IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2023-004547

First-tier Tribunal No:
EA/10543/2022

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On the 14 January 2025

Before

UPPER TRIBUNAL JUDGE SMITH

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

WAYNE LEE GREYLING
(NO ANONYMITY ORDER MADE)

Respondent

Representation:
For the Appellant: Mr P Deller, Senior Home Office Presenting Officer
For the Respondent: Mr R Claire, Counsel instructed by RP Singh solicitors

Heard via a hybrid hearing at Field House on 3 January 2025

DECISION AND REASONS

BACKGROUND

1. This is an appeal by the Secretary of State. For ease of reference, I refer to the parties as they were before the First-tier Tribunal. The Respondent challenges the decision of First-tier Tribunal Judge Aldridge promulgated on 3 August 2023 ("the Decision"). By the Decision, the Judge allowed the Appellant's appeal against the Respondent's decision dated 14 October 2022 refusing him status under the EU Settlement Scheme ("the EUSS") based on his relationship with his two stepchildren who are Irish nationals

and with whom he lived in South Africa before coming to the UK in 2021. The Appellant's partner (the mother of the two children), Joanna, has been granted pre-settled status under the EUSS as has their child ([A]).

2. Following the grant of permission to appeal by Deputy Upper Tribunal Judge Monson on 6 January 2024, the appeal first came before this Tribunal (Upper Tribunal Judge Norton-Taylor and Deputy Upper Tribunal Judge Welsh) on 13 February 2024. The Tribunal adjourned that hearing with directions. It next came before me sitting with Deputy Upper Tribunal Judge Farrelly on 13 September 2024. We again adjourned the hearing with directions. Our adjournment decision issued on 17 September 2024 also sets out the salient factual and procedural background and I have therefore annexed that decision hereto to save repeating those matters.

3. The appeal was next listed to come before me on 6 November 2024. However, prior to the hearing, the Respondent sought a further adjournment which was not opposed in order that both parties could comply with the filing and service of position statements as directed and would have the opportunity to consider each other's position.

4. The appeal came before me on 3 January 2025 therefore as an error of law hearing. It was however agreed by both parties that my decision as to error of law would be determinative of the substantive appeal. If I reject the Respondent's case that there is an error of law or find that the Judge below reached the right conclusion even if on an erroneous legal basis (so that any error would be immaterial), the Appellant's appeal will remain allowed. If I accept the Respondent's case that, as a matter of law, the Appellant is not entitled to status under the EUSS, then his appeal will fall to be dismissed.

5. I had before me a bundle running to 665 pages (pdf) containing the documents relevant to the error of law, and the Appellant's and Respondent's bundles before the First-tier Tribunal. I refer to those documents as [B/xx]. I also had an agreed bundle of authorities and position statements dated 11 November 2024 (from the Respondent) and 24 November 2024 (from the Appellant). I also had skeleton arguments from the Appellant dated 9 February 2024 and 1 May 2024 and from the Respondent dated 17 April 2024.

6. Having heard submissions from Mr Deller and Mr Claire, I indicated that I would reserve my decision and provide that with reasons in writing which I now turn to do.

DISCUSSION

7. In light of the agreement that the error of law decision will determine the outcome of this appeal, it is more appropriate that my consideration of the issues focus on the legal position rather than the reasoning of the previous Judge, not least because I had the benefit of more detailed submissions from the Respondent in relation to the law.

8. Briefly, though, the appeal before Judge Aldridge focussed on the Appellant's case that he is entitled to status under the EUSS on the basis that he is the "Zambrano" carer of two Irish children, his stepchildren Jemma and Rocco. He accepts that he is unable to meet the Immigration Rules which apply ("Appendix EU"). The focus of his case is therefore on the terms of the agreement between the UK and EU on the UK's departure from the EU ("the Withdrawal Agreement").

9. Judge Aldridge took into account that the Appellant along with his partner, Joanna, and their son [A] had been given family permits to enter the UK on 17 December 2020. I will return below to the basis on which those were sought and granted. Judge Aldridge concluded at [17] of the Decision that "the leave for the appellant to remain in the UK was facilitated before the specified date of 31 December 2020" so that "the protection of the Withdrawal Agreement may come into effect". That led him to the conclusion that he had to consider the proportionality of the Respondent's decision. He found at [19] of the Decision that "the denial of the appellant's application would be disproportionate".

10. As set out in the Tribunal's earlier decision, the Respondent appeals the Decision on the ground that the Judge erred in his conclusion that the Appellant's entry to the UK had been "facilitated" within the terms of Article 10 of the Withdrawal Agreement as the family permit was sought and granted on the basis of the Appellant being a "Zambrano" carer and not as an extended family member. It was also submitted that the Judge could not allow the appeal on the basis that the Respondent's decision was disproportionate by reference to Article 18 of the Withdrawal Agreement as that could only be relied upon if the Appellant were within personal scope of that agreement under Article 10 which he was not. Reliance was placed in that regard on Celik (EU exit; marriage; human rights) [2022] UKUT 00220 (IAC) as subsequently upheld by the Court of Appeal ([2023] EWCA Civ 921) ("Celik"). Reliance was also placed on Batool & Ors (other family members; EU exit) [2022] UKUT 219 (IAC) ("Batool") as authority for the proposition that an application made on one basis is not required to be treated as an application on a different basis.

11. I am satisfied that there is an error of law established by the grounds. As I come to below, Article 10 is not premised on there being mere facilitation; facilitation of entry and residence relates to extended family members falling within Article 3(2) of Directive 2004 /38/EC ("the Directive"). That was not something considered by the Judge who based his analysis on entry having been "facilitated" as a "Zambrano" carer. The Judge did not consider whether Article 10 could apply in those circumstances. Further, as the Court of Appeal made clear at [56] of its judgment in Celik "[t]he principle of proportionality is not intended to lead to the conferment of residence status on people who would not otherwise have any rights to reside". Article 18 of the Withdrawal Agreement cannot therefore operate to confer a right on the Appellant if he has no such right under Article 10.

12. As noted above, however, if the Judge reached the correct conclusion albeit by the wrong legal reasoning, the error would not be material and the allowing of the appeal could be maintained.

13. Although I have considerable sympathy for the predicament in which the Appellant and his family find themselves, I am unable to find that the Appellant is entitled to succeed in his appeal.

14. I begin with the issue of "facilitation". The factual background to this appeal is set out at [11] of the Tribunal's earlier decision and I do not repeat what is there said. Applications were made on behalf of the Appellant, Joanna and [A] in June 2020 to accompany Jemma and Joseph to the UK. At that time, as Irish nationals, Jemma and Rocco were entitled to enter the UK as EEA nationals. As confirmed by the Appellant's solicitor in the course of the hearing before me, the applications for family permits were made on the basis of the Appellant and Joanna being joint primary carers of Jemma and Rocco and [A] as their half-sibling and dependent on the Appellant and Joanna. The applications were made under regulation 16 of the Immigration (European Economic Area) Regulations 2016 ("the EEA Regulations").

15. As I observed at [11(6)] of the earlier decision and in the course of the hearing before me, it may well be that the grant of the family permits in this case was not an error as regulation 16 of the EEA Regulations continued to apply at the date of the grant (17 December 2020). In any event, evidence in the bundle suggests that the reason for the grant of the family permit was that the Appellant, Joanna and [A] qualified by reason of the principle in Chen ([B/578]).

16. Mr Claire made the very valid point that the family could not enter the UK at that stage as they did not have visas until March 2021 and the two EEA national children were not of an age where they could come to the UK alone. However, the fact remains that none of the family were in the UK at the "specified date" of 31 December 2020.

17. Mr Claire in his position statement described the fact of Jemma and Rocco's appeals being dismissed as a "red herring". I disagree. The Upper Tribunal's decision in their appeals (not in the bundle) makes clear that Jemma and Rocco were not within the scope of the Withdrawal Agreement because they did not arrive in the UK until after 31 December 2020. They were not therefore exercising a right to reside prior to the end of the transition period. Since they were not within scope of Article 10(1)(a) of the Withdrawal Agreement, it follows that none of their family can derive any right from them. In any event, "Zambrano" rights are not catered for by the Withdrawal Agreement and it is accepted by the Appellant that he cannot bring himself within Appendix EU. Jemma and Rocco are, as the Upper Tribunal pointed out, entitled to remain in the UK under arrangements in relation to the Common Travel Area but that gives no rights for others to remain with them.

18. I turn then to whether the Withdrawal Agreement can apply to the Appellant in relation to the application which he made, and which led to the decision under appeal here. The covering letter to that application is dated 20 October 2021 and appears at [B/105-114]. As was pointed out by Mr Claire, the fact that the application was made after 31 December 2020 is of no legal consequence. The Respondent permitted applications to be made after that date until 1 July 2021. The Appellant and his partner and child made applications before that date online but were told that they had to complete forms which were sent to them leading to the applications being formally made on 20 October 2021. No point is taken by the Respondent about the timing of those applications.

19. As the covering letter sets out, the applications for pre-settled status were made on three bases. The first was based on the Appellant and Joanna being primary carers of Jemma and Rocco and [A] being similarly dependent on them. The second was based on a Chen derivative right to reside. The third was that the Appellant, Joanna and [A] were members of the household of Jemma and Rocco and therefore extended family members within Article 3(2) of the Directive.

20. Article 10(2) and (3) of the Withdrawal Agreement read as follows:

> "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."

21. It appears to be the case that only Article 10(3) could apply to this Appellant. Whilst it might be said that the Appellant's entry was facilitated prior to 31 December 2020, his residence was not. In any event, as the Respondent points out, the Appellant's entry was facilitated (if it can be described as such) by a family permit granted as a "Zambrano" carer or based on the principle in Chen and not as an extended family member. As already noted, Batool is authority for the proposition that an application made on one basis is not to be treated as an application made on a different basis.

22. There appears to be a deliberate distinction in drafting between the two parts of Article 10. Whilst it might be argued that the different wording of Article 10(3) means that the Appellant would only have to show that he was a person "falling under points (a) and (b) of Article 3(2)" of the

Directive to bring himself within that sub-article (rather than requiring facilitation on that basis), that argument cannot avail him for two reasons.

23. First, facilitation of residence would in those circumstances have to be "in accordance with [the UK's] national legislation" and the Appellant accepts that he cannot meet the requirements of Appendix EU. Second, in any event, it is difficult to see how the Appellant can claim a right as the extended family member of EU nationals (Jemma and Rocco) who themselves have no rights under the Withdrawal Agreement.

24. I can deal very briefly with the definition of "family members" under Article 9(a)(ii) of the Withdrawal Agreement on which Mr Claire also placed some reliance. That reads as follows:

> "persons other than those defined in Article 3(2) of Directive 2004/38/EC whose presence is required by Union citizens or United Kingdom nationals in order not to deprive those Union citizens or United Kingdom nationals of a right of residence granted by this Part;"

25. The difficulty for the Appellant is that, once again, the Union citizens here (Jemma and Rocco) themselves do not have any right of residence granted by the Withdrawal Agreement. They are in the UK as Irish nationals with rights arising from the Common Travel Area and not EU law rights.

26. As already noted, "Zambrano" rights are, understandably, not covered by the Withdrawal Agreement as the rights of British citizens which arose from being also EU citizens ended with the UK's exit from the EU. The only reference to Chen rights is to be found at Article 24 of the Withdrawal Agreement and is set out as follows:

> "…2. Where a direct descendant of a worker who has ceased to reside in the host State is in education in that State, the primary carer for that descendant shall have the right to reside in that State until the descendant reaches the age of majority, and after the age of majority if that descendant continues to need the presence and care of the primary carer in order to pursue and complete his or her education."

27. The father of Jemma and Rocco (the Irish national from whom they derive their nationality) does not and did not reside in the UK. He lived with them in South Africa. Jemma and Rocco were not in education in the UK until after 31 December 2020. As such, the Appellant cannot derive a Chen right from them.

28. Mr Claire also placed reliance on the Court of Appeal's judgment in Vasa and another v Secretary of State for the Home Department [2024] EWCA Civ 777 ("Vasa"). The facts of Vasa (and linked appeal of Mr Hasanaj) are however very different from those in this case. The appellants in those cases were allowed to enter the UK in 2020 and 2019 apparently based on rights under the EEA Regulations. Both were therefore residing in the UK

prior to 31 December 2020. In those cases, there was not and could not be any dispute that the family members on whose status Mr Vasa and Mr Hasanaj relied, were in the UK exercising EU Treaty rights on 31 December 2020. Nor did they rely on any rights other than as extended family members of their EU national siblings. As such, the Court of Appeal's judgment is readily distinguishable from this case.

29. Mr Claire also relied on guidance issued by the Respondent which he said supported the Appellant's case. I did not hear argument on this because, as I pointed out, the Respondent's guidance cannot alter the legal position under the Withdrawal Agreement. It might be relevant to interpretation of the relevant Immigration Rules, but the Appellant does not rely on being able to meet those rules.

30. In any event, insofar as the guidance is that set out at [13] of the Appellant's skeleton arguments dated 9 February 2024 and 1 May 2024, it does not avail the Appellant. The Appellant was not relying on a switch from pre-settled to settled status. I have already explained why the Appellant cannot derive a right under the Chen principle on the facts of this case. In any event, the Appellant does not rely on being able to meet the definition in Annex 1 to Appendix EU.

31. Mr Claire also placed reliance on there being a legitimate expectation based on the grant of the family permit. There are however several reasons why the Appellant cannot succeed on that basis.

32. First, if the Respondent is right to say that the family permits granted to the Appellant (and Joanna and [A]) were issued in error, there is authority for the proposition that a public authority should not usually be expected to replicate a mistake (R (on the application of Begbie) v Department of Education and Employment [1999] EWCA Civ 2100 at [61]).

33. Second, the grounds of appeal before this Tribunal are only that the Respondent's decision was not in accordance with the relevant Immigration Rules (here Appendix EU) or in breach of rights conferred by the Withdrawal Agreement. The Appellant does not rely on the first of those grounds. I have already explained why the second is not made out. Legitimate expectation has no part to play in that debate.

34. As I have already pointed out when dealing with the error of law, and as made clear by the Court of Appeal in Celik, "[t]he principle of proportionality is not intended to lead to the conferment of residence status on people who would not otherwise have any rights to reside". As the Appellant has no rights under the Withdrawal Agreement because he is not within personal scope, he cannot pray in aid the proportionality principle in Article 18 of the agreement in order to succeed.

35. The Respondent's conduct in granting the family permits (and in giving pre-settled status to Joanna and [A] apparently also by mistake) may be

relevant to a claim of a breach of Article 8 ECHR and the public interest which attaches to interference with the Appellant's rights in that regard, but that is not a matter of which I am seized.

36. The Respondent was invited to consider whether the Appellant could raise his human rights in this appeal. As Mr Deller pointed out in the Respondent's position statement, however, this Tribunal can only consider a matter relevant to the substance of the decision under appeal (regulation 9(4) of the Immigration (Citizens' Rights Appeals) (EU Exit) Regulations 2020 ("the 2020 Regulations")). Although he accepted that the Tribunal can be given consent to considering something as a "new matter" under regulation 9(5) of the 2020 Regulations, he submitted that the Respondent was entitled to maintain the line between EUSS appeals and appeals on human rights grounds, absent a proper application made on human rights grounds.

37. It is of course open to the Appellant to make such an application. There may be obstacles in the way of such an application succeeding given the status of Joanna and the three children. However, even outside the Immigration Rules, the Appellant would be entitled to pray in aid the circumstances which have led to him being in the predicament he is. It would be open to him in that context to raise the issues of legitimate expectation and proportionality, particularly since his partner and three children are and are entitled to remain in the UK. Even though the Respondent is unclear why Joanna and [A] have been granted status under the EUSS, there is nothing to suggest that the Respondent intends to revoke that status.

38. As for this appeal, however, for the reasons set out above, the Appellant's appeal fails.

CONCLUSION

39. The decision of First-tier Tribunal Judge Aldridge promulgated on 3 August 2023 contains an error of law. I set that decision aside. I go on to re-make the decision.

40. The Respondent's decision does not breach the Appellant's rights under the Withdrawal Agreement. The Appellant does not argue that the Respondent's decision is not in accordance with scheme rules (Appendix EU). Accordingly, this appeal must be dismissed.

Notice of Decision

The decision of First-tier Tribunal Judge Aldridge promulgated on 3 August 2023 contains an error of law. I set that decision aside. I re-make the decision by dismissing the Appellant's (Mr Greyling's) appeal.

L K Smith

Judge of the Upper Tribunal
Immigration and Asylum Chamber

7 January 2025

ANNEX: ADJOURNMENT DECISION

IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2023-004547

First-tier Tribunal No:
EA/10543/2022

THE IMMIGRATION ACTS

Decision and Directions Issued:

...17 September 2024.....

Before

UPPER TRIBUNAL JUDGE SMITH
DEPUTY UPPER TRIBUNAL JUDGE FARRELLY

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

And

WAYNE LEE GREYLING

Respondent

Representation:
For the Appellant: Mr P Deller, Senior Presenting Officer
For the Respondent: Mr R Claire, Counsel instructed by RP Singh solicitors

Heard at Field House on Friday 13 September 2024

ADJOURNMENT DECISION AND DIRECTIONS

The error of law hearing is hereby adjourned to be relisted on the first available date after Monday 4 November 2024, face to face before Upper Tribunal Judge Smith with a time estimate of 3 hours. The following directions apply:

1. **By no later than 4pm on Friday 11 October 2024, the Secretary of State shall file with the Tribunal and serve on Mr Greyling her position statement dealing with the issues as identified in the course of the hearing on 13 September 2024 (as set out below).**
2. **By no later than 4pm on Friday 25 October 2024, Mr Greyling shall file with the Tribunal and serve on the Secretary of State his position statement in response.**

REASONS

1. This is an appeal by the Secretary of State. For ease of reference we refer to the parties as they were before the First-tier Tribunal. The Respondent challenges the decision of First-tier Tribunal Judge Aldridge dated 3 August 2023 ("the Decision") allowing the Appellant's appeal against the Respondent's decision dated 14 October 2022 refusing him status under the EU Settlement Scheme ("the EUSS") based on his relationship with his two stepchildren who are Irish nationals and with whom he lived in South Africa before coming to the UK in 2021.

2. The Appellant relied on having been granted a family permit on 16 December 2020. That was granted in order that the Appellant could join an EEA child. It was granted in response to an application under the Immigration European Economic Area Regulations 2016 ("the EEA Regulations") as a "Zambrano carer" (and therefore under regulation 16 of the EEA Regulations).

3. The Appellant accepts that he cannot meet the Immigration Rules relating to EUSS (Appendix EU). He therefore relied before Judge Aldridge on the agreement between the UK and EU on the UK's withdrawal from the EU ("the Withdrawal Agreement"). It was argued and the Judge accepted that, the Appellant having been granted a family permit to enter the UK, he had his residence facilitated by the Respondent prior to the specified date of 31 December 2020. As such, the Judge found that the Appellant was entitled to the protection of the Withdrawal Agreement ([17] of the Decision). The Judge did not expressly refer to Article 10 of the Withdrawal Agreement which sets out the personal scope of that agreement. However, at [17] of the Decision, he appears to have accepted the argument that the Appellant's right to remain in the UK "was facilitated before the specified date of 31 December 2020". In consequence, he found that the protection available to the Appellant meant that he had to consider the proportionality of the decision refusing the Appellant status and that the decision was disproportionate (under the Withdrawal Agreement). That would appear to be a conclusion that the appeal should be allowed based on Article 18 of the Withdrawal Agreement although that is not expressly stated.

4. The Respondent appealed the Decision on the basis that the Appellant's residence could not have been facilitated by the grant of the family permit in December 2020 as such facilitation was available only to extended family members. It is said that the family permit was

mistakenly granted and then only on the basis of a derivative right under regulation 16 of the EEA Regulations. The Respondent relies on the decisions of this Tribunal in Celik (EU exit; marriage; human rights) [2022] UKUT 00220 (IAC) ("Celik") (as subsequently upheld in the Cout of Appeal) and Batool & Ors (other family members: EU exit) [2022] UKUT 219 (IAC) ("Batool") as authority for two propositions. Celik and Batool were authority for the proposition that Article 18 of the Withdrawal Agreement cannot be relied upon if an individual is not within personal scope of the Withdrawal Agreement under Article 10. Batool is also now relied upon as authority for the proposition that an application made on one basis is not required to be treated as an application on a different basis.

5. Permission to appeal was initially refused by First-tier Tribunal Judge Mills on 6 September 2023 on the following basis so far as relevant:

> "..5. I have concluded that no arguable error of law is disclosed by the challenge, and find that the Judge was entitled to treat the appellant as someone whose residence had been facilitated by the respondent when he was issued with a family permit under the 2016 Regulations. Thus, being within scope of the Agreement, the Judge correctly proceeded to consider proportionality, his conclusions in relation to which are not criticised in the grounds."

6. The Respondent renewed her appeal to this Tribunal. Permission to appeal was granted by Deputy Upper Tribunal Judge Monson on 6 January 2024 on the following basis:

> "1. It is arguable that, as pleaded in Ground 1, the FTT Judge materially erred in law in finding that the admission and residence of the Appellant ('A') had been 'facilitated' by the issue to him in March 2021 of an EEA Family Permit to join an EEA national child in the UK pursuant to Regulation 16 of the EEA Regulations 2016.
> 2. It is arguable that, as pleaded in Ground 2, the FTT Judge materially erred in law in finding that A came within the personal scope of the Withdrawal Agreement where he was not residing in the UK on or before the specified date (31 December 2020 2300GMT) in accordance with the EEA Regulations 2016 and he did meet the criteria of Article 9(a)(ii) of the Withdrawal Agreement so as to be a family member of a Union citizen under Article 10 on derivative right of residence grounds.
> 3. It is arguable that, as pleaded in Ground 3, the FTT Judge thereby materially erred in law in conducting a proportionality exercise pursuant to Article 18 of the Withdrawal Agreement."

7. The matter came before this Tribunal first on 13 February 2024 (before Upper Tribunal Judge Norton-Taylor sitting with Deputy Upper Tribunal Judge Welsh). The hearing was adjourned with directions for skeleton arguments to be filed and served on both sides and for a compliant error of law bundle and bundle of authorities to be filed by the Respondent.

8. The Respondent filed a skeleton argument on 17 April 2024 and the Appellant on 1 May 2024. We had before us also a bundle running to 665 pages (pdf) and a bundle of authorities.

9. The matter came back before us in order to determine whether the Decision contains an error of law. If it does, we must decide whether to set it aside in consequence. If we do so, we must then either re-make the decision ourselves or remit the appeal to the First-tier Tribunal to do so.

10. As we understood both parties to accept, the issues here are ones of pure law although, as we come to, influenced by what are very unusual facts. However, as a consequence, if the Decision does not contain an error of law, then the appeal remains allowed. Similarly, if the conclusion reached by the Judge was legally correct even if reached by potentially the wrong legal route, any error would not be material and the Decision would fall to be upheld. On the other hand, if the Decision does contain an error of law on the basis that the Judge reached the wrong conclusion in law then the error of law decision would be determinative also on re-making.

11. We sought to establish at the outset of the hearing the very unusual facts of this case. So far as those were established in discussion, they are as follows:

(1) The two children on whose position the Appellant seeks to rely (Jemma and Rocco Joseph) are his stepchildren. They are Irish by incidence of birth to an Irish national father. Both were children at the date of application. However, Jemma is now aged 19 years.

(2) Neither child has ever lived in Ireland. The father of the children who is the ex-husband of the Appellant's partner, Joanna Joseph is Irish but lived with her and the children in South Africa.

(3) Joanna and the Appellant are both nationals of South Africa. They are not married. They have one child, [A], who is also a South African national.

(4) Joanna, the Appellant, Jemma, Rocco and [A] all lived in South Africa together before coming to the UK. The Appellant and Joanna have been in a relationship now for 13 years.

(5) Applications were made by the family in July 2020 for family permits to come to the UK under the EEA Regulations based on rights deriving from Jemma and Rocco based on their Irish nationality. Those were initially refused on 30 July 2020 but in the course of appeals against those decisions, they were withdrawn. I was shown the withdrawal of the decision in relation to the Appellant dated 16 December 2020 which confirms withdrawal and indicates that the Appellant was

permitted to enter the UK to join an EEA national child for a period of 6 months.

(6) As I observed, it appeared to me that this might not have been a mistake on the part of the Respondent. Even if the permit were granted after 31 December 2020, regulation 16 of the EEA Regulations remained in force on 16 December 2020 when the Respondent resolved to grant the permit (although there may be an issue whether a "Zambrano" or other derivative right arose at all in circumstances where Jemma and Rocco were not in the UK or indeed the EU at that time).

(7) At that point, an issue arose about the status of Jemma and Rocco. I was told that they had not been granted any status under Appendix EU. In fact, that status had been refused. After some discussion and investigation, I was taken to a decision of this Tribunal in cases UI-2022-003400; UI-2022-003401 (Joseph v Secretary of State for the Home Department) (unreported) promulgated on 15 February 2023. That was an error of law decision where the Tribunal (Upper Tribunal Judge Sheridan sitting with Deputy Upper Tribunal Judge B Keith) found there to be no error of law in the decision of First-tier Tribunal Judge Kinch dismissing the appeals of Jemma and Rocco.

(8) The reasoning of the Tribunal in those cases is that Jemma and Rocco could not fall within Appendix EU; neither could they fall within the Withdrawal Agreement because they were not resident in the UK on 31 December 2020 (and therefore were not within Article 10(1)(a)). The Tribunal also found that the Respondent's guidance permitting late applications did not apply because the issue was not the date of application but rather the date of their residence in the UK. The clear wording of Article 10 did not permit of any departure.

(9) An argument was also put forward that the Respondent's refusal of the applications of the two children was contrary to the Common Travel Area ("CTA") and Memorandum of Understanding between the UK and Ireland ("MOU"). However, the Tribunal rejected that argument on the basis that the children were entitled to reside in the UK under the CTA and that was not affected by the refusal under Appendix EU. The Tribunal concluded by saying that "[t]he appellants, as Irish citizens, did not need to apply under the EU Settlement Scheme, but having done so their applications fell to be decided in the same way as would be applications made by citizens of other EU countries". We are not entirely clear whether any status has been granted to Jemma and Rocco subsequently but there is no suggestion that they have been granted any status under the EUSS.

(10) Notwithstanding that decision, the Appellant's partner, Joanna Joseph and their child [A] were granted pre-settled status under Appendix EU on 14 October 2022 (on the same date as the Appellant's application was refused). We queried with Mr Deller why they had

been granted status and the Appellant had not. It appeared to us that the status of Joanna and [A] was no different from that of the Appellant. Mr Deller very fairly indicated that he had not been able to understand why status had been granted and that this may have been in error. Although there is no suggestion that the grants of status will be withdrawn even if granted in error, it would be helpful for the Respondent to clarify in her position statement whether the grants were indeed in error and, if not, why they were granted and the Appellant's application refused.

12. Having ascertained the factual position (which raised even more legal questions than it answered), we set out our provisional observations on the Respondent's grounds. We emphasise that these are only provisional and Mr Claire made clear that he did not necessarily accept them.

13. First, it seems to us that there is some force in the Respondent's submission that the Appellant is not within personal scope of the Withdrawal Agreement. Articles 10(2) or 10(3) apply only to "[p]ersons 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…" or "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".

14. Second, and following from that, it appears to us that the Court of Appeal's judgment in Vasa and another v Secretary of State for the Home Department [2024] EWCA Civ 777 is readily distinguishable from this case. In both cases before the Court of Appeal, the appellants were claiming to be extended family members of persons with status in the UK as EU nationals (on the basis of being their dependents or members of their household in the country from where they came). Although there is some similarity with the present case in that Mr Vasa and Mr Hasanaj had been permitted to enter the UK under the EEA Regulations, they were both relying as extended family members on Directive 2004/38/EC. Moreover, both they and their EU national sponsors were residing in the UK as at 31 December 2020.

15. In the present case, the Appellant does not rely on being the extended family member of Jemma and Rocco (and could only even potentially do so on the basis of being a member of their household which itself may be problematic since neither Jemma nor Rocco was residing in the UK prior to the specified date). Instead, the Appellant relies on derivative rights which do not arise under the Directive but derive only from the status of the EU national child. "Zambrano" rights are not provided for in the Withdrawal Agreement. So-called "Chen" rights are mentioned in Article 24(2) of the Withdrawal Agreement but

the circumstances there set out do not appear to apply to the facts of this case and in any event, a “Chen” carer is not apparently in personal scope under Article 10 of the Withdrawal Agreement.

16. There was some discussion before us as to the impact of Jemma and Rocco being Irish nationals. Whilst we understand the decision of the Tribunal (which stands unless overturned) that they are both entitled to remain as if they were settled in the UK, that does not make any difference to their rights under EU law and therefore, provisionally at least, we cannot see how that decision assists the Appellant.

17. As was discussed at the hearing, however, there may be a way through for the Appellant if he were to rely on Article 8 ECHR which he has not done thus far. Even that may not be easy given that his partner and child only have pre-settled status (albeit Jemma and Rocco’s status may assist). Nevertheless, Mr Deller indicated that he would be prepared to consider at least whether the Appellant should be permitted to raise this as a new matter (with or without an application) and, if the Respondent is prepared to consent whether the Appellant would be likely to succeed. We would hope that the Respondent will give the Appellant’s position careful consideration given the handling of his case (and that of his family) to date.

18. In consequence of our discussions, it was agreed that it would be in the interests of justice to adjourn the hearing to permit further discussions to take place between the parties and for both parties to put forward their positions in writing on the issues which arise and which arose for discussion at the hearing, taking into account the facts as now established and our provisional observations about the legal position.

L K Smith
Upper Tribunal Judge Smith
Judge of the Upper Tribunal
Immigration and Asylum Chamber
13 September 2024