IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2022-006565

First-tier Tribunal No: EA/01405/2022

THE IMMIGRATION ACTS

Decision & Reasons Issued:

14TH September 2023

Before

UPPER TRIBUNAL JUDGE CANAVAN
DEPUTY UPPER TRIBUNAL JUDGE DOYLE

Between

ENTRY CLEARANCE OFFICER

Appellant

and

Md RASEL KHALIL
(NO ANONYMITY ORDER MADE)

Respondent

Representation:
For the Appellant: Ms S Cunha, Senior Home Office Presenting Officer
For the Respondent: Ms Fatima Faran, pupil barrister, instructed by Law Dale, solicitors.

Heard at Field House on 4 September 2023

DECISION AND REASONS

Introduction

1. We have considered whether any parties require the protection of an anonymity direction. No anonymity direction was made previously in respect of the Appellant. Having considered all the circumstances and evidence we do not consider it necessary to make an anonymity direction.

2. The Secretary of State for the Home Department brings this appeal but, to avoid confusion, the parties are referred to as they were in the First-tier Tribunal. This is an appeal by the Secretary of State against a decision of First-

tier Tribunal Judge Sweet, promulgated on 22 June 2022., which allowed the Appellant's appeal.

Background

3. The Appellant was born on 2 March 1988 and is a national of Bangladesh.

4. On 5 January 2022 the Appellant applied for an EUSS family permit as the dependent of his brother, a Spanish national, who has leave to remain in the UK.

5. On 5 January 2022 the respondent refused the Appellant's application because the respondent says that the appellant does not fall within the definition of a "*family member of a relevant EEA citizen*" contained in Appendix EU (Family Permit) to the Immigration Rules.

The Judge's Decision

6. The Appellant appealed to the First-tier Tribunal. First-tier Tribunal Judge Sweet ("the Judge") allowed the appeal against the Respondent's decision.

7. Grounds of appeal were lodged, and on 13 July 2022 Judge Barker gave permission to appeal stating *inter alia*

> The Judge's approach to the assessment of the requirements of the immigration rules under the EUSS is arguably flawed, as the appellant does not appear to fall within the permitted relationships that are defined as "family members".

The Hearing

8. For the respondent, Ms Cunha moved the grounds of appeal. She told us that the Judge was wrong to find that the appellant is the extended family member of his Spanish brother. She told us that because the appellant did not apply to be recognised as a family member under regulation 8 of the Immigration (EEA) Regulations 2016 prior to 31 December 2020, the facts and circumstances of the appellant's case do not fall within the Withdrawal Agreement.

9. Ms Cunha took us to the definitions contained in annex 1 to appendix EU (family permit). She told us that, to succeed, the appellant has to establish that he is a family member of a relevant EEA citizen. The agreed facts in this case are that the appellant's brother is a Spanish national with leave to remain in the UK. Appendix EU (family permit) defines *a family member* as a spouse; civil partner; durable partner; child, grandchild, great grandchild under 21; dependent child, grandchild, or great grandchild over 21; or dependent parent, grandparent, or great grandparent.

10. Ms Cunha told us that the appellant cannot meet the definition of a family member, and that the Judge's finding that the appellant is an adult who is dependent upon his EEA national brother is not a finding which brings the appellant within the definitions contained in Appendix EU (family permit). She

said that the Judge's decision is tainted by material error of law. She invited us to set the decision aside and to determine the appeal of new by dismissing the appellant's appeal.

11. For the appellant, Ms Faran opposed the appeal. She relied on the terms of her skeleton argument. She told us that the appellant is the extended family member of an EEA national, and urged us to dismiss the appeal and allow the decision to stand.

12. Ms Faran wanted to advance arguments relating to the Immigration (EEA) Regulations 2016, but, on reflection, she accepted that those arguments have no relevance to an appeal against a decision to refuse to grant an EUSS family permit. Ms Faran started to make submissions on article 8 ECHR grounds but had to concede that article 8 ECHR has not previously been argued, and so we do not have jurisdiction in this appeal to consider the 1950 convention.

Analysis

13. The undisputed facts in this appeal are that the appellant is a Bangladeshi national who was born in 1988. On 5 January 2022 he applied for an EUS family permit as the family member of a relevant EEA citizen. The relevant EEA citizen is the appellant's brother who is a Spanish national who was granted pre-settled status and 2019.

14. The Judge's findings are found at [7] of the decision. There, the Judge finds that the appellant is the dependent relative of his Spanish national brother, and on that basis allows the appeal on the ground that he "*is a dependant relative of an EEA citizen under EUSS*".

15. The application was made under Appendix EU (family permit) to the Immigration Rules. Adult siblings do not fall within the definition of a family member of a relevant EEA citizen contained in Appendix EU (family permit).

16. Annex 1 to Appendix EU (family permit) contains a number of definitions including the definition of a *family member of a relevant EEA citizen*. The degrees of relationship contained within that definition do not include siblings. This was the sole reason given in the decision letter for refusing the application. The Judge's finding that the appellant and the EEA citizen are brothers was a finding which should have led the Judge to dismiss the appeal.

17. On the undisputed facts in this case, the appellant cannot meet the requirements of Appendix EU (family permit) to the Immigration Rules.

18. The decision contains a material error of law. We set it aside.

Remaking the appeal decision

19. The material facts in this case are not in dispute, so we are able to substitute our own decision. It is not disputed that the relevant EEA citizen is

the appellant's Spanish national brother. It is not disputed that the respondent granted the appellant's Spanish national brother pre-settled status in 2019.

20. The determinative question in this case is whether or not siblings fall within the definitions of *family member of a relevant EEA citizen* contained in Appendix EU (family permit). At Annexe 1 to Appendix EU (family permit) there is a lengthy definition of "*family member of a relevant EEA citizen*". That definition lists the degrees of relationship as

> a spouse; civil partner; durable partner; child, grandchild, or great grandchild under 21; dependent child, grandchild, or great grandchild over 21; or dependent parent, grandparent, or great grandparent.

21. Brothers are not *family members* for the purposes of Appendix EU (family permit) to the Immigration Rules. The respondent's decision dated 5 January 2022 is correct. On the undisputed facts in this case the appellant cannot succeed.

22. Ms Faran wanted to pursue arguments in relation to the Immigration (EEA) Regulations 2016, arguments concerning European jurisprudence, and arguments on article 8 ECHR grounds, none of which can be considered in this appeal.

23. A right of appeal against the refusal of an application to grant leave to enter or remain in the United Kingdom is granted by regulation 3 of the Immigration (Citizens' Rights Appeals) (EU Exit) Regulations 2020 ("the Appeal Regulations"). There are two relevant grounds of appeal set out in regulation 8 of the Appeal Regulations, namely that (1) the decision breached any right conferred under, amongst other things, Chapter 1 of Title II of Part Two of the Withdrawal Agreement (which includes decisions on applications for the grant of a residence status under Article 18) and (2) the decision was not in accordance with the rules in Appendix EU to the Immigration Rules.

24. The appellant did not make an application for a family permit under EU law before the United Kingdom exited from the EU on 31 December 2020. He had not been facilitated entry nor established any rights under EU law before that specified date. The application for entry clearance was made several months later, when the only application that could be made was under the immigration rules. He did not meet the requirements of Appendix EU (Family Permit) for entry as the family member of a relevant EEA citizen. In such circumstances, he had not engaged any rights under the Withdrawal Agreement before 31 December 2021.

25. Celik v SSHD [2023] EWCA Civ 921 confirmed the Upper Tribunal's finding that 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.

26. Where no notice under section 120 of the 2002 Act has been served and where no decision to remove has been made, an appellant cannot bring a Human Rights challenge to removal in an appeal under appendix EU (family permit). There is no ECHR appeal before us.

DECISION

The decision of the First-tier Tribunal promulgated on 22/06/2022 is tainted by a material error of law and is set aside.

We substitute our own decision.

The appeal is dismissed under the immigration rules.

Signed Paul Doyle Date 4 September 2023
Deputy Upper Tribunal Judge Doyle