IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2022-006409
First-tier Tribunal No: EA/02834/2022

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On the 15 April 2024

Before

UPPER TRIBUNAL JUDGE MACLEMAN

Between

RASHIDA ABDULLAH
(no anonymity order requested or made)

Appellant

and

Entry Clearance Officer

Respondent

For the Appellant, on 24 January and on 3 April 2024, no legal representative; sponsor present
For the Respondent, on 24 January 2024, Mrs Arif, and on 3 April 2024 Mr Diwnycz, Senior Home Office Presenting Officers

Heard at Edinburgh on 24 January and 3 April 2024

DECISION
(remaking decision on appeal, as originally brought to the FtT)

1. The appellant a citizen of Pakistan, applied on 18 December 2020 for a "European Family Permit" under the "EU Settlement Scheme" ("EUSS") (form at pp 108-115 UT bundle).

2. (My "error of law" decision referred incorrectly to the application as being for an "EEA family permit". The distinction is significant.)

3. The appellant's three children applied to the respondent at the same time. The four applications were based on the appellant being the brother of the sponsor, who is an Irish citizen.

4. The sponsor is Mr Muhammad Imran, [36 **** Road].

5. The appellant's application was refused on 24 February 2021 (p 60 of the UT bundle) by a decision headed "Refusal of EUSS family permit" on the

grounds that her relationship was not within the definition of "family member of a relevant EEA citizen" in the immigration rules, appendix EU (family permit) (which does not include a sister).

6. Her children's applications were also refused. Those decisions (p 63 onwards) are headed "refusal of EEA family permit" and framed in terms of the Immigration (EEA) Regulations 2016, giving these reasons:- evidence limited, and does not prove dependency, or that without support provided essential living needs could not be met; evidence also inadequate to prove relationships.

7. Judge Mensah dismissed the appeals of the appellant and her three children by a decision promulgated on 29 November 2022 (p 28). Citing *Batool* [2022] UKUT 00219, she held that the appellant could not meet the definition of a family member, and had no right to be considered under the EUSS. In respect of the children, she found at [7] that there was little evidence. They had not shown that, on the balance of probabilities, they were "related to the sponsor as claimed and dependent on him for all their essential needs".

8. The four appellants sought permission to appeal to the by applications dated 30 November 2022.

9. The present appellant's grounds contend that the Withdrawal Agreement and Home Office guidance required the respondent to process EEA family permit applications made before 31 December 2020 and to "issue a product" (presumably an EUSS family permit) if such an application was successful, even when the route closed after 30 June 2021. The grounds further contend that the appellant fell within the definition of "extended family member" under the 2016 Regulations.

10. On 22 January 2022 FtT Judge Austin granted permission to the first appellant only.

11. The three children did not apply further for permission.

12. On 14 February 2023, the SSHD responded under rule 24 to the grounds: …

> 2. The respondent accepts that the judge erred by overlooking the fact that the appellant made the application before 31 December 2020 and therefore, the application of the main appellant should have been decided according to the rules in place before 31 December 2020. Whereas the application was decided on the basis of the rules in place after 31 December 2020.
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> 3. The respondent does not oppose the appellant's application for permission to appeal and invites the Tribunal to determine the appeal with a fresh oral (continuance) hearing to consider whether the appellant's application for an EU Settlement Scheme (EUSS) Family Permit under Appendix EU (Family Permit) should be granted.

13. The case came before me firstly on 24 January 2024. The sponsor was present. Mrs Arif, Senior Presenting Officer, conceded that in light of the

rule 24 response the decision of the FtT, in respect of the first appellant, should be set aside. She submitted that the decision should be remade by dismissing the appellant's appeal, because on the evidence provided to the ECO, it failed for the same reasons as the three children, both on relationship and on dependency. The FtT had not fallen into the same error when making those decisions.

14. Mrs Arif said that the reasons were to be found not in the decision of Judge Mensah, but in the decisions of the ECO. Those decisions were not before the UT, but Mrs Arif said they could be located and served.

15. Mrs Arif was not personally responsible for the respondent's position to that date, but it was unsatisfactory, and procedurally unfair to the appellant. It appeared that the appellant had not received a decision from the ECO's side in terms which should have been forthcoming 3 years ago. She had no notice of the case to meet in the UT, which should have been stated, at latest, along with the rule 24 response.

16. The sponsor sought to provide some further evidence, in the form of a family registration certificate, and birth certificates. He had copies with him, and said these had been emailed to the tribunal a day or two before the hearing. They had not reached the file, and had not yet been considered by the respondent.

17. I considered that the case could not fairly be decided, as matters stood on 24 January 2024. Mrs Arif accepted that the appellant should have the opportunity to consider and prepare her case (and to seek legal representation, although that was a matter for her).

18. My written decision on error of law, dated 25 January 2024, directed the appellant to provide the respondent and the UT with all the evidence on which she sought to rely.

19. The respondent was directed to file a written submission, explaining what decision should have been made on the original application, and what decision was sought from the UT, supported by and referenced to all evidence relied upon (including, if relevant, the ECO's decisions in the cases of the three children).

20. The consequent submission for the ECO, dated 15 February 2024, runs as follows: …

> Unfortunately analysis has shown up further difficulties which on their face mean that the challenge to Judge Mensah's determination and the ECO's rule 24 response were misconceived. The appeal was premised on the suggestion that different "rules" applied to the application as it was made before 11pm 31 December 2020, the end of the Transition Period after the United Kingdom left the European Union.
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> What emerges however is that the applications were actually doomed. All relied upon Extended Family member ("EFM") relationships which fell under what had been regulation 8(2) of the 2016 Regulations, but they were made not under those regulations but for EUSS Family Permits under Appendix EU (Family Permit). As has been made clear in the cases of *Batool* and *Celik* neither the EU Settlement Scheme nor the Withdrawal Agreements made any provision for regulation 8(2) EFM whose

residence had not been facilitated by a successful application under the EEA Regulations.

The matters raised in the challenge to Judge Mensah's determination asserted that applications made before 31 December 2020 would continue after that date to be preserved by the earlier rules, and this was accepted in the rule 24. It was however incorrect given that the applications were not made under the 2016 Regulations. They were not for facilitation and were not caught by Article 10(3) of the Withdrawal Agreement.

The ECO's current position is therefore that there was no error in Judge Mensah's determination such that it ought to have been set aside, or in the alternative that if the appeal proceeds to remaking it must be dismissed.

The Secretary of State observes however that the Court of Appeal heard and reserved judgment in the case of *Siddiqa* on Thursday and Friday 8 and 9 February. This goes to a question very much on point in this appeal and the cases of the Appellant's children, which was whether an application made under the EU Settlement Scheme ought to have been treated as one for facilitation under the 2016 Regulations by any provision of the Withdrawal Agreements. It is therefore possible that the applications – doomed to failure on the basis on which they were made – could have further life as ones under the 2016 Regulations.

It is respectfully suggested that it is in the interests of justice to sist this appeal to await the outcome in *Siddiqa*. This of course means further delay for the Appellant but means that his case can look to its best remaining chance of success.

21. The report of the UT's decision in *Siddiqa* (other family members: EU exit) [2023] UKUT 00047 (IAC) is headnoted: ...

(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.

22. *Siddiqa* was appealed to the Court of Appeal. Its report, [2024] EWCA Civ 248, dismissing the appeal, is dated 14 March 2024. Dingemans LJ, with whom LJJ Baker & Laing agreed, said at [89]:

> For the detailed reasons set out above, in my judgment: (1) the FTT and UT were right to find that Ms Siddiqa had not made an application under the 2016 Regulations, and therefore any appeal under the 2016 Regulations was bound to fail; (2) and (3) article 18 of the Withdrawal Agreement did not apply to the application made by Ms Siddiqa; and (4) the appeal does not succeed under the provisions of articles 10(3) and (5) of the Withdrawal Agreement.

23. In advance of the hearing on 3 April 2024, the sponsor provided evidence of money transfers in 2019.

24. Mr Diwnycz relied upon the submission above and said that the outcome of *Siddiqa* was fatal to the present appeal.

25. The sponsor told me that the appellant and her children are related to him as claimed; that they have depended for many years on the substantial financial support which he provides; and that as a result of procedures on application made in 2016 – 2017, DNA evidence had been obtained to put the matter of relationship beyond doubt. On the legal issues, however, and understandably, he had little to say.

26. I reserved my decision.

27. The decision of the FtT has already been set aside. In remaking that decision, I have no reason not to apply *Siddiqa*.

28. The appellant did not apply under the 2016 Regulations. Her appeal cannot succeed by either reference to those regulations, or by reference to the Withdrawal Agreement and the EUSS. My further observations are incidental.

29. The sponsor struck me as a candid and straightforward witness. Mr Diwyncz made no suggestion to the contrary. For what it is worth, I would be prepared to accept that, more likely than not, he is the appellant's brother and the uncle of her three children, and contributes financially to their significant advantage. Unfortunately, however, that is not only insufficient but irrelevant.

30. The case as put to the ECO and to the FtT may have been imperfectly presented, due to absence of legal representation and to opting not to have an oral hearing. However, without the DNA reports and with minimal financial evidence, the outcome on those points could not, as matters stood before the tribunal, realistically have been different.

31. The appeal, as originally brought to the FtT, is dismissed.

Hugh Macleman

Judge of the Upper Tribunal
Immigration and Asylum Chamber
3 April 2024