



UT Neutral citation number: [2023] UKUT 00047 (IAC)

Siddiqi (other family members: EU exit)

IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Heard at Field House

THE IMMIGRATION ACTS

Heard on 18 January 2023
Promulgated on 10 February 2023

Before

THE HON. MRS JUSTICE HILL
UPPER TRIBUNAL JUDGE KEBEDE

Between

TANJINA SIDDIQA
(no anonymity order made)

Appellant

and

ENTRY CLEARANCE OFFICER

Respondent

Representation:

For the Appellant: Mr M Biggs and Mr M West, Counsel, instructed by Lexwin Solicitors

For the Respondent: Ms A Ahmed, Senior Home Office Presenting Officer

(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.*

DECISION AND REASONS

Introduction

1. The appellant, born on 20 February 1994, is a national of Bangladesh, currently living there. This is her appeal against the decision of First-tier Tribunal Judge Rodger, promulgated on 9 December 2021, dismissing her appeal against the respondent’s refusal on 25 January 2021 of her out-of-country application to join her brother, Md Moin Uddin, in the UK.

The factual background

2. On 5 February 2020 the appellant's brother, who is a national of both Bangladesh and Portugal, was granted limited leave to remain in the UK under Part 1 of Appendix EU to the Immigration Rules.

3. On 7 December 2020 an out-of-country application was made for the appellant to join her brother in the UK. This involved the completion of an online application. The "type of visa / application" specified was "European Family Permit". In response to the question "Select the category you are applying for" the following was selected: "Close family member of an EEA or Swiss national with a UK immigration status under the EU Settlement Scheme. I confirm I am applying for an EU Settlement Scheme Family Permit". The appellant's brother's details were provided as her sponsor. Documentation was submitted in support of the application including evidence of the identities of the appellant and her brother and proof that she was financially dependent on him.

4. On 14 December 2020 the appellant's brother provided a 'letter of declaration' to accompany the application. The letter stated that he wished to invite his sister to come to the UK under a "European Family Permit Visa". He explained that she was financially dependent on him.

5. On 25 January 2021 the appellant's application was refused. In the refusal letter the respondent noted that the appellant had made an application for an EU Settlement Scheme ("EUSS") family permit on the basis that she was a "family member" of a relevant EEA citizen, under Appendix EU (Family Permit) to the Immigration Rules. The letter stated that the appellant had not provided sufficient evidence to prove that she was such a family member (ie. a spouse; civil partner; child; grandchild; great grand-child under 21, dependent child, grandchild or great grand-child over 21; or dependent parent, grandparent or great grand-parent) of a relevant EEA citizen. On that basis it was said that she did not meet the eligibility requirements for an EUSS family permit. The appellant appealed.

The First-tier Tribunal hearing

6. On 24 November 2021 First-tier Tribunal Judge Rodger heard the appellant's appeal. The appellant argued that she met the requirements for a different kind of permit, namely an EEA family permit, under Regulation 8 of the Immigration (European Economic Area) Regulations 2016 ("the 2016 Regulations"). This was because she was an "extended family member" financially dependent on an EEA citizen exercising treaty rights in the UK.

7. The two different schemes were later described by the judge as follows:

"19. [The EUSS] provided a basis for EEA citizens resident in the UK by the end of the transition period at 11 pm on 31 December 2020, and their family members, to apply for UK immigration status which they required in order to remain here after 30 June 2021. This was in furtherance of the Withdrawal Agreement with the European Union reached on 17 October 2019, with the citizens' rights agreements reached with the other EEA countries. Those agreements now have effect in UK law through the European Union (Withdrawal Agreement) Act 2020. The Immigration Rules were

amended so as to include Appendix EU which sets out the rules and requirements of the EU Settlement Scheme. An application under EUSS is an application for immigration status under the UK Immigration Rules and is distinct and separate from an application under the [2016 Regulations].

20. As set out at page 9 of the Home Office Guidance titled “EU settlement scheme Family Permit and Travel Permit” dated November 2021, the EUSS family permit operated alongside the EEA family permit, which, until 30 June 2021, continued to provide a separate entry clearance route for those who qualified for it. Where a person was eligible and able to apply for both, they could apply for either”.

8. The appellant’s counsel, Mr Khan, argued that the respondent was wrong to simply refuse the application with reference to Appendix EU (Family Permit) without considering whether she met the provisions of the 2016 Regulations. Reliance was placed on CP (section 86(3) and (5): wrong immigration rule) Dominica [2006] UKAIT 00040; [2006] Imm AR 525 at [13] where it was held that the legal duty on Entry Clearance Officers (“ECOs”), Immigration Officers and the Secretary of State to apply the immigration rules required the relevant decision maker to “apply the correct rule applicable to the individual circumstances put forward to gain entry to or to stay in the UK”.

9. Mr Khan submitted that the appellant had never claimed to fall within the definition of a “family member” within Appendix EU (Family Permit). Her clearly explained circumstances supported by the documentary evidence were that she was applying as the sibling of an EU national, a relationship which by virtue of its very definition fell to be regarded as an “extended family member” or other family member. Therefore her circumstances as advanced, namely as a sibling of an EU national, ought to have been considered by the respondent and ought to have led to consideration of her application under Regulation 8 of the 2016 Regulations rather than Appendix EU (Family Permit).

The First-tier Tribunal decision

10. The judge observed that the appellant’s witness statement had not dealt with the fact that she made an application under the EUSS rather than the 2016 Regulations, finding that “[i]t is not known why she completed the application form in the way that she did but what is clear is that she confirmed in the application form that she was making an application for an EUSS family permit”: decision at [18].

11. The judge noted that in CP it was said that an Immigration Judge is not under an obligation to “embark upon a roving expedition among the rules” for a rule that applies to the claimant’s case. However, once the correct immigration rule is identified, it is the Immigration Judge’s obligation to apply that rule subject to the requirements of fairness: decision at [21].

12. The judge’s central findings were as follows:

“22. Having considered the case of CP, I am not satisfied that the findings and judgment in that case are applicable to the

circumstances of this appeal. The judgment involves considerations of applications made under the Immigration Rules and I do not accept that the judgment states or is persuasive authority that there is a legal duty on an ECO to apply any other law or application criteria other than that under which the application was made. The application in CP was made under the Immigration Rules. The ECO was, in those circumstances, under a duty to apply the correct immigration rule and determine the application under the correct immigration rule applicable to the circumstances put forward by the applicant. The ECO in this appeal was under a duty to apply the correct immigration rule within the Immigration Rules but I do not accept that the ECO was under a duty to consider or apply any law or Regulation outside of the Immigration Rules.

23. The appellant was able to make two applications before 31/12/20 and this application was made under the EUSS scheme within the Immigration Rules and not under the [2016 Regulations]. Overall I am not persuaded that the Upper Tribunal judgment in CP is supportive of an ECO being under a legal duty to consider anything other than the Immigration Rules in determining the application made under the Immigration Rules. The appellant in this appeal made a specific application under the EU Settlement Scheme and this is confirmed at page 1 of her application form. In these circumstances I do not find that the ECO decision was not in accordance with the law and I do not accept that I am obliged to consider the EEA Regulations in determining this appeal against a refusal of an application made under the Immigration Rules”.

13. The judge also made the following finding in respect of the Home Office Guidance:

“24...The guidance makes clear that there are two distinct applications that could have been made [by family members]. The current guidance confirms that where an application for an EEA family permit was made before 31/12/20 and is successful then an EEA family permit will be issued despite the fact that the UK has left the EU and that the EEA Regulations application route is no longer open or available. It does not provide guidance to decision makers that an application under one route should be considered under further or alternative routes that may well have been available at the time of application”: decision at [24].

14. The judge concluded that the concession that an EEA family permit can now be granted in respect of successful applications (even after appeal) made before 31 December 2020, even though the EEA family permit route is no longer available, was not relevant because the appellant had not made an application for an EEA family permit before 31 December 2020: decision at [25].

15. The judge then considered the arguments relating to Article 18(1)(o) of the Withdrawal Agreement (see [65] below). The judge noted that Annex 2.2 of Appendix EU (Family Permit) permitted a decision maker to request further missing information, or interview an applicant prior to the decision being made.

The judge concluded that Appendix EU (Family Permit) and the application process was consistent with the Withdrawal Agreement and that:

“... there is nothing within the Withdrawal Agreement which can be read to create a duty to consider other legal rights that an EEA citizen may well have outside of the scheme set up to facilitate and further the agreed terms within the Withdrawal Agreement”: decision at [26].

16. Overall the judge concluded that the respondent was entitled to consider the appellant’s application under Appendix EU (Family Permit) as that was the application before it. The burden was on the appellant to make the correct application and to demonstrate that she met the requirements for an EUSS permit and she was unable to do so: decision at [27].

The procedural history

17. On 14 April 2022 the appellant sought permission to appeal to the Upper Tribunal, having been refused permission by First-tier Tribunal Judge Adio on 14 February 2022. A sole ground was advanced, to the effect that the First-tier Tribunal had materially erred in law by failing to appreciate the scope and nature of its jurisdiction, because it assumed that the appellant had only appealed under the Immigration (Citizens’ Rights Appeals) (EU Exit) Regulations 2020 (“the CRA Regulations”); whereas in fact she had (also or only) appealed under the 2016 Regulations (“**Ground (1)**”).

18. On 10 July 2022 Upper Tribunal Judge O’Callaghan granted permission to appeal, noting that in addition to the question of appeal rights expressly addressed by the grounds, two questions of law implicitly arose. These were: (1) Was the respondent (and consequently the First-tier Tribunal) required to treat the EUSS application as including an application for facilitation of entry and residence under Article 3(2) of Directive 2004/38 and if so, how ought this to have been dealt with?; and (2) Did Regulation 21 of the 2016 Regulations prevent the respondent (and consequently the First-tier Tribunal) from considering the application for facilitation of entry and residence under the 2016 Regulations? Upper Tribunal Judge O’Callaghan observed that the appellant may well be required to establish that Regulation 21 of the 2016 Regulations could properly be disapplied, but was satisfied the ground of appeal was arguable.

19. The appellant’s skeleton argument dated 14 October 2022 sought to add a further ground of appeal, relating to the First-tier Tribunal’s interpretation and application of Article 18(1) of the Withdrawal Agreement, in particular Articles 18(1)(o) and (r) (“**Ground (2)**”).

20. The appeal was listed before Upper Tribunal Judge Kebede on 17 October 2022, at which time permission was granted to the appellant to advance the proposed new ground of appeal. Ms Ahmed, on behalf of the respondent, applied for an adjournment of the appeal hearing on the basis that the appellant’s skeleton argument, which she had only been provided with at the hearing, required detailed consideration and raised issues of general

importance. Mr Biggs, for the appellant, submitted that an adjournment was appropriate because the matters raised in his grounds had not been addressed in the relevant Upper Tribunal panel decisions of Batool and Ors (other family members: EU exit) [2022] UKUT 219 (IAC) and Celik (EU exit, marriage, human rights) [2022] UKUT 220 (IAC), both promulgated on 19 July 2022.

21. The application for an adjournment was therefore granted and a timetable set for the appellant to file a comprehensive skeleton within 7 days, with the respondent's skeleton to follow within 21 days of the directions being issued, which was on 25 October 2022, and any reply from the appellant to be filed 14 days before the hearing.

22. The appellant filed a detailed skeleton argument on or around 14 November 2022. The respondent's skeleton was provided on or around 16 December 2022. The delay in this being provided and other professional commitments meant that the appellant's reply was not served until the late afternoon of 16 January 2023, the appeal having been listed to take place before us on 18 January 2023.

23. Shortly before the hearing the respondent made an application for an adjournment on the basis of the late submission of the appellant's reply. This was refused during the afternoon of 17 January 2023 on the basis that although the appellant's reply had been served late, the respondent was already fully aware of the arguments made by the appellant from the skeleton argument.

24. Ms Ahmed renewed the application for an adjournment at the outset of the hearing on 18 January 2023. This was opposed by Mr Biggs on behalf of the appellant. We indicated at the hearing that the application was refused.

25. Our reasons for refusing the application were substantially the same as the reasons given on 17 January 2023. In addition we were not persuaded that the small number of "new" issues suggested by Ms Ahmed to have been raised in the appellant's reply were genuinely "new". The first related to Mr Biggs' reliance on ECO v Ahmed and ors (UI-2022-002804-002809), an unreported Upper Tribunal case which had been promulgated on 6 November 2022, but it was accepted that the respondent had been aware of this decision prior to its citation in the reply. The second was the reference in the reply to Khan v SSHD & Anor [2017] EWCA Civ 1755, [2018] 1 WLR 1256, but this had featured in the appellant's first skeleton. Ms Ahmed also referred to the appellant's position on the materiality issue as set out in the reply, but this was in response to a point taken for the first time in the respondent's skeleton which itself had been delayed. The appellant was not required to serve the reply in any event, but could simply have made the relevant submissions through counsel. We considered that all these issues could fairly be dealt with during the hearing, although we put the case back in the list to allow Ms Ahmed to take any further instructions needed.

26. The appeal therefore proceeded before us during the afternoon of 18 January 2023. Mr Biggs relied on the submissions made in his skeleton argument and reply. Ms Ahmed relied on the respondent's Rule 24 reply and

skeleton argument. Both representatives made further oral submissions before us.

The application under Rule 15(2A) of the Tribunal Procedure (Upper Tribunal) Rules 2008

27. By this application dated 14 October 2022 the appellant sought to admit a further statement from the appellant's brother, Mr Uddin, explaining the process by which her application had been made in December 2020. Upper Tribunal Judge Kebede adjourned this application from the hearing on 17 October 2022 for determination at the appeal hearing.

28. Rule 15(2A) provides as follows:

“(2A) In an asylum case or an immigration case –

(a) if a party wishes the Upper Tribunal to consider evidence that was not before the First-tier Tribunal, that party must send or deliver a notice to the Upper Tribunal and any other party –

(i) indicating the nature of the evidence; and

(ii) explaining why it was not submitted to the First-tier Tribunal; and

(b) when considering whether to admit evidence that was not before the First-tier Tribunal, the Upper Tribunal must have regard to whether there has been unreasonable delay in producing that evidence”.

29. Mr Biggs submitted that the overriding objective very strongly indicated that the application should be granted to allow the tribunal to determine the issues in light of the facts. The evidence in Mr Uddin's second statement was not adduced before the First-tier Tribunal because it was not appreciated at that time how important the procedure used to make the 7 December 2020 application may be to the Tribunal's jurisdiction. He argued that the timing of the application had caused no prejudice to the respondent.

30. Ms Ahmed opposed the admission of this evidence. She referred to the fact that neither the witness statement nor the covering letter explained, as required by Rule 15(2A)(a)(ii), why the evidence contained in the witness statement was not produced and put before the First-tier Tribunal. Further, no explanation had been provided, as required by Rule 15(2A)(b), for the delays in making the application of more than nine months since the appellant applied on 7 January 2022 to the First-tier Tribunal for permission to appeal, six months since the application was renewed to this Tribunal on 14 April 2022 and more than three months since the grant of permission on 10 July 2022.

31. We consider that there is force in Ms Ahmed's points. The application was defective as it did not explain why the evidence was not submitted to the First-tier Tribunal: that explanation was only forthcoming in the appellant's reply. Further, we have regard, as we are required to do, under Rule 15(2A)(b) to the fact that there was delay in producing the evidence, without any explanation having been provided for that delay.

32. However on balance we have decided that it would be appropriate to admit the evidence, for two reasons. First, it provides further detail as to the process used to make the application, over and above what is obvious from the contemporaneous documents. The manner in which the application was made is relevant to several of the issues in the appeal, including whether Regulation 21 of the 2016 Regulations was complied with and whether the respondent has breached Articles 18(1)(o) or (r) of the Withdrawal Agreement. Second, the respondent had had around 3 months to apply to rely on her own evidence in response to Mr Uddin's second statement (and indeed it was clearly anticipated at the 17 October 2022 hearing that she would do so), but has chosen not to. We therefore agree with Mr Biggs that she cannot be said to be prejudiced by the admission of this evidence.

33. Mr Uddin's evidence described the process for the making of the application, and confirmed that the option of the EUSS family permit had been selected in error.

Submissions and discussion

Ground (1)

34. The appellant's case under Ground (1) was that the First-tier Tribunal had materially erred in law by wrongly assuming that the appellant had only appealed under the CRA Regulations when in fact she had also, or only, appealed under the 2016 Regulations. This overarching ground involves a series of sub-issues which we address in turn.

Issue (1): Did the Respondent make an "EEA decision" so as to trigger the right of appeal under the 2016 Regulations?

35. The right to appeal under the 2016 Regulations is set out in Regulation 36(1), which provides that "the subject of an EEA decision may appeal against that decision under these Regulations".

36. An "EEA decision" is defined by Regulation 2 which provides in material part as follows:

"EEA decision" means a decision under these Regulations that concerns-

(a) a person's entitlement to be admitted to the United Kingdom;

(b) a person's entitlement to be issued with or have renewed, or not to have revoked, an EEA family permit...(but does not include a decision to reject an application for the above documentation as invalid)".

37. As to how Regulation 2 should be interpreted, Mr Biggs relied on Khan v SSHD & Anor [2017] EWCA Civ 1755, [2018] 1 WLR 1256. In Khan, the Court of Appeal was concerned with an application by an extended family member under the materially similar language of the predecessor to the 2016 Regulations. The Court held that the words "concerns...an entitlement" did not

exclude decision-making in respect of extended family members, even though this involved the exercise of a discretion on the part of the respondent: [20], [23], [42]-[45], [48] and [51]. On that basis, Mr Biggs submitted that the language used in Regulation 2 is broad, and the words “a decision that... concerns...a person’s entitlement to be admitted to the United Kingdom” in limb (a) of the definition of an EEA decision was wide enough to cover the 25 January 2021 decision. Arguably so too was the wording of limb (b) of the definition (“a person’s entitlement to be issued with or have renewed, or not to have revoked, an EEA family permit”).

38. Ms Ahmed did not take issue with the appellant’s reliance on Khan, but submitted that the decision in this case was simply not covered by Regulation 2, as it was not a “decision under these Regulations” for the purposes of the opening words of Regulation 2. Further, the decision did not concern “a person’s entitlement to be admitted to the United Kingdom” for the purposes of Regulation 2(a), as this related to the provisions for rights of admission to the UK under Regulation 11 of the 2016 Regulations, with which the respondent’s decision was not concerned. The decision was not concerned with the 2016 Regulations but was solely focussed on whether or not to grant the appellant an EUSS family permit under the CRA regulations.

39. The effect of these submissions is that whether or not the decision in this case was an “EEA decision” for these purposes becomes a largely factual one. It is necessary to determine whether the respondent (and thus the First-tier Tribunal) erred in not treating the application as one made under the 2016 Regulations.

40. Mr Biggs argued that the appellant objectively intended to, and in substance did, make an application under the 2016 Regulations. Although the appellant’s 7 December 2020 application wrongly referred to the EUSS, it was tolerably clear from the entirety of the material provided that she was seeking to join her brother in the UK on the basis that she was an extended family member pursuant to Regulation 8 of the 2016 Regulations. This was apparent from (i) the fact that the appellant’s sponsor was identified on the form as a relative who could only be an extended family member under the 2016 Regulations; (ii) the documents submitted with the application, which were consistent with it being an application under the 2016 Regulations; and (iii) the wording of the 14 December 2020 letter of declaration submitted with the application, to the effect that the appellant sought a family permit based on her dependence on her sponsor brother. In light of Khan, and the substance of the appellant’s application, Mr Biggs submitted that the respondent’s 25 January 2021 decision concerned the appellant’s “entitlement to be admitted to the United Kingdom” under the 2016 Regulations and therefore generated the right appeal under Regulation 36.

41. He drew support from the decision of the Upper Tribunal panel in ECO v Ahmed and ors (UI-2022-002804-002809), where the applicants had also erroneously made applications for EUSS family permits when they intended to make applications under the 2016 Regulations. As had occurred in this case according to Mr Uddin, “confusion and ambiguity” had arisen because the

applicants had selected the “incorrect pre prepared answer from a drop-down menu in one box on the first page of the same form”: [24]. The Upper Tribunal held:

“19...The respondent’s position is that because one particular drop-down box is selected the appellants have irrevocably committed to make an application for an EUSS family permit. We find that that is too blinkered an approach to take...

25. We cannot agree that making a clerical error with the click of a computer mouse commits the appellants to an application which (they know) will not succeed. The Respondent treated the erroneous selection of an answer from a drop-down menu as the determinative factor in the appellant’s applications instead of reading the letter dated 30 December 2020 and considering the documents which accompanied the application.

26. What really happened is the respondent received applications under the 2016 regulations which had simply been incorrectly labelled as an application for EUSS Family Permits. If the Respondent had considered the contents of the applications rather than the label on its cover it would have been obvious that the applications made by each appellant were for entry clearance as extended family members under the 2016 Regulations”.

42. Ms Ahmed submitted that the evidence that the appellant’s application was one which, objectively viewed, was one under the 2016 regulations was very thin. The reference in the 14 December 2020 letter to a “European family permit visa” could be taken as either an EUSS application or an application under the 2016 Regulations. Ahmed should not be relied on as it is an unreported authority and the respondent has sought permission to appeal it. In any event the facts of Ahmed meant that it could be distinguished from this case. It involved merely a clerical error in the application form, and the covering letter had specifically referred to the 2016 Regulations: Ahmed at [12].

43. She argued that it is an applicant’s responsibility to ensure they apply for the correct product and to follow the correct application process for it. Ignorance of the law is not a defence. The respondent had set out information about the two different schemes on www.gov.uk to assist applicants decide which product to apply for. As at 4 December 2020 the website clearly explained who was eligible for an EUSS family permit and who was eligible for an EEA family permit. It was unreasonable to expect the respondent to have deciphered the appellant’s intention on the facts of this case. The consequences of a ruling that the respondent is obliged to consider an application made on one basis as if it were made on another is likely to be significant. Given the number of applications the respondent processes each year (for example, the respondent refused 365,899 visa applications in the year ending 30 September 2022), it was not reasonable to expect the respondent to consider those applications under other routes and provide a right of appeal (if applicable) even though no application under that route was actually made. Reliance on intention in this context is problematic in principle and could have adverse consequences for applicants.

44. We consider that the factual background to the Ahmed decision is markedly different to this case. The key reason why the Upper Tribunal made the decision it did in Ahmed was the nature of the covering letter which accompanied the applications, described by the Upper Tribunal thus:

“21. The covering letter dated 30 December 2020 list the documents which accompanied the applications. Those are documents which meet the requirements of Regulation 21 [of] the 2016 Regulations. The covering letter...implores the Respondent, in its opening paragraph, to consider the applications under Regulation 12 of the 2016 Regulations. It contains a paragraph under the heading “*Legal Submission*” which refers to Regulations 6, 7, 8, and 12 of the 2016 Regulations. The letter goes on to quote from Regulation 7 of the 2016 Regulations, and concludes with a citation of case law which relates directly to the 2016 Regulations. Even the full citations of the two decisions cited (both of which were provided in the covering letter) demonstrate quite clearly that their citation was directed to supporting a case that these were applications made by extended or other family members under the 2016 Regulations: Moneke (EEA - OFMs) Nigeria [2011] UKUT 00341 (IAC) and Chowdhury (extended family members: dependency) [2020] UKUT 00188 (IAC)”.

45. In summary, therefore, the Upper Tribunal found that the clarity with which the appellants in Ahmed had indicated in the covering letter that they were making an application under the 2016 Regulations should have been seen by the ECO as “correcting” the fact that they had erroneously selected the EUSS option on the drop-down menu.

46. The position was different in this case. The covering letter did not specifically refer to the 2016 Regulations or give any other express indication that this was the nature of the application being made. It referred to a “European Family Permit Visa” which, objectively viewed, was at least consistent with an application for an EU Settlement Scheme Family Permit, the drop-down box for which had been selected (even if it could also be said to be consistent with an EEA family permit under the 2016 Regulations). In those circumstances, it was not unreasonable for the ECO to treat it as such, and not to review the contents of the application and consider whether it had been correctly advanced.

47. As explained at [12] above, the First-tier Tribunal judge decided this issue on the basis that CP did not oblige an ECO to apply any other law or application criteria other than that under which the application was made. We consider that this was correct. We are fortified in this by the Upper Tribunal’s decision in Batool and our findings in respect of Articles 18(1)(o) and 18(1)(r), as set out under Issue (7) below.

48. However, even if Ahmed is correct, and it is appropriate for an ECO to look beyond the category of application selected on the drop-down menu, that approach does not assist the appellant for the reasons set out above.

49. We therefore conclude that the respondent had not made an EEA decision for the purposes of Regulation 2 of the 2016 Regulations, such that the First-tier Tribunal was correct to find as it did at [23] of its decision that it was not obliged to determine the appeal with reference to the 2016 Regulations.

Issue (2): Did the appellant’s application comply with Regulation 21 of the 2016 Regulations?

50. As noted at [18] above, in granting permission Upper Tribunal Judge O’Callaghan identified Regulation 21 of the 2016 Regulations as a potential difficulty for the appellant’s case.

51. Regulation 21 provides as follows:

“(1) An application for documentation under this Part, or for an EEA family permit under Regulation 12, must be made—

(a) online, submitted electronically using the relevant pages of www.gov.uk; or

(b) by post or in person, using the relevant application form specified by the Secretary of State on www.gov.uk.

(2) All applications must—

(a) be accompanied by the evidence or proof required by this Part or Regulation 12, as the case may be, as well as that required by paragraph, within the time specified by the Secretary of State on www.gov.uk; and

(b) be complete.

(3) An application for a residence card or a derivative residence card must be submitted while the applicant is in the United Kingdom.

(4) When an application is submitted otherwise than in accordance with the requirements in this Regulation, it is invalid and must be rejected.

(4A) An application for documentation under this Part, or for an EEA family permit under Regulation 12, is invalid where the person making the application is subject to a removal decision made under Regulation 23(6)(b), a deportation order made under Regulation 32(3) or an exclusion order made under Regulation 23(5).

(5) Where an application for documentation under this Part is made by a person who is not an EEA national on the basis that the person is or was the family member of an EEA national or an extended family member of an EEA national, the application must be accompanied... by a valid national identity card or passport in the name of that EEA national.

(6) Where—

(a) there are circumstances beyond the control of an applicant for documentation under this Part; and

(b) as a result, the applicant is unable to comply with the requirements to submit an application online or using the application form specified by the Secretary of State, the Secretary of State may accept an application submitted by post or in person which does not use the relevant application form specified by the Secretary of State.”

52. Ms Ahmed submitted that even if the respondent was obliged to consider the appellant’s application as if it had been made under the 2016 Regulations, it was not a valid application for an EEA family permit because it did not comply with Regulation 21(1)(a) thereof. This was because it was not submitted electronically using the relevant web page of www.gov.uk for EEA family permits: instead the appellant selected the different web page to apply for an EUSS family permit. As the application was invalid, Regulation 21(4) would have required the respondent to reject it.

53. Mr Biggs argued that the application complied with Regulation 21(1)(a). Although the wrong option was selected, the appellant nevertheless used the web page specified for an application under the 2016 Regulations, as the www.gov.uk website used the same web pages for EEA applications and EUSS applications, albeit that an applicant had to make selections within at least one of the web pages identifying which route to immigration status the applicant was using. He submitted that bearing in mind the terms of Regulation 21(1)(a), selecting the wrong option on the right web page could not itself invalidate the application under the 2016 Regulations, at least not if it was apparent that the intention of the applicant was to apply for a family permit.

54. He observed that the respondent had adduced no evidence in support of her assertion that the appellant did not use the relevant page of www.gov.uk to apply for an EEA family permit. Given that the respondent should have access to the relevant evidence but had chosen not to provide it, he submitted that the unsupported assertion should not be accepted, in reliance on Royal Mail Group Ltd v Efobi [2021] UKSC 33; [2021] 1 WLR 3863 at [41]. Further, he noted that the respondent’s assertion as to the way in which the www.gov.uk site operated was inconsistent with her position before, and the decision of the Upper Tribunal in, Ahmed, recorded at [23] of the decision thus:

“It is our understanding from submissions made in this case (and in a similar case in today's list) which were not challenged by [the Senior Home Office Presenting Officer], that to make either an EUSS family permit application or an application under the Immigration (EEA) Regulations 2016, the appellant goes to the same web page which offers the same form (regardless of which application is made) at the same URL address. That form is completed by selecting preprepared answers from a drop-down menu. On the first page of the form, a drop-down menu offers the choice between proceeding with application for an EUSS family permit, or, alternatively proceeding with an application under the 2016 Regulations”.

55. We note that the description of the manner in which the website operates summarised in Ahmed at [23] is broadly consistent with Mr Uddin's description of using it. Further, the respondent was aware from the time of the adjourned hearing in this case in October 2022 that the manner in which the website operates was likely to be an issue on this appeal, but has chosen not to adduce any evidence about it. That is particularly surprising if she wished to seek to persuade us that the finding made in Ahmed, stated to be without demur from the respondent in that case, was actually incorrect.

56. We therefore consider it more likely that the description of how the website operates set out in Ahmed is correct. However, the appellant did not select the correct option within the website to apply for a permit under the 2016 regulations; and for the reasons set out under Ground (1) did not otherwise make clear that she was seeking to do so. It was not therefore an application made in accordance with Regulation 21(1)(a). However, this issue is immaterial given our conclusion on Issue (1).

Issue (3): If the appellant's application did not comply with Regulation 21 of the 2016 Regulations, did Articles 18(1)(o) and 18(1)(r) of the Withdrawal Agreement nevertheless require the respondent to treat it as an application under the 2016 Regulations?

57. Mr Biggs submitted that reliance by the respondent or the First-tier tribunal on the suggestion that Regulation 21 was not satisfied to argue that a right to appeal under the 2016 Regulations did not arise would be contrary to Article 18(1)(o). That Article at least required the respondent to allow the appellant to confirm whether she sought to apply under the 2016 Regulations, or under the EUSS, or both, and if necessary to give her the chance to vary the December 2020 application accordingly. This was so that she could "correct any deficiencies, errors or omissions".

58. Further, he submitted that the respondent and the First-tier Tribunal should be precluded from relying on a procedural deficiency that would or could have been remedied had Article 18(1)(o) been complied with: to do otherwise would be to permit the respondent to rely on her own breach of Article 18(1)(o), which would be inconsistent with Article 18(1)(r).

59. This aspect of Ground (1) overlaps substantially with Mr Biggs' submissions on Ground (2), and so we consider it further under that heading below.

Issue (4): Was any error of law by the First-tier Tribunal material to the decision?

60. Ms Ahmed submitted that even if the appellant had received an adverse EEA decision for the purposes of the 2016 Regulations this would not have availed her. This was because the ECO made the decision under challenge on 25 January 2021. By that date, the 2016 Regulations had been revoked subject to the saving and modifying provisions in Schedule 3 to the Immigration and Social Security Co-ordination (EU Withdrawal) Act 2020 (Consequential, Saving, Transitional and Transitory Provisions) (EU Exit) Regulations 2020 ("the CSTT

Regulations”). The combined effect of paragraphs 5(1)(d) and 6 of schedule 3 was that it would not have been open to the First-tier Tribunal to allow the appeal under the 2016 Regulations as saved and modified, only potentially under the citizens’ rights agreements, which was a ground of appeal the appellant had under the CRA Regulations in any event.

61. Mr Biggs submitted that this argument was misconceived because (i) it failed to have regard to the entirety of the scheme of schedule 3 to the CSTT Regulations; (ii) it was inconsistent with the position of the Upper Tribunal and the respondent recorded in Batool at [67]; and (iii) it was inconsistent with the position taken by the respondent at page 11 of her policy entitled “EU Settlement Scheme Family Permit and Travel Permit” (version 4).

62. As we have found no error of law in the First-tier Tribunal’s approach under Ground (1) we do not need to determine the materiality issue. Had we been required to do so, we would have found in the appellant’s favour on it: we consider Mr Biggs’ submissions, in particular the elements of it summarised at (i) and (ii) above, persuasive.

63. For all these reasons Ground (1) fails.

Ground (2)

64. Ground (2) asserts that the First-tier Tribunal materially erred in law in respect of its interpretation and application of Article 18(1) of the Withdrawal Agreement, in particular Articles 18(1)(o) and (r). This is because Article 18(1)(o) required the respondent to consider the substance of the appellant’s application rather than insist rigidly on requirements of form, and the failure to comply with this obligation meant that the respondent breached Article 18(1)(r) by acting disproportionately. It was argued that the appeal should also have been allowed by the First-tier Tribunal on this basis.

65. Articles 18(1)(o) and 18(1)(r) of the Withdrawal Agreement provide that:

“Article 18

Issuance of residence documents

1.The host State may require Union citizens or United Kingdom nationals, their respective family members and other persons, who reside in its territory in accordance with the conditions set out in this Title, to apply for a new residence status which confers the rights under this Title and a document evidencing such status which may be in a digital form.

Applying for such a residence status shall be subject to the following conditions:

...(o) the competent authorities of the host State shall help the applicants to prove their eligibility and to avoid any errors or omissions in their applications; they shall give the applicants the

opportunity to furnish supplementary evidence and to correct any deficiencies, errors or omissions...

(r) The applicant shall have access to judicial and, where appropriate, administrative redress procedures in the host State against any decision refusing to grant the residence status. The redress procedures shall allow for an examination of the legality of the decision, as well as of the facts and circumstances on which the proposed decision is based. Such redress procedures shall ensure that the decision is not disproportionate...".

Issue (5): Was Article 18 of the Withdrawal Agreement irrelevant to the appellant's case because she did not "reside in" the territory of a party to the Agreement?

66. Ms Ahmed submitted that the provisions of Article 18 of the Withdrawal Agreement are irrelevant to the appellant's application, the respondent's decision or this appeal. That is because the appellant did not make an application pursuant to Article 18(1) of the Withdrawal Agreement. This means an application "for a new resident status" which may be made by EU citizens and their family members "who reside in [the UK's] territory in accordance with the conditions set out in this Title", the requirements of which are reflected in Appendix EU to the Immigration Rules. The appellant does not reside in the UK and she did not make an application under Appendix EU. She resides in Bangladesh and applied under Appendix EU (Family Permit).

67. Mr Biggs highlighted that this argument was not part of the basis on which the First-tier Tribunal rejected the appellant's reliance upon Article 18(1)(o). The respondent was therefore seeking to uphold the decision of the First-tier Tribunal on a different basis to the one given. In those circumstances the respondent was obliged to raise the point in her Rule 24 response in accordance with SSHD v Devani [2020] EWCA Civ 612; [2020] Imm AR 1183 at [12] and [29]-[35] and Smith (appealable decisions; PTA requirements; anonymity [2019] UKUT 216 (IAC); [2019] Imm AR 1325 at [48]-[59] and any application to amend her Rule 24 response in this respect would now be far too late.

68. In any event, he submitted that the respondent's interpretation of Article 18, which would substantially reduce its scope and mean it did not apply to applications made by EU nationals, their family members and their extended family members who are outside the UK, was wrong. This was because such an interpretation (i) would undermine the apparent purposes and objectives of the Withdrawal Agreement as set out in the recital; (ii) was inconsistent with the overall scheme of the Withdrawal Agreement, in particular, the personal scope provisions in Article 10(1)(e) and 10(3), which clearly applied to people outside the UK; (iii) was inconsistent with Batool where the Upper Tribunal gave no indication that there was any doubt that Article 18 could apply to applications by extended family members who were outside the UK; and (iv) was inconsistent with Celik at [62] where the Upper Tribunal held that:

"The parties to the Withdrawal Agreement must have intended that an applicant, for the purposes of sub-paragraph (r), must include

someone who, upon analysis, is found not to come within the scope of Article 18 at all; as well as those who are capable of doing so but who fail to meet one or more of the requirements set out in the preceding conditions”.

69. In Batool, the appellants were living in Pakistan when they made applications on 3 February 2020 under the EUSS. Their applications were refused by the respondent on 20 February 2020 on the basis that none of them met the eligibility requirements for an EUSS family permit. One of the arguments advanced was that Article 18 required the United Kingdom to issue residence documents to family members and other persons, that expression being a shorthand for extended family members and those in a durable relationship: Batool at [16]. We agree with Mr Biggs that in considering the appellants’ arguments about Article 18, it was no part of the Upper Tribunal’s reasoning that this Article was not available to the appellants as extended family members who were outside the UK at the time of their applications: Batool at [70]-[73].

70. Ms Ahmed lodged further submissions on this issue after the hearing (with our permission). She argued that although the First-tier Tribunal judge had considered Article 18, this appeared to have been of the judge’s own motion rather than as a result of the submissions from the parties. The Article 18 point was first raised by the appellant in the appeal after the respondent’s Rule 24 response had been filed. The overriding objective dictated that the respondent be able to rely on this point.

71. Given the importance of the Article 18 arguments to the appeal, we consider that it is appropriate to permit the respondent to respond to them in full, notwithstanding her failure to apply to amend her Rule 24 response to take this point. However we do not consider that this particular aspect of her Article 18 submissions is persuasive for the reasons given by Mr Biggs. We note in particular that the out-of-country basis on which the applications were made was not considered an issue in Batool.

Issue (6): Was the appellant entitled to rely on Article 18 of the Withdrawal Agreement?

72. Article 10(3) of the Withdrawal Agreement provides that:

“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”.

73. Mr Biggs submitted that the First-tier Tribunal appeared to accept that the appellant fell within the personal scope of Title II, Chapter 1 of the Withdrawal Agreement under Article 10(3). This was correct because (i) Article 10(3) has an autonomous meaning and should not be confined to applications for facilitation of entry and residence that comply with Regulation 21: what matters for the purposes of Article 10(3) is the substance of the application; (ii)

for the reasons advanced under Ground (1), she had made a valid application under the 2016 Regulations which complied with the requirements of Regulation 21; (iii) this meant that she had sought to facilitate her entry and residence in to the UK as an extended family member falling within Article 3(2) of Directive 2004/38 in time; and (iv) if there was any formal difficulty in respect of that application, it would be contrary to Article 18(1)(o) to deny it. The fact that the appellant was within the personal scope provisions in Article 10(3) distinguished her case from the facts of Batool (see [66] thereof).

74. Further, he submitted that in Celik at [62] (see [68] above) it was expressly acknowledged that an applicant could benefit from the protections of Article 18(1)(o) even if they did not satisfy the personal scope provisions in Article 10.

75. Ms Ahmed submitted that the appellant was not within the personal scope of the Withdrawal Agreement. An application for facilitation of entry for the purposes of personal scope means an application for an EEA family permit under the 2016 Regulations, which meets the validity requirements set out in Regulation 21 thereof, and the appellant had made no such application.

76. It is clear that a key part of the appellant's case on personal scope relies on whether or not she had made an application under the 2016 Regulations. For the reasons set out under Ground (1) we find that the ECO was entitled to conclude that she had not.

77. To the extent that the arguments on personal scope rely on whether Article 18(1)(o) required the respondent to address any deficiencies in the appellant's application, we address them under Issue (7).

78. Beyond that, we do not consider it necessary to reach a final view on this issue. Rather, we are content to accept, for the purposes of argument, that the appellant can, in principle, invoke Article 18 on the basis of Celik at [62].

Issue (7): Did the respondent breach Articles 18(1)(o) and (r) by not considering the substance of the appellant's application and thus by acting disproportionately?

79. Mr Biggs relied on R (Independent Monitoring Authority for the Citizens' Rights Agreements) v SSHD [2022] EWHC 3274 (Admin) at [64]-[70] and [128]-[136] for the proposition that in interpreting the Withdrawal Agreement, it is necessary to consider its purposes, objects and context. Ms Ahmed did not dispute that this was the correct approach.

80. He argued that the First-tier Tribunal's rejection of the arguments relating to Article 18 at [26]-[27] of its decision (see [15]-[16] above) was wrong in law. The Tribunal's finding in respect of the burden being on the applicant is inconsistent with the language and purpose of Article 18(1)(o). The failure to comply with the Article 18(1)(o) obligation and consider the substance of the appellant's application rather than insisting rigidly on requirements of form meant that the respondent breached Article 18(1)(r) by acting disproportionately. Bearing in mind the language and purpose of the relevant

parts of the Withdrawal Agreement, Article 18(1)(o) and/or (r) can and should be read as at least imposing a duty on the respondent to give the appellant the opportunity to correct an error or omission in her application that meant, or may well have meant, that she lost out on her legal right (or her right to seek) a family permit or entry under the 2016 Regulations.

81. Further, he submitted that there is no good reason why Article 18(1)(o) should be read narrowly to exclude errors or omissions of this sort. The very purpose of the right under Article 18(1)(o) is to allow for defects in an application including defects going to validity to be addressed without prejudicing the position of the applicant. The parties to the Withdrawal Agreement must have intended to allow the sort of defects that had arisen here to be addressed. The construction he contended for was consistent with the language and context of the provision, the objects and purposes of the Withdrawal Agreement, and with fairness and common sense

82. On that basis, he submitted that there had been a breach of Article 18(1)(o) and/or (r) and the First-tier Tribunal should have allowed the appeal on this basis, even if it was proceeding only under the CRA Regulations. Finally, he contended that the respondent's reliance on Batool was misconceived, because Batool had not considered the argument made in respect of Ground (1) in this case or Article 18(1)(o).

83. Ms Ahmed submitted that the appellant did not benefit from Article 18 and could not establish that her Withdrawal Agreement rights had been breached. She relied on the findings of the Upper Tribunal in Batool at [70]-[73] to this effect:

"70. Mr De Mello seeks to draw support from Article 18.1(e) of the Withdrawal Agreement, whereby the host State "shall ensure that any administrative procedures for applications are smooth, transparent and simple, and that any unnecessary administrative burdens are avoided". Mr De Mello also relies upon Article 18.1(f), which requires application forms to be "short, simple, user-friendly and adapted to the context of this Agreement".

71. The guidance on www.gov.uk, however, shows that the Secretary of State has been at pains to provide potential applicants with the relevant information, in a simple form, including highlighting the crucial distinction between "close family members" and "extended family members". That is a distinction which, as we have seen from the Directive and the case law, is enshrined in EU law. It is not a novel consequence of the United Kingdom's leaving the EU. It is, accordingly, not possible to invoke sub-paragraphs (e) and (f) of Article 18 as authority for the proposition that the respondent should have treated one kind of application as an entirely different kind of application.

72. Mr De Mello also invoked Article 18.1(r). This requires redress procedures to ensure that the decision refusing to grant the residence status "is not disproportionate". It cannot, however, be disproportionate for the respondent and the Secretary of State, faced with the scale of EUSS applications, to devise and operate a system which draws attention to the two fundamentally different

ways in which a family application should be made, and which then determines applications by reference to what an applicant is specifically asking to be given.

73. The upshot is that the appellants cannot show their rights under the Withdrawal Agreement were breached by the respondent's decisions. The appellants cannot show that those decisions were not in accordance with Appendix EU (FP). Accordingly, the First-tier Tribunal could not allow their appeals by reference to Regulation 8 of the 2020 Appeal Regulations”.

84. We consider that Ms Ahmed was correct to draw support from Batool. The above passages make clear that the Upper Tribunal did not accept that Articles 18(1)(e) or (f) 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”. We cannot identify any 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, we do not accept that Article 18(1)(o) required the respondent to treat the appellant’s application as something that it was not stated to be; or to identify errors in it and then highlight them to her.

85. As the First-tier Tribunal judge noted, 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, we do not accept that Article 18(1)(o) required 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]. Contrary to Mr Biggs’ submission, this does provide 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.

86. Accordingly, Ground (2) fails.

87. It follows that we do not accept Mr Biggs’ submissions on the impact of Article 18(1)(o) on any breach of Regulation 21, summarised under Issue (3) of Ground (1) above, either.

88. For all these reasons, despite the comprehensive submissions of Mr Biggs, the appeal is dismissed.

Notice of Decision

89. The making of the decision of the First-tier Tribunal did not involve an error on a point of law requiring it to be set aside. We do not set aside Judge Rodger's decision and his decision therefore stands.

Mrs Justice Hill

Sitting as a Judge of the Upper Tribunal
Immigration and Asylum Chamber

3 February 2023