IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case Nos: UI-2022-003915
UI-2022-003920; UI-2022-003917
UI-2022-003918; UI-2022-003916
UI-2022-003919

First-tier Tribunal Nos: EA/14255/2021
EA/10905/2021; EA/08915/2021
EA/09078/2021; EA/09081/2021
EA/08920/2021

THE IMMIGRATION ACTS

Decision & Reasons Promulgated
On 24 February 2023

Before

UPPER TRIBUNAL JUDGE KOPIECZEK
DEPUTY UPPER TRIBUNAL JUDGE JUSS

Between

(i) SHAKEEL AHMED
(ii) SADIA SHAKEEL
(iii) SUMMIYA SHEHZADI
(iv) KASHAF ZAHRA
(v) MAQ
(vi) MS

Appellants

and

ENTRY CLEARANCE OFFICER

Respondent

Representation:
For the Appellants: Ms Bassiri-Dezfouli, (Counsel)
For the Respondent: Mr D Clarke (Senior Home Office Presenting Officer)

Heard at Field House on 1 December 2022

Order Regarding Anonymity

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Pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008, [those appellants who are minors and who have been identified in this decision by initials only] (*and/or any member of his family, expert, witness or other person the Tribunal considers should not be identified*) are granted anonymity.

No-one shall publish or reveal any information, including the name or address of the appellant, likely to lead members of the public to identify the appellant (*and/or other person*). Failure to comply with this order could amount to a contempt of court.

DECISION AND REASONS

1. This is an appeal against the determination of First-tier Tribunal Judge Dempster, promulgated on 13th May 2022, following a hearing at Hatton Cross on 28th April 2022. In the determination, the judge dismissed the appeal of the Appellants, who subsequently applied for, and were granted, permission to appeal to the Upper Tribunal, and thus these matters come before us today.

The Appellants

2. The Appellants are all nationals of Pakistan. The first Appellant is a male and was born on 1st January 1975. The second Appellant is his wife and was born on 25th June 1980. The third Appellant is a female and was born on 27th December 2001. The fourth Appellant is also a female who was born on 30th June 2003. The fifth Appellant is a male and was born on 28th October 2014. The sixth Appellant is also a male who was born on 14th June 2006.

3. The first and second Appellants are the mother and father of the remaining four Appellants, who are their children. With the exception of the first Appellant, they all applied on 10th September 2020 to join their UK relative, *Attiq Ur Rehman Akhtar*, the Sponsor, with the first Appellant then following up with his own application on 20th September 2020. They all applied as dependent family members under Appendix EU (Family Permit) of the Immigration Rules. The first Appellant, Shakeel Ahmed, is the brother of the Sponsor, *Attiq Ur Rehman Akhtar*, who is a national of Spain, exercising treaty rights in the UK. All the applications were refused.

The Appellants' Claim

4. The Appellant's claim is that since the principal Appellant, Shakeel Ahmed, is the brother of the Sponsor, Rehman Akhtar, they do not meet the definition of a "family member" that is contained in Annex 1 of Appendix EU (Family Permit). It is accepted that they had wrongly submitted applications for an EUSS family permit on this basis. What they ought to have done was to have applied for a family permit as "extended family members" of the Sponsor under Regulation 8 of the Immigration (European Economic Area) Regulations 2016 ("the 2016 Regulations"). The refusal decisions were received by the family members on 24th

December 2020, on 6th March 2021 and on 8th April 2021, and by that time after the latest refusal decision had arrived, they were out of time to apply as extended family members because EU law had ceased to apply in the UK.

5. They now claim that, although they had not made their applications under the 2016 Regulations prior to the end of the transition period, they were entitled to come under the terms of the Withdrawal Agreement, as if their applications had been made under the 2016 Regulations, as extended family members.

Relevant Legal Framework

6. First, there is Directive 2004/38/EC (also known as 'the Citizens Directive'). This lays down 'the conditions governing the exercise of the right of free movement and residence within the territory of the Member States by Union citizens and their family member' and what it states in Article 3(2) is as follows:

> (2) Without prejudice to any right to free movement and residence the persons concerned may have in their own right, the host Member State shall, in accordance with its national legislation, facilitate entry and residence for the following persons:
>
> > (a) any other family members, irrespective of their nationality, not falling under the definition in point 2 of Article 2 who, in the country from which they have come, are dependants or members of the household of the Union citizen having the primary right of residence, or where serious health grounds strictly require the personal care of the family member by the Union citizen;
> >
> > (b) the partner with whom the Union citizen has a durable relationship, …

7. Second, there is the Withdrawal Agreement (2019/C 384 I01). Article 10 of this deals with 'Personal Scope' with Article 10(1)(a) making it clear that it shall apply to 'Union citizens who exercised their right to reside in the United Kingdom in accordance with Union law before the end of the transition period and continue to reside there thereafter.' Article 10(1)(e) then adds that it shall also apply to

> (e) family members of the persons referred to in points (a) to (d), provided that they fulfil one of the following conditions:
>
> > (i) they resided in the host State in accordance with Union law before the end of the transition period and continue to reside there thereafter.'

8. Article 18(1) of the Withdrawal Agreement (2019/C 384 I01) then deals with the 'Issuance of residence documents.' What it states is that:

> 'The host State may require Union citizens or United Kingdom nationals, their respective family members and other persons, who reside in its territory in accordance with the conditions set out in this Title, to apply for a

new residence status which confers the rights under this Title and a document evidencing such status which may be in a digital form.'

9. It then goes onto say in Article 18 (1)(r) that:

> 'the applicant *shall have access to judicial and, where appropriate, administrative redress procedures* in the host State against any decision refusing to grant the residence status. The redress procedures shall allow for *an examination of the legality of the decision,* as well as of the facts and circumstances on which the proposed decision is based. *Such redress procedures shall ensure that the decision is not disproportionate*'(emphases added).

10. These provisions were relied upon by the Appellants in this appeal.

The Judge's Findings

11. The judge rejected these submissions. The main argument presented before the judge was that, although it was conceded by Appellants' Counsel that they did not come under the definition of a "family member of an EEA national", nevertheless, they stood to benefit from Article 10(3) of the Withdrawal Agreement, which the Respondent was said to have breached. The judge noted how Article 10(2) was to the effect that "persons falling under Article 3(2) of the Directive 2004/38/EC, whose residence was facilitated by the host state in accordance with its national legislation before the end of the transition period" would be able to "retain their right of residence in the host state ...". The judge noted that Article 10(3) went on to say that the aforesaid provision would apply to those "who have applied for facilitation of entry and residence before the end of the transition period, and whose residence is being facilitated by the host state in accordance with its national legislation thereafter". What Appellants' Counsel wished to emphasise was that in this case the Appellants had all applied "before the end of the transition period, which was 11 p.m. on 31st December 2020". The judge recognised that there was no dispute as to this. That was the extent of the agreement by the judge with the Appellant's position.

12. The judge, however, did not agree that Article 10(3) applied to the Appellants if that provision was read in its entirety because the provision went on to say, "*and whose residence is being facilitated by the host state in accordance with its national legislation thereafter*" (see paragraph 13 of the determination, with emphases added). As the judge went on to explain, "this Article can apply only to those who are in the process of transitioning from one state to another", and that "if the Article applied to those who had made an application prior to the end of the transition period without more, then the remainder of the Article would be otiose" (at paragraph 13). The plain fact was that the Appellants' residence in the host state was not being facilitated after the making of the application "in accordance with its national legislation" (at paragraph 13).

13. The appeal was refused.

Grounds of Application

14. The grounds of application state that after 31st December 2020 there began to be problems with those who had made their applications before the end of the withdrawal period but who had been unable to travel to the UK before 30th June 2021 (i.e. the end of the grace period).

15. For this reason, the grounds stated that new guidance was issued by the Home Office on 1st November 2021 which sought to deal with further difficulties for extended family members whose relationships were recognised before 31st December 2020, but who because of circumstances beyond their control, were unable to obtain permission to remain in the UK or to join their family members in the UK before 30th June 2021.

16. This new guidance, it was said (see paragraphs 13 to 15 of the grounds) sought to address concerns by stating the following:

> "Changes have been made in particular to reflect changes to Appendix EU (Family Permit) made in Statement of Changes in Immigration Rules HC 617, laid on 10 September 2021. Changes also include a temporary concession outside Appendix EU (Family Permit) to bring in scope of the EUSS family permit some extended family members (other than durable partners), some applicants relying on certain derivative rights and some persons issued with an EEA family permit and who were unable to travel to the UK by 30 June 2021".

17. The grounds then went on to argue (at paragraph 17) that a recent decision by the Upper Tribunal of **Geci (EEA Regs: transitional provisions; appeal rights) [2021] UKUT 00285** saw the Tribunal state that appeals brought against decisions made before the end of the withdrawal period (i.e. 31st December 2020) which affected the residence rights of family members of EEA nationals prior to that date must be determined under the 2016 Regulations. This was required by Schedule 3 of the Withdrawal Act. The Appellant relied both on Regulation 8 of the 2016 Regulations and on Regulation 10.

18. First, in relation to Regulation 8, the Appellant maintained that the applications were made on 10th September and on 20th November, and given that the transition period of EU citizens' rights was until 31st December 2020, the Respondent unlawfully failed to properly apply the European Union (Withdrawal Agreement) Act 2020. The Appellants could not unlawfully be excluded from consideration of their rights under the 2016 Regulations as well as the EU Settlement Scheme under Appendix EU of the Immigration Rules.

19. Second, in relation to Article 10, the Appellants argued that this specifically dealt with extended family members, Regulation 10(3) was clear in that it related to those "who have applied for facilitation of entry and residence before the end of the transition period", which the Appellants had all done in this case.

20. For all these reasons, the Appellants deserve to succeed under Article 3(2) of Directive 2004/38/EC. That makes it clear that "this Directive shall apply to all Union citizens who move to or reside in a member state other than that of which they are a national and to their family members ..." (Article 3(1)). It further adds that "without prejudice to any right to free movement and residence the persons concerned may have in their own right, the host member state shall, in accordance with its national legislation, facilitate entry and residence for ... any other family members" (Article 3(2)(a)). The Appellants, it was argued, plainly were "any other family members" and therefore stood as beneficiaries under the said Directive.

21. On 4th July 2022, permission to appeal was granted by Judge Chowdhury of the First-tier Tribunal, on the grounds that it was arguable that the application should have been considered under Regulation 8 and given the guidance in **Geci.**

Submissions

22. At the hearing before us on 1st December 2022 we had two bundles of documents from the Appellant. First, there was a 104 page bundle, which included the grounds of application, the skeleton argument, and the original determination. Second, there was a bundle of 278 pages, which was the original bundle before the judge below. Ms Bassiri-Dezfouli began by placing reliance on her Skeleton Argument (at page 5 of the 104 page bundle). She then took us to paragraph 6 of the grounds. She explained that the application was made before 31st December 2020 with respect to all the Appellants. It was the wrong application. It was made as "family" members. It ought to have been made as "extended family members".

23. When we pointed out to Ms Bassiri-Dezfouli that it nevertheless remained the wrong application to make, she replied that the applications had not been made by the Appellants themselves. She then took us to paragraph 4 of the judge's determination and pointed out that he had failed to consider the 2016 Regulations. She agreed that before proceeding any further the judge did look at "any guidance issued to Home Office caseworkers when making decisions on applications such as the present" (paragraph 7 of the determination) and noted the Home Office guidance issued on 13th April 2022, which related to "family members" of those who fell under the EU Settlement Scheme. However, Ms Bassiri-Dezfouli pointed out that this guidance of 13th April was the wrong guidance. What had been asked for was the guidance of 6th April 2022 and this was not considered. Given that the judge's decision was promulgated on 13th May 2022 the guidance of 6th April 2022 ought to have been considered by the judge as it was out by then.

24. She accepted, nevertheless, that consistent with Article 10(3) of the Withdrawal Agreement, the Home Office is required to consent to make decisions on valid EEA family permit applications for extended family members when made by 21st December 2020. Ms Bassiri-Dezfouli then went on to say that "it would have been clear that this application was made by an extended family member because the Appellant was the brother of the EEA national", and that this being

so, "the ECO had a duty to consider it". In the circumstances, the judge had erred in law because he "should have considered the actual application and considered what are the actual implications of it". She ended by relying upon the **Geci** case.

25. For his part, Mr Clarke submitted that the entire appeal was wholly misconceived. The judge had at the outset recorded (at paragraph 4) that the application was made in error. The Upper Tribunal had already confirmed in **Batool & Ors (other family members: EU exit) [2022] UKUT 219 (IAC)** that

> "An extended (oka other) family member whose entry and residence was not being facilitated by the United Kingdom before 11 p.m. GMT on 31 December 2020 and who had not applied for facilitation for entry and residence before that time, cannot rely upon the Withdrawal Agreement or the immigration rules in order to succeed in an appeal under the Immigration (Citizens' Rights Appeals) (EU Exit) Regulations 2020" (see headnote 1).

26. It also went on to say that

> "Such a person 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/or other family member" (see headnote 2).

27. Similarly, what **Geci [2021] UKUT 285**, makes clear is that

> "The Immigration (European Economic Area) Regulations 2016 were revoked in their entirety on 31st December 2020 by paragraph 2(2) of Schedule 1(1) to the Immigration and Social Security Co-ordination (EU Withdrawal) Act 2020" (see headnote 1).

28. That decision also made it clear that,

> "Many of the provisions of the EEA Regulations are preserved (although subject to amendment) for the purpose of appeals pending as at 31 December 2020 by the Immigration and Social Security Co-ordination (EU Withdrawal) Act 2020 (Consequential, Saving, Transitional and Transitory Provisions) (EU Exit) Regulations (SI 2020 1309), ('the EEA Transitional Regulations'). The preserved provisions and amendments made are set out in paragraphs 5 and 6 of Schedule 3 to the EEA Transitional Regulations" (see headnote 2).

29. However, what is significant is that the decision then goes on to say that

> "The effect of the amendments is that the sole ground of appeal is now, in effect, whether the decision under appeal breaches the appellant's rights under the EU Treaties as they applied in the United Kingdom prior to 31 December 2020" (see headnote 3).

30. In this case, it was plain, submitted Mr Clarke, that the decision did not breach the Appellants' rights under the EU treaties because as **Batool** makes clear they had no such rights. They had made the wrong applications. The 2016 Regulations no longer applied as they had been revoked by the 2020 EU Withdrawal Agreement. The Appellants before the judge below had in fact conceded that they had not made a valid application. The Withdrawal Agreement does not assist the Appellants. What it is meant to do is to preserve rights that existed prior to the Withdrawal Agreement. Yet, the grounds themselves accept that, "It is respectfully submitted that the Appellant is not the one whose residence was facilitated by the United Kingdom before the end of the transition period" (paragraph 22). As the Upper Tribunal in **Celik (EU exit; marriage; human rights) [2022] UKUT 220 (IAC)** made clear,

> "It is not possible to invoke principles of EU law in interpreting the Withdrawal Agreement, save insofar as that Agreement specifically provides. This is apparent from Article 4(3). It is only the provisions of the Withdrawal Agreement which specifically refer to EU law or to concepts or provisions thereof which are to be interpreted in accordance with the methods and general principles of EU law. EU law does not apply more generally" (at paragraph 58).

31. Second, as for the April 2021 the guidance, this does not assist the appellants either, because it makes it clear that the wider families, such as uncles and aunts or brothers in law, are no longer in the eligible category. The reliance on this only affirms, submitted Mr. Clarke, that the appellants had made the wrong application.

32. Third, that the judge gave express consideration to the appellants reliance upon Article 10(3) because, as the judge said, "they had applied for facilitation of entry prior to the end of the transition period." However, as the judge explained this provision clearly states that such persons residence has to be "facilitated by the host state" in accordance with their "national legislation thereafter." The national legislation in this case, submitted Mr Clarke, were the immigration rules. They did not facilitate such a residence. Therefore, the appellants could not succeed here either.

33. In her reply to Mr Clarke, it was submitted by Ms Bassiri-Dezfouli that the date on which application was made was on 20th November 2020, and decided on 8th April 2021, and 'by the time that the decision was made it was too late for applicant to make a new application..' As she explained, 'my clients made an error, which they have accepted, and I have accepted but the consequences of that error' should not now be visited upon the Appellants if regard was had to what had been argued at paragraphs 22-23 of the Grounds of Appeal.

34. We reserved our decision.

Error of Law

35. We find that the judge did not err in law.

36. First, the judge plainly did properly consider the provisions of the Withdrawal Agreement. That agreement did not provide any applicable rights to a person in the Appellants' situation. The beneficiaries of the Withdrawal Agreement, as Article 10(1)(e) makes clear, are those persons who reside in accordance with EU Law as of 31st December 2020. The Appellants are not in that situation. Their residence had not been facilitated in accordance with national legislation. This has already been made clear in **Batool** and indeed the Grounds of Appeal actually accepts this to be the case (see paragraph 22). Article 10(1)(e) requires the appellants to have 'resided in the host State in accordance with Union law before the end of the transition period and continue to reside there thereafter.' This was not the case and the judge highlighted this by explaining that the Appellants 'submission fails to have regard' to the entirety of that Article (at paragraph 13). Indeed, as the Upper Tribunal in **Celik** made clear:

> "… Article 10 of the Withdrawal Agreement reflects the intention of the United Kingdom and the EU that the Agreement should ensure an orderly withdrawal of the UK; protect only those United Kingdom and EU citizens who were exercising free movement rights before a specific date (see the 6th recital); and provide legal certainty to citizens and economic operators as well as to judicial and administrative authorities (see the 7th recital)." (at paragraph 59).

37. We conclude to allow the Appellants to succeed in the manner in which it is contended before us would undermine the orderly withdrawal of the UK from the EU as was envisaged by the UK government.

38. Second, the Appellants cannot succeed on the grounds of 'proportionality' either under the Article 18(1)(r) requirement that the decision be proportionate. The Appellants did not make the right application, and were out of time to make it by the time the curtain fell on them, but now argue that their invalid application should be considered anyway because as Ms Bassiri-Dezfouli put it candidly 'my clients made an error' but that 'the consequences of that error' were too grim for them as they were now being shut out completely. However, as was explained in **Celik**, "[o]ne looks in vain in Article 18 and elsewhere in the Withdrawal Agreement for anything to the effect that a person who did not meet the relevant requirements as at 11pm on 31 December 2020 can, nevertheless, be treated as meeting those requirements by reference to events occurring after that time." Indeed, "[i]f that had been the intention of the United Kingdom and the EU, the Withdrawal Agreement would have so specified." This being so "[i]t would plainly be contrary to the Vienna Convention to interpret the Withdrawal Agreement in the way for which the appellant contends" (at paragraph 60). It is significant that the Appellants are seeking to avail themselves of the benefits of the Withdrawal Agreement (which the judge said can only apply to those who can show entitlement under Title 1, which contains Article 10 – at paragraph 14). As **Celik** made clear "[t]he nature of the duty to ensure that the decision is not disproportionate must, however, depend upon the particular facts and circumstances of the applicant" although "[t]he requirement of proportionality may assume greater significance where, for example, the applicant contends that they were unsuccessful because the host State imposed unnecessary

administrative burdens on them." In this case, it can hardly be said that the Appellants had "unnecessary burdens" imposed by them by the State. In that case, as explained in **Celik**, "[b]y contrast, proportionality is highly unlikely to play any material role where, as here, the issue is whether the applicant falls within the scope of Article 18 at all" (at paragraph 63). This is precisely the position here.

39. Third, insofar as reliance is placed on Article 3(2)(a) of is Directive 2004/38/EC (also known as 'the Citizens Directive') that too does not assist the Appellants. What this provision states is that, "the host Member State shall, in accordance with its national legislation, facilitate entry and residence for the following persons"(at sub-paragraph 2) and that this shall cover, "any other family members, irrespective of their nationality…"(at sub-sub-paragraph (a)). However, in this case the UK government has done precisely that in order to "facilitate" the entry and residence of "other family members" through "its national legislation" but that very national legislation has not been complied with by the Appellants. They made the wrong application under the wrong provisions of the national legislation. They failed to comply with that which they were required to comply with. The judge properly rejected their claim for reasons he amply set out at paragraph 13 of his determination.

40. For all these reasons, the judge's decision in refusing the appeal on the basis that the decision was not disproportionate was correct in law. The Appellant's grounds do not raise a challenge that is sustainable. It was not open to the judge to address the issue in the context of proportionality because the Withdrawal Agreement provided no applicable rights to a person in the Appellants' circumstances.

41. In short, the judge did not err materially as a matter of law in concluding as he did. This appeal by the Appellants is dismissed.

Notice of Decision

42. The appellants' appeal is refused.

43. Those appellants who are minors and who have been identified in this decision by initials only are granted anonymity.

Satvinder S. Juss

Deputy Judge of the Upper Tribunal
Immigration and Asylum Chamber

23rd February 2023