

EUSS and the Withdrawal Agreement-----Where we are now? *By Stephen Vokes, Head of the Immigration, Asylum and Human Rights team, No 8 Chambers.*

First, a disclaimer these notes and my (brief) talk are merely an outline of the situation; they are not meant to be comprehensive in any shape or form, but hopefully they are useful!

The situation presently is that the FTT has been the forum for substantial number of appeals, many persons unrepresented, from refusal decisions by the Home Office. In short, the Home Office position is often show us your family permit, if you want leave to remain!

EUSS and the EEA Family Permit scheme

EUSS was introduced on 30th March 2019 and until 31st December 2020 EU citizens and their family members could either apply for an EUSS Family Permit, or under the 2016 Regulations for an EU family permit.

The key cut-off date was the end of the transition period stated in Article 126 of the Withdrawal Agreement to be 31st December 2020 (the “specified date” according to Appendix EU, and EU (FP))

Now the difference in applications as we shall see depended on your family member, whether they were a direct family member or an “other family member”.

In crucial Article 10, the Withdrawal Agreement stated in Article 10 (e) (i) it was necessary before the end of the transition period to reside in the host state “*in accordance with Union law*” .

However, by Article 10.3 persons who had applied for the facilitation of entry were also included if they applied before the end of the transition period.

Now after 31st December 2020, and before the 30th June 2021 there was a grace period for direct family members as set out in Appendix EU to apply for residency if they were present in the UK, but not for family members seeking to join their relatives in the UK they were covered by Appendix EU (FP). This only applied for direct family members who would receive an EUSS Permit.

So, it really depended on making the correct application before 31st December 2020 if you were an “other family member” without any existing family permit.

Tough if the wrong application was made; see **Batool & others (other family members: EU Exit) [2022] UKUT 219 (IAC)** and I note that Lady Justice Andrews has refused permission to appeal in the case with some rather searching remarks.

This position has been slightly modified by **Siddiqia (other family members; EU exit) [2023] UKUT 47 (IAC)** which while supporting and confirming **Batool** acknowledged that ticking the wrong drop box did not invalidate the application as long as the substance of the application made it clear it was an application under the 2016 Regulations for other family members (see here **ECO v Ahmed and others (UI-2022-002804-002809)**—referred to in the decision.

The other area of litigation which has been produced by Appendix EU is that concerned with durable partners, and marriage, in short did they have to have their relationship facilitated under the EU Withdrawal Agreement by 31st December 2020 in order to qualify, and whether the concepts of proportionality, and that of fairness can be invoked. In short many applicants claimed that they could not arrange a marriage, or have a civil partnership registered because of COVID 19 and so did not qualify under Appendix EU. In **Celik (EU exit; marriage; human rights) [2022] UKUT 220 (IAC)** the UT took a hard line and said no Article 18 of the Withdrawal Agreement could not be invoked because of the COVID 19 situation, which led to parties being unable to marry. However leave to

appeal to the Court of Appeal has been granted and there is evidence that the UT are staying cases until their decision.

However, there is a decision of the UT in **SSHD v Kabir (UI-2022-002538)** which is helpful regarding durable partners where due to COVID 19 the parties were unable to get married, but were in a durable relationship. They had attempted to get married in December 2020, but this was cancelled and was accepted to be so in the FTT. So, the UT held they did meet the definition of a durable partner in Appendix EU, and because the Appellant had leave to remain at the date of the application, she met the eligibility requirement of the Rules.

The difficulty overall is Appendix EU is so convoluted that the Home Office are often unaware of their own Rules, and also their own Guidance, which creates discretionary exceptions, so that what was billed as a simple user friendly exercise is anything but, presently.