IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2021-001734
First-tier Tribunal No: EA/09298/2021

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On 11 May 2022

Before

UPPER TRIBUNAL JUDGE BRUCE

Between
Musarrat Parveen
(no anonymity order made)

Appellant

and

Entry Clearance Officer

Respondent

Representation:
For the Appellant: Mrs Zahoor, Prestige Solicitors
For the Respondent: Mr Tan, Senior Home Office Presenting Officer

Heard at Manchester Civil Justice Centre on 6 March 2023

DECISION AND REASONS

1. The Appellant is a national of Pakistan born on the 1st January 1964. She appeals with permission against the decision of the First-tier Tribunal to dismiss her appeal with reference to Appendix EU of the Immigration Rules and/or the Immigration (European Economic Area) Regulations 2016.

Background and the Appellant's Appeal

2. On the 7th November 2020 Ms Parveen made an application for under the EU Settlement Scheme to join her "close family member" in the UK. That close family member was her Portuguese brother-in-law, upon whom she claims to have been dependent since 2000.

3. On the 10th April 2021 the ECO refused the application, on the grounds that the definition of "family member" in Appendix EU of the Immigration Rules did not extend to sisters-in-law.

4. Ms Parveen appealed and on the 19th October 2021 the matter came before First-tier Tribunal Judge Thorne. In his written decision of the 30th November

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2021 Judge Thorne agreed with the ECO that this was not an application with any prospect of success under Appendix EU: the definition of a 'family member' set out therein does not include 'sister-in-law'. Judge Thorne went on, however, to note that the ECO had made a mistake about the date that the application was made. The refusal notice wrongly records the date of her application as the 10th March 2021. In fact she had made her application in November 2020[1], and so, reasoned Judge Thorne, her application should have been considered under the Immigration (European Economic Area) Regulations 2016 which were then still in force. It was possible, concluded Judge Thorne, that as a sister-in-law she could succeed under those Regulations, but he concluded that on the facts she could not do so: she had not demonstrated that she was dependent upon her brother-in-law as claimed.

5. The Appellant has obtained permission to appeal against that decision on the grounds that Judge Thorne failed to have regard to material evidence capable of establishing the claimed dependency, and that the appeal should have been allowed under the Immigration (European Economic Area) Regulations 2016.

The Respondent's Reply and the 'Error of Law'

6. On the 14th January 2023 this appeal came before Deputy Upper Tribunal Judge Alis. Judge Alis was provided with a 'Rule 24 response' on behalf of the ECO, drafted by Senior Presenting Officer Mr P Deller. I have here highlighted the crux of the Respondent's case, as it is set out in that document:

> *3. The respondent opposes the appellant's appeal.* ***Although there may be something in the ground that the Judge did not have regard to all of the evidence provided to show dependency, the fact is that as an application for a EUSS Family Permit the attendant appeal provided no locus for consideration by reference to the 2016 Regulations****, whether as an available ground or by application of unspecified Withdrawal Agreement rights not applicable as the applicant was not in scope of the Agreement under Article 10 as an undocumented extended family member. The application was not for facilitation under Article 3.2 of the 2004 Directive and was not successful, so Article 10(3) is not engaged. It is thus immaterial whether theappellant showed dependence on the EEA sponsor (noting additionally that the regularly-cited caselaw on dependence refers to direct family members). The appeal could not succeed on either statutory ground and there is no reason why section 12 set-aside is appropriate*

7. At the hearing before Judge Alis the Appellant was represented by Mrs Zahoor, and the ECO by Mr Tan. Although Mr Tan accepted that Judge Thorne may have overlooked some of the evidence relating to the claimed dependency, he resisted the grounds by submitting, in accordance with Mr Deller's argument, that the Appellant had in effect doomed her own case from the outset by making the wrong application. She was not a 'family member' and so could not succeed under the EUSS, and she had never made

[1] It should be said that there might be some debate about that, since there was a five month lag between the application being lodged online on the 7th November 2020 and the Appellant enrolling her biometrics in March 2021. For the reasons that I set out below, nothing now turns on that.

an application under the Regulations. The application form, reproduced in the Respondent's bundle, clearly shows that she asked for entry as the "close family member of an EEA or Swiss national with a UK immigration status under the EU Settlement Scheme". In case there was any doubt, in the next box it is written: "I confirm I am applying for an EU Settlement Scheme Family Permit"

8. In his written decision of the 14th February 2023 Judge Alis made a preliminary decision that the decision was flawed for the error of failing to have regard to material evidence about dependency, but adjourned the proceedings so that Mrs Zahoor could have the opportunity to respond to the new argument now advanced, for the first time, by the ECO. The matter has now come back before me for remaking. It is common ground that it stands and falls on whether or not the argument now advanced by Mr Deller and Mr Tan is correct.

Disposal

9. In the time between the hearing before Judge Alis and the hearing before myself, the Upper Tribunal (Mrs Justice Hill and Upper Tribunal Judge Kebede) handed down the judgment in the reported case of Siddiqa (other family members: EU Exit) [2023] UKUT 00047 (IAC), in which the applicant found herself in a situation very similar to that faced by this Appellant. Siddiqa had applied on the 7th December 2020 to join her Portuguese brother in the UK. She completed the same form as the Appellant in this case, and from the drop-down menu selected the same options: she stated that she was the "close family member of an EEA or Swiss national with a UK immigration status under the EU Settlement Scheme". She further confirmed that she was "applying for an EU Settlement Scheme Family Permit". Her application was refused under the EUSS on the grounds and she proceeded to appeal to the First-tier Tribunal, which found that she could not succeed under the EUSS because there is no provision within Appendix EU for a sibling; the Tribunal was not satisfied that the ECO should have considered, in the alternative, whether the Immigration (European Economic Area) Regulations 2016 applied, and the appeal was accordingly dismissed.

10. Before the UT, Siddiqa argued the ECO was obliged to evaluate the applicable law at the date of the application, and that in fact her application should have been considered with reference to Regulation 8 of the Immigration (European Economic Area) Regulations 2016, enabling her to show that she was an all material times the dependent – 'extended' family member of her brother. The UT held that this argument was misconceived. The first problem was that there was no right of appeal. A right of appeal under the Immigration (European Economic Area) Regulations 2016 only arises where the Respondent has made a decision under the Immigration (European Economic Area) Regulations 2016. This decision was under the EUSS. The second problem was that she had used the wrong form which would immediately invalidate any application purportedly made under the regulations: see reg 21. All of this led the Tribunal to reach conclusions expressed in the headnote as follows:

> *(1) In the case of an applicant who had selected the option of applying for an EU Settlement Scheme Family Permit on www.gov.uk and whose documentation did not otherwise refer to*

having made an application for an EEA Family Permit, the respondent had not made an EEA decision for the purposes of Regulation 2 of the Immigration (European Economic Area) Regulations 2016 ("the 2016 Regulations"). Accordingly the First-tier Tribunal was correct to find that it was not obliged to determine the appeal with reference to the 2016 Regulations. ECO v Ahmed and ors (UI-2022-002804-002809) distinguished.

(2) In Batool and Ors (other family members: EU exit) [2022] UKUT 219 (IAC), the Upper Tribunal did not accept that Articles 18(1)(e) or (f) of the Withdrawal Agreement meant that the respondent "should have treated one kind of application as an entirely different kind of application"; and that it was not disproportionate under Article 18(1)(r) for the respondent to "determine…applications by reference to what an applicant is specifically asking to be given". There was no reason or principle why framing the argument by reference to Article 18(1)(o) should lead to a different result. Accordingly, consistently with the approach taken by the Upper Tribunal in Batool, Article 18(1)(o) did not require the respondent to treat the applicant's application as something that it was not stated to be; or to identify errors in it and then highlight them to her.

(3) Annex 2.2 of Appendix EU (Family Permit) enables a decision maker to request further missing information, or interview an applicant prior to the decision being made. The guidance given by the respondent as referred to in Batool at [71] provides "help [to] applicants to prove their eligibility and to avoid any errors or omissions in their applications" for the purposes of Article 18(1)(o). Applicants are provided with "the opportunity to furnish supplementary evidence and to correct any deficiencies, errors or omission" under Article 18(1)(o). In accordance with Batool, Article 18(1)(o) did not require the respondent to go as far as identifying such deficiencies, errors or omission for applicants and inviting them to correct them. This is especially so given the "scale of EUSS applications" referred to in Batool at [72]. This provides a good reason for Article 18(1)(o) to be read narrowly to exclude errors or omissions of this sort, and this was the effect of the approach taken by the Upper Tribunal in Batool.

11. Siddiqa is, as Mrs Zahoor realistically accepted, binding authority on this Tribunal. She nevertheless submitted that the present case could be distinguished from Siddiqa. The applicant in Siddiqa had missed two opportunities to perfect her application, whereas this Appellant had none; the mistake of picking the wrong option from a drop down menu was not hers, it was the sponsor's; the witness statement of the Sponsor does make reference to the Immigration (European Economic Area) Regulations 2016.

12. As valiant an effort as Mrs Zahoor made, I am not persuaded that any of these matters could properly lead me to a different conclusion from that reached in Siddiqa, and indeed in Batool and Ors (other family members: EU exit) [2022] UKUT 219 (IAC). Crucially, none of those points of divergence in the respective chronologies can construct a right of appeal where there is none. The argument that the error was not hers is one that will perhaps in

the future be relied upon in a human rights claim: as Mrs Zahoor explained, there may be good reason why such an application should be pursued and certainly the loss of a right the Appellant might otherwise have been entitled to but for another's mistake is a factor capable of attracting some weight in a proportionality balancing exercise. It does not however change the fact that the mistake was made. As for the sponsor referring to the regulations, no express reference is in fact made. It is true that in his final paragraph he asserts that his sister-in-law is an 'extended family member' but as the preceding paragraph makes clear, this was a document drafted on appeal and was not included in the application. It is not therefore analogous to the covering letter discussed in the unreported decision in ECO v Ahmed and ors (UI-2022-002804-002809), to which the panel in Siddiqa refer. It follows that there was no right of appeal under the Regulations, and Judge Thorne's error in failing to consider all of the evidence concerning dependency was immaterial.

Notice of Decision

The appeal is dismissed.

There is no anonymity order.

Judge of the Upper Tribunal Bruce
Immigration and Asylum Chamber

11th May 2023