IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case Nos: UI-2022-002662
UI-2022-002664
UI-2022-002663

First-tier Tribunal Nos:
EA/12475/2021
EA/12480/2021
EA/12477/2021

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On the 02 February 2023

Before

UPPER TRIBUNAL JUDGE PERKINS

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

ANGELINA BAJRAKTARI
ELVIS GJOKA
ELOISA GJOKA
(NO ANONYMITY ORDER MADE)

Respondents

Representation:
For the Appellant: Mr D Clarke, Senior Home Office Presenting Officer
For the Respondent: Mr S Hingora, Counsel instructed by Jein Solicitors

Heard at Field House on 22 September 2022

DECISION AND REASONS

1. This is an appeal by the Secretary of State against the decision of the First-tier Tribunal allowing the appeals of the respondents, hereinafter "the claimants", against the decision of the Secretary of State by an Entry Clearance Officer on 4 August 2021 refusing each of them an EUSS Family Permit.

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2. As is explained, very aptly, by the First-tier Tribunal Judge in his Decision and Reasons, the first appellant is the wife of the second appellant and the third appellant is their infant daughter born in 2018. The appellants are dependent on each others' cases.

3. The applications were made on forms applicable for an EU Settlement Scheme Family Permit to join the sponsor as dependent extended family members. The applications were refused because the appellants had not shown that they were family members of the UK resident sponsor. The meaning of "family member" is defined and the claimants do not come within the definition.

4. It is important to appreciate that the application was identified by the Secretary of State in each case as an application "for an EU Settlement Scheme (EUSS) Family Permit". As the Secretary of State explained in each case, "as your relationship to the sponsor does not come within the definition of 'family member of a relevant EEA citizen' as stated in Appendix EU (Family Permit) to the Immigration Rules, you do not meet the eligibility requirements."

5. Then, in accordance with standard practice, the Secretary of State informed the claimants that they could make a fresh application or appeal:

> "on the basis that the decision is not in accordance with the EUSS Family Permit rules, or that it breaches any rights you have under the Withdrawal Agreement, the EEA EFTA Separation Agreement, or the Swiss Citizens' Rights Agreement."

6. I have read regulation 8 of The Immigration (Citizens' Rights Appeals) (EU Exit) Regulations 2020 and consider this to be a fair summary of the permissible grounds of appeal.

7. The claimants chose to exercise their right of appeal but, notwithstanding the Secretary of State's reminder of the permissible grounds, the grounds were drawn in the following terms:

> The decision of the Respondent is contrary to EU Rules and unreasonable under Wednesbury principles: cf R (Giri) v Secretary of State for the Home Department [2016] 1 WLR 2218 (CA) at paragraph 30.
>
> Appellants applied for EEA Family Permit to join their sponsor in the UK under regulation 8 of the Regulation 2016.
>
> Unfortunately, ECO has considered the applications under EUSS which is unfair and unlawful.
>
> Thus, the refusals are wrong and should be reversed. Appellants respectfully submit their appeals to the Tribunal.

8. According to counsel's skeleton argument for the First-tier Tribunal at paragraph 5 headed "Appeal":

> 5. It is against the above refusals the appellant appeals on the ground that the decision is not in accordance with the EU Settlement Scheme rules, and/or that it breaches their rights under the Withdrawal Agreement, the EEA EFTA Separation Agreement, and/or the Swiss Citizens' Rights

Agreement, see Regulation 8 of the Immigration (Citizens' Rights Appeals) (EU Exit) Regulations 2020. Further or alternatively, the appellants appeal on the ground the decision breaches their rights under the EU Treaties (as they applied in the United Kingdom prior to 31 December 2020) in respect of entry to or residence in the United Kingdom, see Amirteymour & Ors (EEA appeals; human rights) [2015] UKUT 466 (IAC), and Geci (EEA Regs: transitional provisions, appeal rights) Albania [2021] UKUT 285 (IAC)[AB2-3].

~~9.~~ There is no suggestion that counsel applied to amend the grounds but as the formulation of the grounds in the skeleton argument echoes the permitted statutory grounds I see no material error in the judge following counsel's formulation.

~~10.~~ The applications for leave were made on a prescribed form that requires an applicant to select the category in which they are applying and in these appeals the forms shows that the claimants selected the option: "close family member of an EEA or Swiss national with a UK immigration status under the EU Settlement Scheme". Beneath that it states "I confirm that I am applying for an EU Settlement Scheme Family Permit".

~~11.~~ The appellants were represented in the First-tier Tribunal by Mr Reuben Solomon of Counsel who had prepared a skeleton argument. It is dated 24 March 2022 which is the date of the hearing. The Secretary of State was not represented.

~~12.~~ As is made plain in the skeleton argument, the claimants *did* apply for entry clearance in the form of an EU Settlement Scheme Family Permit to join the sponsor as a "family member of a relevant EEA citizen". However, on 17 May 2021, the claimants' representatives wrote to the Secretary of State asserting that they *meant* to apply for an EEA Family Permit under the Immigration (European Economic Area) Regulations 2016 to join the sponsor as his extended family members. I have not seen a copy of that letter and can make no decision about its precise terms and effects.

~~13.~~ For the avoidance of doubt, the skeleton argument expressly accepts that the claimants cannot meet the requirements of the Rules because they do not come within the definition of "family member".

~~14.~~ This purported attempt at variation or clarification does not feature anywhere in the Secretary of State's decision. Assuming that the letter was received it was, for whatever reason, ignored. Herein lies the problem. By the time the applications were decided it was too late to make a new application under the 2016 regulations. Before the applications were decided the claimants, by their solicitors, had asserted that the applications, properly understood were, or should have been treated as being, under the 2016 regulations but that assertion was ignored by the Secretary of State.

~~15.~~ It is quite clear that the decision that was made was made under the 2020 provisions. Arguably the claimants *might* have had a remedy in judicial review. They might have argued that the Secretary of State's decision was unlawful because the letter of 17 May 2021 had been ignored but they did not do that. Rather they appealed to the First-tier Tribunal relying on irrelevant grounds that were altered, apparently without either permission or objection, to lawful grounds at the hearing.–

16. The skeleton argument then set out the issues. First, does the decision breach the claimant's rights under the Withdrawal Agreement, second, does the Tribunal have jurisdiction to determine the appeal on the ground that the decision breaches the claimant's rights under the EU Treaties and if yes, third, do the claimants satisfy the requirements of Regulation 8(2) of the Immigration (European Economic Area) Regulations 2016?

17. I consider now the judge's Decision and Reasons.

18. The judge noted at paragraph 10 that it was the claimants' case that they had made the application erroneously under the EU Settlement Scheme. Their applications were submitted before 31 December 2020 and, it was argued, should have been considered by the respondent under Regulation 8 of the 2016 Regulations as extended family members. It is the appellants' case that the appellants' solicitors had written to the respondent on 17 May 2021 indicating that the application was intended to be under the 2016 Regulations but that seemed to have been ignored. It was too late then to make a timely application under the 2016 rules but the application that had been made had not been answered. The appellants' contention is that they did satisfy the requirements of Regulation 8(2) of the Immigration (EEA) Regulations 2016 and their applications should have succeeded.

19. The judge then examined the claimants' assertion that they did in fact satisfy the requirements of regulation 8(2) of the Immigration (EEA) Regulations 2016. The judge notes that no issue is taken with he alleged relationships or the asserted dependency. The judge said at paragraph 13:

> "The only issue in this case is the question of whether the respondent should have considered the appellants' applications under the then applicable Immigration (EEA) Regulations 2016. In my judgement this question must be answered in the affirmative, especially in light of the fact that the appellant's representative identified the error, and wrote to the respondent to that effect on 17/5/2021, (before the respondent's decision), detailing that the application was under the EEA Regulations 2016 and not under EU Settlement Scheme. The said letter is appended at page 16 to the respondents bundle in relation to the second appellant's appeal."

20. The judge then referred to paragraph 22 of the skeleton argument where Mr Solomon quoted from the headnote in **CP (Section 86(3) and (5); wrong Immigration rule) Dominica [2006] UKAIT 00040** states as follows:

> *"Where the Secretary of State (or Entry Clearance Officer) applies the wrong immigration rule, the resulting immigration decision is technically unlawful. However, subject to the requirements of fairness, an Immigration Judge should apply the correct rule when deciding an appeal. If the appellant satisfies the requirements of the correct rule, the appeal will be allowed in full under s 86(3) of the 2002 Act. If any (or all) of the requirements are not satisfied, the appeal will be dismissed in substance under s 86(5). However, the appeal will be allowed in part under s 86(3) to the limited (and inconsequential) extent that the decision was 'not in accordance with the law'. See also RM (Kwok On Tong: HC395 para 320) India [2006] UKAIT 00039."*

The First-tier Tribunal Judge regarded this as a binding precedent which required him to apply the 2016 Regulations. He then found that they were satisfied. This is not a seamless conclusion even on its own terms. The judge noted that the Regulations require the respondent to have undertaken "an extensive examination of the personal circumstances" but that had not happened here. Nevertheless the judge found that the appellant had discharged the burden of proof because the only points required in investigation were the relationship whether the relatives are extended family members and they were.

21. The judge allowed the appeal. Essentially the judge decided that appellants satisfied the requirements for entry to the United Kingdom and so they should be allowed to enter, notwithstanding that they had framed the application inappropriately and especially not when they had tried to correct the error before the decision was made.

22. There is undoubtedly something attractive about the judge's approach. However the decision prompted pithy grounds from the Secretary of State drawn by Mr Peter Deller of the Specialist Appeals Team. There is only one ground. This is summarised as "Inadequate reasons as to why the ECO "should" have considered the application on (?) a different basis and how that affected the appeal against the decision actually made". Point 2 asserts that the appellants were not in the scope of the Withdrawal Agreement and so Article 18(1)(o) and 18(1)(r) duties were not owned to an undocumented extended family member. Point 3 asserts that the application under the 2016 Regulations would not have turned solely on relationship or dependency but on the Entry Clearance Officer performing an extensive examination which was required by the Regulations and that had not happened. Point 4 asserts that **CP Dominica** was misunderstood. It depended on the ground of appeal "not in accordance with the law" which is no longer available and so was not binding in the way suggested.

23. However, ground 1.1 goes to the core of the matter and I set it below because, with respect to Mr Deller, it is, I find, exceptionally apt. It states:

> "The Judge had before him an appeal under the 2020 Citizens' Regulations against refusal of an EUSS Family Permit, the application which in form had been made and which the ECO had decided. It simply was not open procedurally or legally to recast the application, decision and appeal as being on a different basis because the ECO 'should' have considered the application under that different basis. It was certainly not permissible to hybridise and apply considerations which may have existed in a Citizens' Rights appeal (e.g. Withdrawal Agreement rights) to make the case for this piece of statutory alchemy. It was also not open to take against the ECO lack of consideration of matters which on the application which was decided simply did not arise. There is no suggestion that the requirements of Appendix EU (FP) could be met by undocumented extended family members whose entry had not yet been facilitated, and thus the refusal on its face was entirely sound. The Judge has considered a non-appeal against a non-decision."

24. I have read the decision in **CP**. It is plain from even a quick reading of the decision that it depended entirely on the Tribunal's power to determine that an appeal was not in accordance with the law. The approach that was commended in **CP** is the approach taken by the judge here but it depended on the Tribunal having jurisdiction to find that a decision was "not in accordance with the law"

because the wrong rules were applied and on the Tribunal finding lawfully that the requirements of the relevant rules were mere.

~~25.~~ That is no longer a permissible ground of appeal and, I find, **CP** is no longer relevant, or rather is not relevant in appeals brought when the ground "not in accordance with the law" is not available.

~~26.~~ That finding is probably sufficient to dispose of the appeal.

~~27.~~ Mr Clarke adopted the grounds. He additionally argued by amplification that the decision was clearly under the EUSS and the application was clearly under the EUSS. If it was to be considered under any other basis, then there would have had to have been an application to permit a new matter and which was not argued and may not have succeeded in any event.

~~28.~~ Mr Hingora argued that should have been clear to the Secretary of State that the application was under the 2016 Regulations. The judge treated it as under the 2016 Regulations which is what ought to have happened and reached a permissible conclusion.

~~29.~~ I do not agree.

~~30.~~ First, I accept the assertion in the grounds that more needed to be done than simply determine the relationship or dependency. There had to be full consideration. Even if the judge could have considered the application as an application under the 2016 regulations he was not in a position to allow the appeal because there had not been an "extensive examination of the personal circumstances of the applicant" by the Secretary of State as is required by regulation 8(5). The judge could not lawfully allow the appeal outright even if he could consider the 2016 regulations.

~~31.~~ However there is a much bigger problem here. It is accepted that the applications were framed as EUSS applications and that they could not be allowed on that basis. Indeed the claimants seek to rely on this to support the contention that the application was so obviously bound to fail it should have apparent that it was not the application that was intended. The appeal was allowed because the judge found (wrongly) that the claimants satisfied rules in force when the application was made and so they should be entitled to a family permit. That decision was reached by drawing a false analogy with appeals that could be brought where the decision was "not in accordance with the law". That ground of appeal was permissible because Parliament said that it was. Now that Parliament no longer permits that ground it should not have been relied upon.

~~32.~~ The judge made little effort to show how the appeal could be allowed on any available ground.

~~33.~~ As the appeals clearly could not be allowed on the grounds that the claimants satisfied the EUSS (2020) rules they could only be allowed on the grounds summarised by the Secretary of State as the decision "breaches any rights you have under the Withdrawal Agreement, the EEA EFTA Separation Agreement, or the Swiss Citizens' Rights Agreement."

~~34.~~ The skeleton argument appreciates the difficulty and contends that "the decision breached the appellants' rights under the Withdrawal Agreement" but

does not explain that contention in a way that I find at all persuasive. The applications were not applications for facilitation (see Batool and others (other family members: EU exit) [2022] UKUT 219 (IAC). Neither is it to do with prescribed forms. The claimants' problem is that the Secretary of State determined the applications that they had made.

35. If there is a fault at all on the part of the Secretary of State it lies in failing to consider a letter that might have resulted in the applications being treated differently. That possible fault could be been addressed by judicial review of the decision under the EU provisions on the basis that it was not a decision on the application. I am far from suggesting that such an application would have merit but it was a route to consider.

36. The decision under the rules cannot be challenged and it is not a decision with the withdrawal agreement.

37. The appeal to the First-tier Tribunal cannot succeed if the law is applied properly.

38. I allow the Secretary of State's appeal.

39. I set aside the decision of the First-tier Tribunal.

40. I substitute a decision dismissing the claimants' appeals against the decision of the Secretary of State.

Jonathan Perkins

Judge of the Upper Tribunal
Immigration and Asylum Chamber

1 February 2023