



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

Appeal Number:

UI-2022-002804 (EA/03237/2021)

UI-2022-002806 (EA/03241/2021)

UI-2022-002807 (EA/03242/2021)

UI-2022-002808 (EA/08499/2021)

UI-2022-002809 (EA/08506/2021)

THE IMMIGRATION ACTS

Heard at Field House

**Decision & Reasons
Promulgated**

On 22 September 2022

On 6 November 2022

Before

**UPPER TRIBUNAL JUDGE BLUNDELL
& DEPUTY UPPER TRIBUNAL JUDGE DOYLE**

Between

ENTRY CLEARANCE OFFICER (Sheffield)

Appellant

and

**RACWI MOHAMED AHMED
RAHIMA MOHAMED AHMED
RASHA MOHAMED AHMED
RIHAAM MOAHMED AHMED
RUWEIDA MOHAMED AHMED
(ANONYMITY DIRECTION NOT MADE)**

Respondent

Representation:

For the Appellant: Mr S Kotas, Senior Home Office Presenting Officer

For the Respondent: Mr M West, counsel, instructed by Affinity Law Seven Solicitors

DECISION AND REASONS

1. We have considered whether any parties require the protection of an anonymity direction. No anonymity direction was made previously in respect of these Appellants. Having considered all the circumstances and evidence we do not consider it necessary to make an anonymity direction.

2. The Entry Clearance Officer brings these appeals but in order to avoid confusion the parties are referred to as they were in the First-tier Tribunal. This is an appeal by an Entry Clearance Officer against a decision of First-tier Tribunal Judge Atkinson, promulgated on 11 May 2022, which allowed the Appellants' appeals on Immigration (EEA) Regulations 2016 grounds.

Background

3. The Appellants are five siblings born on 1 September 1999, 20 February 2001, 26 June 2002, 21 October 2003, and 30 August 2007. All five appellants are Somali nationals.

4. On 30 December 2020, all five appellants (together with both of their parents) made applications to join the appellants' brother in the UK. The appellants' brother is a Dutch citizen exercising European Community treaty rights in the UK. The respondent refused all of the applications treating each of the five applications as applications under the EU Settlement Scheme (EUSS). The respondent considered appendix EU (Family Permit) to the Immigration Rules and decided that the appellants could not fall within the definition of family members contained there.

The Judge's Decision

5. The Appellants appealed to the First-tier Tribunal. First-tier Tribunal Judge Atkinson ("the Judge") allowed each of the appeals against the Respondent's decisions, saying

Appeals on consideration of 2016 EEA regulations are allowed

6. Grounds of appeal were lodged by the Respondent and on 20 June 2022 Judge Boyes gave permission to appeal stating (inter alia)

The grounds assert that the Judge erred in proceeding in light of the adjournment request and in any event erred in the application of the relevant law. The matter should have been adjourned following application in light of the UT case upon which judgement is expected.

The Hearing

7. The Appellants were represented by Mr M West, of counsel. The respondent was represented by Mr S Kotas, a Senior Home Office Presenting Officer.

8. For the respondent, Mr Kotas moved the grounds of appeal. He referred us to [62] and [63] of Batool and others (other family members: EU exit) [2022] UKUT 00219 (IAC). Mr Kotas asked us to consider the appellants' applications. He told us that the applications, although submitted on 30 December 2020, were applications made for entry clearance under appendix EU(Family Permit) to the Immigration Rules. Mr Kotas emphasised that at the date of application each appellant chose one of two possible applications. The appellants were asked to choose to either apply for entry clearance as extended family members under regulations 8 and 12 the Immigration (EEA) Regulations 2016, alternatively the appellants could submit an application under appendix EU (Family Permit) for an EUSS family permit.

9. Parties agree that the appellants submitted their applications online, using the Gov.UK website. Parties agree that, there, an applicant is faced with one form (the same form is used for both possible applications) to be completed by choosing alternative drop-down answers to questions on the form.

10. Mr Kotas told us that each appellant had chosen an answer on the first page of the online form which said that they intended to apply for EUSS family permits. Mr Kotas told us that in selecting that drop-down answer, the appellants have irrevocably embarked on an application for an EUSS family permit, which is distinct from an application under the Immigration (EEA) Regulations 2016. Mr Kotas told us that it was not for the Respondent to consider whether the applicants have mistakenly embarked on a misconceived application, even though all of the supporting documents referred to the Immigration (EEA) Regulations 2016. The documents supporting each application were the documents required by Regulation 21 of the Immigration (EEA) Regulations 2016.

11. Mr Kotas told us that the appellants cannot succeed in this appeal because they have each made a form filling mistake which was fatal to their original applications.

12. For the appellants, Mr West drew our attention to the covering letter dated 30 December 2020, which accompanied the applications. He told us that that letter made it clear that the appellants intended to submit an application under the Immigration (EEA) Regulations 2016, because the letter quoted those regulations, and because the letter cites caselaw relevant to the Immigration (EEA) Regulations 2016. Mr West conceded that the appellants cannot succeed with an EUSS application and can only

succeed as extended family members relying on regulations 8 & 12 of the 2016 Regulations. He readily accepted that the respondent was not required to consider the applications under the 2016 Regulations merely because the applications had seemingly been made under the EUSS scheme; his argument was, instead, that the applications had clearly been made on the former basis and that the selection of the latter option from the drop-down menu on the form was clearly and obviously an error.

13. Mr West told us that there are two questions raised in these appeals:

(i) Were the appellant's applications requests for facilitation of residence in terms of article 10(3) of the Withdrawal Agreement? (or, put another way, did they, in reality, make an application under the 2016 Regulations) and, if they did,

(ii) What remedy is available in the First-tier Tribunal?

14. Mr West submitted that the answer to the first of these questions was that the appellants had plainly applied for facilitation of residence under the 2016 Regulations and that the answer to the second was that the First-tier Tribunal should have allowed the appeal on the basis that the decision was not in accordance with Article 10(3) of the Withdrawal Agreement.

15. Mr Kotas adhered to the grounds of appeal and insisted that a fair reading of the letter accompanying the applications dated 30 December 2022 leads to the conclusion that the appellants submitted applications under Appendix EU (Family Permit) because the words "*Close Family Members*" were used repeatedly, and those words reflect the terminology contained in Appendix EU (Family Permit).

Analysis

16. Both Mr West and Mr Kotas agree that the answer to question [13(ii)] above, is found in the grounds of appeal available for EUSS decisions, which are set out in Regulation 8 of The Immigration (Citizens Rights Appeals) (EU Exit) Regulations 2020. There are two grounds of appeal; they are (a) that the decision is not in accordance with the immigration rules or (b) the decision is not in accordance with the Withdrawal Agreement.

17. Having considered regulation 8 of the Immigration (Citizen Rights Appeals) (EU Exit) Regulations 2020, both Mr Kotas and Mr West agreed that the Judge's decision that the appeals succeed under the Immigration (EEA) Regulations 2016 is wrong and that even if the respondent's appeal does not succeed, the limits of the appellants' success must be that their appeals are allowed, solely to the extent that they are not in accordance with the Withdrawal Agreement.

18. The central issue in this case is therefore whether or not the appellants' applications were, in fact, applications under the Immigration (EEA) Regulations 2016. Article 10 (2) & (3) of the Withdrawal Agreement says

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

3. Paragraph 2 shall also apply to persons falling under points (a) and (b) of Article 3(2) of Directive 2004/38/EC who have applied for facilitation of entry and residence before the end of the transition period, and whose residence is being facilitated by the host State in accordance with its national legislation thereafter.

19. These appeals are resolved by a combination of common sense and law. 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.

20. The answer to the question posed at [13(i)] (above) is found in the appellants' solicitor's covering letter which accompanied the applications and is dated 30 December 2020. Regulation 21 of the Immigration (EEA) Regulations 2016 provides for the method of making a valid application under those regulations. Regulation 21 specifies the documentary evidence which is necessary to support a valid application.

21. The covering letter dated 30 December 2020 lists the documents which accompanied the applications. Those are documents which meet the requirements of Regulation 21 of the 2016 Regulations. The covering letter dated the December 2020 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 caselaw 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).

22. Batool tells us that there are two distinct categories of application, but the guidance given there only provides limited help on the particular facts and circumstances of these appeals. When we look at the documents produced to support the applications and the wording of the explanatory covering letter dated 30 December 2020, we can see that the intention of each appellant was to submit an application under the 2016 Regulations. It is common ground that the appellants could not succeed with an application of the EUSS scheme. That common ground supports our conclusion that the appellants intended to apply under the 2016 Regulations.

23. It is our understanding from submissions made in this case (and in a similar case in today's list) which were not challenged by Mr Kotas, that to make either an EUSS family permit application or an application under the Immigration (EEA) Regulations 2016, the appellant goes to the same webpage 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 an application for an EUSS family permit, or, alternatively, proceeding with an application under the 2016 Regulations.

24. The appellant submitted an application online. The words on the documents used to support the application could only indicate to a reasonable decision-maker that the appellants made an application under the 2016 Regulations. The fork in the road which lead to confusion and ambiguity was selecting the incorrect preprepared answer from a drop-down menu in one box on the first page of the same form.

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.

27. The Respondent's decisions, against which the appellants appeal, are therefore a breach of the Withdrawal Agreement because they do not comply with article 10(3) of the Withdrawal Agreement. Contrary to the view she took, the appellants had in reality made an application for facilitation under the 2016 Regulations before 30 December and the

respondent was required by the Withdrawal Agreement to consider them as such.

28. The Judge's decision promulgated on 11 May 2022 contains a material error of law because the Judge's decision is that the appeals are allowed under the 2016 Regulations. The appeals are appeals against decisions made under appendix EU (Family Permit) to the Immigration Rules. The only competent grounds of appeal are found in regulation 8 of the Immigration (Citizen Rights Appeals) (EU Exit) Regulations 2020.

29. In granting the appeals under the 2016 Regulations, the Judge exceeded his jurisdiction. That is a material error of law. We therefore set the decision aside.

30. Although we set the Judge's decision aside, there is nothing wrong with the Judge's fact-finding exercise. We find that we can preserve the Judge's findings of fact and substitute our own decision.

31. Mr West told us that his position before the First-tier Tribunal was that the appeals should be allowed to the limited extent that they are not in accordance with the Withdrawal Agreement.

32. We substitute our own decision that the decisions appealed against breach article 10(3) of the Withdrawal Agreement.

33. We have found that the appellants submitted applications for entry clearance as extended family members under the Immigration (EEA) Regulations 2016. We therefore find that the Secretary of State still has to decide, in accordance with the law, the appellants' applications under the Immigration (EEA) Regulations 2016.

Decision

34. We find that the decision of First Tier Tribunal Judge Atkinson promulgated on 11 May 2022 contains a material error of law. We therefore set the decision aside. We substitute the following decision.

35. The appeals are allowed. The applications remain outstanding and await a lawful decision by the Secretary of State.

Signed **Paul Doyle**

Date 27 September 2022

Deputy Upper Tribunal Judge Doyle

NOTIFICATION OF APPEAL RIGHTS

1. A person seeking permission to appeal against this decision must make a written application to the Upper Tribunal. Any such application must be **received** by the Upper Tribunal within the **appropriate period** after this decision was **sent** to the person making the application. The appropriate period varies, as follows, according to the location of the individual and the way in which the Upper Tribunal's decision was sent:
2. Where the person who appealed to the First-tier Tribunal is **in the United Kingdom** at the time that the application for permission to appeal is made, and is not in detention under the Immigration Acts, the appropriate period is **12 working days (10 working days, if the notice of decision is sent electronically)**.
3. Where the person making the application is in detention under the Immigration Acts, **the appropriate period is 7 working days (5 working days, if the notice of decision is sent electronically)**.
4. Where the person who appealed to the First-tier Tribunal is **outside the United Kingdom** at the time that the application for permission to appeal is made, the appropriate period is **38 days (10 working days, if the notice of decision is sent electronically)**.
5. **A "working day" means any day except a Saturday or a Sunday, Christmas Day, Good Friday or a bank holiday.**
6. **The date when the decision is "sent" is that appearing on the covering letter or covering email.**