Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Numbers: EA/04927/2020
EA/04932/2020, EA/04943/2020
EA/04940/2020, EA/04935/2020
EA/03290/2021

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 8 March 2022	**On 6 September 2022**

Before

THE HON. MR JUSTICE LANE, PRESIDENT
UPPER TRIBUNAL JUDGE NORTON-TAYLOR

Between

JAVED MAHMOOD (FIRST APPELLANT)
PARVEEN JAVED (SECOND APPELLANT)
MUHAMMAD QAISER (THIRD APPELLANT)
LAIBA JAVED (FOURTH APPELLANT)
ZAIN UL ABIDEEN (FIFTH APPELLANT)
ABDUL AHAD (SIXTH APPELLANT)
(ANONYMITY DIRECTION NOT MADE)

Appellants

and

ENTRY CLEARANCE OFFICER

Respondent

Representation:
For the Appellants: Unrepresented and no appearance
For the Respondent: Mr T Lindsay, Senior Home Office Presenting Officer

DECISION AND REASONS

Introduction

1. This decision highlights the importance of the distinction between "family members" and "other family members" (also referred to elsewhere as "extended family members") when considering appeals brought under the Immigration (Citizens' Rights Appeals) (EU Exit) Regulations SI 2020/61 ("the 2020 Regulations") and the significance of the particular type of application made by other family members when seeking entry clearance to join EEA national relatives in the United Kingdom.

2. These appeals are against the decision of First-tier Tribunal Judge Sills ("the judge"), promulgated on 15 September 2021. By that decision, the judge dismissed the Appellants' appeals against the Respondent's decisions, dated 23 September 2020 (in respect of the first five Appellants) and 25 February 2021 (in respect of the sixth Appellant), refusing their applications for entry clearance (in the form of family permits) under the European Union Settlement Scheme ("the EUSS"), as set out in Appendix EU (Family Permit) to the Immigration Rules ("Appendix EU (FP)").

3. The Appellants are all citizens of Pakistan. The first Appellant is the brother of an Irish citizen ("the sponsor") who had settled status under the EUSS and had resided in the United Kingdom at all material times. The second Appellant is the wife of the first, and the remaining Appellants are their children, aged 21, 19, 18, and 15 as at the hearing before the judge. In their applications, made on 15 July 2020, the Appellants described themselves as "close" family members of the sponsor.

The Respondent's decisions and the grounds of appeal to the First-tier Tribunal

4. The Respondent considered the applications had been made under Appendix EU (FP) and concluded as follows (the wording of the decisions being essentially identical in respect of each of the Appellants):

> "Your application has been refused because you have not provided sufficient evidence to prove that you are a 'family member' - (a spouse; civil partner; child, grandchild, great-grandchild under 21; dependent child, grandchild, great-grandchild over 21; or dependent parent, grandparent, great-grandparent) - of a relevant EEA…citizen…
>
> 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.
>
> Your application is therefore refused."

5. The decision letters confirmed the right of appeal set out in the 2020 Regulations. The Appellants duly exercised that right, asserting in the grounds of appeal that the Appellants had made "EEA Family Permit applications" and that the Respondent had ignored evidence which

demonstrated that they met the criteria "required by the EEA Regulations." References were made to the claimed dependency of the Appellants on the sponsor, that an "EEA Family Permit" should have been granted, and that the refusals were against "the spirit" of regulation 8 of the Immigration (European Economic Area) Regulations 2016 ("the EEA Regulations").

6. On 6 January 2021, reviews of the original decisions were undertaken by the Respondent and they were maintained in all respects.

The decision of the First-tier Tribunal

7. The judge confirmed that he was approaching the appeals before him on the basis that the Appellants had applied for family permits under the EUSS: [12]. He directed himself to the provisions of Appendix EU (FP), which set out the requirements for entry clearance to be granted, citing FP6(1) and the definition of "family member of a relevant EEA citizen" set out in Annex 1 to the Appendix: [14]

8. It was common ground that the Appellants were related to the sponsor in the manner claimed. The judge took the Appellants' contention to be that they were other family members of the sponsor and should, on that basis alone, have succeeded in their appeals: [17]-[18]. It is worth quoting in full the remainder of the judge's analysis at [19]-[24]:

> "19. However, while it may have been the case that they could have obtained family permits under [the EEA Regulations] (I say 'may' because they would still have needed to establish that they were dependent upon the sponsor), the fact is that the appellants have not applied under the EEA Regulations but rather under the successor scheme which, being entirely a creation of domestic law, is less generous in various respects.
>
> 20. Specifically, the EUSS does not provide any basis by which relatives such as the appellants, those who would have been termed 'extended family members' under Regulation 8 of the EEA Regulations, can obtain entry clearance to join their EEA national relatives in the UK.
>
> 21. The right to a family permit under the domestic law EUSS is now specifically limited to more closely connected relatives, who are still termed 'family members' as they were previously under Regulation 7 of the EEA Regulations.
>
> 22. The appellants' relationships with their EEA sponsor fall outside of that group, and they are therefore unable to qualify for family permits under the scheme found in the immigration rules.
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> 23. The suggestion in the skeleton argument and the oral submissions of Mr Saeed, that the Home Office guidance suggests otherwise, is mistaken. He refers me to the definitions found under Appendix EU of the rules, and the corresponding guidance, which do indeed seem to allow for more distant relatives to qualify. However, those are the rules and

> guidance applicable to in-country applications, the EUSS allowing 'extended family members' who were already in the UK prior to Brexit to apply. For those outside the UK at the relevant date, it is the more restrictive definitions found in Appendix EU (Family Permit) which are applicable.
>
> 24. In all the circumstances I am satisfied, on the balance of probabilities, that the appellants are not entitled to family permits under the EU Settlement Scheme, as they are not 'family members of a relevant EEA citizen', and their appeals must fail."

9. Under the heading "Notice of Decision", the judge confirmed that the appeals were dismissed "under" the EUSS.

The grounds of appeal and grant of permission

10. The grounds of appeal begin by confirming that the Appellants had applied for family permits under the EUSS. They then request that the judge's "findings" that the Appellants could have obtained family permits under the EEA Regulations should be preserved. We observe that in fact the judge did not make any explicit finding that the Appellants had been dependent on the sponsor. His comment at [19] was couched in tentative terms - employing the word "may" - so as to leave unresolved the factual issue of dependency. Given our ultimate conclusions on these appeals, nothing turns on this point.

11. The substance of the Appellants' challenge can be summarised as follows. Relying on the ground of appeal set out under regulation 8(2)(a) of the 2020 Regulations (namely, that the Respondent's decision breached a right held by virtue of Chapter 1, or Article 24(2) or 25(2) of Chapter 2, of Title II of Part 2 of the Withdrawal Agreement), it was asserted that because the Appellants were the "family members" of the sponsor and were seeking to join him in United Kingdom, they should have succeeded in their appeals if they were in fact dependent on him. The judge therefore erred by restricting his consideration to the EUSS and the ground of appeal set out in regulation 8(3) of the 2020 Regulations.

12. Permission to appeal was granted by the First-tier Tribunal in a decision dated 27 October 2021. Aside from discerning merit in the grounds, reference was made to a letter from the Minister for Future Borders and Immigration, dated 27 September 2021, by which a so-called concession had been created for other family members who had, in the words of the judge granting permission, "applied for family permits before 31 December 2020 [and] were caught by a lacuna in Article 10(3) of the Withdrawal Agreement." We note that the effect of the letter has subsequently been incorporated into the Respondent's guidance[1] and, in

[1] EU Settlement Scheme Family permits.docx (publishing.service.gov.uk). The position adopted in the passage quoted was originally contained in a letter from Mr Kevin Foster MP, Minister for Future Borders and Immigration, to *the3million* organisation, dated 27 September 2021.

the event, the point taken in the grant of permission has proved to be a legal red herring: the position adopted by the Respondent applies only to those who had applied under the EEA Regulations, not under the EUSS.

The hearing

13. The day before the hearing, the Upper Tribunal received an email from Abbott Solicitors, who had represented the Appellants throughout the appellate proceedings, confirming that they had been left without instructions and could therefore no longer act.

14. At the hearing itself, there was accordingly no legal representation. Nor did the sponsor attend. There had been no application to adjourn.

15. Mr Lindsay did not suggest that we should adjourn of our own volition.

16. We considered whether it was nonetheless appropriate to adjourn the hearing and concluded that, for the following reasons, it was not.

17. There was no indication that the lack of instructions was due to any emergency or other temporary circumstance which might resolve itself, resulting in the re-instruction of the legal representatives. We were satisfied that the sponsor was aware of the hearing and he chose not to attend. The Appellants' case on appeal was stated with sufficient clarity in the grounds of appeal and we were able to address it. Finally, the Respondent was in a position to put forward her case without requiring an adjournment.

18. Mr Lindsay provided us with a copy of the Ministerial letter referred to in the grant of permission, an extract from the *gov.uk* website (as it stood at 31 December 2020) relating to the routes by which relatives could apply for family permits) and the judgment of the Court of Appeal in Aibangbee [2019] EWCA Civ 339; [2019] Imm AR 979.

19. In the first instance, Mr Lindsay relied on a concise skeleton argument drafted by a member of the Respondent's Specialist Appeals Team. This addressed the Appellants' single ground of appeal, submitting that they were not "family members" of the sponsor within the meaning of Article 9 of the Withdrawal Agreement and Article 2(2) of Directive 2004/38/EC ("the Citizens' Directive"). They were, at most, other family members. Given that they had applied under the EUSS and not the EEA Regulations, they could not have succeeded in their appeals before the judge and his decision was correct.

20. Mr Lindsay emphasised the following points. First, the distinction between family members and other family members. Second, the importance of determining the basis of an application for a family permit: whether it was under the EEA Regulations or the Appendix. Third, the narrowly defined definition of "family member" in the Withdrawal Agreement and the

Citizens' Directive. Fourth, that the position set out in the Ministerial letter (and now contained within the Respondent's guidance) applies only to those who made an application under the EEA Regulations.

21. With reference to Article 10(3) of the Withdrawal Agreement, Mr Lindsay submitted that the "national legislation" referred to therein was the EEA Regulations and not Appendix EU (FP) because other family members were not within the scope of the Immigration Rules.

22. Mr Lindsay ended by indicating that there was at present "some confusion" amongst representatives before the First-tier Tribunal surrounding the approach to other family members who had sought family permits prior to the end of the transition period.

23. We reserved our decision.

Discussion

24. The core legal issues arising in these appeals have been addressed in the recent decision of Batool and others (other family members: EU exit) [2022] UKUT 00219 (IAC), the judicial headnote of which reads 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."

25. Unlike the present appeals, the Tribunal in Batool received full legal argument from both parties and we regards its conclusions as correct and applicable to the issues with which we are concerned. Thus, we are able to state the following matters in brief terms, making reference to particular passages set out in Batool where appropriate.

26. There is a "fundamental distinction" between a family member and other family members for the purposes of the Citizens' Directive: Batool, at paragraphs 31-41. Whereas rights accruing to family members arise simply by virtue of that status, other family members derive only what has been described as a "procedural right" from the Citizens' Directive, namely to have an application facilitated by the relevant Member State. A right of residence only crystallises once the individual has been issued with relevant residence documentation. This distinction had been implemented in domestic legislation by virtue of regulations 7, 8, 12, and 18 of the EEA Regulations.

27. As a consequence of the United Kingdom's withdrawal from the EU, the EEA Regulations were revoked on 31 December 2020. Until then, persons residing overseas and claiming to be other family members could have made an application for an EEA family permit under the EEA Regulations. Since 1 January 2021, the respondent has not been able to consider an application for an EEA family permit, except where a valid application was made before that date (or where specific legislative provisions applied, which is not the position in the present appeals). A valid application required the use of the specified application form.

28. The Withdrawal Agreement provides for a host State to introduce "constitutive residence schemes", which require EU citizens and direct family members to apply for residence rights. With reference to Article 10.2 and Article 10.3, other family members are entitled to apply for residence rights provided they had "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"; Batool, at paragraphs 50-58.

29. The EUSS, introduced on 30 March 2019, was the United Kingdom's residence scheme, pursuant to the Withdrawal Agreement. As it relates to persons seeking entry clearance from abroad, the scheme is manifested in Appendix EU (FP). For our purposes, the relevant provision is FP6(1), which requires an applicant to be "family members of a relevant EEA citizen", as defined in Annex 1. The definition contained therein is narrow: a "family member" must be a spouse, civil partner or durable partner of a relevant EEA citizen; or be the child or dependent parent of such a citizen, or of that the citizen's spouse or civil partner.

30. It is plain that, save for durable partners, other family members are not within the scope of Appendix EU (FP). An application made by such an individual under the Appendix would fail on eligibility grounds.

31. In light of the foregoing, persons claiming to be other family members could, from the formal introduction of the EUSS on 30 March 2019 until 31 December 2020, have made two types of application: for an EEA family permit under the EEA Regulations; or for a family permit under Appendix EU (FP): Batool, at paragraph 61.

32. These options were publicised on the *gov.uk* website, the full text of which is set out at paragraph 62 of Batool. Suffice it to say that the important distinction between family members (described as needing to be "close" if an application under the EUSS was being made) and other family members was made abundantly clear.

33. We are entirely satisfied that the Appellants' applications for family permits were made under the EUSS, not the EEA Regulations. Whilst the original grounds of appeal to the First-tier Tribunal sought to suggest that applications had been made under the latter, the application forms before us plainly show that this was not the case. Further, the grounds of appeal

challenging the decision of the judge expressly accepted the basis of the applications to have been Appendix EU (FP).

34. It follows from our analysis of the relevant legislative provisions, based as it is on the conclusions reached in Batool, that the Appellants were not family members of the relevant EEA national, but were instead other family members, and as such did not fall within Appendix EU (FP). Their applications were bound to fail.

35. In turn, the judge was correct in concluding that the Appellants' appeals could not succeed with reference to the legal provisions under which they had made their application.

36. For the sake of completeness, we have considered whether the Appellants were able to have benefited from the Withdrawal Agreement in any other way. It cannot be said that the application made under Appendix EU (FP) constituted an application "for facilitation of entry and residence" for the purposes of Article 10.3: that provision relates only to those who apply for entry of residence as other family members. By applying under Appendix EU (FP), the Appellants were asserting that they were family members, not other family members: Batool, at paragraph 66.

37. Nor can it be said that the Respondent should have treated the application made under the EUSS as one instead made under the EEA Regulations. As has already been highlighted, the crucial distinction between family members (described as "close family members") and other family members was made plain by the Respondent through the guidance published on the *gov.uk* website. There was nothing disproportionate or otherwise in breach of the Withdrawal Agreement for the Respondent to have considered the Appellants' application on the basis on which it was put to her and, in turn, for the judge to have dealt with the appeals as he did.

38. Neither Article 8 ECHR, nor the Charter of Fundamental Rights have been raised in these appeals and there is no need for us to address that issue.

Anonymity

39. The First-tier Tribunal made no anonymity direction. In the circumstances of these appeals and having regard to the importance of open justice, there is no proper reason for us to make such a direction.

Notice of Decision

40. The making of the decision of the First-tier Tribunal did not involve the making of an error on a point of law and that decision shall stand.

41. The appeals to the Upper Tribunal are accordingly dismissed.

Signed: H Norton-Taylor Date: 6 September 2022
Upper Tribunal Judge Norton-Taylor