Upper Tribunal
(Immigration and Asylum Chamber)

Case No: UI-2023-003071
First-tier Tribunal No: EA/02964/2022

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
Heard on 2 October 2023 **Prepared on 2 October 2023**	10th October 2023

Before

DEPUTY UPPER TRIBUNAL JUDGE WOODCRAFT

Between

MISS KLEA TOTA
(Anonymity order not made)

Appellant

and

ENTRY CLEARANCE OFFICER

Respondent

Representation:
For the Appellant: Mr M Al-Rashid, counsel
For the Respondent: Mr M Parvar, Home Office Presenting Officer

DECISION AND REASONS

The Appellant

1. The appellant is a citizen of Albania born on 12 January 2008. She appealed against a decision of the respondent dated 10 March 2022 which was to refuse her application for entry clearance. The appellant states that she is an extended family member of her sister-in-law AK a Greek citizen exercising treaty rights in the United Kingdom ("the sponsor"). The appellant applied on 10 November 2021 under the terms of appendix EU (family permit), her brother and parents having previously been granted entry clearance to the United Kingdom. Her appeal was allowed by the First-tier tribunal following a hybrid hearing at Hatton Cross on 20 July 2022. The respondent appeals with leave against that decision. Although the matter comes before me as an appeal by the respondent I shall

nevertheless continue to refer to the parties as they were known at first instance in the interest of clarity.

The Relevant Law

2. The appellant appealed against the respondent's decision under Regulation 8 of the Immigration (Citizen's Rights of Appeal) (EU Exit) Regulations 2020 arguing that following the withdrawal of the United Kingdom from the European Union she was permitted to enter the United Kingdom under the provisions of Appendix EU(FP) to the Immigration Rules. This Appendix sets out the basis on which a person will, if they apply under it, be granted an entry clearance in the form of an EU Settlement Scheme Family Permit to join a relevant EEA citizen. I note that for the purposes of this appeal the sponsor is a relevant EEA citizen.

3. By virtue of paragraph FP3, an applicant will be granted entry clearance under the Appendix, valid for a period of six months from the date of decision, by an entry clearance officer where:

> (a) A valid application has been made in accordance with paragraph FP4;
>
> (b) The applicant meets the eligibility requirements in paragraph FP6(1), (2) or (3); and
>
> (c) The application is not to be refused on grounds of suitability in accordance with paragraph FP7.

I pause to note here that there is no mention in paragraph FP3 of the appendix of a separate right to enter the United Kingdom by virtue of paragraph FP8A.

1. For the purposes of this appeal the relevant sub paragraph of FP6 referred to above is FP 6(1) which reads:

> FP6. (1) The applicant meets the eligibility requirements for an entry clearance to be granted under this Appendix in the form of an EU Settlement Scheme Family Permit, where the entry clearance officer is satisfied that at the date of application:
>
> (a) The applicant is not a British citizen;
>
> (b) The applicant is a family member of a relevant EEA citizen;

2. It was common ground at first instance and before me that the appellant could not meet the provisions of paragraph 6 (1). The appellant instead relies upon a certain interpretation of paragraph F8A which I discuss in more detail below, see [15] et seq.

3. Insofar as is relevant, paragraph F8A reads:

FP8A. The applicant will be granted an entry clearance under this Appendix, in the form of an EU Settlement Scheme Family Permit, where:

(a) the entry clearance officer is satisfied that the applicant is a **specified EEA family permit case**; and

(b) had the applicant made a valid application under this Appendix, it would not have been refused on grounds of suitability under paragraph FP7.

4. A specified EEA family permit case is defined in Annex 1 to the Appendix as a person who:

(a) on the basis of a valid application made under the EEA Regulations before [31 December 2020] would, had the route not closed after 30 June 2021, have been issued an EEA family permit under regulation 12 of the EEA Regulations:
(i)(aa) as an extended family member under regulation 8;

5. In **Batool and others (other family members: EU exit) [2022] UKUT 219 (IAC),** the Upper Tribunal held:

"(1) An extended (or other) family member whose entry and residence was not being facilitated by the United Kingdom before 11pm GMT on 31 December 2020 and who had not applied for facilitation of 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.

(2) 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/other family member."

The Decision at First Instance

6. At [20] of her determination the judge explained why she was allowing the appeal as follows:

> “I did not accept the respondent’s submission that the appellant was not a family member of an EEA citizen under the appendix. I accepted that she was not a family member as set out under FP6(1)….. However that was not the end of the investigation that the ECO should have conducted. The ECO was also required to consider the requirements of FP8A which the ECO did not consider….. Indeed I find that the requirements of FP8A were designed to deal with a case where the facts of the case are the same or similar to this case. Had the ECO done so, the officer would have concluded that the appellant did meet the requirements under this qualifying paragraph and was therefore required to issue her with a family permit. I am satisfied that

the appellant meets all of the conditions under FP8A and the respondent is obliged to grant her such a permit."

The Onward Appeal

7. The respondent appealed this decision on the grounds that appendix FP8A was not a separate standalone application but was in the Appendix in order to facilitate applications made under paragraph 6. Permission to appeal was granted by an FTTJ who noted that FP8A referred to applications under the EEA regulations whereas the appellant in this case had applied under the EUSS, appendix EU regulations.

8. Upon the Upper Tribunal's receipt of the respondent's grounds of appeal, Upper Tribunal Judge Gleeson made a direction on 6 September 2022 that the appellant was to provide written submissions regarding the authority of **Celik [2023] EWCA Civ 921** and confirm whether the appeal was still being pursued. The appellant responded to this direction by filing a rule 24 response to the grant of permission seeking to distinguish **Celik** on the basis that that case referred to a partner who was an extended family member not as here where the appellant was outside the United Kingdom. It was submitted that FP8A was a separate permission granting provision.

The Hearing Before Me

9. In consequence of the grant of permission the matter came before me to determine in the first place where there was a material error of law in the decision of the First-tier Tribunal such that it fell to be set aside. If there was then I would make directions on the rehearing of the appeal. If there was not the decision at first instance would stand.

10. For the respondent in support of the application to set aside the determination, it was observed that the appellant had applied under appendix EU one year after the specified date in December 2020. Therefore the appellant could not fall within the category of a family member. There was no evidence that the appellant had applied before the specified date. Annex 1 contained the definition of a specified EU family permit case which referred to an application under the regulations which the appellant could not bring. The appellant could not qualify under the rules.

11. For the appellant it was argued that the respondent's interpretation of appendix FP8A was not made before the judge at first instance. The respondent's own guidance to case workers was that they must grant leave to enter if an appellant met the provisions of FP8A. It was another route to enter the United Kingdom it was not merely a mechanism. The judge had considered the relevant provisions of the appendix including the definition of who or what was a specific family case. Appendix FP8A envisaged a situation like the present where the appellant's family were all already in the United Kingdom. This definition of appendix FP8A dispensed in some cases with the requirements of complying with the cut off date. If

the respondent had not closed the route to enter the appellant would have succeeded and would have satisfied the provisions of the regulations.

12. In response the presenting officer said the tribunal could not speculate on what had happened at first instance. There was no valid application before the ECO under the regulations. Following the conclusion of submissions I reserved my decision which I now give.

Discussion and Findings

13. This case raises a short point of law on the interpretation of appendix EU. The facts of the case are not in dispute. The appellant is a citizen of Albania who wishes to enter the United Kingdom as the extended family member of a qualified sponsor exercising treaty rights. The withdrawal of the United Kingdom from the European Union resulted in a number of changes to the immigration regime concerning EU citizens and their family members. The issue in the case is whether the appellant can bring herself within appendix EU(FP). The judge held that the appellant could bring herself within it and criticised the respondent for not considering the appellant's application separately under appendix FP8A. The judge accepted the argument put forward on behalf of the appellant that appendix FP8A was a separate and alternative route for entry into the United Kingdom.

14. I do not accept this interpretation. As I have pointed out above at [3] there is no mention at the beginning of appendix EU of a separate right to enter the United Kingdom over and above paragraph 6(1). If there were such a separate right it is reasonable to have expected the drafters of the appendix to have made that clear. What there is instead is a date, the specified date as the appendix refers to it which is 31 December 2020 by which time applications for settlement should have been made. As the Court of Appeal put it in **Celik**:

> "The Withdrawal Agreement represents the settled agreement of the European Union and the United Kingdom as to who should be able to continue to have rights to reside after the departure of the United Kingdom from the European Union. That Agreement provided for a transition period. Persons who met certain requirements before the end of that period would continue to have rights to reside. Persons who did not meet those requirements by that date would not have such rights. "

15. In this case the appellant did not apply for entry clearance before the specified date she only applied one year later. That meant she could not make a valid application under the appendix, see **Batool** which I cite at [7] above. As she could not bring herself within paragraph 6(1), there was no valid application under appendix EU before the ECO. I agree with the respondent's submissions in this regard. The judge's criticisms of the ECO's consideration of the appellant's application were therefore misplaced.

16. The judge posed the question in her determination why there would be appendix FP8A if it was not a separate and alternative route into the United Kingdom. The purpose of appendix FP8A was to give an opportunity for entry clearance to extended family members (see the decision to grant permission to appeal at [9] above). The transition period (for extended family members referred to in **Celik**) had a tight deadline. Applicants had to have made their application before the specified date in order to bring themselves within the regulations. This the appellant could not do because of the lateness of her own application. That lateness cannot be corrected. Because the appellant's application was out of time, the respondent did not have a valid application in front of them. There was thus no lawful basis on which an appeal against the respondent's decision could be allowed. I do not accept the rule 24 submission that the case of **Celik** can be distinguished in the present case. **Celik** emphasised the importance of the deadline contained in the transition arrangements which the appellant in this case has fallen foul of. There were no oral submissions made to me seeking to distinguish Celik.. It was a material error of law to allow the appeal and I therefore set aside the decision of the First-tier tribunal.

17. At the conclusion of submissions I indicated to the parties that if I found a material error of law I would either remit the matter back to the First-tier, keep the matter in the Upper Tribunal or dismiss the appellant's appeal altogether. There were no submissions from either party in response to this. As there was no valid appeal against the respondent's decision the appellants appeal must fail and there is no basis on which he matter could be remitted or further considered. I therefore remake the decision in this case by dismissing the appellant's appeal against the respondent's decision.

Notice of Decision

The decision of the First-tier Tribunal involved the making of an error of law and I set the decision aside.

I remake the decision by dismissing the Appellant's appeal

I make no anonymity order as there is no public policy reason for so doing.

Signed this 5th October 2023

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Judge Woodcraft
Deputy Upper Tribunal Judge

TO THE RESPONDENT
FEE AWARD

As I have set aside the decision of the First-tier Tribunal I also set aside the decision to make a fee award against the Respondent

Signed this 5th October 2023

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Judge Woodcraft
Deputy Upper Tribunal Judge