



**Upper Tribunal
(Immigration and Asylum Chamber)**

Appeal Numbers:
UI-2022-002797 (EA/10745/2021)
UI-2022-002801 (EA/10746/2021)
UI-2022-002810 (EA/10748/2021)

THE IMMIGRATION ACTS

**Heard at Field House
On 24 October 2022**

**Decision & Reasons Promulgated
On 11 December 2022**

Before

UPPER TRIBUNAL JUDGE NORTON-TAYLOR

Between

**MR MD NAZRUL HUSSAIN KHAN (FIRST APPELLANT)
MRS ASMA BEGUM CHOWDHURY (SECOND APPELLANT)
MASTER KHAN ZAVEER (THIRD APPELLANT)
(ANONYMITY DIRECTION NOT MADE)**

Appellants

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr M Rahman, CILEX immigration practitioner
For the Respondent: Mr D Clarke, Senior Presenting Officer

DECISION AND REASONS

Introduction

1. To avoid any confusion I shall refer to the parties as they were before the First-tier Tribunal: therefore the Secretary of State is once more “the Respondent” and Mr Khan, Mrs Chowdhury and Master Khan are “the Appellants”.
2. The Respondent appeals with permission against the decision of First-tier Tribunal Judge Richard Wood (“the judge”), promulgated on 23 May 2022. By that decision, the judge allowed the Appellants’ appeals.
3. The Appellants are all nationals of Bangladesh currently resident in that country. The First Appellant is the husband of the Second and they are the parents of the Third who has, at all material times, been a minor. The First and Third Appellants made applications under the Immigration (European Economic Area) Regulations 2016 (“the 2016 Regulations”) for family permits in order to join the First Appellant’s sister (“the Sponsor”) in the United Kingdom. The Second Appellant made an application for a family permit under the EUSS. All the applications were made prior to the specified date of 31 December 2020.
4. Following refusal, the Appellants appealed to the First-tier Tribunal, the First and Third pursuant to the 2016 Regulations and the Second under the Immigration (Citizens’ Rights Appeals) (EU Exit) Regulations 2020 (“the 2020 Regulations”).

The decision of the First-tier Tribunal

5. At paragraph 2 of the judge’s decision he erroneously recorded that it was only the First Appellant who had applied under the 2016 Regulations. In the event, this error has not had a material bearing on the outcome of the appeals in the Upper Tribunal. What is of real consequence, however, is the judge’s conclusion at paragraphs 15 and 18 that the Second Appellant was a “family member” of the Sponsor “for the purposes of the Regulations and the EUSS”.

The Respondent’s challenge

6. The Respondent challenges this finding on the basis that the Second Appellant, as the Sponsor’s sister-in-law, simply did not fall within the definitions of “family member” contained within Annex 1 and that the 2016 Regulations had no bearing on her situation.

Discussion and conclusions

7. Mr Rahman accepted that a person in the Second Appellant’s situation did not fall within the definitions. However, he posed an alternative basis for the judge’s finding namely that she was a part of a family unit and was the mother of a minor child and therefore the judge, having considered all of

the circumstances, would have been entitled to conclude that her appeal should be allowed on that basis.

8. I have no hesitation in concluding that the judge has made an error of law in respect of his conclusion that the Second Appellant was a “family member” for the purposes of the EUSS. I am satisfied that she could not meet any of the definitions contained in Annex 1. Further, the judge did not put forward any alternative basis for his conclusion and, notwithstanding Mr Rahman’s submissions, I can only go by what is said on the face of the decision. It is not for me to search around for alternatives to which no reference had previously been made.
9. It follows from this that the judge was not entitled to have allowed the Second Appellant’s appeal under the 2020 Regulations. That part of the judge’s decision must be set aside.
10. Having said that, I conclude that the decisions relating to the First and Third Appellants are sustainable. The judge considered all of the evidence before him in respect of the disputed issue of dependency. I am satisfied he directed himself correctly in law to the relevant tests on dependency. He made clear findings supported by adequate reasons and indeed these have not been challenged by the Respondent. I am satisfied the judge was entitled to conclude that the First and Third Appellants were dependent in the relevant sense on the Sponsor.
11. The grounds of challenge argued that the judge had erroneously allowed the appeals of the First and Third Appellants outright by effectively exercising his own discretion for the issue of a family permit, rather than allowing the appeals on the limited basis that the relevant Appellants were indeed dependent and it was for the Secretary of State to undertake an extensive examination of all relevant circumstances and to exercise her discretion under the 2016 Regulations.
12. I disagree with this interpretation of what is said at paragraph 18 of the judge’s decision. In my view, the judge was only allowing those appeals on the limited basis that the First and Third Appellants had demonstrated that they were dependent on the Sponsor and nothing beyond that.
13. I make it clear that in respect of the First and Third Appellants it is now for the Secretary of State to undertake the relevant examination of the overall circumstances and to exercise her discretion as to whether to issue a family permit or not.
14. In light of the above, I uphold the judge’s decision insofar as it relates to the First and Third Appellants.

Re-making the decision

15. In terms of the Second Appellant, Mr Rahman had urged me to remit the matter to the First-tier Tribunal for a further hearing. I disagree with that course of action. Firstly, remittal is an exception to the Rule, but more

importantly I am satisfied that it is not now open for the Second Appellant to rely on Article 8 in her appeal under the 2020 Regulations on the basis that the Respondent has not issued her with a section 120 notice. So whether her appeal was remitted or retained in the Upper Tribunal, she would be precluded from relying on the essential argument which has been put forward by Mr Rahman to the effect that the family unit should not be split. The appropriate course is for me to go on and re-make the decision in her appeal now on the materials before me. I do so based solely on the two grounds of appeal potentially open under the 2020 Regulations.

16. There is only one outcome to her appeal, namely that it must be dismissed. That is because, as I have mentioned already, she simply cannot fall within the definitions of “family member” under Annex 1. The appeal fails in respect of the EUSS.
17. No issue under the Withdrawal Agreement has ever been raised. Suffice it to say that the appeal fails in respect of the Withdrawal Agreement.
18. It is open to the Second Appellant to make an application for entry clearance in the form of an Article 8 claim outside the Rules to either accompany or join the First and Third Appellants. She would be entitled to rely on the judge’s decision and my error of law decision to the effect that the First and Second Appellants will, depending on the Secretary of State exercise of discretion in respect of the issuance of a family permit, be coming to the United Kingdom and that she would be in a position to assert that she should accompany them. The outcome of any future entry clearance application is of course not a matter for me to express a view on.

Notice of Decision

The making of the decision of the First-tier Tribunal did involve the making of an error on a point of law in respect of the Second Appellant. The decision of the First-tier Tribunal is set aside only to that limited extent.

The making of the decision of the First-tier Tribunal did not involve the making of an error on a point of law in respect of the First and Third Appellants and, to that extent, the decision is upheld.

It is now for the Respondent to consider how to implement the decision of the First-tier Tribunal as it relates to the First and Third Appellants.

I re-make the decision in the Second Appellant’s appeal and dismiss it under the Immigration (Citizens’ Rights Appeals)(EU Exit) Regulations 2020.

No anonymity direction is made.

Signed H Norton-Taylor

Date: 7 November 2022

Upper Tribunal Judge Norton-Taylor