Upper Tribunal (Immigration and Asylum Chamber)

Appeal Number
UI-2022-002263 EA/04027/2021
UI-2022-002250 EA/04026/2021

THE IMMIGRATION ACTS

Heard at Field House
On the 22 September 2022

Decision & Reasons Promulgated
On the 01 November 2022

Before

UPPER TRIBUNAL JUDGE BLUNDELL
and
DEPUTY UPPER TRIBUNAL JUDGE DOYLE

Between

(1) RICHMOND ALIPUI YORKE
(2) VERONICA EFUA OTERBAH CRADOCK
(ANONYMITY DIRECTION NOT MADE)

Appellants

and

ENTRY CLEARANCE OFFICER

Respondent

Representation:
For the Appellant: Adam Pipe, instructed by M & K Solicitors
For the Respondent: Stefan Kotas, Senior Presenting Officer

DECISION AND REASONS

1. The appellants appeal, with permission granted by First-tier Tribunal Judge Komorowski, against the decision of First-tier Tribunal Judge Juss ("the judge"). By his decision of 21 February 2022, the judge found that neither appellant was the extended family member of their EEA national sponsor and dismissed their appeals.

Background

2. The appellants are Ghanaian nationals who both live near Kumasi in the centre of Ghana.

3. The first appellant was born on 12 January 2001. At 1258 on 11 December 2020, he made an online application for a European Family Permit to enable him to join his sponsor in the United Kingdom. Under the heading 'Application category', the appellant selected 'Close family member of an EEA or Swiss national, with a UK immigration status under the EU Settlement Scheme'. His sponsor is Elizabeth Ama Hayfron. She is an Italian national of Ghanaian heritage who lives in Luton. She is the appellant's aunt. The first appellant was represented by M & K Solicitors of Luton then, as he is now, and his application form was completed by Ms Shakil of that firm.

4. The second appellant was born on 6 September 2002. At 1248 on 11 December 2020, she made an application for a European Family Permit to enable her to join her sponsor in the United Kingdom. Under the heading 'Application Category', this appellant selected 'Family member of an EEA national' as the category she was applying for. Her sponsor is John Allotey. He is an Italian national of Ghanaian heritage who lives in Luton. He is the uncle of the second appellant's mother. She was also represented by M & K Solicitors of Luton and her application form was also completed by Ms Shakil.

5. The sponsors were married in Ghana in 1996 and they made a joint statutory declaration in support of the appellant's applications. The declaration explained the background to the applications and, in particular, how it was said that the appellants had either been dependent upon them or members of their household at various stages. Details of the sponsors' employment was given. It was said that the sponsors' house in Luton was large enough to accommodate the appellants and that they would be supported by the sponsors so as not to present a burden on public funds. As to the legal basis on which the applications were made, the statutory declaration stated as follows:

> [1] We wish to apply to sponsor namely Richmond Alipui Yorke (Mrs Elizabeth Ama Hayfron's nephew) Date of birth 12 January 2001, Ghanaian national and holder of Ghanaian passport with number [X], issued on 5 November 2020 and due to expire on 4 November 2030, currently residing [X] for family permit for the UK as family member under the EEA Regulations. Exhibit A – Applicant's Copy of Ghana Passport and TB certificate.
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> [2] We also wish to apply to sponsor namely Veronica Efua Oterbah Cradock (Mr John Robert Allotey's niece's daughter), Date of Birth: 6 September 2002, Ghanaian national ad holder of Ghanaian passport with number [X] issued on 4 November 2020 and due to expire on 3 November 2030, currently residing [X] for family permit as family member under the EEA Regulations. Exhibit A – Applicant's Copy of Ghana Passport and TB certificate.

6. The first appellant's application was considered and refused on 3 March 2021. The decision maker noted that he had applied for an EU Settlement Scheme (EUSS) Family Permit. The application had been refused because he did not 'meet the requirements for a EUSS Family Permit'. The following page of the decision gave the reasons for it. The reason was, in summary, that the appellant did not come within the definition of 'family member of a relevant EEA citizen' as stated in Appendix EU (Family Permit) to the Immigration Rules.

7. The second appellant's application was also considered and refused on 3 March 2021. The decision maker noted that she had applied for an EEA Family Permit and stated that the application had been considered under regulation 8 of the Immigration (EEA) Regulations 2016. The respondent gave reasons for concluding that the appellant had not established her dependency on her sponsor. It was not accepted, therefore, that she was an extended family member under that regulation.

The Appeals to the First-tier Tribunal

8. The appellants appealed to the First-tier Tribunal. The grounds of appeal were settled by Ms Shakil, who stated in the covering email that the appellants were

> appealing against the Entry Clearance Officer (ECO) decisions to refuse their application for EEA Family Permit to the UK as a dependent extended family member of their EU National Sponsor, under the Regulation 8 and 12 of the EEA Regulations 2016.

9. The substantial bundle of documents which was filed by the appellants' solicitors contained a skeleton argument. Shortly before the hearing, however, Mr Pipe of counsel was instructed. It was apparent to Mr Pipe that both appellants (and Ms Shakil) had intended to make their applications under the 2016 Regulations and that an error had been made in the first appellant's case.

10. On 24 November 2021, therefore, Mr Pipe settled an addendum skeleton argument in which he argued, in summary, that the first appellant's application had, in substance, also been an application under the 2016 Regulations. A statement from Ms Shakil was appended, in which she accepted that she had erred in completing the first appellant's online application form. She suggested that the error would have been apparent to the respondent and that she had not been contacted by the respondent thereafter. At [6] of her statement, she highlighted the uncontentious fact that the applications had both been submitted on 11 December 2020 and that they would not have been able to make such applications after 30 December 2020.

11. So it was that the appeals came before the judge, sitting in Birmingham on 25 November 2021. The appellants were represented by Mr Pipe. The respondent was represented by a Presenting Officer (not Mr Kotas).

12. Whilst the judge was clearly aware of the argument about the first appellant's situation, he chose not to consider it and preferred to cut

through to what he regarded as the quick, by deciding whether or not both appellants could succeed under the 2016 Regulations. The judge decided, in summary, that the appellants were not dependent on the sponsors. They were unable to establish that they were extended family members under the 2016 Regulations, therefore, and he dismissed their appeals.

The Appeals to the Upper Tribunal

13. The appellants appealed to the Upper Tribunal. There are three grounds of appeal:

(i) The judge failed to consider the first appellant's appeal under the Immigration (Citizens Rights Appeals) (EU Exit) Regulations 2020 ("the 2020 Regulations");

(ii) The judge's decision was incomplete, ending as it did with extensive citation from authority; and

(iii) The judge failed to give adequate reasons for finding that the appellants were not dependent on the sponsors.

14. Judge Komorowski considered these grounds to be arguable, albeit that he stated in terms that he was granting permission to appeal on a pragmatic basis.

15. On 30 May 2022, the respondent filed a response to the grounds of appeal under rule 24 of the Tribunal Procedure (Upper Tribunal) Rules 2008. She accepted that the judge's decision was unsafe 'due to a number of material errors of law'. The accepted errors were crisply particularised as follows:

> There are repeated and numerous misstatements of the relevant statute governing the applications and appeals, with seemingly no acknowledgment that the applications were refused under different schemes and attracted wholly different appeal rights. This lack of care extends to miscategorising the documents sought, to applying case law relevant to applicants in the United Kingdom (paragraph 7 appears to cite without naming it the case of *Dauhoo*); and even to misstating the status of the EEA national sponsors in the aftermath of the United Kingdom leaving the European Union and Free Movement Rights coming to an end. There is also misguided reference to regulation 7 (irrelevant to either appeal) and to the case law applicable to the dependence of ascending direct relatives. The ground relating to adequate reasoning on the findings on dependence also seems sustainable in the overall unsatisfactory setting of such a flawed determination.

16. The respondent did not unreservedly accept all that had been said on the appellants' behalf, however. She did not accept, in particular, that the first appellant stood any chance of succeeding, since what he was required to show in his appeal was that the decision was in breach of his rights under the Withdrawal Agreement. The respondent's position was

that such rights could only accrue when the appellant was in personal scope of the Agreement under Article 10. It was submitted that these appellants were not; the second appellant had applied for facilitation under the EEA Regulations and the first claimed that his application ought to have been treated as being for facilitation, but in neither case was their entry 'being facilitated' in accordance with Article 10(3).

17. Mr Kotas drew the respondent's rule 24 response to our attention at the start of the hearing. It had not been uploaded to the Upper Tribunal's file management system and we had not previously been aware of it.

18. Having considered the contents of that notice, both advocates indicated that they were content for us to order that the second appellant's appeal should be remitted to the First-tier Tribunal for consideration afresh. It remained, however, for Mr Pipe to address us as to whether the first appellant's appeal stood any prospect of success, it having been accepted in his addendum skeleton that the respondent was correct to conclude that the first appellant was unable to succeed under the EU Settlement Scheme as his relationship to the sponsor was not one which met the definition of a close family member under that scheme.

19. Mr Pipe made two submissions. The first was that the first appellant's application was clearly made under the 2016 Regulations and should have been considered as such. In the event that we were with him as to the first submission, Mr Pipe submitted that the FtT and the Upper Tribunal could, in those circumstances, find that the respondent had acted unlawfully in deciding the application under Appendix EU (FP) and the respondent should be required to make a lawful decision on the application actually made.

20. For the respondent, Mr Kotas submitted that the first appellant's application had clearly been made under Appendix EU (FP) and that it was artificial to suggest otherwise. An application under that Appendix was fundamentally different from an application under the 2016 Regulations and that distinction was made clear to applicants from 30 March 2019 onwards: Batool [2022] UKUT 00219 (IAC) referred, at [61]-[63] in particular. The first appellant therefore fell at the first hurdle as it was accepted on all sides that he was unable to meet the more restricted definition of a family member in Appendix EU (FP).

21. In any event, Mr Kotas submitted that neither the First-tier Tribunal nor the Upper Tribunal had any power to allow the appeal on the basis that the first appellant's application had been considered under the wrong regime. The grounds of appeal were those found in regulation 8 of the Immigration (Citizens Rights Appeals) (EU Exit) Regulations 2020 and the decision was neither in breach of any of the Withdrawal Act rights listed at regulation 8(2) or not in accordance with any of the domestic provisions in regulation 8(3). Mr Kotas did not accept that a person who had made a valid application for facilitation as an extended family member before the end of the transition period fell within the scope of Article 10(3).

22. Mr Pipe replied briefly, contending as he had before that the first appellant's application was clearly under the 2016 Regulations and that

the Tribunal was able to allow the appeal on the basis that the decision was in breach of rights protected by the Withdrawal Act.

23. We announced at the conclusion of the submissions that the appeal would be allowed and that it would be for the respondent to reach a lawful decision on the application made by the first appellant under the 2016 Regulations. We stated that our reasons for that decision would follow in writing.

Analysis

24. As we have recorded above, the second appeal was resolved by consent and the decision of the judge will be set aside and the appeal remitted to the First-tier Tribunal for consideration afresh. The argument before us therefore focused on the situation of the first appellant, to which we now turn.

25. There are, as Mr Pipe submitted, two questions which are to be considered in the first appellant's case. The first is whether the first appellant's application was made under Appendix EU (FP) or the 2016 Regulations, or both. The second question only arises in the event that we find that the application was under the 2016 Regulations. It is whether, given the limited grounds of appeal available to the appellant in an appeal under the 2020 Regulations, the Tribunal (whether the FtT or the Upper Tribunal) has any power to remedy the respondent's error. The judge failed to consider either of these questions, despite Mr Pipe's conspicuous desire to grasp the nettle in his addendum skeleton argument.

26. As to the first question, it is fair to say that we were at times very much persuaded by Mr Kotas's submissions, which were based squarely on certainty and administrative workability. It was common ground before us that there is one online application form for both types of applications. It was also common ground that the only entry on the application form which determines the ultimate 'route' which it takes (under the 2016 Regulations or Appendix EU (FP)) was selected from a drop-down menu. In the case of the second appellant, the entry selected was 'Family member of an EEA national', whereas in the case of the first appellant, the entry selected was 'Close family member of an EEA or Swiss national with a UK Immigration status under the EU Settlement Scheme'.

27. Mr Kotas submitted that the choice of the wrong category was fatal, in and of itself, and that the respondent was unarguably correct to consider only whether the first appellant could succeed under Appendix EU (FP). We consider that submission in the context of the guidance given by the President in Batool and in the context of the enormous number of applications received by the Secretary of State as the UK was in the process of leaving the European Union. We accept that clear advice was given to applicants and that, as the President said at [72] of Batool, the respondent is entitled to operate a system which 'determines applications by reference to what an applicant is specifically asking to be given'.

28. The real question, however, is what such an applicant is specifically asking to be given and we do not accept Mr Kotas's stark submission that the choice made in the form is determinative in all cases. An extreme example will illustrate why that cannot be so.

29. A self-representing applicant seeks to enter the United Kingdom in order to join their uncle. They complete the form themselves, without legal assistance. They select the 'EU Settlement Scheme Family Permit' application category on the first page of the application form. The application form clearly demonstrates that the applicant is relying on their dependency on their family member. The application is submitted with a letter in which the applicant states, in terms, that they are applying under the 2016 Regulations because they appreciate that their relationship to their uncle cannot fall within the scope of Appendix EU (FP). Could it be right, in those circumstances, for the respondent to fold her arms and to treat the application as being made, and only made, under the Immigration Rules, purely because of the choice made in the drop-down menu? We come to the clear conclusion that it would not be. The respondent obviously has a discretion to consider the application under both routes and is required to exercise that discretion with a modicum of intelligence, common sense and humanity, as Sullivan J said in R (Forrester) v SSHD [2008] EWHC 2307 (Admin).

30. We recognise that there are important difference between the fictitious example immediately above and the case of the first appellant. He was not acting alone and has had the benefit of legal advice throughout. There was no letter which accompanied the application. In circumstances such as this, and given the obvious desirability of administrative certainty, Mr Kotas is plainly entitled to submit that the respondent should have taken the first appellant as he found him and decided his application only under Appendix EU (FP). With some hesitation, however, we have concluded that the respondent should have considered the application under the Immigration Rules and the 2016 Regulations. We reach that conclusion for the following reasons.

31. Firstly, there can be no doubt that the application was a valid application under regulation 21 of the 2016 Regulations, and Mr Kotas did not attempt to suggest otherwise. It was common ground, as we have noted, that the application was submitted online, using the relevant pages of www.gov.uk, as required by regulation 21(1)(a). Equally, it was common ground that the application was complete and that it was accompanied by the required evidence establishing the sponsor's Italian nationality, as required by regulation 21(2). There is no basis for saying that the application was invalid under regulation 21(4) simply because the wrong entry on the drop-down menu was selected.

32. Secondly, it should have been apparent even from the contents of the application form itself that the first appellant was seeking to establish a case that he was the extended family member of the sponsor. Under the sub-heading 'Documents' the form itself showed that the appellant was providing evidence to establish his financial dependency on the sponsor.

33. Thirdly, and most importantly, the application was made at the same time as the second appellant's, and in reliance on the statutory

declaration made by both sponsors. As we have recorded above, that declaration made reference to the application being under the EEA Regulations and clearly sought to establish a case that both appellants were related to the sponsors and were either dependent upon their sponsors or that they were members of their households. The 2016 Regulations was the only instrument cited in the declaration; there was no suggestion that the appellants were applying under the Immigration Rules.

34. Fourthly, it is also relevant to observe, when considering the fact that the two applications were seemingly made under different routes, albeit on the same evidence, that the first appellant's application was doomed to fail in the event that it was made under Appendix EU (FP). He was not, as Mr Pipe has readily accepted throughout, within the category of 'family member' as defined in that Appendix. Whilst not impossible, it was inherently unlikely that the appellants' solicitor would simultaneously and intentionally make one application which might succeed and one which, on any view of the applicable provisions of the Immigration Rules, could not.

35. Mr Kotas submitted at one point that it was not for the respondent to 'rake through' the application in order to discern the basis upon which it was made. We consider him to be correct in that submission, but only to a point. It is obviously incumbent upon the respondent to consider the application form submitted and all of the supporting evidence provided with it. In the case of the first appellant, there was enough in the application form to cast doubt on the intention stated by selecting the EU(FP) option on the drop-down menu. By the time a reasonable caseworker came to the opening paragraphs of the statutory declaration, however, there could be no doubt that this was intended to be an application under the EEA Regulations. The respondent was not required to 'rake through' the papers, pondering the type of application before her.

36. We therefore conclude that the application made by the first appellant was a valid application for an EEA Family Permit and that it should have been considered as such. In failing to consider the application under the 2016 Regulations, and in considering it only as a wholly misconceived application under the Immigration Rules, the respondent erred.

37. The answer to the second question formulated by Mr Pipe, as to the jurisdiction of the Tribunal to correct such an error, is not as straightforward. Before we descend into the detail, however, we make it clear that the effect of the conclusion which we have reached above is that the first appellant awaits a lawful decision on a valid application he made for a family permit as an extended family member under the 2016 Regulations. Whether or not that conclusion entitles the Tribunal to allow his appeal, he is entitled to a clear declaration of the situation as we have found it to be.

38. Turning to the detail, there can be no doubt that the first appellant's appeal is under The Immigration (Citizens' Rights Appeals) (EU Exit) Regulations 2020 ("the 2020 Regulations"). Mr Pipe has never sought to suggest otherwise. The only decision made by the respondent in the first

appellant's case was a decision to refuse an application for scheme entry clearance, which is a decision of the type specified in regulation 5(a) of The Immigration (Citizens' Rights Appeals) (EU Exit) Regulations 2020. There was no EEA decision made by the respondent which was capable of attracting a different right of appeal and there was no section 120 notice provided by the appellant, seeking to rely on alternative matters which might (subject to the respondent's consent) have widened the scope of the appeal, as envisaged at [87]-[98] of Celik [2022] UKUT 220 (IAC) and [76] *et seq* of Batool.

39. If the first appellant is to succeed in his appeal, therefore, he must establish either that the decision breaches any of the specified rights contained in the Withdrawal Agreement (regulation 8(2) refers) or that it is contrary to the domestic provisions set out in regulation 8(3).

40. We should make two points at the outset. Firstly, we acknowledge that the limited grounds of appeal which are available to an appellant in this position do not include a general ground that the decision is 'otherwise not in accordance with the law'. It is not open to us simply to conclude, therefore, that the appeal falls to be allowed because the respondent failed to consider the first appellant's application under the correct legal regime.

41. Secondly, however, it is difficult to accept that a person in such a position would have to resort to judicial review in order to secure a decision under the correct regime. It is inherently more likely, given the numbers involved and the obvious potential for error, that the intention was to provide a judicial remedy through which errors such as these can be corrected more simply.

42. Mr Pipe did not attempt to submit that the appellant was entitled to succeed on any of the bases set out at regulation 8(3) of the Immigration (Citizens' Rights Appeals) (Eu Exit) Regulations 2020. It was not contended, in particular, that the respondent's decision was 'not in accordance with the provision of the immigration rules by which it was made', as in regulation 8(3)(a). The focus of the submissions was therefore in relation to the rights protected by regulation 8(2) and, in particular, the correctness of the respondent's submission in the rule 24 notice that the appellant does not fall within the scope of Article 10 of the Withdrawal Agreement**.**

43. Article 10 provides a list of persons to whom Part One of the Withdrawal Agreement applies. It is not necessary to reproduce it in its entirety but we do need to set out Article 10(2)-(5) in full:

> (2) Persons falling under points (a) and (b) of Article 3(2) of Directive 2004/38/EC whose residence was facilitated by the host State in accordance with its national legislation before the end of the transition period in accordance with Article 3(2) of that Directive shall retain their right of residence in the host State in accordance with this Part, provided that they continue to reside in the host State thereafter.

> (3) Paragraph 2 shall also apply to persons falling under points (a) and (b) of Article 3(2) of Directive 2004/38/EC who have applied for facilitation of entry and residence before the end of the transition period, and whose residence is being facilitated by the host State in accordance with its national legislation thereafter.
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> (4) Without prejudice to any right to residence which the persons concerned may have in their own right, the host State shall, in accordance with its national legislation and in accordance with point (b) of Article 3(2) of Directive 2004/38/EC, facilitate entry and residence for the partner with whom the person referred to in points (a) to (d) of paragraph 1 of this Article has a durable relationship, duly attested, where that partner resided outside the host State before the end of the transition period, provided that the relationship was durable before the end of the transition period and continues at the time the partner seeks residence under this Part.
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> (5) In the cases referred to in paragraphs 3 and 4, the host State shall undertake an extensive examination of the personal circumstances of the persons concerned and shall justify any denial of entry or residence to such persons.

44. Mr Kotas submitted that Article 10(3) could not apply to the first appellant because his residence is not being facilitated in accordance with the UK's national legislation. We note what was said by the President in Celik in this connection:

> "If the appellant had applied for facilitation of entry and residence before the end of the transition period, Article 10.3 would have brought him within the scope of that Article, provided that such residence was being facilitated by the respondent "in accordance with ... national legislation thereafter". Celik, at [53]

45. The appellant in Celik was accepted not to have applied for facilitation of entry or residence before the end of the transition period, however, and the precise meaning of the final seventeen words of Article 10(3) was not subjected to any examination by the President's tribunal.

46. In our judgment, the respondent seeks to construe Article 10(3) too narrowly when she submits that its protection extends only to those whose residence is already being facilitated. That submission fails to adopt the necessarily purposive approach to Article 10. It also fails, in our view, to consider the provision as a whole.

47. The purpose of Article 10 is principally to afford some protection to those who had already exercised their right to free movement under the Treaties before the end of the transition period. As is clear from Article 10(5), however, Article 10(3) and 10(4) were also intended to provide some protection for those, like these appellants, who had applied for facilitation before the end of the transitional period and had not received a response to that application. Were that not the case, a person who had

made an application for facilitation appreciably before the end of the transition period would have no protection under the Withdrawal Agreement, whether or not the host state had delayed unreasonably in deciding their application.

48. As we suggested to Mr Kotas at the hearing, it seems inherently unlikely that the signatories to the Withdrawal Agreement would have wanted such people – who had taken proper steps to regularise their position under the pre-existing instruments – to have no enforceable right to a decision post-transition. Article 10(5) shows that to be so, in that it provides how an application pending at transition is to be decided. We note that it is to be decided after an 'extensive examination of the personal circumstances of the person concerned' and that any denial of entry or residence to such person shall be justified. That requirement replicates the previous requirement in Article 3(2) of Directive 2004/38/EC and illustrates clearly, to our mind, that the intention was to extend protection under the Withdrawal Agreement to those who had pending applications for facilitation at the end of the transition period. If Mr Kotas was correct in his submission, it is not clear what purpose Article 10(5) would serve. It would presumably require a signatory state to revisit the position of a person whose residence was already being facilitated, by conducting another extensive examination of their personal circumstances and justifying any denial of entry or residence. We cannot accept that this was the intention of the signatories to the Withdrawal Agreement.

49. We therefore accept that the first appellant was a person who had applied for facilitation of entry before the end of the transition period and who consequently fell within the scope of Part 2 (and, thus, Article 18) of the Withdrawal Agreement. The respondent erred in concluding otherwise and we allow the first appellant's appeal accordingly. The respondent is therefore required to consider the application which he made for facilitation before the end of the transition period.

Notice of Decision

The first appellant's appeal is allowed. The decision of the FtT is set aside and the first appellant's application under the 2016 Regulations remains outstanding before the respondent.

The second appellant's appeal is allowed. The decision of the FtT is set aside and the appeal is remitted to be heard afresh by the FtT.

No anonymity direction is made.

M.J.Blundell

Judge of the Upper Tribunal
Immigration and Asylum Chamber

30 September 2022