation reflects the fact that extended family members (those falling within Article 3 of the Directive and as defined by regulation 8 of the 2016 Regulations) did not derive rights of residence from EU law but from national law. The reference to "in accordance with its national legislation", and "a document issued by the relevant national authorities in the host state in accordance with Article 3(2)" are simply a recognition that the legal act or decision conferring the right to reside will be one taken under national law. Articles 10(2) and 18(1)(l)(iv) of the Withdrawal Agreement were not seeking to introduce a requirement that individuals seeking to continue rights granted prior to the end of the transition period had to demonstrate that those rights had been granted under national legislation which had, as a matter of domestic law, been properly interpreted and applied. There is no reason why the Withdrawal Agreement (which concerns the position of family members of EEA nationals in the United Kingdom, and family members of UK nationals in other member states) would be concerned with ensuring that domestic legislation was in place and had been properly applied. Rather, the focus of the Withdrawal Agreement was that their rights under EU law (for EU nationals and their family members as defined by Article 2 of the Directive) were protected after the end of the transition period and, similarly, that rights granted by relevant national authorities acting under national law (in the case of family members as defined by Article 3 of the directive) were also protected where a new residence status was created as contemplated by Article 18 of the Withdrawal Agreement.

48. Finally, the Court of Appeal rejected the argument from the Secretary of State in Vasa & Hasanaj that the decisions of the Immigration Officers in those cases were legally flawed, either on an erroneous factual basis or outside the scope of their powers.

49. Although at first sight it may seem like the decision in this case should apply by analogy to the present Appellant, there are a number of reasons why I find that it is distinguishable and does not assist him. Firstly, the Appellant here was not relying on arrival on a solely domestic law provision or decision for his entry or residence as he had already been issued with a Residence Card in Italy as the family member of an EEA national. His admission to the United Kingdom in December 2019 was therefore governed by the Directive, as implemented by the EEA Regulations. In particular, his right of entry was provided for by Article 5 of the Directive, as implemented by Regulation 11 of the EEA Regulations; both of which would obligate an Immigration Officer to permit entry - provided the documentary requirements for entry are met, they were accompanying or joining an EEA national and unless a person was subject to a removal decision. That is entirely consistent with what happened on the Appellant's account of his arrival at Manchester airport, the required documents were checked and he was travelling with an EEA national; there being no suggestion of any removal decision. No further decision or consideration was required by the Immigration Officer and as also specified in the Directive and in the EEA Regulations, no stamp or documentary record was made of the entry.

50. Secondly, on the facts in Vasa and Hasanaj, the Court of Appeal considered that the reasonable person would understand the decision of the Immigration Officers made in those cases to mean. They were satisfied that, *"in context, considered objectively, a reasonable person would understand the stamps to record a decision that Mr Vasa and Mr Hasanaj were each allowed to come into the United Kingdom and live with their respective relative who was a national of an EU member state."* [58]. It was further accepted in paragraph 60 that it might have been difficult to determine when, precisely, the rights granted by the Immigration Officers came to an end as there was no time limit expressly stated. However, it was found that *"The likelihood is that, objectively interpreted, they were admitted to the United Kingdom for so long as they satisfied the substantive requirements for such persons to be eligible to be in the United Kingdom under the 2016 Regulations, i.e. so long as they were dependent on, or members of the household of, the relevant EU national."* It was further noted that the Respondent had not at any time sought to revoke the grant of admission on grounds it had expired.

51. In the present case, the only decision that could have been made by the Immigration Officer was to permit entry in accordance with EU law, as implemented by the domestic EEA Regulations, following which the Appellant would have been entitled to a specific period of initial residence, not exceeding three months[1] pursuant to Article 6 of the Directive, as implemented by Regulation 13 of the EEA Regulations. Objectively interpreted, a reasonable person could only understand that the Appellant had been permitted entry and residence for a maximum period of three months in the United Kingdom. There is nothing in the Appellant's account of what happened on arrival at the airport to suggest otherwise and contrary to the facts in Vasa and Hasanaj, there is no stamp in his passport without any time restriction.

[1] Subject to holding a valid national identity card or passport issued by the EEA State; not being an unreasonable burden on the social assistance system of the United Kingdom and not being subject to any decision to remove/refusal to issue documentation/cancellation of right of residence/revocation of admission/exclusion order/deportation order. None of which are relevant to the present appeal.

52. Thirdly, for these reasons, although the Appellant's entry and residence to the United Kingdom had been facilitated by the United Kingdom in December 2019; this was pursuant to directly enforceable EU law and not solely in accordance with its national legislation.

53. Fourthly, in any event, this initial right of residence would have expired long before the end of the transition period (which ended at 11pm on 31 December 2020) and there had been no intervening application for, let alone decision by the United Kingdom to continue to facilitate the Appellant's residence past that initial three-month period. At the end of the transition period, there was no facilitation of residence in accordance with national legislation that could be retained.

54. The Withdrawal Agreement does not assist in this regard as it does not create a right of residence as at the end of a transition period, merely protects those rights which exist as at that date, subject to certain conditions. Article 10(2) applies only to ensure a right of residence is retained for EU nationals 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 thereafter and for 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. The Appellant does not fall within either category of person.

55. As such, neither Article 10(2) or (3) of the EU Withdrawal Agreement applies to the Appellant. Although there had been a historic facilitation of his entry and residence to the Untied Kingdom in late 2019 and early 2020 in accordance with EU law as the holder of an Article 10 Residence Card; there was no facilitation of his entry and residence in accordance with national legislation at the end of the transition period. That is the key relevant date as clarified in R (on the application of Fatima Ali) v Secretary of State for the Home Department [2023] EWHC 1615 (Admin).

56. Mr Karim submitted that the Appellant would have had a continued right of residence as a direct family member under Regulation 7(3) of the EEA Regulations; however, this only applies to a person who has been issued with an EEA family permit, a registration certificate or a residence card (all of which are defined in Regulation 2 as documents issued under the EEA Regulations, with a different term and definition of 'qualifying EEA State residence card' for those issued in another Member Sate); which the Appellant had not applied for nor been issued with. He was not therefore treated as a family member under Regulation 7 nor did he have any right of residence as such.

57. For these reasons, I do not find that the Appellant falls within the personal scope of the EU Withdrawal Agreement.

58. Fifthly, even if the Appellant did fall within the personal scope of the EU Withdrawal Agreement, there are no provisions of Article 18 which assist him and no substantive rights of residence identified elsewhere for a dependent family member.

59. In Vasa and Hasanaj, the appeals were allowed under Article 18(1)(l)(iv) of the EU Withdrawal Agreement on the basis that those appellants had a 'document issued by the relevant authority in the host state in accordance with Article 3(2) of Directive 2004/38', namely the stamps placed in their passports. That is distinguishable from the present appeal in which there is no such document at all

and no stamp in the passport. There is nothing in the Court of Appeal's decision to suggest that any part of Article 18 did not require a document at all, to the contrary, the express wording required a document and the only departure from this was that the Withdrawal Agreement was not so limited as the definition in Appendix EU as to the specific type of document required.

60. It is wholly unarguable that the handwritten note on the Appellant's boarding passport was akin to a stamp in the passport given that it was not issued by a relevant authority in the host state. The oral evidence on who wrote that the visa was 'ok at gate' was not consistent, but it was clear from both the Appellant and the Sponsor that this happened in Italy and not in the United Kingdom and nothing to suggest any UK Immigration Officers were stationed at the airport in Italy to have written this. As I noted at the hearing, I take judicial notice of the fact that airlines have responsibilities as carriers to ensure that a person has the correct permission to travel and given the reference to the 'gate' both on the boarding pass and at least in part in the oral evidence; I find it more likely than not that the handwritten note was made by a member of airline staff. Even if made by an Italian immigration official, that would not meet the requirement as the document must have been issued by the relevant authority in the host State, i.e. the United Kingdom.

61. I do not find that any of the other specific provisions relied upon by the Appellant in Article 18(1)(j), (n), (o) or (r) otherwise provide any assistance to him in this appeal. These provisions deal with copies of documents being acceptable, applicants not being required to submit documents beyond those that are strictly necessary, giving an applicant an opportunity to submit supplementary evidence and correct errors; and access to judicial or administrative redress. The first three are simply not relevant on the facts on this appeal, there is no suggestion of a refusal based on copies of documents, a requirement for additional supporting documents or a lack of opportunity to submit further documents. The final point is clearly not applicable and not breached given the appeal now before the Upper Tribunal against the refusal decision. No submissions were made on behalf of the Appellant that the decision would be disproportionate.

62. Finally, there is nothing in paragraph 65 of the decision in Vasa and Hasanaj affects any of the analysis above nor assists the Appellant.

63. For all of these reasons, the appeal must also be dismissed on the basis that the Respondent's decision was not contrary to the EU Withdrawal Agreement.

64. The final issue as to dependency is no longer material as for the reasons already given, the appeal must fail both under Appendix EU and the EU Withdrawal Agreement. However, I deal with it for completeness.

65. For the reasons set out in Ali, the relevant date on which dependency (or by analogy membership of the same household) must be assessed is the date of application; which is consistent with the express wording contained in Appendix EU.

66. In the present case, the date of application was 26 January 2022. The documentary evidence at that point in time supports the claim that the Appellant and Sponsor were living together at the same address, as listed on their respective bank statements and consistent with a joint utility bill to the same address issued in November 2021.

67. As to financial dependence, there is documentary evidence in the Appellant's bank statements to show receipts from the Sponsor around the date of application, with transfers from the Sponsor in the month preceding the application on 21 December 2021 for £20; on 29 December 2021 for £70; on 3 January 2022 for £50; and 11 January 2022 for £20. The Sponsor's bank statements show entries around the date of application, with corresponding transfers to the Appellant in the month preceding the application on 21 December 2021 for £20, on 29 December 2021 for £70; on 3 January 2022 for £50; and on 11 January 2022 for £20. The earlier statements for both the Appellant and Sponsor show entries of irregular payments (in terms of frequency and amount) over a much longer period of time.

68. Whilst Ms Isherwood properly challenged the evidence of the situation as at the date of hearing, there was no specific challenge to the evidence as at the date of application beyond a submission that there were no corresponding bank statement entries (no examples were identified and in the month preceding the application, four transfers matched) and a query as to third party support or means of the Sponsor to provide financial support to the Appellant. These matters do not sufficiently undermine the documentary evidence, which I find establishes that at the date of application, the Appellant was both a member of the Sponsor's household and financially dependent on him.

69. If, as submitted by Ms Isherwood, it was also relevant to consider the position at the date of hearing, I would not have found that either dependency or membership of the same household was established. There was no evidence at all of any financial support as at that date and the evidence on where the Appellant and Sponsor both lived was wholly incredible. The Sponsor gave a different address on his statement to the Appellant; he was unable to remember the address which he claimed to have moved to some five to six weeks before with the Appellant and both gave wholly different answers to who lived at the property with them. These were not minor inconsistencies but significant differences on very basic information about the accommodation. I did not find either witness to be credible on this point and whatever the position was as the date of application, it was not established that any financial support for dependency to be established, nor membership of the same household continued to the date of hearing. However, as above, for the reasons given in Ali, it seems that a right of residence on the grounds of dependency is not lost even if circumstances change after the date of application.

Notice of Decision

For the reasons set out in the decision annexed, the making of the decision of the First-tier Tribunal did involve the making of a material error of law. As such was necessary to set aside the decision.

The appeal is remade as follows:

The appeal is dismissed on all grounds.

G Jackson

Judge of the Upper Tribunal
Immigration and Asylum Chamber

7th January 2025

IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2022-005322

First-tier Tribunal No: EA/03543/2022

THE IMMIGRATION ACTS

Decision & Reasons Issued:

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Before

UPPER TRIBUNAL JUDGE JACKSON

Between

TAJAMAL HAZOOR RANDHAWA
(NO ANONYMITY ORDER MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr S Karim of Counsel, instructed by Whitefield Solicitors
For the Respondent: Mr C Bates, Senior Home Office Presenting Officer

Heard at Field House by remote video means on 25 July 2023

DECISION AND REASONS

1. This has been a remote hearing which has not been objected to by the parties. The form of remote hearing was by video, using Teams. There were no technical difficulties for the hearing itself and the papers were all available electronically.

2. The Appellant appeals with permission against the decision of First-tier Tribunal Judge Cruthers promulgated on 1 July 2022, in which the Appellant's appeal against the decision to refuse his application under the EU Settlement Scheme (the EUSS) dated 1 March 2022 was dismissed.

3. The Appellant is a national of Pakistan, born on 1 April 1975, who made an application on 26 January 2022 under the EUSS for pre-settled status as the dependent relative of an EU citizen.

4. The Respondent refused the application the basis that there was insufficient evidence that the Appellant was the family member of a relevant EU citizen,

specifically that he did not have an EEA Residence Card or EEA Family Permit as such. The application was therefore refused under paragraphs EU11 and EU14 of Appendix EU to the Immigration Rules.

5. Judge Cruthers dismissed the appeal in a decision promulgated on 1 July 2022 on the basis that although the Respondent was satisfied that the Appellant's Italian Residence Card issued in August 2017 and May 2018 as a family member met the relevant document requirement in Appendix EU; it was not found that the Appellant had been dependent on nor lived in the same household as the Sponsor prior to the Appellant joining the Sponsor in Italy in 2017 and it was the situation in the Appellant's country of origin, i.e. Pakistan, that was necessary to establish. The Judge also doubted that the Sponsor is currently the main source of financial support for the Appellant given that he has a zero hours employment contract, supports three children and gives £100 to the Appellant who also has a wife and six children in Pakistan and the accommodation in the United Kingdom appeared to be over-crowded as a two bedroom flat with four adults living there (the Sponsor, his son, his daughter and the Appellant).

The appeal

6. The Appellant appeals on two grounds as follows. First, that the First-tier Tribunal materially erred in law in considering that the country of origin in this case was Pakistan and not Italy from where the Appellant came to the United Kingdom and in Italy, it was accepted that the Appellant was part of the Sponsor's household, as he is in the United Kingdom. Secondly, that the First-tier Tribunal materially erred in law in its assessment of whether the Appellant was financially dependent on the Sponsor by failing to take into account or make findings on specific evidence showing transfers in excess of £100 a month in different accounts and in not considering that financial support only need be for some of the Appellant's essential needs and not all of them.

7. In a rule 24 response dated 24 February 2023, the Respondent opposed the appeal on the basis that the First-tier Tribunal had properly directed itself as to the correct country of origin in accordance with the decision in Sohrab and others (continued household membership) Pakistan [2022] UKUT 00157 (IAC).

8. Just prior to the oral hearing, the Respondent submitted a fresh rule 24 notice with the intention that this replaced the first response and also sought permission to withdraw a concession made before the First-tier Tribunal. In this notice, the Repsondent did not oppose the first ground of appeal, accepting that on the facts of the present case, the relevant assessment was as to the Appellant's circumstances in Italy from where he came to the United Kingdom and not those in Pakistan prior to 2017.

9. Permission was sought to withdraw the concession by the Home Office Presenting Officer that the Appellant's Italian Residence Card satisfied the requirement for a relevant document as defined in Annex 1 to Appendix EU of the Immigration Rules on the basis that this was simply a mistake and contrary to the express and clear wording in Annex 1 itself which requires it to be a document issued by the authorities in the United Kingdom subject to an application made under the Immigration (European Economic Area) Regulations 2016. It was submitted, by reference to various authorities, that there would be no prejudice to the Appellant by the withdrawal of the concession given the appeal was necessary because of an accepted error of law by the First-tier Tribunal which

necessitates a remaking of the appeal. There is further a public law interest in the consistent and fair interpretation of the Immigration Rules.

10. At the oral hearing, Mr Clarke relied on the second rule 24 notice reiterating the points thereing. The parties were agreed that there was an error of law on the first ground of appeal and that in substance, the second ground of appeal added little if anything given that the error of law on the first ground necessitated the setting aside of the First-tier Tribunal decision.

11. On behalf of the Appellant, Mr Karim opposed the application to withdraw the concession for a number of reasons. First, on a procedural basis, the application was not contained in the first rule 24 notice, had been made outside of the time limit for such a response of one month from the date of grant of permission and did not contain any application for an extension of time. Secondly, the application did not contain any reasons why the concession was made in the First-tier Tribunal and there is no statement from the Home Office Presenting Officer as would be expected in a case such as this. Thirdly, as a matter of substance, Mr Karim submitted that the concession was properly and lawfully made on the facts of this case.

12. Whilst Mr Karim did not seek to suggest that the Appellant could fufil the precise wording of the definition in Annex 1 to Appendix EU on the basis of his Italian Residence Card, he submitted that this was not necessary as the Appellant is and is to be treated as a direct family member (not an extended family member) given that he had already been granted a Residence Card as a family member in Italy. On the basis of this card, he was able to enter the United Kingdom lawfully in 2019 with the Sponsor pursuant to Regulation 11 of the Immigration (European Economic Area) Regulations 2016 without the need to apply for Entry Clearance or an EEA Family Permit. In any event, the Appellant is covered by the Withdrawal Agreement as a direct family member.

Findings and reasons

13. The first issue in this appeal is whether the First-tier Tribunal materially erred in law in finding that the Appellant was not dependent on or part of the Sponsor's household in Pakistan as the required country of origin for the Appellant. The parties appropriately agreed that this was an error of law and that it was only necessary to consider the position in the country from which the Appellant had come, in this case Italy. That agreement was properly reached and I find the First-tier Tribunal erred in law in this regard, the requirement being that family members who, in the country from which they have come, are dependents or members of the household of the Union citizen. The First-tier Tribunal decision must be set aside for this reason with a fresh determination of whether the Appellant meets the relevant requirements of Appendix EU and/or whether the decision is in breach of the Withdrawal Agreement.

14. The second issue concerns the application for withdrawal of the concession, which requires an assessment of whether a person who has a Residence Card as a family member issued by another Member State requires a relevant document issued in the United Kingdom for the purposes of the EUSS and/or is otherwise covered by the terms of the Withdrawal Agreement. The parties were not in agreement on this issue and at the hearing I canvassed the appropriate way forward on this point given that there needed to be a remaking of the appeal in any event and in which more detailed submissions on the legal issue were likely to be required.

15. The parties agreed that the issues overlapped somewhat with those raised in CA-2023-000371 recently granted permission in the Court of Appeal as to the interpretation of the Withdrawal Agreement and in particular what is meant by a person whose residence 'has been facilitated in accordance with national legislation' and whether a person who entered the United Kingdom as an extended family member of an EU national was entitled to the benefit of the Withdrawal Agreement even if he could not meet the specific terms of Appendix EU and whether it would be disproportionate to refuse to recognise any rights of residence for want of a 'relevant document'. In these circumstances, it is appropriate to stay the remaking of this appeal behind the decision in CA-2023-000371 and given the question of whether withdrawal of the concession should be granted is intrinsincally linked to the legal issues raised I also formally stay consideration of whether the concession may be withdrawn. Further directions will be issued following the decision in CA-2023-000371.

Notice of Decision

The making of the decision of the First-tier Tribunal did involve the making of a material error of law. As such it is necessary to set aside the decision.

I set aside the decision of the First-tier Tribunal.

Directions

The remaking of this appeal is stayed behind the Court of Appeal's decision in CA-2023-000371.

G Jackson

Judge of the Upper Tribunal
Immigration and Asylum Chamber

2nd August 2023