



IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER
Hybrid hearing

Case No: UI-2022-006529

First-tier Tribunal No:
EA/52669/2021 EA/12417/2021

THE IMMIGRATION ACTS

Decision & Reasons Issued:

2nd October 2023

Before

UPPER TRIBUNAL JUDGE KEBEDE
UPPER TRIBUNAL JUDGE RINTOUL

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

LEEN ZEAITER
(NO ANONYMITY ORDER MADE)

Respondent

Representation:

For the Appellant: Ms H Ahmed, Senior Home Office Presenting Officer

For the Respondent: Mrs Fatme Zeaiter, Sponsor

Heard at Field House on 13 September 2023

DECISION AND REASONS

1. The Secretary of State appeals with permission against the decision of First-tier Tribunal Judge G Davison promulgated on 8 February 2022 allowing Miss Zeaiter's appeal against a decision made by an Entry Clearance Officer to refuse her application for a family permit made under the EU Settlement Scheme.

2. We refer to Miss Zeaiter as the appellant for reasons of convenience and because the appeal has to be re-made at which point Miss Zeaiter became again the appellant.
3. The appellant sought permission to enter the United Kingdom along with her mother, Sonia Zeaiter, to join family in the United Kingdom. The mother's application was allowed but the appellant's decision was refused on the basis that the Entry Clearance Officer was not satisfied that she was a family member of a relevant EEA national or the spouse or civil partner of that EEA national. In this case the relevant EEA national sponsor is a French citizen and is the appellant's sister-in-law, married to the appellant's brother, Wael Zeaiter and on that basis is a family member. The EEA national sponsor appeared before us today.
4. When the matter came before Judge Davison the Secretary of State was not represented; the appellant was represented by Mr Saeed from Abbott Solicitors. The judge decided that the appellant did fall within paragraph FP6(1) of Appendix EU-FP of the Immigration Rules as she is a family member. The judge accepted, and this is not in dispute, that the appellant's mother met the definition of family member which is set out in Annex (e)(i) of the EU Settlement Scheme Family Permit Rules. The judge then went on at paragraph 16 to set out subparagraph (f) of that Rule, then Rule EU2 and EU11, and concluded that the appellant was entitled to a family permit by reference to condition 1 of EU11. The judge also considered that refusing the appellant entry clearance was in any event disproportionate having had regard to Article 4 of the Withdrawal Agreement and Article 52 of the Charter of Fundamental Rights of the European Union.
5. The Secretary of State sought permission to appeal against that decision on two grounds. Firstly, the judge had not properly applied the law in which dependent family members were defined, and secondly, the judge erred in concluding that the decision was disproportionate under the withdrawal agreement. Permission was granted on both grounds by First-tier Tribunal Judge Parkes on 28 April 2023.
6. The matter came before us on that basis. It is, however, appropriate to record at this stage that at a late stage before the proceedings, we were informed that the appellant was no longer represented by Abbott Solicitors and that the sponsor would have some difficulty in attending which is why the hearing was converted into a hybrid hearing whereby the sponsor was present by video link but the Presenting Officer was in the same court as the panel. No objection to that was made and although there were some difficulties in getting connected these were resolved and the hearing was able to proceed, albeit that we had to hear from Ms Ahmed again as she had already made her submissions before the sponsor was able to join us.
7. Ms Ahmed relied on her skeleton argument taking us through the various provisions of the Rules and explaining to us why the appellant does not fall within the Rules as they are set out.

8. Mrs Fatme replied to that asking us why it was that if that was so, the application was permitted to go forward and drawing our attention to the difficulties that the appellant, who has only just now turned 18, has in the circumstances in which she lives in Lebanon which we consider are of a compassionate nature.
9. We turn then to the provisions of the law.
10. The right of appeal in this case is found in the Immigration (Citizens Rights Appeals) (EU Exit) Regulations (“the Citizens Rights Appeals Regulations”) 2020 (SI 2020/61) which grants a right of appeal to those refused a permit under Appendix EU (FP). The permissible grounds of appeal are set out in reg. 8 and provide, so far as is relevant:

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,

(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;

11. In order to obtain a family permit an applicant has to meet the requirements of Appendix EU Family Permit to the Immigration Rules. In broad terms that person must fulfil the requirements of Rules FP6(1) and 6(2) which set out the eligibility requirements. In this case the eligibility requirement was that the appellant is a “family member of a relevant EEA citizen”.
12. The definition of “family member of a relevant EEA citizen” in Annex 1 is lengthy, and identifies several different categories of people in the subparagraphs of that definition. We note as an aside that the appellant’s mother fell within paragraph (e) but we are concerned with paragraph (f) which we set out in full.

(f) **a person who** the entry clearance officer is satisfied by evidence provided by the person that they **would**, if they had made a valid application under Appendix EU to these Rules before 1 July 2021, **have been granted** (as the case may be) indefinite leave to enter under paragraph EU2 of that Appendix or limited **leave to enter** under paragraph EU3 and that leave would not have lapsed or been cancelled, curtailed, revoked or invalidated before the date of application under this Appendix (and, in respect of that application, the

requirements in paragraph FP6(1)(c) and (d) of this Appendix do not apply): (06.04.2022 HC 1118):

(i) as a family member who has retained the right of residence by virtue of a relationship with a relevant EEA citizen (as defined in Annex 1 to Appendix EU); or

(ii) on the basis that condition 6 of paragraph EU11 of Appendix EU is met; or

[emphasis added for clarity]

13. The judge appears not to have considered the subparagraphs numbered (i) and (ii) which follow on from paragraph (f). That is an error because those provisions have the effect of limiting this category of family members only to those who would have been granted leave to remain as either a family member who has retained the right of residence or was a family member of someone who had died; it does not include those who might have been granted leave to remain in some other capacity.
14. In this case, neither point (i) or (ii) could have been met. First, the appellant is not a person who would have had the right of residence before and so could not have retained it, and second, condition 6 of paragraph 11 relates to circumstances in which the EEA national has died; that is not the case here.
15. We also note that in any event the appellant could not meet the definition of “family member of a relevant EEA citizen” for the purpose of Appendix EU (point (i)) as she did have the “relevant document” which in this case which would have been a family permit. For these reasons we consider that the first ground of appeal is met because the appellant cannot meet the requirements of the Appendix EU(FP) of the Immigration Rules and the judge erred in concluding that she did.
16. Turning to the second ground of appeal, the first point to be made is that the Charter of Fundamental Rights of the European Union does not apply, as can be seen from the decision of the Upper Tribunal in Celik (EU exit; marriage; human rights) [2022] UKUT 220 at paragraph 69. Further and following the decision of the Upper Tribunal in Batool and others (other family members: EU exit) [2022] UKUT 219, it cannot be argued that the appellant falls within the terms of the withdrawal agreement and for these reasons taken together the second ground of appeal is not made out.
17. We announced our decision at the hearing and asked for further submissions which we received from the sponsor. We consider that for the reasons we have already given the appellant cannot fall within the terms of Appendix EU-FP and that accordingly the decision made by the Entry Clearance Officer was correct. For the reasons we have also given the appellant does not fall within the terms of the Withdrawal Agreement, nor is the Charter of Fundamental Rights and Freedoms applicable and thus she cannot succeed on the other permissible ground of appeal in this case.

18. We do however find it necessary to explain that whilst there may well be compassionate circumstances in this case those cannot be raised in this appeal. It is of course open to the appellant if so advised to make an application under a different part of the Immigration Rules, for example, the dependent relative Rules or on a human rights basis, but those are not matters which can be raised in this appeal.

Accordingly for these reasons we conclude that the decision of the First-tier Tribunal involved the making of an error of law and we set it aside. We re-make the appeal by dismissing the appeal on all grounds.

Notice of Decision

1. The decision of the First-tier Tribunal involved the making of an error of law and we set it aside.
2. We remake the decision by dismissing the appeal on all grounds.

Signed

Date: 28 September 2023

Jeremy K H Rintoul
Judge of the Upper Tribunal