UT Neutral citation number: [2022] UKUT 00220 (IAC)

Celik (EU exit; marriage; human rights)

Upper Tribunal
(Immigration and Asylum Chamber)

Heard at Field House

THE IMMIGRATION ACTS

Heard on 9 June 2022
Promulgated on 19 July 2022

Before

THE HON. MR JUSTICE LANE, PRESIDENT
UPPER TRIBUNAL JUDGE HANSON
UPPER TRIBUNAL JUDGE MCWILLIAM

Between

HALIL CELIK
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the appellant: Mr B. Hawkin, Counsel, instructed by Kreston Law Ltd
For the respondent: Ms J. Smyth, Counsel, instructed by the Government Legal Department

(1) A person (P) in a durable relationship in the United Kingdom with an EU citizen has as such no substantive rights under the EU Withdrawal Agreement, unless P's entry and residence were being facilitated before 11pm GMT on 31 December 2020 or P had applied for such facilitation before that time.

(2) Where P has no such substantive right, P cannot invoke the concept of proportionality in Article 18.1(r) of the Withdrawal Agreement or the principle of fairness, in order to succeed in an appeal under the Immigration (Citizens' Rights) (EU Exit) Regulations 2020 ("the 2020 Regulations"). That includes the situation where it is likely that P would have been able to secure a date to marry the EU citizen before the time mentioned in paragraph (1) above, but for the Covid-19 pandemic.

(3) Regulation 9(4) of the 2020 Regulations confers a power on the First-tier Tribunal to consider a human rights ground of appeal, subject to the prohibition imposed by regulation 9(5) upon the Tribunal considering a new matter without the consent of the Secretary of State.

DECISION AND REASONS

A. BACKGROUND

1. This appeal is of a kind which we understand is featuring frequently in cases heard by the First-tier Tribunal. The appellant is a citizen of Turkey, born in 1995. He arrived in the United Kingdom in September 2007 and claimed asylum. That claim was refused, as was a subsequent appeal. Since 8 April 2019, the appellant has remained unlawfully in this country.

2. The appellant says that he began a relationship with a Romanian national in December 2019. She was living in the United Kingdom. The couple began cohabiting sometime in or after February 2020. A water bill dated 24 February 2020, relating to the premises said to be occupied by the couple, is in the appellant's name, although the respondent notes that the appellant was not listed as a permitted occupier of the premises named in the bill. The Romanian national was granted limited leave to remain in the United Kingdom, pursuant to Appendix EU of the Immigration Rules. This was on 10 March 2020.

3. The post-EU exit transition period ended at 11pm GMT on 31 December 2020. On 19 October 2020, the appellant made an application for leave to remain under the EUSS. The respondent refused that application in a decision dated 2 March 2021. This was on the basis that the appellant had not been issued with a registration certificate, family permit or residence card under the Immigration (European Economic Area (Regulations) 2016 as an extended family member (durable partner) of the Romanian

national; and therefore did not meet the requirements of the EUSS as a family member of a relevant EEA citizen.

4. The appellant did not appeal against that decision.

5. The appeal with which we are concerned arose in the following way. The appellant states that on 19 September 2020 he proposed to his partner. On 20 October 2020, he made contact with Bracknell Forest Council's Register Office, in order to secure a date for his wedding. On that date, the appellant gave notice to the Register Office and paid them a fee of £50. The appellant says he was told by the Register Office that, "they needed to carry out certain checks and procedures before we were given a date to get married".

6. The appellant says that it was "due to Covid-19 restrictions and the lockdown rules which were in place at the time" that he and his fiancée, "were not given the date to get married before 31/12/2020. We only managed to get a date to get married on 09/04/2021". It is common ground that there is nothing from the Register Office which states that it was unable to provide an earlier date because of the Coronavirus situation. The only reference to the pandemic is in an email dated 9 February 2021, which confirms the ceremony as fixed to take place on 9 April 2021, and which states that owing to the Coronavirus situation and the current government guidelines on social distancing:

> "We have had to make some changes to make sure everyone remains as safe as possible. If you are having your ceremony in the Register Office, ONLY the couple and 2 witnesses can attend. If you are having your ceremony in the Ceremonies Room, we will have already agreed with you the number that can attend".

7. Despite this, Mr Hawkin, for the appellant, urges us to take judicial notice of the disruption caused by the Covid-19 pandemic at the relevant time and to infer that, but for this, the appellant would have married his wife before 31 December 2020.

8. Following his marriage, the appellant made an application under the EU Settlement Scheme for leave to remain, on the basis that he was the spouse of a relevant EEA citizen. On 23 June 2021, the respondent refused the appellant's application. The respondent considered that the appellant had, "not provided sufficient evidence to confirm that you were a family member of a relevant EEA citizen prior to the specified date, as defined in Annex 1 of Appendix EU (i.e. 2300 GMT on 31 December 2020). Your marriage certificate shows your marriage took place on 9 April 2021".

9. The respondent then considered whether the appellant met the eligibility requirements for settled status under the EU Settlement Scheme as a durable partner. Home Office records did not show that the appellant had been issued with a family permit or residence card as the durable partner of the EEA national. Accordingly, the respondent concluded that the

appellant did not meet the requirements for settled status under the EU Settlement Scheme.

10. Consideration was then given as to whether the appellant met the eligibility requirements for pre-settled status, as set out in paragraph EU14 of Appendix EU to the Immigration Rules. Again, however, the respondent concluded that the appellant had not shown he was a family member of a relevant EEA citizen, as defined in Annex 1 of Appendix EU. As the appellant did not meet the requirements of EU11 or EU14, the application fell to be refused by reason of EU6.

B. THE APPEAL

11. The appellant appealed to the First-tier Tribunal. His appeal was heard on 22 December 2021 by First-tier Tribunal Judge Hyland, sitting at Hatton Cross.

12. At paragraph 9 of her decision, the First-tier Tribunal Judge said:

> "9. As fairness appeared to be the main issue in the case, I began by asking Mr Bassi [the respondent's Presenting Officer] whether this is a case which the respondent may wish to review. He responded that arguments relating to Covid such as in this case would not prompt a review and the respondent wished to proceed on the basis of the reasons in the refusal letter."

13. Before the First-tier Tribunal Judge, the parties made submissions concerning EU14. At paragraph 24 of her decision, the First-tier Tribunal Judge noted that, in order to succeed under EU14, the appellant had to be a family member of a relevant EEA citizen. Annex 1 to Appendix EU defines a "family member" as including a "durable partner". However, the definition of "durable partner" includes a requirement that the person concerned "holds a relevant document as the durable partner of the relevant EEA citizen …". Since the appellant could not satisfy that definition, he could not succeed under EU14.

14. At paragraph 14 of her decision, the First-tier Tribunal Judge said:

> "14. In his initial representations to me, Mr Hawkin made reference to the appellant's Article 8 rights and sought to include those in this application. However, I drew his attention to the nature of the appeal, which was brought under the 2020 regulations. The grounds of appeal are laid out in regulation 8 and do not allow for an appeal on human rights grounds. Mr Hawkin sought to rely on the provisions of regulation 9(4) and argued that this was in the category of any matter which the relevant authority thinks relevant to the substance of the decision appealed against. Nevertheless, I refused to consider an article 8 argument, no human rights case having been made and it not being an available ground of appeal under the 2020 regulations. Mr Hawkin did not seek to press the point further."

15. At paragraph 23, the First-tier Tribunal Judge had noted it to be "an unchallenged fact" that the appellant could not satisfy EU11, as he had not completed a continuous qualifying period of five years, which was required in order to obtain settled status pursuant to that provision.

16. Beginning at paragraph 18, the First-tier Tribunal Judge addressed the alternative basis upon which the appellant contended that he should succeed:

> "18. Mr Hawkin submitted that in the alternative, a temporary concession may be granted by the Secretary of State in accordance with page 29 of the guidance. This provides that the requirement for the applicant to hold a relevant document can be met by way of an appropriate letter from the Secretary of State where an extended family member who applied before the end of the transition period at 11 PM on 31 December 2020 for a residence card under the EEA regulations, would have been issued with one but for the closure of that route on 30 June 2021. He submits that this could be interpreted as a family member who *could* or *would* have applied before the end of the transition period. He argues that the appellant would fall within such an interpretation as he would have applied, but was prevented from doing so by the Covid pandemic causing his wedding ceremony to be delayed until 2021, even though notice of the wedding was given before the end of the transition period.
>
> 19. In furthering this argument, Mr Hawkin also relies on principles of fairness as set out in his skeleton argument and in the case of SF. The headnote of that case, which I have read in full is that "*even in the absence of a "not in accordance with the law" ground of appeal, the Tribunal ought to take the Secretary of State's guidance into account if it points clearly to a particular outcome in the instant case*".
>
> 20. Continuing on the fairness point, Mr Hawkin referred me to those parts of his skeleton argument which refer to the Coronavirus (COVID-19):EU Settlement Scheme – guidance for applicants, dated 18 November 2021 (the Coronavirus guidance) which acknowledges problems that might be caused by Covid-19 in obtaining certain documents. Although there is no reference in that document to circumstances such as those arising in this case, he nevertheless urged upon me to extend the same principle in this case."

17. The First-tier Tribunal Judge dealt with this submission as follows:

> 21. At the hearing, Mr Hawkin was unable to identify an error in the respondent's application of the immigration rules and neither did he highlight any breaches of rights under the withdrawal agreement, being the grounds of appeal available under regulation 8. Instead, he relied solely on the fairness principle.
>
> 22. The comprehensive Coronavirus guidance drawn to my attention does not include any reference to policies which are relevant to individuals who were prevented from marrying due to Covid restrictions. In addition, I can find no ground that would enable me to extend the guidance to the circumstances of this case. Therefore, the appellant would not be able to make his application as a spouse, only as a durable partner.

…

25. I do not agree with the interpretation of page 29 of the guidance relating to temporary concessions that Mr Hawkin urges upon me. Given the cut-off date of the end of December 2020, by which a person may apply for the relevant documents, it is clear that the respondent anticipated that persons in the applicant's position would continue to make applications under regulation 8 of the EEA regulations only up until that date. This would in turn enable them to secure the identity document required for a durable partner or extended family member to secure status under the EUSS scheme. The applicant did not make such an application, when he could have done so as a durable partner and that window of opportunity has now closed."

18. Having found, at paragraph 27, that she had "no power or discretion to allow" the appeal, the First-tier Tribunal Judge dismissed it.

19. Permission to appeal to the Upper Tribunal was granted by the First-tier Tribunal on 1 March 2022. The judge who granted permission considered that Judge Hyland had, in particular, arguably erred in law in not addressing the appellant's argument that Article 18(1)(r) of the Withdrawal Agreement (2019/C 384 I01) "requires an examination of the proportionality of the [respondent's] decision".

C. LEGAL FRAMEWORK

20. ***WITHDRAWAL AGREEMENT***

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

"Preamble …

RECALLING that, pursuant to Article 50 TEU, in conjunction with Article 106a of the Euratom Treaty, and subject to the arrangements laid down in this Agreement, the law of the Union and of Euratom in its entirety ceases to apply to the United Kingdom from the date of entry into force of this Agreement,

STRESSING that the objective of this Agreement is to ensure an orderly withdrawal of the United Kingdom from the Union and Euratom,

RECOGNISING that it is necessary to provide reciprocal protection for Union citizens and for United Kingdom nationals, as well as their respective family members, where they have exercised free movement rights before a date set in this Agreement, and to ensure that their rights under this Agreement are enforceable and based on the principle of non-discrimination; recognising also that rights deriving from periods of social security insurance should be protected,

…

UNDERLINING that this Agreement is founded on an overall balance of benefits, rights and obligations for the Union and the United Kingdom,

...

PART ONE

COMMON PROVISIONS

ARTICLE 1

Objective

This Agreement sets out the arrangements for the withdrawal of the United Kingdom of Great Britain and Northern Ireland ("United Kingdom") from the European Union ("Union") and from the European Atomic Energy Community ("Euratom").

ARTICLE 2

Definitions

For the purposes of this Agreement, the following definitions shall apply:

(a) "Union law" means:

(i) the Treaty on European Union ("TEU"), the Treaty on the Functioning of the European Union ("TFEU") and the Treaty establishing the European Atomic Energy Community ("Euratom Treaty"), as amended or supplemented, as well as the Treaties of Accession and the Charter of Fundamental Rights of the European Union, together referred to as "the Treaties";

(ii) the general principles of the Union's law;

(iii) the acts adopted by the institutions, bodies, offices or agencies of the Union;

(iv) the international agreements to which the Union is party and the international agreements concluded by the Member States acting on behalf of the Union;

(v) the agreements between Member States entered into in their capacity as Member States of the Union;

(vi) acts of the Representatives of the Governments of the Member States meeting within the European Council or the Council of the European Union ("Council");

(vii) the declarations made in the context of intergovernmental conferences which adopted the Treaties;

...

ARTICLE 4

Methods and principles relating to the effect, the implementation and the application of this Agreement

1. The provisions of this Agreement and the provisions of Union law made applicable by this Agreement shall produce in respect of and in the United Kingdom the same legal effects as those which they produce within the Union and its Member States.

   Accordingly, legal or natural persons shall in particular be able to rely directly on the provisions contained or referred to in this Agreement which meet the conditions for direct effect under Union law.

…

3. The provisions of this Agreement referring to Union law or to concepts or provisions thereof shall be interpreted and applied in accordance with the methods and general principles of Union law.

…

PART TWO

CITIZENS' RIGHTS

TITLE I

GENERAL PROVISIONS

ARTICLE 9

Definitions

For the purposes of this Part, and without prejudice to Title III, the following definitions shall apply:

(a) "family members" means the following persons, irrespective of their nationality, who fall within the personal scope provided for in Article 10 of this Agreement:

   (i) family members of Union citizens or family members of United Kingdom nationals as defined in point (2) of Article 2 of Directive 2004/38/EC of the European Parliament and of the Council;

   (ii) 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;

…

ARTICLE 10

Personal scope

1. Without prejudice to Title III, this Part shall apply to the following persons:

(a) Union citizens who exercised their right to reside in the United Kingdom in accordance with Union law before the end of the transition period and continue to reside there thereafter;

(b) United Kingdom nationals who exercised their right to reside in a Member State in accordance with Union law before the end of the transition period and continue to reside there thereafter;

(c) Union citizens who exercised their right as frontier workers in the United Kingdom in accordance with Union law before the end of the transition period and continue to do so thereafter;

(d) United Kingdom nationals who exercised their right as frontier workers in one or more Member States in accordance with Union law before the end of the transition period and continue to do so thereafter;

(e) family members of the persons referred to in points (a) to (d), provided that they fulfil one of the following conditions:

(i) they resided in the host State in accordance with Union law before the end of the transition period and continue to reside there thereafter;

(ii) they were directly related to a person referred to in points (a) to (d) and resided outside the host State before the end of the transition period, provided that they fulfil the conditions set out in point (2) of Article 2 of Directive 2004/38/EC at the time they seek residence under this Part in order to join the person referred to in points (a) to (d) of this paragraph;

(iii) they were born to, or legally adopted by, persons referred to in points (a) to (d) after the end of the transition period, whether inside or outside the host State, and fulfil the conditions set out in point (2)(c) of Article 2 of Directive 2004/38/EC at the time they seek residence under this Part in order to join the person referred to in points (a) to (d) of this paragraph and fulfil one of the following conditions:

– both parents are persons referred to in points (a) to (d);

– one parent is a person referred to in points (a) to (d) and the other is a national of the host State; or

– one parent is a person referred to in points (a) to (d) and has sole or joint rights of custody of the child, in accordance with the applicable rules of family law of a

Member State or of the United Kingdom, including applicable rules of private international law under which rights of custody established under the law of a third State are recognised in the Member State or in the United Kingdom, in particular as regards the best interests of the child, and without prejudice to the normal operation of such applicable rules of private international law;

(f) family members who resided in the host State in accordance with Articles 12 and 13, Article 16(2) and Articles 17 and 18 of Directive 2004/38/EC before the end of the transition period and continue to reside there thereafter.

2. Persons falling under points (a) and (b) of Article 3(2) of Directive 2004/38/EC whose residence was facilitated by the host State in accordance with its national legislation before the end of the transition period in accordance with Article 3(2) of that Directive shall retain their right of residence in the host State in accordance with this Part, provided that they continue to reside in the host State thereafter.

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

4. Without prejudice to any right to residence which the persons concerned may have in their own right, the host State shall, in accordance with its national legislation and in accordance with point (b) of Article 3(2) of Directive 2004/38/EC, facilitate entry and residence for the partner with whom the person referred to in points (a) to (d) of paragraph 1 of this Article has a durable relationship, duly attested, where that partner resided outside the host State before the end of the transition period, provided that the relationship was durable before the end of the transition period and continues at the time the partner seeks residence under this Part.

5. In the cases referred to in paragraphs 3 and 4, the host State shall undertake an extensive examination of the personal circumstances of the persons concerned and shall justify any denial of entry or residence to such persons.

…

ARTICLE 18

Issuance of residence documents

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 the 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:

(a) the purpose of the application procedure shall be to verify whether the applicant is entitled to the residence rights set out in this Title. Where that is the case, the applicant shall have a right to be granted the residence status and the document evidencing that status;

(b) the deadline for submitting the application shall not be less than 6 months from the end of the transition period, for persons residing in the host State before the end of the transition period.

For persons who have the right to commence residence after the end of the transition period in the host State in accordance with this Title, the deadline for submitting the application shall be 3 months after their arrival or the expiry of the deadline referred to in the first subparagraph, whichever is later.

A certificate of application for the residence status shall be issued immediately;

(c) the deadline for submitting the application referred to in point (b) shall be extended automatically by 1 year where the Union has notified the United Kingdom, or the United Kingdom has notified the Union, that technical problems prevent the host State either from registering the application or from issuing the certificate of application referred to in point (b). The host State shall publish that notification and shall provide appropriate public information for the persons concerned in good time;

(d) where the deadline for submitting the application referred to in point (b) is not respected by the persons concerned, the competent authorities shall assess all the circumstances and reasons for not respecting the deadline and shall allow those persons to submit an application within a reasonable further period of time if there are reasonable grounds for the failure to respect the deadline;

(e) the host State shall ensure that any administrative procedures for applications are smooth, transparent and simple, and that any unnecessary administrative burdens are avoided;

(f) application forms shall be short, simple, user friendly and adapted to the context of this Agreement; applications made by families at the same time shall be considered together;

…

(l) the host State may only require family members who fall under point (e)(i) of Article 10(1) or Article 10(2) or (3) of this Agreement and who reside in the host State in accordance with point (d) of Article 7(1) or Article 7(2) of Directive 2004/38/EC to present, in addition to the identity documents referred to in point (i) of this paragraph, the following supporting documents as referred to in Article 8(5) or 10(2) of Directive 2004/38/EC:

(i) a document attesting to the existence of a family relationship or registered partnership;

…

(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 to 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;

(p) criminality and security checks may be carried out systematically on applicants, with the exclusive aim of verifying whether the restrictions set out in Article 20 of this Agreement may be applicable. For that purpose, applicants may be required to declare past criminal convictions which appear in their criminal record in accordance with the law of the State of conviction at the time of the application. The host State may, if it considers this essential, apply the procedure set out in Article 27(3) of Directive 2004/38/EC with respect to enquiries to other States regarding previous criminal records;

…

(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.

…

3. Pending a final decision by the competent authorities on any application referred to in paragraph 1, and pending a final judgment handed down in case of judicial redress sought against any rejection of such application by the competent administrative authorities, all rights provided for in this Part shall be deemed to apply to the applicant, including Article 21 on safeguards and right of appeal, subject to the conditions set out in Article 20(4).

4. Where a host State has chosen not to require Union citizens or United Kingdom nationals, their family members, and other persons, residing in its territory in accordance with the conditions set out in this Title, to apply for the new residence status referred to in paragraph 1 as a

condition for legal residence, those eligible for residence rights under this Title shall have the right to receive, in accordance with the conditions set out in Directive 2004/38/EC, a residence document, which may be in a digital form, that includes a statement that it has been issued in accordance with this Agreement.

…

CITIZENS' RIGHTS DIRECTIVE

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

of 29 April 2004

on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC

…

GENERAL PROVISIONS

Article 1

Subject

This Directive lays down:

(a) the conditions governing the exercise of the right of free movement and residence within the territory of the Member States by Union citizens and their family members;

(b) the right of permanent residence in the territory of the Member States for Union citizens and their family members;

(c) the limits placed on the rights set out in (a) and (b) on grounds of public policy, public security or public health.

Article 2

Definitions

2) "Family member" means:

(a) the spouse;
(b) the partner with whom the Union citizen has contracted a registered partnership, on the basis of the legislation of a Member State, if the legislation of the host Member State treats registered partnerships as equivalent to marriage and in accordance with the

conditions laid down in the relevant legislation of the host Member State;

(c) the direct descendants who are under the age of 21 or are dependants and those of the spouse or partner as defined in point (b);

(d) the dependent direct relatives in the ascending line and those of the spouse or partner as defined in point (b);

Article 3

Beneficiaries

1. This Directive shall apply to all Union citizens who move to or reside in a Member State other than that of which they are a national, and to their family members as defined in point 2 of Article 2 who accompany or join them.

2. Without prejudice to any right to free movement and residence the persons concerned may have in their own right, the host Member State shall, in accordance with its national legislation, facilitate entry and residence for the following persons:

(a) any other family members, irrespective of their nationality, not falling under the definition in point 2 of Article 2 who, in the country from which they have come, are dependants or members of the household of the Union citizen having the primary right of residence, or where serious health grounds strictly require the personal care of the family member by the Union citizen;

(b) the partner with whom the Union citizen has a durable relationship, duly attested.

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

…

EUROPEAN UNION (WITHDRAWAL) ACT 2018

s.5 Exceptions to savings and incorporation

…

(4) The Charter of Fundamental Rights is not part of domestic law on or after [IP completion day]

(5) Subsection (4) does not affect the retention in domestic law on or after exit day in accordance with this Act of any fundamental rights or principles which exist irrespective of the Charter (and references to the Charter in any case law are, so far as necessary for this purpose, to be

read as if they were references to any corresponding retained fundamental rights or principles).

…

s. 7A General implementation of remainder of Withdrawal Agreement

(1) Subsection (2) applies to—

(a) all such rights, powers, liabilities, obligations and restrictions from time to time created or arising by or under the withdrawal Agreement, and

(b) all such remedies and procedures from time to time provided for by or under the withdrawal Agreement, as in accordance with the withdrawal Agreement are without further enactment to be given legal effect or used in the United Kingdom.

(2) The rights, powers, liabilities, obligations, restrictions, remedies and procedures concerned are to be—

(a) recognised and available in domestic law, and
(b) enforced, allowed and followed accordingly.

(3) Every enactment (including an enactment contained in this Act) is to be read and has effect subject to subsection (2).

…

Schedule 1 (further provision about exceptions to savings and incorporation)

3

(1) There is no right of action in domestic law on or after exit day based on a failure to comply with any of the general principles of EU law.

(2) No court or tribunal or other public authority may, on or after exit day—

(a) disapply or quash any enactment or other rule of law, or
(b) quash any conduct or otherwise decide that it is unlawful,

because it is incompatible with any of the general principles of EU law.

…

5

(1) References in section 5 and this Schedule to the principle of the supremacy of EU law, the Charter of Fundamental Rights, any general principle of EU law or the rule in *Francovich* are to be read as references to that principle, Charter or rule so far as it would otherwise continue to be, or form part of, domestic law on or after exit day in accordance with this Act.

(2) Accordingly (among other things) the references to the principle of the supremacy of EU law in section 5(2) and (3) do not include anything which would bring into domestic law any modification of EU law which is adopted or notified, comes into force or only applies on or after exit day.

IMMIGRATION RULES

APPENDIX EU

Purpose

EU1. This Appendix sets out the basis on which an **EEA citizen** and their family members, and the family members of a **qualifying British citizen**, will, if they apply under it, be granted indefinite leave to enter or remain or limited leave to enter or remain.

Requirements for limited leave to enter or remain other than as a joining family member of a relevant sponsor

EU3. The applicant will be granted five years' limited leave to enter (where the application is made outside the UK) or five years' limited leave to remain (where the application is made within the UK) where:

- A valid application has been made in accordance with paragraph EU9;
- The applicant does not meet the eligibility requirements for indefinite leave to enter or remain in accordance with paragraph EU11 or EU12, but meets the eligibility requirements for limited leave to enter or remain in accordance with paragraph EU14; and
- The application is not to be refused on grounds of suitability in accordance with paragraph EU15 or EU16.

Eligibility for indefinite leave to enter or remain

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

EU11. The applicant meets the eligibility requirements for indefinite leave to enter or remain as a **relevant EEA citizen** or their family member (or as a **person with a derivative right to reside** or a **person with a Zambrano right to reside**) where the Secretary of State is satisfied, including (where applicable) by the **required evidence of family relationship**, that, at the date of application and in an application made by the **required date**, one of conditions 1 to 7 set out in the following table is met:

Condition	**Is met where:**
1.	(a) The applicant: (i) is a relevant EEA citizen; or (ii) is (or, as the case may be, was) a **family member of a relevant EEA citizen**; or (iii) is (or, as the case may be, was) a **family member who has**

	retained the right of residence by virtue of a relationship with a relevant EEA citizen; and (b) The applicant has a **documented right of permanent residence**; and (c) No **supervening event** has occurred

…

Eligibility for limited leave to enter or remain

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

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

Condition	**Is met where:**
1.	(a) The applicant is: (i) a relevant EEA citizen; or (ii) a family member of a relevant EEA citizen; or (iii) a family member who has retained the right of residence by virtue of a relationship with a relevant EEA citizen; or (iv) a person with a derivative right to reside; or (v) a person with a Zambrano right to reside; and (b) The applicant is not eligible for indefinite leave to enter or remain under paragraph EU11 of this Appendix solely because they have completed a continuous qualifying period of less than five years

…

Annex 1 – Definitions

…

durable partner	(a) the person is, or (as the case may be) for the relevant period was, in a durable relationship with a relevant EEA citizen (or, as the case may be, with a qualifying British citizen or with a relevant sponsor), with the couple having lived together in a relationship akin to a marriage or civil partnership for at least two years (unless there is other significant evidence of the durable relationship); and (b)(i) the person holds a relevant document as the durable partner of the relevant EEA citizen (or, as the case may be, of the qualifying British citizen or of the relevant sponsor) for the period of residence relied upon; for the purposes of this provision, where the person applies for a

	relevant document (as described in sub-paragraph (a)(i)(aa) or (a)(ii) of that entry in this table) as the durable partner of the relevant EEA citizen or, as the case may be, of the qualifying British citizen before the specified date and their relevant document is issued on that basis after the specified date, they are deemed to have held the relevant document since immediately before the specified date; or …

…

family member of a relevant EEA citizen	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) the spouse or civil partner of a relevant EEA citizen, and: (i) the marriage was contracted or the civil partnership was formed before the specified date; or (ii) the applicant was the durable partner of the relevant EEA citizen before the specified date (the definition of 'durable partner' in this table being met before that date rather than at the date of application), and the partnership remained durable at the specified date; or (b) the durable partner of a relevant EEA citizen, and: (i) the partnership was formed and was durable before the specified date; and (ii) the partnership remains durable at the date of application (or it did so for the relevant period or immediately before the death of the relevant EEA citizen); …

…

Relevant document	(a)(i)(aa) a family permit, registration certificate, residence card, document certifying permanent residence, permanent residence card or derivative residence card issued by the UK under the EEA Regulations on the basis of an application made under the EEA Regulations before (in the case, where the applicant is not a dependent relative, of a family permit) 1 July 2021 and otherwise before the specified date; …

…

required evidence of family relationship	in the case of: … (e) a durable partner: (i) a relevant document as the durable partner of the relevant EEA citizen (or, as the case may be, of the qualifying British citizen or of the relevant sponsor) and, unless this confirms the right of permanent residence in the UK under regulation 15 of the EEA Regulations (or the right of permanent residence in the Islands through the application there of section 7(1) of the Immigration Act 1988 or under the Immigration (European Economic Area) Regulations of the Isle of Man), evidence which satisfies the Secretary of State that the partnership remains durable at the date of application (or did so for the period of residence relied upon); or (ii) (where sub-paragraph (b)(ii) of the entry for 'durable partner' in this table applies) the evidence to which that sub-paragraph refers, and evidence which satisfies the Secretary of State that the partnership remains durable at the date of application (or did so for the period of residence relied upon);

…

IMMIGRATION (CITIZENS' RIGHTS APPEALS) (EU EXIT) REGULATIONS 2020

Reg. 3.— Right of appeal against decisions relating to leave to enter or remain in the United Kingdom made by virtue of residence scheme immigration rules

(1) A person ("P") may appeal against a decision made on or after exit day —

(a) to vary P's leave to enter or remain in the United Kingdom granted by virtue of residence scheme immigration rules 2 , so that P does not have leave to enter or remain in the United Kingdom,

(b) to cancel P's leave to enter or remain in the United Kingdom granted by virtue of residence scheme immigration rules,

(c) not to grant any leave to enter or remain in the United Kingdom in response to P's relevant application, or

(d) not to grant indefinite leave to enter or remain in the United Kingdom in response to P's relevant application (where limited leave to enter or remain is granted, or P had limited leave to enter or remain when P made the relevant application).

(2) In this regulation, "*relevant application*" means an application for leave to enter or remain in the United Kingdom made under residence scheme immigration rules on or after exit day.

…

Reg. 8 - Grounds of appeal

(1) An appeal under these Regulations must be brought on one or both of the following two grounds.

(2) The first ground of appeal is that the decision breaches any right which the appellant has by virtue of—

(a) Chapter 1, or Article 24(2), 24(3), 25(2) or 25(3) of Chapter 2 , of Title II , or Article 32(1)(b) of Title III, of Part 2 of the withdrawal Agreement,

(b) Chapter 1, or Article 23(2), 23(3), 24(2) or 24(3)], of Title II, or Article 31(1)(b) of Title III, of Part 2 of the EEA EFTA separation Agreement, or

(c) Part 2, or Article 26a(1)(b), of the Swiss citizens' rights agreement.

(3) The second ground of appeal is that—

(a) where the decision is mentioned in regulation 3(1)(a) or (b) or 5, it is not in accordance with the provision of the immigration rules by virtue of which it was made;

(b) where the decision is mentioned in regulation 3(1)(c) or (d), it is not in accordance with residence scheme immigration rules;

(c) where the decision is mentioned in regulation 4, it is not in accordance with section 76(1) or (2) of the 2002 Act (as the case may be);

(d) where the decision is mentioned in regulation 6, it is not in accordance with section 3(5) or (6) of the 1971 Act (as the case may be);

…

Reg. 9 - Matters to be considered by the relevant authority

(1) If an appellant makes a section 120 statement, the relevant authority must consider any matter raised in that statement which constitutes a specified ground of appeal against the decision appealed against. For the purposes of this paragraph, a "*specified ground of appeal*" is a ground of appeal of a kind listed in regulation 8 or section 84 of the 2002 Act.

(2) In this regulation, "*section 120 statement*" means a statement made under section 120 of the 2002 Act and includes any statement made under that section, as applied by Schedule 1 or 2 to these Regulations.

(3) For the purposes of this regulation, it does not matter whether a section 120 statement is made before or after the appeal under these Regulations is commenced.

(4) The relevant authority may also consider any matter which it thinks relevant to the substance of the decision appealed against, including a matter arising after the date of the decision.

(5) But the relevant authority must not consider a new matter without the consent of the Secretary of State.

(6) A matter is a "new matter" if—

(a) it constitutes a ground of appeal of a kind listed in regulation 8 or section 84 of the 2002 Act, and

(b) the Secretary of State has not previously considered the matter in the context of—

(i) the decision appealed against under these Regulations, or
(ii) a section 120 statement made by the appellant.

…

D. APPLICATION UNDER RULE 15(2A)

21. At the hearing on 9 June, Mr Hawkin applied under rule 15(2A) of the Asylum Procedure (Upper Tribunal) Rules 2008 for permission to adduce new evidence. This comprises a number of “Covid-19 policies” of the respondent, some of which post-date the First-tier Tribunal Judge’s decision; and letters dated 7 January 2022 written by representatives of the Immigration Law Practitioners’ Association, “the 3 million” and “Here for Good” to, respectively, the Minister for Immigration and the respondent’s Head of “Euro and Settlement and EU Settled Status Customer Resolution Centre”.

22. We were also provided with a copy of the Minister’s reply of February 2022.

23. For the respondent, Ms Smyth resisted Mr Hawkin’s application. Having heard submissions, we decided to admit them *de bene esse*. In the event, we have dealt substantively with the material, since it may feature in submissions in other First-tier Tribunal cases and thus requires to be addressed, in order for our decision is to be of maximum utility.

24. The Covid-19 policies are, in essence, as follows. On 11 January 2021, the respondent published a Covid Visa Concession Scheme. This was designed to help individuals who had permission to live in the United

Kingdom but whose permission expired whilst they were stranded abroad due to coronavirus travel restrictions. On 8 June 2020, the respondent gave guidance regarding changes to the minimum income and adequate maintenance requirements for those subject to immigration control. An individual who had experienced loss of income due to coronavirus could have their income considered by reference to a period immediately before loss of income or, if furloughed, be treated as receiving 100% of the salary.

25. On 20 April 2020, the respondent issued a guidance document creating a number of temporary immigration exemptions and concessions for those on student and short-term student visas.

26. On 31 March 2020, the respondent announced that doctors, nurses and paramedics with visas due to expire by 1 October 2020 would receive a free one-year extension. That scheme was broadened on 29 April 2020 and further extended in November 2020 and in 2021.

27. The letters of 7 January 2022 refer to unmarried partners of EEA nationals who were in a durable relationship by 31 December 2020, resided in the United Kingdom without immigration permission, and failed to comply with the requirement to make an application for a document under the EEA Regulations 2016 by 31 December 2020 and who, accordingly, were excluded from the EU Settlement Scheme. There are said to be numerous cases where EEA nationals and their durable partners "intended to get married or enter into a civil partnership prior to 2021 but their marriages/civil partnerships were delayed until after the end of the transition period due to Covid-19".

28. The letter says such persons were unable to produce a residence card issued under the EEA Regulations 2016 to confirm they met the definition of a durable partner on 31 December 2020. The letter states that, "had it not been for Covid-19 and the delays this caused to marriages, the spouse/civil partner would have had their rights of residence protected by the Withdrawal Agreement". The respondent was urged to "provide a concession for those whose marriages had been scheduled prior to 1 January 2021 but were postponed due to the Covid-19 pandemic".

29. The Minister's reply on this issue was as follows:

> "Where the spouse or civil partner of an EEA citizen resident in the UK before the end of the transition period is concerned, they will be eligible for the EUSS where they are themselves an EEA citizen and can rely on their own residence in the UK by 31 December 2020, or where the marriage or civil partnership was formed after this date and, in line with the requirements of the Free Movement Directive and the Citizens' Rights Agreements, the couple were durable partners by this date. Any impact COVID-19 may have had on the timing of the marriage or civil partnership does not affect the scope for a non-EEA citizen to have obtained or applied for a relevant document as a durable partner under the EEA Regulations before the end of the transition period, in accordance with those requirements.

Notwithstanding the date on which the marriage or civil partnership was formed, an EEA citizen resident in the UK before the end of the transition period, who obtains status under the EUSS, has a lifetime right to be joined by their existing close family members resident outside the UK at 31 December 2020, where the relationship continues to exist when the family members seeks to join them here. In addition, the EUSS permits a person who was living in the UK before the end of the transition period as the durable partner of an EEA citizen resident here by then (and who may now be their spouse or civil partner), but who did not obtain a residence card under the EEA Regulations and had no other lawful basis of stay in the UK, still to bring themselves within the scope of the scheme as a joining family member.

As you note, the person will need to break the continuity of their residence here by leaving the UK for more than six months. They will then be able to apply to the EUSS from overseas (where eligible to do so) or in the UK (by returning here via an EUSS family permit) as a joining family member of their EEA citizen sponsor, where the sponsor has obtained status under the EUSS. This places them in an equivalent position to those durable partners of EEA citizens resident in the UK before the end of the transition period who were outside the UK at that point. It also means they are not advantaged by having chosen to remain in the UK without a lawful basis of stay before the end of the transition period."

E. THE CASE FOR THE APPELLANT

30. As he had before the First-tier Tribunal Judge, Mr Hawkin submitted that the grounds of appeal permitted by regulation 8 of the 2020 Regulations entitled the appellant to succeed, if he could demonstrate that the decision in his case was not a proportionate one. Regulation 8(2)(a) entitles the appellant to rely on a right which he has by virtue of Title II of Part 2 of the Withdrawal Agreement. This encompasses Article 18, in which provision is made about applying for "a new residence status which confers the rights under this Title and the document evidencing such status which may be in a digital form". Applying for such a residence status is subject to specified conditions. The appellant relies particularly on condition (r), which is as follows:

> "(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."

31. Mr Hawkin says that the appellant was undoubtedly an applicant within the meaning of Article 18 and, accordingly, the First-tier Tribunal Judge was required to consider proportionality. The sole effective reason why the appellant was refused limited leave to remain under paragraph EU14 of

the Immigration Rules was that he married his wife after 11pm on 31 December 2020. By reason of Article 18(1)(r), the First-tier Tribunal Judge should have had regard to what are said to be the "undisputed facts and circumstances", that the appellant's marriage could not take place before the specified date, due to the Covid-19 pandemic and the resulting public emergency, all of which was beyond his control.

32. Relying on government statements that the EUSS was intended to be straightforward, user-friendly, flexible and generous, Mr Hawkin's skeleton argument says:

> "73. … the Appellant accordingly submits that it is entirely proper and just, to have regard to EU principles of law, including proportionality, and if necessary, to the rights contained in the Citizens Rights Directive and in the Charter of Fundamental Rights, in order to resolve his case."

33. Mr Hawkin points to the respondent's guidance in support of the appellant's case. This is *EU Settlement Scheme: EU, other EEA and Swiss citizens and their family members* (version 15.0).

34. At page 44, dealing with circumstances in which the respondent's case officers may be satisfied that a person has reasonable grounds for missing a deadline applicable to them under the EUSS, it is said that a person may have been unaware of the requirement to apply to the EU Settlement Scheme by the relevant deadline or they may have failed to make an application by that deadline because for example they had no Internet access, had limited computer literacy or limited English language skills; or had been living overseas. At page 45, it is said that a person "may have been unable for compelling practical or compassionate reasons – including in light of the Covid-19 pandemic – to obtain the evidence of identity and nationality or residence required to make an application".

35. At page 62, it is said that there may be other reasons why a document cannot be obtained or produced in order to establish identity or nationality. Such other reasons "May arise from the impact of a Covid-19 pandemic. For example, the closure of, or inability to travel to, an embassy or high commission may have prevented an applicant from renewing their passport or national identity card …" each case must be considered on its individual merits.

36. Mr Hawkin's cites SF and Others (Guidance, post-2014 Act) Albania [2017] UKUT 00120 (IAC); [2017] Imm AR 1003 where the Upper Tribunal held that, even in the absence of a "not in accordance with the law" ground of appeal, the tribunal ought to take the respondent's guidance into account if it points clearly to a particular outcome in the instant case. Only by doing so can consistency be obtained between those cases that do, and those cases that do not, come before the tribunal.

37. In his oral submissions, Mr Hawkin argued that the principle of proportionality facilitates a deeper exploration of the fairness of the decision. On the facts, the appellant had a strong legal and moral case

and it would be “staggeringly unjust” if he could not benefit from the EUSS, in all the circumstances.

38. If, contrary to the submissions, the appellant is unable to succeed as the spouse of an EU citizen, Mr Hawkin says that he should qualify as a durable partner. The suggestion that, in order to be durable, the relationship must have existed for at least two years is merely a “rule of thumb”: YB (EEA Reg 17(4), proper approach) Ivory Coast [2008] UKAIT 00062 (IAC). Furthermore, the definition of “durable partner” in Appendix EU expressly allows for a shorter period of residence if there is “other significant evidence of the durable relationship”.

39. Mr Hawkin submits that there is such other significant evidence in the present case. The appellant and his wife had provided considerable evidence of the durability of the relationship through witness statements, a tenancy Agreement, council tax bills, utility bills, photographs and letters of support. The fact that the couple continued to cohabit, as evidenced in utility bills etc from April to June 2022 (is, Mr Hawkin says, significant evidence that the relationship was at all times durable.

40. The appellant also raises the issue of discrimination. In this regard, he points to Article 12 of the Withdrawal Agreement which prohibits “any discrimination on grounds of nationality within the meaning of the first subparagraph of Article 18 TFEU” in respect of the persons referred to in Article 10 of the Withdrawal Agreement.

41. In breach of Article 12, Mr Hawkin says that the definition of “required evidence of family relationship” in Appendix EU shows that a durable partner of an EEA sponsor who married after the specified date must have the required document to satisfy the requirement to be considered as a durable partner. In contrast, those who rely upon their sponsor being a British citizen or from Northern Ireland, can submit other evidence to the respondent in order to prove their relationship was formed and durable before the specified date, if they do not have the required document. This, Mr Hawkin says, is discrimination not permitted by Article 12 of the Withdrawal Agreement. It discriminates against the appellant’s wife in that, if she had been a British citizen sponsor, she could have relied on the evidence of the couple’s durable relationship since February 2020.

42. Finally, Mr Hawkin argues that the First-tier Tribunal Judge was wrong to hold, at paragraph 14 of her decision, that the grounds of appeal in regulation 8 do not allow for an appeal to be advanced on human rights grounds.

43. Mr Hawkin says that the appellant has a family life with his wife and her daughter (now his stepdaughter); and that the undoubted interference with that life caused by the respondent’s decision is a breach of Article 8 of the ECHR and Article 7 of the Charter of Fundamental Rights.

F. DISCUSSION

(1) The Withdrawal Agreement

44. The Withdrawal Agreement lies at the heart of this case. It is therefore necessary to examine, in some detail, how the Withdrawal Agreement applies to a person, such as the appellant, who was (or may have been) in a durable relationship, prior to 31 December 2020, with an EU citizen but who did not marry the EU citizen until after that time.

45. Article 126 provides for a transition period, which started on the day of the entry into force of the Withdrawal Agreement and ended at 23:00 hours GMT on 31 December 2020. During that period, EU law continued to apply in the United Kingdom. Thereafter, Article 4 provides for individuals to rely directly on the provisions of the Withdrawal Agreement, which meet the conditions for direct effect under EU law. In accordance with Article 4, the Withdrawal Agreement is given direct effect in the United Kingdom by section 7A of the European Union (Withdrawal) Act 2018.

46. Part 2 of the Withdrawal Agreement makes provision in relation to citizens' rights. Article 10 sets out who is within scope of Part 2. That Part includes Article 18, upon which the appellant seeks to rely. Article 18.1 refers to "Union citizens… their respective family members and other persons, who reside in" the territory of the host State "in accordance with the conditions set out in this Title".

47. "Family members "are defined in Article 9 in such a way that it is, for example, insufficient for a person merely to meet sub-paragraph (1) of the definition by reason of being the spouse of a Union citizen (Article 2(2)(a)) of Directive 2004/38/EC). The opening words of the definition of "family members" also require the person concerned to "fall within the personal scope provided for in Article 10" of the Withdrawal Agreement.

48. The appellant is not a family member to whom Part 2 of the Withdrawal Agreement applies. He was not a person who, in the words of Article 10.1(e)(i), resided in the United Kingdom in accordance with Union law before 11pm on 31 December 2020 and who continues to reside here afterwards. Nor does he fall within the scope of Article 10.1(e)(ii) or (iii).

49. By the same token, the appellant is not a person who falls within Article 10.1(f), as he was not someone who resided in the United Kingdom in accordance with Articles 12, 13, 16(2), 17 and 18 of Directive 2004/38/EC before the end of the transition period. Broadly speaking, those provisions relate to retained rights of residence and rights of permanent residence, none of which are relevant in the appellant's case.

50. Accordingly, the only way the appellant can bring himself within the scope of Part 2 and, thus, Article 18, is if he can fall within Article 10.2. To reiterate, this provides 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."

51. Article 3(2) of Directive 2004/38/EC requires Member States to "facilitate entry and residence" for "any other family members" who are dependents or members of the household of the Union citizen; or where serious health grounds strictly require the personal care of the family member by the Union citizen. A person is also within Article 3.2 if they are a "partner with whom the Union citizen has a durable relationship, duly attested". For such persons, the host Member State is required to "undertake an extensive examination of the personal circumstances and shall justify any denial of entry or residence to these people".

52. There can be no doubt that the appellant's residence in the United Kingdom was not facilitated by the respondent before 11pm on 31 December 2020. It was not enough that the appellant may, by that time, have been in a durable relationship with the person whom he married in 2021. Unlike spouses of EU citizens, extended family members enjoyed no right, as such, of residence under the EU free movement legislation. The rights of extended family members arose only upon their residence being facilitated by the respondent, as evidenced by the issue of a residence permit, registration certificate or a residence card: regulation 7(3) and regulation 7(5) of the 2016 Regulations.

53. If the appellant had applied for facilitation of entry and residence before the end of the transition period, Article 10.3 would have brought him within the scope of that Article, provided that such residence was being facilitated by the respondent "in accordance with … national legislation thereafter". This is not, however, the position. For an application to have been validly made in this regard, it needed to have been made in accordance with regulation 21 of the 2016 Regulations. That required an application to be submitted online, using the relevant pages of www.gov.uk, by post or in person, using the relevant application form specified by the respondent; and accompanied by the applicable fee.

54. After 30 June 2021, a favourable decision of the respondent by reference to a pre-31 December 2020 application, results in a grant of leave under the EUSS, rather than a grant of residence documentation under the 2016 Regulations.

55. As we have seen, the appellant made no such application.

56. The above analysis is destructive of the appellant's ability to rely on the substance of Article 18.1. He has no right to call upon the respondent to provide him with a document evidencing his "new residence status" arising from the Withdrawal Agreement because that Agreement gives him no such status. He is not within the terms of Article 10 and so cannot

show that he is a family member for the purposes of Article 18 or some other person residing in the United Kingdom in accordance with the conditions set out in Title II of Part 2.

57. The appellant's attempt to rely on his 2021 marriage to an EU citizen is misconceived. EU rights of free movement ended at 11pm on 31 December 2020, so far as the United Kingdom and the present EU Member States are concerned. The Withdrawal Agreement identifies large and important classes of persons whose positions in the host State are protected, following the end of the transition period. The appellant, however, does not fall within any such class.

58. It is not possible to invoke principles of EU law in interpreting the Withdrawal Agreement, save insofar as that Agreement specifically provides. This is apparent from Article 4(3). It is only the provisions of the Withdrawal Agreement which specifically refer to EU law or to concepts or provisions thereof which are to be interpreted in accordance with the methods and general principles of EU law. EU law does not apply more generally.

59. We agree with Ms Smyth's submission that the clarity provided by Article 10 of the Withdrawal Agreement reflects the intention of the United Kingdom and the EU that the Agreement should ensure an orderly withdrawal of the UK; protect only those United Kingdom and EU citizens who were exercising free movement rights before a specific date (see the 6th recital); and provide legal certainty to citizens and economic operators as well as to judicial and administrative authorities (see the 7th recital).

60. Sub-paragraphs (a) to (d) of Article 18 make specific provision for late submission of an application for a new residence status. One looks in vain in Article 18 and elsewhere in the Withdrawal Agreement for anything to the effect that a person who did not meet the relevant requirements as at 11pm on 31 December 2020 can, nevertheless, be treated as meeting those requirements by reference to events occurring after that time. If that had been the intention of the United Kingdom and the EU, the Withdrawal Agreement would have so specified. Article 31 of the Vienna Convention on the Law of Treaties (1969) requires a treaty to be "interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose". It would plainly be contrary to the Vienna Convention to interpret the Withdrawal Agreement in the way for which the appellant contends.

(2) The appeal to proportionality: Article 18.1(r)

61. The appellant places great reliance on Article 18.1(r) of the Withdrawal Agreement. As we have seen, this gives a right for "the applicant" for new residence status to have access to judicial redress procedures, involving an examination of the legality of the decision as well as of the facts and

circumstances on which the decision is based. These redress procedures must ensure that the decision "is not disproportionate".

62. Ms Smyth submitted at the hearing that, since the appellant could not bring himself within Article 18, sub-paragraph (r) simply had no application. Whilst we see the logic of that submission, we nevertheless consider that it goes too far. The parties to the Withdrawal Agreement must have intended that an applicant, for the purposes of sub-paragraph (r), must include someone who, upon analysis, is found not to come within the scope of Article 18 at all; as well as those who are capable of doing so but who fail to meet one or more of the requirements set out in the preceding conditions.

63. The nature of the duty to ensure that the decision is not disproportionate must, however, depend upon the particular facts and circumstances of the applicant. The requirement of proportionality may assume greater significance where, for example, the applicant contends that they were unsuccessful because the host State imposed unnecessary administrative burdens on them. By contrast, proportionality is highly unlikely to play any material role where, as here, the issue is whether the applicant falls within the scope of Article 18 at all.

64. In the present case, there was no dispute as to the relevant facts. The appellant's residence as a durable partner was not facilitated by the respondent before the end of the transitional period. He did not apply for such facilitation before the end of that period. As a result, and to reiterate, he could not bring himself within the substance of Article 18.1.

65. Against this background, the appellant's attempt to invoke the principle of proportionality in order to compel the respondent to grant him leave amounts to nothing less than the remarkable proposition that the First-tier Tribunal Judge ought to have embarked on a judicial re-writing of the Withdrawal Agreement. Judge Hyland quite rightly refused to do so.

66. We also agree with Ms Smyth that the appellant's interpretation of Article 18(1)(r) would also produce an anomalous (indeed, absurd) result. Article 18 gives the parties the choice of introducing "constitutive" residence schemes: see Article 18.4. Article 18.1(r) applies only where a State has chosen to introduce such a scheme. If sub-paragraph (r) enables the judiciary to re-write the Withdrawal Agreement, this would necessarily create a divergence in the application of the Withdrawal Agreement, as between those States that have constitutive schemes and those which do not. This is a further reason for rejecting the appellant's submissions.

(3) Fairness

67. Closely linked to the appellant's submissions on proportionality is his attempt to invoke the principle of fairness. The appellant's case is that he would have secured a date for his wedding to take place before 31

December 2020, but for the Covid-19 pandemic. Although there is nothing in the exchanges with the Register Office that confirms this assertion, we shall take the appellant's case at its highest and assume that this was so.

68. Even on that assumption, however, the principle of fairness cannot assist the appellant. As is the case with proportionality, it does not give a judge power to disregard the Withdrawal Agreement.

(4) Principles of EU law

69. We have earlier set out paragraph 73 of Mr Hawkin's skeleton argument. At risk of repetition, we agree with Ms Smyth that the appellant cannot have regard to EU principles of law, the Citizens Rights Directive or the Charter of Fundamental Rights, except to the extent that this is required by the Withdrawal Agreement. In the present case, that Agreement does not require or permit a court or tribunal to do so. Directive 2004/38/EC no longer applies in the United Kingdom, as a general matter. The Charter of Fundamental Rights no longer applies: section 5(4) of the EU (Withdrawal Act 2018). Although part of "Union law" for the purposes of the Withdrawal Agreement, the Charter does not apply generally.

(5) Decision not in accordance with certain immigration rules

70. The powers of the First-tier Tribunal are set by regulations 8 and 9 of the 2020 Regulations. We shall address regulation 9 under the heading relating to Article 8 of the ECHR. Regulation 8 states that an appeal must be brought on one or both of two grounds. The first is that the decision breaches any right which the appellant has by virtue of (here) Title II of Part 2 of the Withdrawal Agreement. As we have seen, that includes Article 18. For the reasons we have given, the appellant has no substantive rights under that Article.

71. The second relevant ground of appeal in our case is that described in regulation 8(3)(b); namely, that where the decision is mentioned in regulation 3(1)(b), it is not in accordance with the provision of the immigration rules by virtue of which it is made.

72. There is no other power conferred on the First-tier Tribunal by reason of regulation 8 to allow an appeal on some other ground.

73. The appellant criticises paragraph 17 of the First-tier Tribunal Judge's decision, apparently on the basis that she decided that the appellant could not satisfy the requirements of EU14, at least partly because the appellant was unlawfully in the United Kingdom, following his failed asylum claim. Paragraph 17, however, merely records the submission of the Presenting Officer. As Mr Hawkin rightly observes at paragraph 62 of his skeleton argument, the sole effective reason why the appellant was refused limited leave to remain under paragraph EU14 was because he married his wife after 31 December 2020. A similar obstacle would have precluded the

appellant from succeeding under EU11, had the appellant been seeking indefinite leave to remain.

74. In his reply at the hearing, Mr Hawkin acknowledged the difficulties faced by the appellant in showing that he does, in fact, meet the requirements of Appendix EU. Having rejected the appellant's contention that he was entitled to succeed in his appeal by reference to the Withdrawal Agreement, it follows that the First-tier Tribunal Judge would not have been entitled to disregard or "read down" the relevant immigration rules. Accordingly, she was right to reject the appellant's second ground of appeal under regulation 8, in that the decision to refuse to grant leave to enter or remain in response to the appellant's relevant application (regulation 3(1)(c) and (2)) was in accordance with those rules (regulation 8(3)(b)).

(6) Public law

75. The provisions of the respondent's guidance upon which the appellant relies have been set out above. Given the terms of regulation 8 of the 2020 Regulations, the First-tier Tribunal has no jurisdiction to allow an appeal on the ground that the respondent's decision is, as general matter, "not in accordance with the law"; that is to say, on public law grounds.

76. Even if that were not so, we are in no doubt that the respondent's decision cannot be said to be infected by any public law error. The guidance in the *EU settlement scheme: EU, other EEA and Swiss citizens and their family members* (version 15.0) concerns flexibility as to the timing and nature of evidence going to show if an individual can meet the relevant requirements. It does not purport to vary those requirements.

77. Although the position could be said to be otherwise in some of the "other Covid-19 policies" which were included in the appellant's rule 15(2A) application, the appellant has not shown any irrationality in the respondent's decision (as evidenced in the Minister's letter of February 2022) to refuse to introduce a process, which would not have been mandated by the Withdrawal Agreement or the related immigration rules, whereby marriages which would probably have taken place before 31 December 2020 but which did not do so, wholly or in part because of Covid-19 pandemic, should in some way be treated as if they had taken place at an earlier date.

78. In particular, any such public law challenge is rendered hopeless by the fact that (as the present case illustrates) those who marry are highly likely to regard themselves as being in a durable relationship. Accordingly, a person in the position of the appellant could and should have applied to the respondent for facilitation (and, thus, recognition) of their position as an extended family member. The fact that marriage makes the non-EU citizen the possessor of an underlying right, whereas being in a durable relationship with such a person does not automatically do so, is insufficient

to demonstrate that the respondent committed a public law error in not providing some form of concession for those whose weddings were likely to have taken place before 31 December 2020, but for Covid-19.

79. This point is reinforced by the appellant's attempt to rely upon his stated position as a durable partner in order to challenge the decision of the First-tier Tribunal Judge. The appellant points to the definition in Annex 1 to Appendix EU of "durable partner", wherein the requirement to have lived together in a relationship akin to marriage or civil partnership for at least two years can be disregarded if "there is other significant evidence of the durable relationship". The appellant submits that there is, indeed, such other significant evidence. He could and should, therefore, have pursued this path. As we have recorded, Article 10.3 of the Withdrawal Agreement makes specific provision for those who have "applied for facilitation of entry and residence before the end of the transition period". The respondent's scheme gives effect to Article 10.3 by permitting an application in these circumstances under the 2016 Regulations. The applicant made no such application, let alone a valid one.

(7) Discrimination

80. We turn to the ground which alleges discrimination, contrary to Article 12 of the Withdrawal Agreement. This concerns the position of an EEA citizen resident in the United Kingdom before the end of the transition period. We have seen that the Minister's letter of February 2022 refers to such a person as having "a lifetime right to be joined by their existing close family members resident outside the UK at 31 December 2020" and for a person who was "living in the UK before the end of the transition period as the durable partner of an EEA citizen resident here by then (and who may now be their spouse or civil partner) but who did not obtain a residence card under the EEA Regulations … still to bring themselves within the scope of the scheme as a joining family member". These situations are provided for by Article 10.4 of the Withdrawal Agreement, as given effect by the EUSS. Where spouses are concerned, this "lifetime right" applies irrespective of the date of the marriage, provided that the couple were durable partners within the scope of Article 10 at the end of the transition period. Consistently with Article 3(2)(b) of Directive 2004/38/EC, the EUSS requires an applicant who relies on being in a durable relationship with a relevant EEA citizen to show that the couple have lived together in a relationship akin to a marriage or civil partnership for at least two years or that there is other significant evidence of the durable relationship.

81. The appellant submits that the definition of "required evidence of family relationship" in Annex 1 to Appendix EU shows that a durable partner of an EEA sponsor who married after the specified date must have the required document to satisfy the requirement to be considered to be a durable partner. In contrast, however, individuals who rely upon their sponsor being a British citizen or from Northern Ireland can submit other evidence

to the respondent to prove that their relationship was formed and durable before the specified date.

82. The appellant submits that this is discriminatory, contrary to Article 12, albeit not against him. It discriminates against his wife because, while she has evidence of the durable relationship which has been submitted to the respondent, this is not evidence that the respondent will take into account. However, if the same evidence had been submitted by a British citizen sponsor or a sponsor from Northern Ireland, then the respondent would take it into account.

83. Ms Smyth rightly observes that this submission did not feature in the grounds of appeal in respect of which permission was granted. In order, however, for the Upper Tribunal to provide a decision which is of maximum potential utility to the First-tier Tribunal in cases of this kind, we grant of permission for it to be argued.

84. There is, however, no merit in this new ground. Article 12 prohibits discrimination on the grounds of nationality within the meaning of Article 12 of the TFEU "in respect of the persons referred to in Article 10 of this Agreement". Since, for the reasons we have given, the appellant is not a person within Article 10, Article 12 cannot assist him.

85. The appellant's attempt to rely upon the position of his wife, on the basis that she was exercising her right to reside in the United Kingdom in accordance with EU law before 31 December 2020 and continues to do so, cannot enable the appellant to succeed in the appeal. Article 8(2) states in terms that the first ground of appeal is that the decision "breaches any right which the appellant has …" not a third party. Likewise, the appellant's wife cannot be invoked in respect of the second ground of appeal in that the respondent's decision was not contrary to the immigration rules, so far as the wife was concerned.

86. In any event, the appellant's wife is, as Ms Smyth submits, in a better position than British nationals, who do not enjoy automatic rights of entry and residence for their spouses. It appears that the appellant advances his discrimination argument by reference to the discrete category of family members of British citizens who benefit under the EUSS (but not under the Withdrawal Agreement) because of the exercise of EU free movement rights in a different State. This is, as Ms Smyth says, *Surinder Singh* territory. Such persons are not covered by the Withdrawal Agreement but can apply under the EUSS. The appellant's complaint that such persons are not required to produce a document under the 2016 Regulations is incorrect. They are, in fact, required to do so where they were resident in the United Kingdom before the end of the transition period without another lawful basis of stay in the UK: see sub-paragraph (e)(i) of the definition of "required evidence of family relationship" in Annex 1. The extended family member of a British citizen would also need to have

complied with the laws of the State in which their British sponsor had been exercising EU rights to reside.

(8) Article 8 ECHR

87. The final ground of challenge concerns Article 8 of the ECHR. At paragraph 14 of her decision, the First-tier Tribunal Judge noted that Mr Hawkin sought to rely on regulation 9(4) of the 2020 Regulations. This provides that the relevant authority may also consider any matter which it thinks relevant to the substance of the decision appealed against, including a matter arising after the date of the decision. The word "also" signifies that regulation 9(4) is an addition to the requirement on the relevant authority to consider a matter raised in response to a notice issued by the respondent under section 120 of the Nationality, Immigration and Asylum Act 2020. A matter raised in such a statement must be considered if it constitutes a specified ground of appeal; that is to say a ground under regulation 8 or a ground mentioned in section 84 of the 2002 Act (international protection/revocation of protection status/human rights).

88. Regulation 9(5), however, provides that the power conferred by regulation 9(4) is limited, in that the relevant authority "must not consider a new matter without the consent of the Secretary of State". Regulation 9(6) provides that a matter is a "new matter" if, inter alia, "it constitutes a ground of appeal of a kind listed in regulation 8 or section 84 of the 2002 Act".

89. It is evident that regulation 9 is not a general dispensing power, whereby the First-tier Tribunal may disregard the restrictions set by regulation 8. On the contrary, regulation 9 operates by reference to the grounds in regulation 8 and the grounds set out in section 84.

90. In paragraph 14, the First-tier Tribunal Judge stated that she "refused to consider an Article 8 argument, no human rights case having been made and it not been an available ground of appeal under the 2020 Regulations".

91. Mr Hawkin submits that the appellant clearly has a family life with his wife and stepdaughter and that the undoubted interference with that life, occasioned by the respondent's decision, is a disproportionate interference with Article 8 of the ECHR. Mr Hawkin also seeks to rely upon Article 7 of the Charter but, for the reasons we have given, that is not relevant.

92. The first question is to decide whether the First-tier Tribunal has jurisdiction, in an appeal of this kind, to consider human rights. The question arises because decision-making under residence scheme immigration rules (Appendix EU) does not involve a consideration of the applicant's (or any other person's) rights under Article 8 of the ECHR.

93. In order for regulation 9(4) to come into play, two requirements must be satisfied. There must be a "matter", in the sense of being the factual substance of a claim: Mahmud (s.85 NIAA 2002 – 'new matters') [2017] UKUT 00488 (IAC) at paragraph 29. Second, the matter must be "relevant to the substance of the decision appealed against". The interpretation of the words "relevant to the substance of the decision", as found in section 85(4) of the 2002 Act, was considered by the Supreme Court in Patel & Others v SSHD [2013] UKSC 72; [2014] Imm AR 456. Giving the lead judgment, Lord Carnwath (with whom Lord Kerr, Lord Reed and Lord Hughes agreed) upheld the "wide" construction of the words, which had been taken by the majority of the Court of Appeal in AS (Afghanistan) v SSHD [2011] EWCA Civ 833; [2011] Imm AR 832. Under this approach, the substance of the decision appealed against is no more than the decision to refuse to grant or vary leave to enter or remain (or entry clearance) as opposed to, for example, a "decision to refuse to vary leave to remain under rule x" (Sullivan LJ at paragraph 113).

94. Transposed to regulation 9 of the 2020 Regulations, the "decision appealed against", is, in the present case, the decision to refuse to grant the appellant leave to enter or remain generally, as opposed to a decision to refuse him leave to enter or remain under the EUSS rules specifically.

95. This means that regulation 9(4) confers a power on the First-tier Tribunal to consider a human rights ground, subject to the prohibition imposed by regulation 9(5) upon the Tribunal considering a new matter without the consent of the respondent.

96. Given what we have said about the nature of the respondent's decision-making under Appendix EU, the raising of a human rights claim will always be a" new matter", except where, for some reason, the respondent has already considered it.

97. In the present case, the respondent's consent was not sought by the appellant, let alone given. As a result, even though the First-tier Tribunal Judge might have been mistaken as to the ambit of regulation 9(4), any error in this regard is immaterial. Since the respondent had not consented, the First-tier Tribunal Judge was prevented by regulation 9(5) from considering any Article 8 argument.

98. As the respondent submits, if the appellant now wishes to claim that he should be permitted to remain in the United Kingdom in reliance on Article 8, he can and should make the relevant application, accompanied by the appropriate fee.

G. CONCLUSION

99. None of the grounds of challenge to the First-tier Tribunal Judge's decision succeeds. Her decision did not involve the making of an error on a point of law, such that her decision falls to be set aside.

100. It remains for us to thank Mr Hawkin and Ms Smyth for the quality and detail of their respective submissions.

101. The appeal is dismissed.

Mr Justice Lane

The Hon. Mr Justice Lane
President of the Upper Tribunal
Immigration and Asylum Chamber

18 July 2022