IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2022-005401; UI-2022-005400; UI-2022-005406; UI-2022-005403; UI-2022-005405; UI-2022-005404
First-tier Tribunal No: EA/08953/2021; EA/08958/2021; EA/08963/2021; EA/09001/2021; EA/09007/2021; EA/09010/2021

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On 9 August 2023

Before
UPPER TRIBUNAL JUDGE LESLEY SMITH
DEPUTY UPPER TRIBUNAL JUDGE MALIK KC

Between

(1) MR MUHAMMAD HASHIR KHALID
(2) MISS NIMRA KHALID
(3) MR MUHAMMAD HASEEB KHALID
(4) MRS SAIMA KHALID
(5) MR KHALID FAROOQ
(6) MISS JAVERIA KHALID
(NO ANONYMITY DIRECTION MADE)

Appellants

and

ENTRY CLEARANCE OFFICER

Respondent

Representation:
For the Appellant: Ms L Barton, Counsel instructed by Lincoln Solicitors
For the Respondent: Ms A Ahmed, Senior Home Office Presenting Officer

Heard at Field House via Microsoft Teams on Friday 21 July 2023

DECISION AND REASONS

BACKGROUND

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1. The Appellants appeal against the decision of First-tier Tribunal Judge Ficklin promulgated on 7 April 2022 ("the Decision") dismissing their appeals against the Respondent's decisions made on various dates in March and April 2021 refusing them family permits under the EU Settlement Scheme ("EUSS") as the extended family members of their relative who is an Italian citizen living in the UK ("the Sponsor"). In broad summary, the Appellants are a husband, wife and their four children. The Sponsor is the brother of the Fourth Appellant and therefore the brother-in-law or uncle of the remaining Appellants.

2. The applications were refused on the basis that the Appellants could not satisfy the definition of family members under the EUSS. It is the Appellants' case that they intended to make applications under the Immigration (European Economic Area) Regulations 2016 ("the EEA Regulations").

3. We did not have before us all the applications; indeed, we only had that which related to the Second Appellant. Nor did we have all the decisions under appeal. We were missing those relating to the First and Sixth Appellants. Neither representative was able to assist in relation to the exact dates when each Appellant made his or her application nor as to the date when each application was refused. We proceeded with the agreement of both representatives on the basis set out at [2] of the Decision that the First, Third, Fifth and Sixth Appellants made their applications in December 2020 whereas the Second and Fourth Appellants made their applications in February 2021. That is of some importance because, by that latter date, the EEA Regulations had been revoked and the transitional period following the UK's withdrawal from the EU had come to an end. Both occurred on 31 December 2020.

4. Judge Ficklin found that the Appellants could not satisfy the immigration rules relating to the EUSS and did not fall within the Withdrawal Agreement between the UK and the EU ("the Withdrawal Agreement"). He did however observe that it was "a matter for the Upper Tribunal whether the Withdrawal Agreement obligates the Respondent to do anything" (where an applicant has made a wrong application) ([26] of the Decision). He therefore dismissed the appeals.

5. The Appellants appealed on the basis of procedural unfairness as it is said that the Judge, as the Respondent, had failed to consider the applications made in the alternative under the EEA Regulations. The Appellants rely on the case of SZ (Applicable immigration rules) Bangladesh [2007] UKAIT 00037 ("SZ") which is said to be authority for the proposition that the facts of a particular case may require the Tribunal to consider the appeal on an alternative basis. The Appellants pointed to evidence which they said showed that a

mistake had been made by the individual entrusted with the making of the applications in Pakistan, Mr Safdar Rahman. Mr Rahman provided a letter saying he had been asked to make the applications as extended family members. He describes himself as having a basic level of education. He runs a computer shop. He is not a lawyer.

6. Permission to appeal was initially refused by First-tier Tribunal Judge J M Dixon on 27 June 2022 in the following terms so far as relevant:

> "..3. The decision does not contain any arguable errors of law. At paragraphs 23 and 26 the judge considers whether it was appropriate to consider the position under the EEA Regulations, including by reference to SZ, and found that it was not. There is no arguable error in the judge's approach."

7. Following renewal to this Tribunal, permission was granted by Upper Tribunal Judge Stephen Smith on 30 January 2023 in the following terms so far as relevant:

> "…It may be appropriate for the Upper Tribunal to consider whether to give guidance on the duties assumed by the United Kingdom under paragraph 18(1)(o) of the EU Withdrawal Agreement in relation to the matters discussed by the First-tier Tribunal at para. 24."

8. The Respondent filed a Rule 24 Reply dated 9 March 2023 drawing the Tribunal's attention to the reported decision in Siddiqa (other family members: EU exit) Bangladesh [2023] UKUT 00047 (IAC) ("Siddiqa") which in turn made reference to the Tribunal's reported decision in Batool and Ors (other family members: EU exit) [2022] UKUT 219 (IAC) ("Batool"). We return to those decisions in more detail below. The Respondent sought to uphold the Decision in reliance on those decisions.

9. The appeals come before us to determine whether the Decision contains errors of law. If we conclude that it does, we then have to decide whether to set aside the Decision in consequence of those errors. If we set aside the Decision, we then have to go on to either re-make the decision or remit the appeals to the First-tier Tribunal.

10. We had before us the core documents relevant to the challenge to the Decision as well as the Second Appellant's bundle before the First-tier Tribunal and the Respondent's bundle also in relation to the Second Appellant. We have already noted the lack of certain documents relating to the other Appellants but since the factual position was able to be agreed, and the hearing before us turned only on the legal position, we do not need to refer to the documentary evidence.

11. The hearing in the First-tier Tribunal was in Manchester. We were sitting in London and the hearing proceeded remotely via Microsoft Teams. There were no technical difficulties experienced. Having heard submissions from Ms Barton, we indicated that we did not need to hear from Ms Ahmed. We indicated that we found there to be no error of law in the Decision and would therefore uphold the Decision with the consequence that the appeals remain dismissed. We indicated that we would provide our reasons in writing which we now turn to do.

DISCUSSION

12. We begin with Judge Ficklin's reasoning which we anticipate gave rise to the grant of permission to appeal in these cases. That appears at [23] to [27] of the Decision as follows:

> "23. On the face of it, there is no matter under the EEA Regulations before me. There is no EEA decision under appeal. It is not the same as the situation in SZ, though I bear in mind that SZ refers to 'bases' of appeal, not solely other parts of the Immigration Rules. I am not persuaded that the Tribunal can decide to consider the appeals under the EEA Regulations without a decision by the Respondent that is under appeal.
> 24. That said, I observe that Article 18 of the EU Withdrawal Agreement states:
>
> > 'the competent authorities of the host State shall help the applicants to prove their eligibility and to avoid any errors or omissions in their applications; they shall give the applicants the opportunity to furnish supplementary evidence and to correct any deficiencies, errors or omissions.'
>
> 25. The Respondent in this case has provided no help to the Appellants, nor given them any opportunity to correct their applications. It was not argued before me whether there is any functional obligation on the Respondent to do what the Withdrawal Agreement says, and whether that obligation could require the Respondent to have considered the applications under the EEA Regulations, or otherwise assisted the Appellants.
> 26. It seems to me that it is a matter for the Upper Tribunal whether the Withdrawal Agreement obligates the Respondent to do anything. In the absence of authority, and of an argument addressing this point, I cannot allow the appeal with reference to the Withdrawal Agreement.
> 27. It follows that I dismiss the appeal because under Appendix EU (Family Permit). None of the Appellants are within the required family relationships. There is no point considering whether the Appellants are in fact dependent within the meaning of either the EEA Regulations or the Immigration Rules."

13. The article of the Withdrawal Agreement cited at [24] of the Decision is article 18(1)(o) ("Article 18(1)(o)"). It is no doubt due to what is said at [26] of the Decision that Judge Stephen Smith was persuaded to grant permission to appeal.

14. As it is, shortly after the grant of permission in these appeals, in Siddiqa, the Tribunal (The Hon. Mrs Justice Hill DBE and Upper Tribunal Judge Kebede) took the opportunity to give guidance on Article 18(1)(o). That guidance is of importance to these appeals. It is relied upon by the Respondent. We agree with what is said in the Rule 24 Reply. It provides a complete answer to the Appellants' case. The guidance reads 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."

15. In addition to SZ which is relied upon in the pleaded grounds, Ms Barton also made reference in her submissions to CP (section 86(3) and (5): wrong immigration rule) Dominica [2006] UKAIT 00040 ("CP") which she said was a further authority for the proposition that the Respondent or Tribunal should have considered the applications/appeals under the EEA Regulations and not simply the EUSS.

16. The Tribunal in Siddiqa dealt with that argument as set out at [8] of the decision at [47], finding that the First-tier Tribunal Judge in Siddiqa had been correct to distinguish it (see the First-tier Tribunal Judge's reasoning set out at [12] of the decision).

17. Ms Barton also made reference to a Home Office guidance document entitled "EU Settlement Scheme (Family Permit)", the latest version of which was published on 12 April 2023 ("the Guidance"). There is no reference to this having been raised in argument before Judge Ficklin, and it is not referred to in the pleaded grounds of appeal nor does it appear in the Appellants' bundle. We nevertheless permitted Ms Barton to develop this submission. She placed reliance on one section of the Guidance which reads as follows:

> "**Distinction from the EEA family permit**
>
> The EUSS family permit operated alongside the EEA family permit, which, until 30 June 2021, continued to provide a separate entry clearance route for those who qualified for it. Where a person was eligible and able to apply for both, they could apply for either. From the end of the transition period on 31 December 2020 until 30 June 2021, the following cohorts of people could apply for an EEA family permit provided that, at the end of the transition period, they were lawfully resident in the UK by virtue of the EEA Regulations, or had a right of permanent residence in the UK by virtue of those regulations, and did not yet hold status under the EUSS:
>
> • (as defined in regulation 7 of the Immigration (EEA) Regulations 2016) the family member of an EEA citizen, meaning:
>
> o the spouse or civil partner of the EEA citizen
>
> o the child or grandchild of the EEA citizen (or of their spouse or civil partner) who was aged under 21 or dependent on the EEA citizen (or on their spouse or civil partner)
>
> o the dependent parent or grandparent of the EEA citizen (or of their spouse or civil partner)
>
> • (as defined in regulation 8 of the EEA Regulations) the durable partner of an EEA citizen
>
> • (as defined in regulation 10 of the EEA Regulations) a family member who had retained the right of residence in the UK
>
> • (as defined in regulation 16 of the EEA Regulations) a person who had a derivative right to reside in the UK
>
> From the end of the transition period on 31 December 2020 until 30 June 2021, an application for an EEA family permit could also be made by certain family members of EEA citizens where, at the end of the transition period, they (the applicant) were neither lawfully resident in the UK by virtue of the EEA Regulations nor did they have a right of permanent residence in the UK by virtue of those regulations.
>
> The family members eligible to apply on this basis were:
>
> • (as defined in regulation 7 of the EEA Regulations) the family member of an EEA citizen, meaning:
>
> o the spouse or civil partner of the EEA citizen
>
> o the child or grandchild of the EEA citizen (or of their spouse or civil partner) who was aged under 21 or dependent on the EEA citizen (or on their spouse or civil partner)

o the dependent parent or grandparent of the EEA citizen (or of their spouse or civil partner)

• (as defined in regulation 8 of the EEA Regulations) the durable partner of the EEA citizen"

18. We accept that this shows that for a time-limited period, there were two schemes in existence for those seeking to join relatives in the UK following the UK's withdrawal from the EU. However, we understood Ms Barton to accept that the Guidance showed that, at least after 31 December 2020, there was no avenue available for these Appellants to apply under the EEA Regulations. That is fatal to the cases of the Second and Fourth Appellants who did not make their applications until after that date.

19. The Tribunal in Siddiqa was also referred to the Guidance. It is referred to by the First-tier Tribunal in the paragraph cited at [13] of the Upper Tribunal's decision. We agree with the First-tier Tribunal Judge's conclusions in that regard. The Guidance shows that, until 31 December 2020, there were two available routes of application for entry in accordance with EU law. However, the Guidance does not oblige or even advise decision makers to consider an application made under one route to consider the application under the other.

20. The Tribunal in Siddiqa referred to the Presidential panel decision in Batool. The guidance there given is as follows:

> "(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."

21. Whilst we are of course not bound by guidance given by other panels of the Upper Tribunal, we observe that permission to appeal the Tribunal's decision to the Court of Appeal in Batool was refused. In any event, we agree with what is said in both Batool and Siddiqa and gratefully adopt the reasoning given in the guidance in those cases.

22. Ms Barton submitted at the outset that the Decision was contrary to the Guidance and the law. For the reasons set out above, that submission cannot stand. Both the Guidance and the relevant case-law makes clear that there is no obligation on either the Respondent or the Tribunal to consider an application or appeal made under one route for entry as if it were made under the other.

23. We have however also considered the submission based on SZ as set out in the pleaded grounds. The difficulty with reliance on that case is three-fold.

24. First, the Tribunal in SZ made clear that there was no general duty on the Tribunal to consider a case under a different rule from that under which it was made and/or decided by the Respondent but that, in an exceptional case, it might be appropriate to do so.

25. Second, as we pointed out to Ms Barton, SZ and CP were cases which pre-dated the introduction of "one-stop" appeals. SZ was in fact considered by the Court of Appeal in that regard in AS (Afghanistan) v Secretary of State for the Home Department [2009] EWCA Civ 1076. The Court doubted whether SZ was authority for a proposition that the Tribunal ought to consider appeals under a different immigration rule from that which formed the basis of the Respondent's decision under appeal ([29]). In any event, the Court went on to reject the argument that the Tribunal was bound to consider an appeal on grounds raised in a one-stop notice where the grounds raised a different basis of claim from the application considered by the Respondent ([47] to [50]).

26. Third, as pointed out at [35] to [49] of the decision in Siddiqa, the Appellants' arguments also face a jurisdictional obstacle as there is no decision made by the Respondent under the EEA Regulations.

27. Ms Barton submitted at one point that the Decision or the Respondent's decisions were "not in accordance with the law". The guidance given in CP is predicated on the availability of that ground, where an immigration official has considered an application under the wrong immigration rule. There is however no longer a ground of appeal that a decision is "not in accordance with the law". That is the more so where the Tribunal is considering an appeal against a decision under the EUSS. The only grounds which the Tribunal can consider are that the Respondent's decision is not in accordance with the relevant immigration rules under the EUSS or not in accordance with the Withdrawal Agreement.

28. We did not understand the Appellants to take issue with the Decision that they are unable to meet the relevant immigration rules. That leaves only the Withdrawal Agreement. As the Tribunal made clear in Batool, extended family members are not within scope of the Withdrawal Agreement unless their entry or residence has been facilitated under the EEA Regulations before 31 December 2020 or they have made an application under the EEA Regulations before that date. The Appellants did not do so.

29. As the Tribunal decided, in our view correctly, in Siddiqa, there is no obligation under Article 18 of the Withdrawal Agreement either on

the Respondent or the Tribunal to consider the applications or appeals on the alternative route for entry. The Appellants applied for entry under the EUSS. That is the basis on which the Respondent decided their applications. They could not succeed on that basis. Their appeals were therefore doomed to failure from the outset. Judge Ficklin was therefore right to dismiss the appeals.

30. For the foregoing reasons, the Decision does not contain any error of law. We therefore uphold the Decision with the consequence that the appeals remain dismissed.

NOTICE OF DECISION

The Decision of First-tier Tribunal Judge Ficklin promulgated on 7 April 2022 does not involve any error of law. Accordingly, we uphold the decision with the consequence that the Appellants' appeals remain dismissed.

L K Smith
Upper Tribunal Judge Smith
Judge of the Upper Tribunal
Immigration and Asylum Chamber
31 July 2023