Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number:
UI-2022-002724 EA/09971/2021
UI-2022-002726 EA/09996/2021

THE IMMIGRATION ACTS

Heard at Birmingham IAC
On the 29 November 2022

Decision & Reasons Promulgated
On the 07 February 2023

Before

UPPER TRIBUNAL JUDGE HANSON

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

COLLINS GYASI
CHELSEA HALL BROWN SAFRO
(Anonymity direction not made)

Respondents

Representation:
For the Appellant: Mr Williams, a Senior Home Office Presenting Officer.
For the Respondent: Mr Kannangara instructed by Jusmont & Co Solicitors

DECISION AND REASONS

1. The Secretary of State appeals with permission a decision a First-tier Tribunal Judge Anthony ('the Judge') promulgated on 11 May 2022 in

which the Judge allowed the above respondents' appeals against the refusals of their applications made pursuant Appendix EU, for EU Settlement Scheme ('EUSS') family permits.

2. The above respondents are citizens of Ghana who were born on 6 January 1989 and 28 August 2002 respectively. They applied for family permits to enable them to join their sponsor, a national of Belgium living in the UK, to whom the first appellant is related as the stepbrother and the second as a niece.

3. The Judge finds the above respondents applied for facilitation of entry and residence before the end of the transition period of 31 December 2020 and that as the two regimes were running in parallel under the Immigration (EEA) Regulations 2016 ('the 2016 Regulations') and EUSS. The Judge noted the submission of the Home Office Presenting Officer that the above respondents had applied on the wrong form and that of Mr Kannangara that as only two possible applications could have been made, because the two regimes were running in parallel, there was no application form as such, and the relevant questions are decided when an applicant answers the preceding questions on the application form.

4. The Judge accepted the submission by Mr Kannangara, finds there is no application form as such, and that the electronic application form is 'build based' on the answers given by an applicant to questions asked, and that if an applicant confirms they are a close family member under the EUSS the electronic system decides that the application is made pursuant to the EUSS even though the applicant should be directed down the route of an EEA Regulation 2016 application.

5. Having considered the competing arguments the Judge writes:

> 14. In instances where an incorrect application form was completed, then plainly an applicant would have significant difficulties proving eligibility. I find the above phrase, read properly, would encompass help to applicants to prove their eligibility even when an incorrect form has been completed. I find Article 18 (o) of the Withdrawal Agreement places a duty on the respondent to assist applicants improving their eligibility. It is therefore not sufficient for the respondent to simply absolve herself of that duty by stating to an applicant that they have completed the incorrect form.
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> 15. I find the respondent's duty to facilitate the appellant's entry included alerting the appellant's to the fact the incorrect form was completed e.g. before making the refusal decision. I place reliance on both the Statement of Intent published by the Home Office and the Home Office guidance to caseworkers, both of which states that the respondent will contact applicants who fall to be refused on eligibility guidelines. Alternatively, the respondent could have treated the application as an application made under the EEA Regulations 2016 given the appellant's cannot be expected to know that the term 'close family members' would direct them down the route of the EUSS as opposed to the EEA Regulations 2016.
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> 16. As I have stated during the course of the hearing, the respondent has not raised any issue with regard to dependency. This is most likely because the respondent did not get to that question in her assessment

of the appellants' claim. Although the appellants have produced a plethora of evidence going to the question of dependency, I have not considered these as dependency is not an issue before this Tribunal.

17. In conclusion, the reasons set out above, I accept the appellant submissions that the respondent's decision in these appeals breaches the terms of the Withdrawal Agreement.

6. The Secretary of State sought permission to appeal asserting the Judge erred in law by failing to properly consider the provisions of the Withdrawal Agreement which provides no applicable rights to a person in the circumstances of the above respondents by reference to Article 10(3), as they had not applied to facilitate their entry.

7. The Secretary of State accepted the respondents' applied for facilitation before 31 December 2020 and that their residence was not facilitated following the use of an incorrect application form. The grounds argue that the above respondents therefore did not come within the personal scope of the Withdrawal Agreement and have no entitlement to the full range of judicial redress; meaning there was no breach of either of the above respondents' rights.

8. The Grounds assert the Judge has materially erred in extending the scope of the appeal to include consideration of the 2016 Regulations as the applications were refused under Appendix EU of the Immigration Rules and not under the 2016 Regulations.

9. The grounds argue legal error in the alternative, in that the Judge did not address the question of dependency of the above respondents upon the EEA national which is relevant to determining whether they were Extended Family Members.

Error of law

10. Had the Judge been able to consider the merits of the appeal under the 2016 Regulations, and whether the above respondents were able to satisfy the definition of extended family members, it would have been necessary for the Judge to consider the question of dependency and whether any support provided was needed to meet the above respondents essential needs, the failure of which would have amounted to legal error.

11. The issue in this appeal is, however, that identified as the primary ground in the grounds seeking permission to appeal.

12. The refusal which is the subject of the challenge by way of appeal refers to the fact that on 18 December 2020 the above respondents applied for an EU Settlement Scheme (EUSS) Family Permit under Appendix EU (Family Permit) on the basis they were a close family member of a relevant EEA citizen.

13. The above respondents have never been close family members of the relevant EEA citizen as that term applies to a defined class which does not include extended family members.

14. The application form before the Judge to which reference was made at the Error Law hearing clearly shows that the application made by the above respondents was that identified in the refusal notice.

15. Before the Judge Mr Kannangara appears to have argued that because the two systems under the 2016 Regulations and EUSS were running in tandem an application under one should have been sufficient to enable the decision-maker to realise the true nature of the application and to have considered it on the basis of the 2016 Regulations, even though it was an EUSS application.

16. The point to note is that the two systems were until 31 December 2020 operating in tandem for family members. They were not, however, intertwined routes available for an individual in all cases, as clearly under the Withdrawal Agreement the ability of an extended family member to apply for recognition of the right to join their EEA national sponsor ceased to exist. It is settled law that a person claiming such a right as an extended family member must have made a valid application under the 2016 Regulations before 11 PM on 31 December 2020.

17. The relevant provisions under the Immigration (EEA) Regulations 2016 relating to the issue of the family permit could be found at regulation 12 which reads:

> **Issue of EEA family permit**
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> **12.** - (1) An entry clearance officer must issue an EEA family permit to a person who applies for one if the person is a family member of an EEA national and—
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> (a) the EEA national—
>
> (i) is residing in the United Kingdom in accordance with these Regulations; or
>
> (ii) will be travelling to the United Kingdom within six months of the date of the application and will be an EEA national residing in the United Kingdom in accordance with these Regulations on arrival in the United Kingdom; and
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> (b) the family member will be accompanying the EEA national to the United Kingdom or joining the EEA national there.
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> (2) An entry clearance officer must issue an EEA family permit to a person who applies and provides evidence demonstrating that, at the time at which the person first intends to use the EEA family permit, the person—
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> (a) would be entitled to be admitted to the United Kingdom because that person would meet the criteria in regulation 11(5); and
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> (b) will (save in the case of a person who would be entitled to be admitted to the United Kingdom because that person would meet the criteria for admission in regulation 11(5)(a)) be accompanying to, or joining in, the United Kingdom any person from whom the right to be admitted to the United Kingdom under the criteria in regulation 11(5) is derived.
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> (3) An entry clearance officer must issue an EEA family permit to—
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> (a) a family member who has retained the right of residence; or
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> (b) a person who is not an EEA national but who has acquired the right of permanent residence under regulation 15.

(4) An entry clearance officer may issue an EEA family permit to an extended family member of an EEA national (the relevant EEA national) who applies for one if—

(a) the relevant EEA national satisfies the condition in paragraph (1)(a);

(b) the extended family member wants to accompany the relevant EEA national to the United Kingdom or to join that EEA national there; and

(c) in all the circumstances, it appears to the entry clearance officer appropriate to issue the EEA family permit.

(5) Where an entry clearance officer receives an application under paragraph (4) an extensive examination of the personal circumstances of the applicant must be undertaken by the Secretary of State and if the application is refused, the entry clearance officer must give reasons justifying the refusal unless this is contrary to the interests of national security.

(6) An EEA family permit issued under this regulation must be issued free of charge and as soon as possible.

(7) But an EEA family permit must not be issued under this regulation if the applicant or the EEA national concerned is not entitled to be admitted to the United Kingdom as a result of regulation 23(1), (2) or (3) or falls to be excluded in accordance with regulation 23(5).

(8) An EEA family permit must not be issued under this regulation to a person ("A") who is the spouse, civil partner or durable partner of a person ("B") where a spouse, civil partner or durable partner of A or B holds a valid EEA family permit.

18. The procedure for making such an application is set out in regulation 21 which reads:

Procedure for applications for documentation under this Part and regulation 12

21. - (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, 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 and must be rejected.

> (4A) An application for documentation under this Part, or for an EEA family permit under regulation 12, is invalid where the person making the application is subject to a removal decision made under regulation 23(6)(b), a deportation order made under regulation 32(3) or an exclusion order made under regulation 23(5).
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> (5) Where an application for documentation under this Part is made by a person who is not an EEA national on the basis that the person is or was the family member of an EEA national or an extended family member of an EEA national, the application must be accompanied by a valid national identity card or passport in the name of that EEA national.
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> (6) Where—
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> (a) there are circumstances beyond the control of an applicant for documentation under this Part; and
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> (b) as a result, the applicant is unable to comply with the requirements to submit an application online or using the application form specified by the Secretary of State,
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> the Secretary of State may accept an application submitted by post or in person which does not use the relevant application form specified by the Secretary of State.

19. In his submissions before the Upper Tribunal Mr Kananngara put his case slightly differently arguing that when the application was made by the above respondents the only application form available online was that relating to the EUSS. If it is suggested that the above respondents had no option other than to use the form relating to a scheme that had no application on the facts, and that as a result the Judge should have been permitted to find as she did, I find that argument without merit especially in light of regulation 21(6).

20. A person making an application under the 2016 regulations was required to complete the prescribed form on the www.gov.uk website, Form EEA(QP). If a person sought access to that form but could not access it there is still a provision in within the 2016 Regulations for making an application which can be submitted by post or in person not using the specified form.

21. In this matter it does not appear that the above respondents or anybody providing them with advice or assistance, even if they could not access the required form online, thought it appropriate to make use of this additional provision. The application form under the EUSS clearly stipulates it is to be used for an application made under that scheme and does not refer to it being a valid application for a remedy under any other scheme, i.e. as an extended family member.

22. It appears that what happened is that an application was made under the EUSS which was bound to fail for the simple reason that the above respondents are not close family members of the EEA national.

23. As noted by the Presenting Officer before the Judge, it was accepted an application had been made but it was not for something for which the above respondents were lawfully entitled.

24. The question of whether an individual who had applied on the wrong form had enforceable rights was recently considered by a Presidential

panel of the Upper Tribunal in Batool and Others (other family members: EU exit) [2022] UKUT 00219, the head note of which reads:

> *(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.*
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> *(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.*

25. Batool was handed down on 19 July 2022 after the Judge promulgated her decision and the grant of permission to appeal to the Upper Tribunal. What that decision, together with a further decision by the Upper Tribunal in Celik [2022] UKUT 00220, did was to provide guidance in relation upon a number of issues concerning the interpretation and application of the Withdrawal Agreement, Appendix EU, and relevant guidance.

26. In response to the points made by Mr Kannangara, Mr Williams referred to [61] of Batool in which there is confirmation of the parallel schemes referred to before the Judge and that from the 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 the EUSS, and reference to publicly available guidance which clearly specified a person would have to be a close family member to enable them to qualify under the EUSS family permit scheme until 31 December 2020.

27. I accept the submission which reflects that found in Batool at [63] that there is evidence from the guidance on the website that persons were told in plain terms that family members could apply and that extended family members, such as the above respondents, could apply for an EEA family permit but not under the EUSS.

28. What is clear is that to fall within the scope of Article 10 of the Withdrawal Agreement a person asserting a claim to be an extended family member must have applied for facilitation of entry and residence before the end of the transition period meaning they must have made a valid application for leave in such capacity before 11 PM 31 December 2020. A reading of the application form made, considered, and refused in this case shows it is clear that the application was made in the capacity of a family member. It was clear before the Judge that it was not an application for facilitation of entry and residence as an extended family members of the EEA national.

29. Mr Kannangara's argument that although the application was on the wrong form it should have been treated as being under application under the Regulations was a matter specifically considered by the Tribunal in Batool from [69] where specific consideration was given to the argument relating to Article 18 of the Withdrawal Agreement. At [71] of Batool the Upper Tribunal found that the Secretary of State had

provided applicants with relevant information in a simple form including highlighting the crucial distinction between close family members and extended family members, a distinction that is enshrined in EU law and not as a consequence of the United Kingdom leaving the EU, and that Article 18 was no authority for the proposition that the decision-maker should have treated one kind of application as an entirely different kind of application.

30. The Judge finds the decision breaches the terms of the Withdrawal Agreement and I find that it doing so the Judge has erred in law in a manner material to the decision under challenge, for on the applications made, the correct interpretation of the law as it is now understood and the proper application of that law, the above respondents could not succeed under the EUSS as they are not close family members. There is no legal basis for arguing the decision-maker should have treated an application made under one scheme as an application made under another unrelated scheme. I find there was ample publicity advising individuals of the difference in status and separate routes of application, and a clear stated alternative means for making an application under the 2016 regulations if the online application form could not be accessed. The reality is that the above respondents chose instead to make an application under the EUSS which was bound to fail as they cannot satisfy the eligibility requirement.

31. I find that the above respondents do not come within the personal scope of the Withdrawal Agreement as outlined in Article 10(3) as their residence had not been facilitated by the UK in accordance with its national legislation.

32. For the reasons set out in the grounds seeking permission to appeal, the grant of permission to appeal, and proper application of the law, I find the Judge has erred in law in a manner material to the decision to allow the appeal.

33. I set the decision of the Judge aside.

34. In light of the guidance now provided in relation to the correct interpretation of the Withdrawal Agreement, Appendix EU, and the EUSS, and lack of merit in the challenge to the refusal, I substitute a decision to dismiss the appeal, being the only available outcome.

Decision

35. The Judge materially erred in law. I set the decision aside.

36. I substitute a decision to dismiss the appeal.

Anonymity.

37. The First-tier Tribunal made no order pursuant to rule 45(4)(i) of the Asylum and Immigration Tribunal (Procedure) Rules 2005.

I make no such order pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008.

Signed…….
Upper Tribunal Judge Hanson

Dated 30 November 2022