Upper Tribunal
(Immigration and Asylum Chamber) Appeal Numbers: UI-2022-002446
EA/02379/2021

THE IMMIGRATION ACTS

Heard at Field House **Decision & Reasons Promulgated**
On 3 October 2022 **On 4 December 2022**

Before

UPPTER TRIBUNAL JUDGE KEBEDE
UPPER TRIBUNAL JUDGE RINTOUL

Between

MS FAKHIRA ASHRAF
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellants: Mr S Hingora instructed by Wright Justice solicitors
For the Respondent: Ms A Nolan, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellant appeals with permission against the decision of First-tier Tribunal Judge S Aziz, promulgated on 15 February 2022, dismissing her appeal against the decision of the respondent made on 30 January 2021 to refuse her application- for an EU Settlement Scheme ("EUSS") Family Permit made on 27 December 2020.

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The Appellants' Case

2. The appellant is a citizen of Pakistan, born in 1978. She is divorced and her case is that she is entirely dependent on her brother-in-law, Mr R K Mohammad ("the sponsor"), an Italian national living and working in the United Kingdom.

3. Prior to the application made on 27 December 2020, the appellant had made an application for an EUSS Family Permit on 26 December 2019 which had been refused on 13 January 2020 and an application for an EEA Family Permit pursuant to reg. 23 of the Immigration (European Economic Area) Regulations 2016 ("the EEA Regulations), refused on 24 September 2020 on the basis that the respondent was not satisfied that the appellant was dependent on the sponsor. She did not exercise her right to appeal against that decision.

The Respondent's case

4. The respondent refused the application on the basis that the appellant did not fall within the definition of "Family member of a relevant EEA Citizen" as defined in Appendix EU (Family Permit) of the Immigration Rules

The decision of the First-tier Tribunal

5. The judge heard submissions from representatives of both parties.

6. Mr Holmes for the appellant argued that the appellant fell within the ambit of article 10 (3) of the EU Withdrawal Agreement as she had applied for facilitation of her entry prior to the end of the transition period on 31 December 2020.

7. Mr Aigbokie for the respondent argued that the appellant did not fall within the ambit of article 10 (3) as the application made was not one under the EEA Regulations, but one under the EUSS for a family permit.

8. The judge found [21] that the appellant had made an application on the basis that she is a "close family member of an EEA…national with a UK immigration status under the EU Settlement Scheme" and had stated "I confirm I am applying for an EU Settlement Scheme Family permit." He concluded that on that basis she did not fall within the terms of the Withdrawal Agreement and on that basis he dismissed the appeal.

9. The appellant sought permission to appeal on the grounds that the judge had erred: -

(i) In misapplying article 10 (3) of the Withdrawal Agreement as the appellant clearly came within article 3 (2) of Directive 2004/38/EC ("the Citizenship Directive") as an "other family member"; and

(ii) had failed to consider whether the decision was contrary to article 3(2) of the Citizenship Directive.

10. On 27 April 2022 First-tier Tribunal Judge Galloway granted permission to appeal.

11. Subsequent to that the Upper Tribunal handed down its decision in Batool & Ors (other family members: EU Exit) [2022] UKUT 00219 (IAC) and the Upper Tribunal issued directions for both parties to address that decision in the skeleton argument.

The Hearing

12. We had before us skeleton arguments prepared by both representatives; we also heard submissions from both.

13. Mr Hingora submitted that the appellant fell within the ambit of article 10 (3) of the Withdrawal Agreement as she had applied for facilitation of entry before the end of the transition period and that whether or not she used the wrong form was not a sufficient reason to extinguish the right she sought to invoke or rely upon.

14. Mr Hingora submitted also that it was clear from the application form that the appellant was applying as an "extended family member", and that the judge erred in his consideration of material aspects of the application form which made that clear.; and thus, she was assisted by what was held in Batool at [66].

15. Mr Hingora submitted that Batool was decided on the basis that respondent would not exercise her discretion to treat an application under the EUSS FP as an application under the EEA Regulations unless asked to do so; but he relied upon the material contained within the additional bundle submitted pursuant to rule 15 (2A) of the Tribunal Procedure (Upper Tribunal) Rules 2008 which indicated that the respondent was in fact independently exercising her discretion in other decisions, consistent with her obligation under article 3 (2) of the Citizenship Directive to facilitate. He submitted further that this material did satisfy the test in Ladd v Marshall.

16. He sought also to rely on R (Mohibullah) v SSHD (TOEIC- ETS- judicial review principles) [2016] UKUT 00561 as support for the submission that where, as here, there is a multiplicity of decision-making mechanisms there is a duty on the decision maker to be aware of the options and to take that into account when opting for a particular mechanism.

17. It was further submitted that the more generous approach to applicants shown in the examples adduced was consistent with article 18 (1)(e) of the Withdrawal Agreement. He submitted also that the rules in themselves were so complex that the onus on an applicant to have used the correct form was lessened.

18. Ms Nolan relied on her skeleton argument and the Rule 24 response. She submitted that this was not a valid application, as had been accepted in the determination at [55]. She submitted further that there could not have

been any realistic confusion as to the type of application made; there had been a previous application and as was noted in Batool at [69 and [70], clear guidance had been given on the gov.uk website.

19. She submitted that there had been no error of law and that the decision had been adequately and properly reasoned.

The law

20. The Immigration (Citizens Rights Appeals) (EU Exit) Regulations 2020 (SI 2020/61) grant a right of appeal to those refused leave to enter under the EUSS Family Permit provisions of the Immigration Rules. The permissible grounds of appeal are set out in reg. 8 and provide, so far as is relevant:

> **Reg. 8 - Grounds of appeal**
>
> (1) An appeal under these Regulations must be brought on one or both of the following two grounds.
>
> (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,
>
> (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) [;]
>
> The host Member State shall undertake an extensive examination of the personal circumstances and shall justify any denial of entry or residence to these people.

21. Article 10 of the Withdrawal Agreement provides, so far as is relevant

> 2. Persons falling under points (a) and (b) of Article 3(2) of 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 in accordance with Article 3(2) of that Directive shall retain their right of

residence in the host State in accordance with this Part, provided that they continue to reside in the host State thereafter.

3. Paragraph 2 shall also apply to persons falling under points (a) and (b) of Article 3(2) of Directive 2004/38/EC 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.

22. Article 3(2) of the Citizenship Directive provided:

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, duly attested.

23. Regulation 21of the EEA Regulations provides, so far as is relevant.

21.— Procedure for applications for documentation under this Part and regulation 12

(1) An application for documentation under this Part, or for an EEA family permit under regulation 12, must be made—

(a) online, submitted electronically using the relevant pages of www.gov.uk; or

(b) by post or in person, using the relevant application form specified by the Secretary of State on www.gov.uk.

(2) All applications must—

(a) be accompanied by the evidence or proof required by this Part or regulation 12, as the case may be, as well as that required by paragraph (5), within the time specified by the Secretary of State on www.gov.uk; and

(b) be complete.

(3) An application for a residence card or a derivative residence card must be submitted while the applicant is in the United Kingdom.

(4) When an application is submitted otherwise than in accordance with the requirements in this regulation, it is invalid.

…

24. As was held in Batool:

(1) An extended (oka 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.

61. From the formal introduction of the EUSS on 30 March 2019 until 31 December 2020, EEA citizens and their family members could apply either under the 2016 Regulations or under the EUSS.

62. There was publicly available guidance on www.gov.uk website as follows:

…

63. 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.

64. As we have seen from Article 10 of the Withdrawal Agreement, in order to fall within the scope of Part 2 (and, thus, Article 18) a person asserting to be an other family member must have "applied for facilitation of entry and residence before the end of the transition period.

…

66. Faced with this difficulty, the appellants contend that the application they made on 3 February 2020 under Appendix EU (FP) was an application "for facilitation of entry and residence" for the purposes of Article 10.3 of the Withdrawal Agreement. It is, however, plain that Article 10.3 encompasses those who apply for entry or residence as other family members. The expression "facilitation" in the context of the preceding phrase "persons falling under points (a) and (b) of Article 3(2) of Directive 2004/38/EC" puts that beyond doubt. 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 applications was. The appellants applied on the basis that they were family members.

Discussion

Preliminary issue – rule 15 (2A) application

25. We consider first the application to admit material not before the First-tier Tribunal. In doing so we remind ourselves of the principles set out in E & R v SSHD [2004] EWCA Civ 49 at [91] – [92] per Carnwath LJ:

> 91. In summary, we have concluded in relation to the powers of this Court:
>
> i) An appeal to this Court on a question of law is confined to reviewing a particular decision of the Tribunal, and does not encompass a wider power to review the subsequent conduct of the Secretary of State;
>
> ii) Such an appeal may be made on the basis of unfairness resulting from "misunderstanding or ignorance of an established and relevant fact" (as explained by Lord Slynn in *CICB* and *Alconbury*);
>
> iii) The admission of new evidence on such an appeal is subject to *Ladd v Marshall* principles, which may be departed from in exceptional circumstances where the interests of justice require.
>
> 92. In relation to the role of the IAT, we have concluded
>
> i) The Tribunal remained seized of the appeal, and therefore able to take account of new evidence, up until the time when the decision was formally notified to the parties;
>
> ii) Following the decision, when it was considering the applications for leave to appeal to this Court, it had a discretion to direct a re-hearing; this power was not dependent on its finding an arguable error of law in its original decision.
>
> iii) However, in exercising such discretion, the principle of finality would be important. To justify reopening the case, the IAT would normally need to be satisfied that there was a risk of serious injustice, because of something which had gone wrong at the hearing, or some important evidence which had been overlooked; and in considering whether to admit new evidence, it should be guided by Ladd v Marshall principles, subject to any exceptional factors.

26. We have therefore asked ourselves:

(i) Could the fresh evidence have been obtained with reasonable diligence for use at the hearing?

(ii) if given, would it probably have had an important influence on the result; and,

(iii) is it apparently credible although not necessarily incontrovertible?

27. We consider that, as the material was protected by client confidentiality and was not seen as material prior Batool, the first limb of the test is met. There is no suggestion that the material is not genuine, and thus the third limb is met.

28. Whether the second limb of the test is met is less clear as we stated at the hearing. We note that in both cases, it is said that there was an application for an EEA Family permit and that it has also been considered if the applicant was entitled to an EUSS family permit. We do not have sight of the applications made, nor the EUSS Family Permit refusals, and we cannot therefore discern on the material provided whether there had been applications made under both the EEA Regulations and the EUSS Family Permit provisions or whether there had been an express request for the application under the former to be treated as an application under the latter. Thus, they are not sufficient evidence to show that the respondent was of her own volition exercising discretion to consider applications under the EUSS FP as applications under the EEA Regulations or vice versa. Accordingly, on that basis, we are not satisfied that, ultimately the second limb of the test is met, or that the evidence is material, given that it does not adequately demonstrate that discretion had been exercised as submitted by the appellant.

29. The appellant seeks to distinguish Batool. She argues first, that her application was an application for facilitation, in effect an application made under the EEA Regulations; and, second, in the alternative that the respondent erred in not treating it as such, as a matter of discretion contrary to the principles set out in Mohibullah. That, in effect, is a submission that the respondent should have exercised discretion to treat the application for a Family Permit as an application under the EEA Regulations, it being (as the appellant submits) clearly a case where she was asserting she is the extended family member of the sponsor.

30. We address first whether there had been an application to facilitate. That in turn requires us to consider whether the FtTJ's decision to the contrary was in error.

31. As the Secretary of State points out, the judge reached a conclusion that there had not been a mistake in this case and gave adequate and sustainable reasons for such a finding. There is in reality no effective challenge to that finding of fact.

32. Having considered the application forms to which we were taken, and the submissions made out of an abundance of caution, we find that the judge's conclusion that there was no error was one manifestly open to him on the material before him.

33. The judge found that the appellant had not made an application under the EEA Regulations, but under Appendix EUSS Family Permit, a decision manifestly open to him on the facts and for which he gave clear and cogent reasons. Although the appellant had made an earlier application

under the EEA Regulations that does not assist her because the requirement in article 10 (3) is that as the application for facilitation was being considered after the end of the transition period, that is, that it was pending at 23.00 on 31 December 2020.

34. Thus, on no proper basis can it properly be argued that the appellant had, as at 31 December 2020, made an application for her leave to be facilitated which had either been decided in her favour or was then pending. She therefore did not come within the personal scope of the Withdrawal Agreement. The reality is that, as a person who fell within article 3(2) of the Citizenship Directive, (as opposed to article 2 (2) which relates to family members of EEA nationals) the only right the appellant had prior to 31 December 2020 was a right to have her application "facilitated".

35. There is a fundamental difference between leave under EUSS and a permit under the EEA Regulations as can be seen from the discussion in Batool at [30] to [41]. Extended family members for the purposes of the 2016 Regulations, are only entitled to have their application for stay to be "facilitated".

36. Insofar as there is a challenge to the mandating of a specific form under the EEA Regulations, we take note of what was held in SSHD v Rahman and Others [2012] EUECJ C-83/11 and in Banger [2018] EUECJ C-89/17 at paragraph [40]:

> 40. In the light both of the absence of more specific rules in Directive 2004/38 and of the use of the words 'in accordance with its national legislation' in Article 3(2) of that directive, each Member State has a wide discretion as regards the selection of the factors to be taken into account. Nonetheless, Member States must ensure that their legislation contains criteria which are consistent with the normal meaning of the term 'facilitate' and which do not deprive that provision of its effectiveness (see, to that effect, judgment of 5 September 2012, *Rahman and Others*, C-83/11, EU:C:2012:519, paragraph 24)..

37. It cannot in our view be argued that the mandating of a specific application form, available freely and indeed online, is inconsistent with "facilitate", not least as certain exemptions are included in reg 21 (6). Nor can it be argued that the respondent was on any notice that she should treat the application as anything other than it appeared to be – an application for a family permit under the EUSS. There is thus no merit in this submission. Further, we do not consider that it is not permissible to require a specific form.

38. We accept, following Rehman EEA Regulations 2016 - specified evidence) [2019] UKUT 195 (IAC) that the requirements that the documents and formalities which can be required under the EEA Regulations must be read in the light of what is permitted under the Citizenship Directive. But, the reasoning in Rehman is not applicable here. Rehman was concerned with the situation where the EEA Regulations sought to impose a documentary

requirement which went beyond what was permitted by the Citizenship Directive. As UTJ Canavan observed [21]to [30], the documents that can be required to support a request for a residence document confirming status are limited by the Directive itself.

39. The position with respect to those who fell within article 3 (2) of the Citizenship Directive is significantly different from those who are EEA nationals, or their family members as defined in article 2(2).

40. In conclusion, the judge did not err in concluding that the applications made were not applications under the EEA Regulations. On that basis, the appellant did not fall within the scope of Article 10(3)of the Withdrawal Agreement.

41. We turn next to ground 2. With regard to ground two, we are not satisfied that this falls within the permissible grounds set out in reg. 8 of the Immigration (Citizens Rights Appeals) (EU Exit) Regulations 2020. This ground is primarily that the respondent has acted contrary to her public law duty. We are not satisfied that this submission falls within the category of a breach of the applicant's rights under the Withdrawal Agreement.

42. The facts in Mohibullah were very different from those in this case. In Mohibullah, the Secretary of State had evidence which permitted her to take action against the applicant by different routes, the route she chose depriving the applicant of the right of appeal. As was noted at [52], the respondent had a choice of three routes and that she needed to consider (in her discretion) which route to take, it being found that there was no real exercise of discretion. Nor had there been a proper consideration of the relevant guidance [60].

43. As a preliminary observation, in this case there was no deprivation of a right of appeal. Nor was there any policy in place indicating circumstances in which the respondent could exercise discretion to treat what was on its face (see [8] above) an application for a EUSS as an application for facilitation under The EEA Regulations. In effect, the submission is that the respondent was under a duty to consider treating an application as something other than what it said because of its content. That is not what Mohibullah is about.

44. Accordingly, for these reasons, it cannot be argued that the decision of the First-tier Tribunal involved the making of an error of law and we uphold it.

45. No anonymity direction is made.

Notice of decision

The decision of the First-tier Tribunal did not involve the making of an error of law and we uphold it

Signed Date 31 October 2022

Jeremy K H Rintoul
Upper Tribunal Judge Rintoul