



IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2021-000863
First-tier Tribunal No:
EA/01621/2021

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On the 18 May 2023

Before

UPPER TRIBUNAL JUDGE OWENS

Between

MS RESHMA BEGUM
(NO ANONYMITY ORDER MADE)

Appellant

and

ENTRY CLEARANCE OFFICER

Respondent

Representation:

For the Appellant: Mr J Martin, Counsel, instructed by Connaught Law Ltd
For the Respondent: Ms J Isherwood, Senior Presenting Officer

Heard at Field House on 9 February 2023

DECISIONS AND REASONS

1. The appellant appeals with permission against the decision of First-tier Tribunal Judge Moon sent on 10 August 2021 dismissing an appeal against a decision dated 11 December 2020 to refuse an application for a family permit under the EU Settlement Scheme.
2. Ms R Begum is a national of India born on 9 May 2004. Her mother Mrs S Begum is an Indian national who has been residing in the UK for many years and has had a resident permit as a family member of an EEA national since 2010. She entered into an Islamic marriage with the EEA sponsor Mr Oprea a Romanian citizen on 12 September 2017. On 4 November 2020 the appellant applied for an EU Settlement Scheme (EUSS) family permit under Appendix EU (Family Permit) of the Immigration Rules. She asserted that she was a “stepchild” aged under 21 of a relevant EEA national.
3. The respondent decided that the appellant did not meet the requirement of the Appendix EU (Family Permit) because she did not provide sufficient evidence that she was a “step child” of the EEA citizen.

4. The position of the appellant before the First-tier Tribunal was set out in a skeleton argument prepared by Mr Akhtar. He asserted that the appellant could meet the requirements of the Appendix EU (Family Permit) because she is a “family member” of a relevant EEA citizen. It was asserted that the appellant has always been dependent on her mother and subsequently was dependent on her EEA sponsor. It was also submitted that the appellant fell under the personal scope of Article 10(3) of the Withdrawal Agreement because she is a family member who had applied for “facilitation of entry and residence” before the end of the transition period.

Decision of the First-tier Tribunal

5. The appeal was heard before First-tier Tribunal Judge Moon on 9 August 2021. At [4] the judge records that at the beginning of the hearing Ms Atcha who was representing the appellant confirmed that the sponsor’s “relationship” with Mrs S Begum had now been accepted by the respondent. It was said that there was previously a problem because Mrs S Begum had not been able to evidence her divorce from the appellant’s father. On behalf of the respondent, Ms Navarro confirmed that the family relationship had been accepted.
6. The judge then noted that the decision letter did not go on to consider the issue of dependency. Ms Navarro confirmed that the respondent did not accept that the appellant was dependent on the sponsor but agreed that if the judge found that the appellant was dependent on the sponsor, the appeal should be allowed. The judge went on to consider the issue of dependency and found that he was not satisfied on the balance of probabilities that the appellant could not meet her essential living needs in whole or in part without financial or other material support of the sponsor. He found that the appellant does not use money sent to her by the sponsor for her living needs and that she is supported by her grandfather. The judge dismissed the appeal finding that the appellant was not dependent on the sponsor.

Grounds of Appeal to the Upper Tribunal

7. In general, the grounds were poorly drafted and particularised. I summarise them as follows:

Ground 1 - The judge gave “insufficient weight” to the evidence of dependency. It is said that the judge “wrongfully” dismissed the appeal as he suggested the appellant is not dependent on her sponsor. The judge misapplied the immigration rules. There was “ample evidence provided to support the fact that it would not be proportionate to refuse the application”.

Ground 2. The appellant meets the requirements of Annex 1 of Appendix EU to the Immigration Rules. The appellant falls under the definition of “child” because she is the direct descendant under the age of 21 years of a relevant EEA citizen or of their spouse or civil partner. In these circumstances there was no requirement to establish dependency. The judge’s decision is unfair and unlawful because such evidence was required. Further if the respondent was not satisfied with the evidence provided with the application, she should have requested further evidence in support of the application.

Ground 3. “Inadequate weight” was given to the financial evidence. Adequate evidence of the financial situation was provided. The sponsor sent remittances to her daughter between 2018 and June 2020 and between September 2020 and March 2021. The judge misapplied the law because there is no requirement for money to be sent frequently or regularly. The sponsor did not cease to have responsibility for her daughter once she relocated to the United Kingdom. There was evidence of communication of money transfers which demonstrated that the sponsor continued to have responsibility for her daughter’s upbringing.

Ground 4. Family life elements. It is asserted that the judge erred in considering the appellant’s family life elements in this appeal. The appellant is dependent on her sponsor and mother. The judge has failed to look at the exceptional circumstances of the appellant’s matter.

Permission

8. Permission was granted by First-tier Tribunal Judge McClure on 2 November 2021 in the following terms.

“The “relationship” was conceded by the respondent at the appeal, having regard to the evidence submitted. Since the judge found that the appellant’s mother is married to an EEA national, the appellant is the stepchild of the EEA national, and under 21. In these circumstances the judge erred in considering the issue of dependency.”

9. The grant of permission was not limited.

Rule 24 Response

10. The Secretary of State did not prepare a Rule 24 response.

Procedural History of the Appeal

11. This appeal was originally listed for hearing on 28 February 2022. At that hearing, Ms Isherwood for the respondent submitted that notwithstanding the concession by the respondent at the First-tier Tribunal, the appellant cannot demonstrate that she is a “family member” of a relevant EEA citizen because the appellant’s mother is neither married nor in a civil partnership with the EEA relevant sponsor. There is no provision under Appendix EU (Family Permit) for the appellant to apply for a family permit as an “extended family member”. She cannot satisfy the immigration rules.
12. In the interests of fairness, since this issue had been raised for the first time on the day of the hearing, Mr Badar who was the representative for the appellant requested an adjournment of the hearing in order to consider the legal implications. Ms Isherwood did not oppose the request for an adjournment and since this was a complex area of law and the appellant had been rather ambushed by this submission, I agreed that it was fair and in the interests of justice to adjourn the hearing.
13. I directed both parties to file and serve on the Tribunal and each other submissions addressing the following issues:
- (a) Did the appellant make a valid application to the respondent? What is the effect of the appeal if no valid application is made?

- (b) Where the appellant's mother is not married to the relevant EEA sponsor, can the appellant succeed under any of the eligibility criteria in Appendix EU (Family Permit)? If not, on what basis is it said that the appeal could succeed?
14. On 25 May 2022 Connaught Solicitors responded to directions. They submitted that the appellant had made a valid application under EU9 because she had used the required application process, had provided the required proof of identity and nationality, and the required proof of entitlement as well as the biometrics.
15. It is then submitted that because the sponsor, Mrs S Begum, the appellant's mother, married the relevant EEA sponsor on 20 May 2022, the appellant can therefore now satisfy the requirements of EU (Family Permit). A copy of the marriage certificate was enclosed.
16. The submissions did not deal with Issue (b).
17. On 20 June 2020 further directions were given indicating that the appeal would be adjourned pending the outcome of several lead cases. On 1 December 2022 further directions (dated 31 October 2022) were issued. The appellant was directed to confirm in writing to the Tribunal within fourteen days of the directions whether she intended to pursue her appeal following Batool & Ors [2022] UKUT 00219 (IAC) and Celik (EU exit, marriage, human rights) [2022] UKUT 00220.
18. The appellant responded to directions on 14 December 2022. The appellant's representative confirmed that they were instructed to pursue the appeal following the lead cases. It was submitted that the appellant's case could clearly be distinguished from Batool and Celik because the question is whether there was a nexus of the relationship with the stepchild and the EEA national. The appellant falls under the definition of a child and this was an application for an EEA family permit under the EEA Regulations, not an application under the EUSS. The hearing was accordingly listed and came before me.

Discussion and Analysis

Preliminary Matters

19. Ms Isherwood for the respondent confirmed that there was no Rule 24 response or skeleton in this appeal. This was primarily because she had been on long term sick leave following the adjournment of the hearing in April and had not returned to work until August and did not have sight of the earlier directions. She had sight of the most recent directions today.
20. Both parties are in agreement that the grant of permission is erroneous in that it suggests that the appellant falls within the definition of a "family member" for the purposes of Appendix EU (Family Permit) and that therefore that the appellant was not required to demonstrate dependency.
21. The facts of this appeal are uncontentious. The appellant is the daughter of Mrs S Begum who herself is an Indian national. Mrs S Begum at the date of the application, the decision and the appeal was in a "durable relationship" with the EEA sponsor, a Romanian national. The application was made on 4 November 2020 prior to the end of the transition period at 11 p.m. GMT on 31 December 2020 and the decision also was made during the transition period. It was not until after the end of the transition period that the EEA sponsor married Mrs Begum lawfully in the United Kingdom at which point, she became his spouse.

22. Mr Martin and Ms Isherwood were both in agreement that the appellant, contrary to the original assertion by Connaught Solicitors in response to the first set of directions, cannot meet the requirements of Appendix EU (Family Permit) because she does not fall within the definition of a “child” because her mother was not married to the EEA sponsor at the relevant time. The appellant does not come into the category of close or direct family member. It was agreed that there was no provision in Appendix EU (Family Permit) for an “other family member” or “extended family member” to join an EEA sponsor in the UK. It is immaterial that the appellant’s mother is now lawfully married to the EEA sponsor because the marriage took place after the end of the transition period.
23. I turn briefly to the grounds as originally pleaded.

Ground 2 - misdirection in law

24. I start by consideration of Ground 2.
25. It is argued that the judge erred by misapplying the law and finding that the appellant had to establish dependency under the rules. The appellant falls under the definition of “child” because she is the direct descendant under the age of 21 years of a relevant EEA citizen or of their spouse or civil partner. There was no requirement for her to be dependant.
26. It is agreed that the judge erred in this respect. He misdirected himself by considering the appeal under the incorrect immigration rule and unintentionally made an error of fact (by virtue of the respondent’s apparent concession) by finding that the appellant’s mother and sponsor and mother were lawfully married, and that the appellant could satisfy the immigration rules provided that she could demonstrate dependency. This is a clear error of law.
27. However, this error is not material because the appeal could not succeed under Appendix EU (Family Permit) in any event as is agreed by both parties. Had the judge had applied the correct immigration rules, he would have dismissed the appeal.

Grounds 1 and 3 - flawed consideration of dependency

28. Any asserted error in the judge’s consideration of dependency is also immaterial because the appellant could not have succeeded under the immigration rules at Appendix EU (Family Permit) regardless of whether the appellant was dependent on her EEA sponsor or not.

Ground 4

29. This ground is poorly pleaded. So far as it asserts that the judge should have considered the appellant’s family life with her mother, this was not argued before the judge at the First-tier Tribunal. There was no reference to this issue in the skeleton argument and the appellant did not ask for the respondent’s consent to consider this issue as a “new matter”. Without such consent the judge would have been prevented by virtue of Regulation 9 (4) of the Immigration (Citizens’ rights appeals) (EU Exit) Regulations 2020 (“the 2020 Regulations”) from considering this issue. Further, the judge had no jurisdiction to allow the appeal on basis that there were some kind of exceptional circumstances.
30. I am satisfied that none of the originally pleaded grounds are made out.

Valid application/ Withdrawal Agreement argument

31. Mr Martin then submitted that the appellant had in fact made a “valid application” under the EEA Regulations 2016 prior to the end of the transition period and as such the appeal could have been allowed under the Withdrawal Agreement because she had applied for “facilitation of entry and residence”.
32. Mr Martin agreed that at the time that the appellant made the application she was an “extended family” member in accordance with Regulation 8 of the EEA Regulations 2016 and did not fall into the definition of “family member” in the EUSS. Mr Martin did not make a formal application to amend the grounds of appeal. Nevertheless, I briefly consider this issue.
33. Ms Isherwood opposed this submission. She pointed to page 1 of 8 of the application where it is said that “This is an application under the European Family Permit”.
34. I agree with Ms Isherwood. In the application, the appellant confirms that the category for which she is applying is as a “close family member of an EEA national with a UK Immigration Status under the EU settlement scheme”. She states, “I confirm I am applying for an EU settlement Scheme Family Permit”. In the body of the application, the appellant refers to herself as a “stepchild” of the EEA sponsor thereby inferring that her mother was lawfully married to the EEA sponsor. There is no question in my view that this application was made on the basis that the appellant could satisfy the Appendix EU (Family Permit) under the EU Settlement Scheme and that she purported to be a close family member of an EEA national, which she was not. There is no covering letter to the application. There is no mention of extended family members or of the EEA Regulations 2016. This argument was not made before the First-tier immigration judge and not pleaded in the grounds to this Tribunal.
35. In my view the facts of this case fall squarely into the Batool scenario.
36. Batool at heading (2)states:

“such a person, i.e. an extended family member, has no right to have any application they have made for settlement as a family member treated as an application for facilitation and residence as an extended/other family member.
37. I note the Tribunal’s comments in Batool explaining that there was public guidance available on the Home Office website from 30 March 2019 until 31 December 2020. EEA citizens and their families could apply either under the 2016 Regulations or under the EUSS. From this guidance it is clear that an extended family member should apply for an EEA family permit under the 2016 Regulations rather than for an EU Settlement Scheme family permit under Appendix EU. At [63] it states:

“As is evident from the website, persons were told in plain terms that family members could apply as such for a family permit or under the EUSS. However, in order to apply under the EUSS, they must be a ‘close’ family member. That was expressly contrasted with the ‘extended’ family member, who could apply for an EEA family permit until 31 December 2020, but not under EUSS”.

38. In Batool the Tribunal made a clear ruling that an application as a family member made prior to the transition date under Appendix EU (FP) was not an application for facilitation of entry and residence of an extended family member. At [66] it is said:

“The appellants’ applications were not made on the basis that the Secretary of State should exercise discretion in their favour, as part of her obligations as identified by the CJEU in Rahman. The application material makes it crystal clear what the basis of the application was. The appellants applied on the basis that they were family members.”

“If the appellants had applied under the 2016 Regulations as extended family members, then the effect of the transitional provisions would have been such as to require the respondent to reach a decision, even after 31 December 2020, on whether their residence should be ‘facilitated’. In the event of a negative decision, a right of appeal would have lain to the First-tier Tribunal. As a result of a concession by the Secretary of State, now contained in the Immigration Rules, a decision in the appellants’ favour would have led to the grant of leave, rather than the provision of EU (EEA) residence documentation (which is no longer available)”.

39. I asked Mr Martin to set out how the appellant fell under the personal scope of the Withdrawal Agreement given Batool, and he conceded that he was in some difficulty. In my view, the appellant in this appeal fell firmly under the Batool scenario and Mr Martin’s attempt to argue that she had made a valid application for facilitation, or that her application should have been considered under the EEA Regulations by the Entry Clearance Officer, does not succeed.
40. It follows that although there was an error in the decision in that the judge considered the incorrect provision of the immigration rules, the error was not material to the outcome of the appeal.

Notice of Decision

The decision to dismiss the appeal under the 2020 Regulations is upheld.

R J Owens

Judge of the Upper Tribunal
Immigration and Asylum Chamber

18 May 2023