Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: EA/16407/2021
(UI/2022/003478)

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 21 September 2022	**On 4 November 2022**

Before

UPPER TRIBUNAL JUDGE MCWILLIAM
DEPUTY JUDGE OF THE UPPER TRIBUNAL JARVIS

Between

APRIL ANTONIO AQUINO
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr C. Rahman, Counsel instructed by Ashfield Solicitors
For the Respondent: Ms A. Nolan, Senior Home Office Presenting Officer

DECISION AND REASONS

INTRODUCTION

1. The Appellant in these proceedings was also the Appellant at the First-tier Tribunal. She appeals to the Upper Tribunal, permission having been granted by Judge RA Chowdhury on 5 July 2022, against the judgment of Judge Dempster (promulgated on 10 June 2022.)

THE RELEVANT BACKGROUND

2. In short, as the background facts are not in dispute between the parties, the Appellant entered the United Kingdom as a family visitor on 20 August 2016 with entry clearance which expired on 27 January 2017.

3. The Appellant's mother, Ms Florencia Antonio Aquino (a national of the Philippines), has been residing in the United Kingdom since 26 May 2004 and began to live with her Irish national partner (Mr Stephen Watson) from 15 July 2009. She was issued with a permanent residence card on 9 April 2014 and later granted settled status under Appendix EU of the Rules on 26 July 2021.

4. On 21 June 2021, the Appellant made an application for settled status under Appendix EU on the basis of her relationship to her mother. This was refused by the Secretary of State on 21 November 2021.

THE DECISION OF JUDGE DEMPSTER

5. At §10, the Judge noted that the Appellant's older sister (Pamela) had made an identical application at the same time as the Appellant and had been granted settled status under Appendix EU. The Judge also recorded that the Respondent's Counsel sought instruction during the hearing but was unable to provide any explanation as to why the Appellant's sister had been granted status.

6. Importantly the Judge also made the following observation/findings:

   (a) Both representatives agreed that there was one single issue before the First-tier Tribunal, namely whether or not the Appellant was a 'family member of a relevant EEA citizen' by reference to the definition in Annex 1 to Appendix EU, see §13.

   (b) It is expressly recorded at §12, that Mr Rahman conceded that the 2016 EEA Regulations were not relevant to the appeal.

   (c) On the basis of the agreement between the parties no oral evidence was called and the Judge formally accepted the contents of the witness statements, see §15.

   (d) At §27, the Judge also recorded that Mr Rahman accepted that Article 8 ECHR was not a relevant consideration in the appeal.

   (e) The Judge went on, at §28, to conclude that the child of a durable partnership under the 2016 EEA Regulations was not within the definition of a family member of a relevant EEA citizen within Annex 1 of Appendix EU.

   (f) The Judge also recorded that Mr Rahman did not argue by reference to the Withdrawal Agreement, §29.

   (g) Despite the Appellant not arguing the Withdrawal Agreement at all, Judge Dempster went on to make further findings about its

application. The First-tier Judge concluded, at §32, that the Appellant could not fall within the scope of Article 10(2) as her residence in the United Kingdom had not been facilitated by 31 December 2020.

(h) The Judge ultimately dismissed the appeal on the single issue of whether or not the Appellant fell within the definition in the Immigration Rules.

7. Although permission was granted by Judge Chowdhury on 5 July 2022, it is also important to note that the Judge concluded that the Appellant's grounds to the First-tier Tribunal were wholly misconceived (see (3)) on the basis that the author of the grounds (Mr Rahman) had concentrated on Article 8 ECHR which was not arguable in the First-tier Tribunal hearing, (as Mr Rahman had accepted at that time.)

8. However, the Judge went on to purport to grant permission on a single ground, on the basis that it was arguable that Judge Dempster had materially erred at §33 when not applying Article 18 of the Withdrawal Agreement when considering the difference in decision-making between the Appellant and her older sister, Pamela. Judge Chowdhury suggested it was prima facie disproportionate to refuse the Appellant's case under the circumstances.

THE ERROR OF LAW HEARING

9. In light of the extremely broad and unfocused nature of the grounds of appeal to the First-tier Tribunal in seeking permission, we sought to understand from Mr Rahman on what basis he was arguing that the First-tier Judge had erred in law. In doing so we sought to assist Mr Rahman by referring him to two recent decisions of the Upper Tribunal in Batool & Ors (other family members: EU exit) [2022] UKUT 219 (IAC) ("Batool") and Celik (EU exit, marriage, human rights) [2022] UKUT 220 (IAC) ("Celik").

10. Mr Rahman emphasised, that in his view there was an unfair inconsistency between the decision-making in the Appellant's case and that of her sister Pamela and submitted that the Secretary of State had power to consider discretion.

11. It was put to Mr Rahman that, in order to take the benefits of EU 11 and EU 14 of Appendix EU (subject to other substantive requirements), the Appellant had to be a family member meeting the definition in Annex 1. Mr Rahman did not contest that observation and had no response to the point that the Appellant simply does not fall into the relevant definition in Annex 1.

12. Despite Judge Chowdhury granting permission on the basis of Article 18 of the Withdrawal Agreement, Mr Rahman did not make any submissions to us about its application and, again, was constrained to accept he did not argue this point to the First-tier Tribunal.

13. Mr Rahman also made a submission by reference to the decision of Upper Tribunal Judge Rintoul in Geci (EEA Regs: transitional provisions, appeal rights) Albania [2021] UKUT 285 (IAC) ("Geci") and made reference to regulation 16 of the 2016 EEA Regulations. In our view there is plainly nothing in this argument and the authority of Geci simply assists the First-tier and Upper Tribunals with its findings on how the various post Brexit legal schemes operate together in the context of the 2016 EEA Regulations and the EU Settlement Scheme rules.

14. We also note that Mr Rahman expressly did not argue the 2016 EEA Regulations at the First-tier hearing and add that there was, in any event, no obvious jurisdiction for the FtT to make a finding under those Regulations when looking at the available grounds of appeal emanating from reg. 8 of the 'IMMIGRATION (CITIZENS' RIGHTS APPEALS) (EU EXIT) REGULATIONS 2020':

> *"(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);…"*

15. In the latter part of his oral submission, Mr Rahman appeared to imply that the First-tier Tribunal hearing was overly brief to the extent that he was unable to make the submissions that he wanted to. This is not something that has ever been raised in the grounds of appeal given permission by Judge Chowdhury but in any event such a submission is hopeless in light of Mr Rahman's acceptance that Judge Dempster accurately recorded the arguments that he made in respect of the EEA Regulations during that hearing.

16. In response, Ms Nolan on behalf of the Secretary of State, argued that in light of Batool and Celik the Withdrawal Agreement was not applicable anyway but again emphasised that it had expressly not been argued at the First-tier Tribunal, see §29.

17. Ms Nolan also endorsed the finding by Judge Dempster at §32, in respect of the non-applicability of the Withdrawal Agreement by reference to Article 10 and asserted that this conclusion was legally in line with Batool and Celik. Ms Nolan later indicated that after the First-tier hearing the Home Office had taken the view that the Appellant's sister Pamela had been granted Leave to Remain in error but in our view this was not germane to the issues relating to the error of law arguments raised by the Appellant.

18. Having heard the competing submissions, we indicated to the parties that we took the view that there was no legal error in the decision of Judge Dempster and that the Appellant's appeal was therefore dismissed. The reasons for that decision are laid out below.

FINDINGS AND REASONS

19. As we have already indicated, the Appellant's case to the First-tier Tribunal for permission to appeal has suffered from a significant lack of focus and a chronic failure to engage with the way in which the case was put before Judge Dempster.

20. For clarity we make plain that we consider that Judge Dempster was entirely right to find that the Appellant did not fall within the definition of a *family member of a relevant EEA citizen* under Annex 1 (our emphasis):

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); or (c) the child or dependent parent of a relevant EEA citizen, and the family relationship existed before the specified date; or **(d) the child or dependent parent of the spouse or civil partner of a relevant EEA citizen (as described in sub-paragraph (a) above), and the family relationship existed before the specified date; or** (e) the dependent relative, before the specified date, of a

> relevant EEA citizen (or of their spouse or civil partner, as described in sub-paragraph (a) above) and the dependency (or, as the case may be, their membership of the household or their strict need for personal care on serious health grounds) continues to exist at the date of application (or did so for the period of residence relied upon)
>
> in addition, where the applicant does not rely on meeting condition 1, 3, or 6 of paragraph EU11 of this Appendix, or on being a family member who has retained the right of residence by virtue of a relationship with a relevant EEA citizen, the family relationship continues to exist at the date of application

21. The Appellant is the child of a durable partner of an EEA citizen and therefore cannot qualify under these Rules.

22. As we have already indicated, despite the Judge who granted permission independently raising Article 18 of the Withdrawal Agreement, Mr Rahman did not seek to argue it and did not take up our invitation to make submissions on Batool or Celik.

23. Nonetheless we accept the submission of the Respondent that the obiter reasoning of Judge Dempster at §32 is in line with the Upper Tribunal's view of the legal scheme as explained in Batool.

24. We consider that there was no other arguable substantive ground of challenge (which had been properly given permission) before us and we concluded that the appeal by the Appellant should be dismissed.

DECISION

25. We therefore conclude that the making of the decision by the First-tier Tribunal did not involve any error on a point of law by reference to s. 12(1) of the Tribunal, Courts and Enforcement Act 2007 and the appeal is therefore dismissed.

Signed  22 September 2022

Deputy Judge of the Upper Tribunal Jarvis

NOTIFICATION OF APPEAL RIGHTS

1. A person seeking permission to appeal against this decision must make a written application to the Upper Tribunal. Any such application must be received by the Upper Tribunal within the appropriate period after this decision was sent to the person making the application. The appropriate period varies, as follows, according to the location of the individual and the way in which the Upper Tribunal's decision was sent:

2. Where the person who appealed to the First-tier Tribunal is in the United Kingdom at the time that the application for permission to appeal is made, and is not in detention under the Immigration Acts, the appropriate period is 12 working days (10 working days, if the notice of decision is sent electronically).

3. Where the person making the application is in detention under the Immigration Acts, the appropriate period is 7 working days (5 working days, if the notice of decision is sent electronically).

4. Where the person who appealed to the First-tier Tribunal is outside the United Kingdom at the time that the application for permission to appeal is made, the appropriate period is 38 days (10 working days, if the notice of decision is sent electronically).

5. A "working day" means any day except a Saturday or a Sunday, Christmas Day, Good Friday or a bank holiday.

6. The date when the decision is "sent' is that appearing on the covering letter or covering email