



IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2023-001049

First-tier Tribunal No: EA/04887/2022

THE IMMIGRATION ACTS

Decision & Reasons Issued:

31st January 2024

Before

UPPER TRIBUNAL JUDGE HANSON
DEPUTY UPPER TRIBUNAL JUDGE CHAMBERLAIN

Between

RAJA JUNAID AKHTER
(NO ANONYMITY ORDER MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr. A. Islam, Counsel instructed by Fountain Solicitors
For the Respondent: Mrs. R. Arif, Senior Home Office Presenting Officer

Heard at Birmingham Civil Justice Centre on 30 January 2024

DECISION AND REASONS

1. By way of a decision issued on 25 October 2023, we set aside the decision of the First-tier Tribunal to be remade.

The hearing

2. The appellant attended the hearing. We heard brief submissions from both representatives.
3. We took into account the documents contained in the bundle of 534 pages, which includes the appellant's consolidated bundle prepared for this hearing.
4. We stated that we would be allowing the appeal, albeit to a limited extent, following the case of Batool and others (other family members: EU exit) [2022] UKUT 219 (IAC).

Decision and reasons

5. It was accepted by Mr. Williams who represented the appellant at the error of law hearing that the appellant's application under the EUSS could not succeed. The issue before us was whether the appeal fell to be allowed as the decision was not in accordance with the Withdrawal Agreement.
6. As set out in the error of law decision, the factual issue to be decided was whether, in addition to the application made under the EUSS, the appellant had made a valid application under the 2016 Regulations prior to the specified date, 31 December 2020. We find on the balance of probabilities that the evidence before us shows that the appellant made such an application.
7. The appellant's supplementary bundle provided to the First-tier Tribunal contains a paper form EEA (EFM) "Application for a registration certificate or residence card as the extended family member of a European Economic Area (EEA) or Swiss national" dated 21 August 2020. It also contains a covering letter dated 21 August 2020, and a certificate of posting also dated 21 August 2020. Mrs. Arif submitted at the error of law hearing, and before us at the resumed hearing, that the respondent's position was that this application had never been received.
8. The appellant provided a witness statement dated 10 November 2023 in which he states at [4]:

"On 27th September 2020, a payment of £65 was taken from my account by 'Nationality Direct', which I believe is an abbreviation for 'Nationality Directorate'. The payment of £65 matches the figure the Respondent charged for the type of application I made, and also was taken from the card I provided on the application form."
9. The appellant provided a copy of his bank statement which shows that a payment of £65 was taken by "Nationality Direct" on 23 September 2020 (although it mistakenly states 27 September 2020 in his statement).
10. At [5] of his statement the appellant states "the application must have been received as this is the only way the Home Office would have access to my debit card details". We agree with this. The EEA(EFM) application form states that the fee is £65. We find, given the evidence of a payment of £65 being taken by "Nationality Direct" shortly after the application was made, that this payment is evidence that the respondent must have received the application. Taking into account the evidence of the application form, the certificate of posting, and the payment, we find that the appellant has shown that he made a valid application under the 2016 Regulations prior to the specified date.
11. Having found that the appellant made a valid application prior to 31 December 2020, we find that the appellant can rely on the Withdrawal Agreement. The case of Batool states:

"(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."

12. Contrary to the position of the appellant in Batool, the appellant had made an application for facilitation of residence in accordance with Directive 2004/38/EC before the end of the transition period. The respondent, for reasons which are not clear, has still not made a decision on that application. As set out at [57] of Batool, Article 10.2 of the Withdrawal Agreement applies to the appellant as he has “applied for facilitation of entry and residence before the end of the transition period”.

13. Further Batool states at [64]:

“As we have seen from Article 10 of the Withdrawal Agreement, in order to fall within the scope of Part 2 (and, thus, Article 18) a person asserting to be an other family member must have applied for facilitation of entry and residence before the end of the transition period.”

14. Accordingly we find that the appellant can rely on the provisions of Part 2 of the Withdrawal Agreement. We find that the respondent has failed to undertake the required extensive examination of the personal circumstances of the appellant, given that he has not made a decision on the appellant’s valid application. It was accepted by Mrs. Arif that, were we to find that a valid application had been made, the respondent would have to make a decision on that application.

15. We therefore allow the appeal to the extent that the respondent is to undertake an examination of the appellant’s personal circumstances in view of his outstanding application under the 2016 Regulations.

Notice of Decision

16. The appeal is allowed under the Withdrawal Agreement.

**Kate
Chamberlain**

Deputy Judge of the Upper Tribunal
Immigration and Asylum Chamber

30 January 2024