IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2022-005230

First-tier Tribunal No:
EA/03089/2022

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On 22 September 2023

Before

UPPER TRIBUNAL JUDGE SMITH

Between

ENTRY CLEARANCE OFFICER

Appellant

and

ABDIRAHMAN ABDULLAHI YOUSEF

Respondent

Representation:
For the Appellant: Mr E Tufan, Senior Home Office Presenting Officer
For the Respondent: Mr Mawlid Abdullai Yousef, Sponsor

Heard at Field House, London on Tuesday 22 August 2023

DECISION AND REASONS

BACKGROUND

1. This is an appeal by the Entry Clearance Officer. For ease of reference, I refer to the parties as they were in the First-tier Tribunal. The Respondent appeals against the decision of First-tier Tribunal Judge Shergill promulgated on 3 August 2022 ("the Decision") allowing the Appellant's appeal against the Respondent's decision dated 10 February 2022 refusing him an EU family permit under the EU Settlement Scheme ("EUSS") as the brother of Mr Mawlid Yousef,

who is a Swedish national with pre-settled status in the UK ("the Sponsor").

2. The Respondent has not challenged any of the factual findings made by Judge Shergill. It is therefore accepted that the Appellant is the brother of the Sponsor. The Appellant is a Somali national currently living in Ethiopia. He is currently aged seventeen years. The Sponsor sends regular remittances to the person who is currently caring for the Appellant. That person is not a family or clan member but someone who is looking after the Appellant out of kindness. The money which the Sponsor sends pays for the Appellant's upkeep and rent and also pays a certain sum to the person looking after the Appellant for his services. The Appellant and Sponsor do not have any family members remaining in Somalia or living in Ethiopia. The Appellant is therefore accepted to be dependent on the Sponsor for his essential needs ([10] of the Decision).

3. The Appellant made the application for an EU Family Permit to join the Sponsor on 24 June 2021. The application was refused because by that time the Appellant did not qualify for an EU Family Permit. He is not a "family member" under the EUSS. He is not a durable partner of an EEA national.

4. The Judge accepted that the Appellant could not meet the Immigration Rules relating to the EUSS which are contained in Appendix EU(FP). The Judge did not deal with whether the Appellant could meet the withdrawal agreement between the UK and EU following the UK's exit from the EU ("the Withdrawal Agreement"). The Judge found however that the Appellant could meet the Immigration (European Economic Area) Regulations 2016 ("the EEA Regulations") as a result of saving and transitional arrangements contained in the Citizens' Rights (Application Deadline and Temporary Protection) (EU Exit) Regulations 2020 ("the 2020 Regulations"). He allowed the appeal on that basis.

5. The Respondent appealed on the basis that it was not open to the Judge to allow the appeal under the EEA Regulations. The application made was under the EUSS and the only grounds of appeal available to the Appellant were that the Respondent's decision was not in accordance with Appendix EU(FP) or was not in accordance with the Withdrawal Agreement. The Judge had found that the Appellant could not meet Appendix EU(FP) and had not considered the Withdrawal Agreement. The Respondent asserted that the Appellant could not succeed under the Withdrawal Agreement in any event. The Respondent therefore submitted that the Judge had materially misdirected himself in law.

6. Permission to appeal was granted by First-tier Tribunal Judge Murray on 17 October 2022 in the following terms so far as relevant:

> "..3. The grounds are arguable. It is arguable that the Appellant did not meet the requirements for an EUSS family permit as he was a dependent sibling and not a 'family member', had not made an application for an EEA Family Permit before 31 December 2020 and therefore the EEA Regulations 2016 did not apply to him. It is also arguable that he could not in any event come within the personal scope of the Withdrawal Agreement under Article 10(3)"

7. The appeal came before me to determine whether the Decision contains errors of law. If I conclude that it does, I then have to decide whether to set aside the Decision in consequence of those errors. If I set aside the Decision, I then have to go on to either re-make the decision or remit the appeal to the First-tier Tribunal.

8. I had all relevant documents before me but as this appeal turns on the proper application of the law, I do not need to refer to those documents. As I have already noted, none of the factual findings made by Judge Shergill were challenged by the Respondent. The Respondent's position is that on those facts, the Appellant simply cannot succeed.

9. Having heard brief submissions from Mr Tufan which in essence adopted the pleaded grounds, I explained to the Sponsor who was accompanied by a friend that the Appellant could not succeed. Judge Shergill had erred in law, and I would have to set aside the Decision. I would also have to dismiss the Appellant's appeal as the Appellant could not succeed in his appeal.

10. As I explained to the Sponsor, it may be that on the factual findings made (which I preserve), there is some other avenue for the Appellant to join the Sponsor whether within the domestic Immigration Rules or outside them in reliance on Article 8 ECHR. It is not my place to offer advice in that regard and the Sponsor will have to seek legal advice.

11. However, unfortunate though it is for the Appellant and Sponsor, I have no choice but to dismiss the Appellant's appeal. I indicated that I would provide my reasons briefly in writing which I now turn to do.

DISCUSSION

12. I begin with the 2020 Regulations upon which Judge Shergill placed reliance. Those contain transitional arrangements relating to the EEA Regulations but do not alter the fact that, subject to saving provisions in the 2020 Regulations, the EEA Regulations were revoked at 11pm on 31 December 2020, that is to say at the end of the implementation period. After that date, no application could be made under the EEA Regulations save insofar as those regulations

continued to apply by the transitional arrangements in the 2020 Regulations.

13. The 2020 Regulations do not convert an application made under the EUSS to an application made under the EEA Regulations. They do not create new substantive rights. They simply preserve certain provisions of those regulations to the extent set out in the 2020 Regulations.

14. Judge Shergill appears to have thought that the "grace period" which continued certain provisions of the EEA Regulations until 30 June 2021 allowed those regulations to be applied to any case whether the application was made under the EEA Regulations or the EUSS. That is not the effect of the 2020 Regulations.

15. One has to look first at the extent of the grace period which applies only for the purposes of Article 18(1)(b) of the Withdrawal Agreement ("Article 18(1)(b)"). Article 18(1)(b) refers only to those persons resident in the host State before the end of the transition period (on 31 December 2020) (which the Appellant was not). For those with "a right to commence residence" after 31 December 2020, the deadline for an application is three months after arrival. However, that itself depends on the applicant having a right to come to the UK under the Withdrawal Agreement.

16. The personal scope of the Withdrawal Agreement is set out in Article 10 of the Withdrawal Agreement ("Article 10"). The only potential provisions which could apply to the Appellant and Sponsor are Articles 10(2) and (3). Article 10(2) applies to those whose residence was facilitated by the host State before the end of the transition period (on 31 December 2020). Article 10(3) applies to those who had applied for facilitation before that date but where the application had not been dealt with by that date.

17. The reference in Article 10 to residence being "facilitated" is to an application made under the EEA Regulations to enter or remain in the UK as an extended family member under regulation 8 of the EEA Regulations. The Appellant had made no such application prior to 31 December 2020. He has never had his residence or entry facilitated. He simply cannot fall within the personal scope of the Withdrawal Agreement (see also in that regard the decision of the Presidential panel in Batool and others (other family members: EU exit) [2022] UKUT 00219 (IAC)).

18. There are further reasons why the 2020 Regulations do not avail the Appellant. Judge Shergill relied on paragraphs 3(2) and 3(5) of the 2020 Regulations. Those read as follows:

"**Grace period**
3..

(2) The provisions of the EEA Regulations 2016 specified in regulations 5 to 10 continue to have effect (despite the revocation of those Regulations) with the modifications specified in those regulations **in relation to a relevant person** during the grace period.

…

(5) For the purposes of this regulation –

(a) the grace period is the period beginning immediately after IP completion day and ending with the application deadline;

(b) a person is to be treated as residing in the United Kingdom at any time which would be taken into account for the purposes of calculating periods when the person was continuously resident for the purposes of the EEA Regulations 2016 (see regulation 3);

(c) a person who does not have the right to reside in the United Kingdom permanently is to be treated as having such a right if the person had a right of permanent residence in the United Kingdom under those Regulations (see regulation 15) and who, immediately before IP completion day, has been absent from the United Kingdom for a continuous period of 5 years or less (disregarding any period of absence before the person acquired the right of permanent residence)."

[my emphasis]

19. Paragraph 3(2) depends on the meaning of "relevant person". That term is defined in paragraph 3(6) as follows:

"'relevant person' means a person who does not have (and who has not, during the grace period, had) leave to enter or remain in the United Kingdom by virtue of residence scheme immigration rules and who –

(j) immediately before IP completion day –

(i) was lawfully resident in the United Kingdom by virtue of the EEA Regulations 2016, or

(ii) had a right of permanent residence in the United Kingdom under those Regulations (see regulation 15), or

(k) is not a person who falls within sub-paragraph (a) but is a relevant family member of a person who immediately before IP completion day –

(i) did not have leave to enter or remain in the United Kingdom by virtue of residence scheme immigration rules, and

(ii) either –

(aa) was lawfully resident in the United Kingdom by virtue of the EEA Regulations 2016, or

(bb) had a right of permanent residence in the United Kingdom under those Regulations (see regulation 15)"

20. That definition in turn cross-refers to the definition of a "relevant family member" which is defined in paragraph 3(6) (so far as potentially relevant) as follows:

"'relevant family member', in relation to a person ('P'), means a family member who –

(f) was a family member of P immediately before IP completion day;

(g) is P's child and –

(i) the child's other parent is a relevant person or has leave to enter or remain in the United Kingdom by virtue of residence scheme immigration rules;
(ii) the child's other parent is a British citizen;
(iii) P has sole or joint rights of custody of the child in the circumstances set out in the last point of Article 10(1)(e)(iii) of the withdrawal agreement …or
(iv)…"

21. The Appellant is not either a "relevant person" or a "relevant family member" as those terms are defined by paragraph 3(6) of the 2020 Regulations. If it were necessary to make the point any clearer, it is put beyond doubt by the definition of "family member" in paragraph 3(6) as follows:

"'family member' –
(d) has the same meaning as in paragraph (1) of regulation 7 of the EEA Regulations 2016 (read with paragraph (2) of that regulation) as those Regulations had effect immediately before IP completion day, and
(e) includes an extended family member within the meaning of regulation 8 of those Regulations as they had effect immediately before IP completion day if that person –
(i) immediately before IP completion day satisfied the condition in regulation 8(5) of those Regulations (durable partner), or
(ii) holds a valid EEA document (regardless of whether that document was issued before or after IP completion day)"

22. The combined effect of the provisions in paragraph 3 of the 2020 Regulations is that the relevant provisions of the EEA Regulations which are continued until 30 June 2021 (that is to say during the "grace period") are continued for extended family members under the EEA Regulations only if they have applied for facilitation under the EEA Regulations prior to 31 December 2020 or have had their entry or residence facilitated prior to that date (or are permanently resident under the EEA Regulations by reason of prior facilitation). None of those provisions come close to applying to the situation of the Appellant. The effect of this paragraph of the 2020 Regulations is also consistent with the application of the Withdrawal Agreement which brings within scope of that agreement only those who have applied for or had facilitation of entry and residence prior to 31 December 2020.

23. For those reasons, the Appellant could only have succeeded in entering in reliance on EU law if he had made an application for facilitation of his entry under the EEA Regulations before those were revoked on 31 December 2020. He did not do so. Accordingly, he cannot succeed in his application to enter under the EUSS.

24. As the Respondent has pointed out, the only grounds of appeal against a decision under the EUSS are that the decision is contrary

to the relevant scheme rules (here Appendix EU (FP)) or contrary to the Withdrawal Agreement. I have explained above why the Withdrawal Agreement does not apply to the Appellant's situation. I have also explained why the EEA Regulations cannot avail the Appellant and why those regulations are not continued by the 2020 Regulations as Judge Shergill appears to have thought.

25. Although Judge Shergill found that the Appellant could not meet Appendix EU (FP), in order to assist the Appellant's understanding, I set out very briefly why he cannot succeed under those rules. Under Appendix EU(FP)6, in order to be granted entry clearance under the EUSS, the applicant has to be either an EEA national or the family member of one. "Family member" has a specific meaning in EU law and is defined in Annex 1 to Appendix EU (FP). The Appellant is not within any of those categories.

26. Entry clearance can also be granted in a "specified EEA Family Permit case" which is defined, and which applies to extended family members under the EEA Regulations but only where an application was made under those regulations prior to the "specified date" which is also defined as 11pm on 31 December 2020. Appendix EU(FP) therefore reflects the position under the Withdrawal Agreement as would be expected.

CONCLUSION

27. I have every sympathy for the Appellant given the predicament in which he and the Sponsor find themselves. However, for the reasons set out above, the Decision allowing the Appellant's appeal cannot stand in law and must be set aside. I confirm as I have done above that the factual findings concerning the relationship between the Appellant and Sponsor and the Appellant's dependency on the Sponsor are preserved. However, for the reasons also set out above, the Appellant's appeal cannot succeed and is therefore dismissed. If the Appellant wishes to join the Sponsor in the UK, they will need to find an avenue to do so under other of the Immigration Rules or outside the Rules.

NOTICE OF DECISION

The Decision of First-tier Tribunal Judge Shergill promulgated on 3 August 2022 involves the making of an error of law. I set aside that decision (but preserving the factual findings at [3], [7] and [10] of the Decision as set out at [2] above). I re-make the decision dismissing the Appellant's appeal. The Respondent's decision is in accordance with Appendix EU (FP) and in accordance with the Withdrawal Agreement.

L K Smith

Upper Tribunal Judge Smith

Judge of the Upper Tribunal
Immigration and Asylum Chamber

23 August 2023