



IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2022-002114
First-tier Tribunal No:
EA/10649/2021

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On the 31 May 2023

Before

UPPER TRIBUNAL JUDGE STEPHEN SMITH

Between

The Entry Clearance Officer

Appellant

and

Mr Hudu Osumane Zeba
(NO ANONYMITY DIRECTION MADE)

Respondent

Representation:

For the Appellant: Ms A. Everett, Senior Home Office Presenting Officer
For the Respondent: Mr S. Zeba Ousmane (brother of the respondent)

Heard at Field House on 22 May 2023

DECISION AND REASONS

1. By a decision promulgated on 22 February 2022, First-tier Tribunal Judge Morgan (“the judge”) allowed an appeal brought under the Immigration (Citizens' Rights Appeals) (EU Exit) Regulations 2020 against a decision of the Entry Clearance Officer dated 30 April 2021. The Entry Clearance Officer’s decision was to refuse an application brought by Mr Hudu Osumane Zeba, a citizen of Ghana, under the EU Settlement Scheme (“the EUSS”) for leave to enter to reside with his brother, Seidu Zeba Ousmane (“the sponsor”), a citizen of Italy residing in the UK, on 8 December 2020. The judge allowed the appeal on the basis that the decision failed to give effect to Article 3 of Directive 2004/38/EC, concerning “extended

family members”, as applied by the EU Withdrawal Agreement, and the decision was disproportionate.

2. The Entry Clearance Officer now appeals against the judge with the permission to appeal of Upper Tribunal Judge Kebede.
3. Although this is an appeal of the Entry Clearance Officer, for ease of reference I will refer to the appellant before the First-tier Tribunal as “the appellant”.

Factual background

4. The appellant is a citizen of Ghana. He applied for entry clearance on 8 December 2020 under Appendix EU (Family Permit) of the Immigration Rules. The Entry Clearance Officer refused the application because the appellant was not a “family member of a relevant EEA citizen” as defined in the EUSS. The appellant and the sponsor were adult brothers, which is a category of relationship that is not included in the definition of “family member”.
5. The judge accepted that the appellant and sponsor were related as claimed. He found that the appellant was dependent upon the sponsor. The appellant, who was then represented by Mr Kannangara, had submitted that, had the application been made under Immigration (European Economic Area) Regulations 2016 (“the 2016 Regulations”), the appellant would have succeeded as an “extended family member”. In the alternative, Mr Kannangara had submitted that the appeal should be allowed by reference to the EU Withdrawal Agreement directly, on the basis that the appellant was an extended family member as defined by Article 3(2) to Directive 2004/38/EC concerning the rights enjoyed by citizens of the European Union to move and reside freely in the territories of EU Member States.
6. The judge accepted the second submission. At paragraph 9 he said:

“I am persuaded by the appellant’s submissions and find that the respondent’s decision is incompatible with the withdrawal agreement because it fails to give effect to Article 3 of the Directive. It was not in dispute that the appellant and his sponsor are brothers but for the sake of completeness I note the DNA evidence confirming this relationship. Dependency was not raised as an issue but again for the sake of completeness I find that the evidence before me demonstrates that the appellant has been dependent on his brother for financial support for an extensive period of time and has been entirely dependent on his brother since the outbreak of coronavirus in early 2020.”
7. At paragraph 10, the judge found that, because the appellant had demonstrated that he met the requirements of the EU Withdrawal Agreement, the decision was disproportionate. The judge allowed the appeal.

Issues on appeal to the Upper Tribunal

8. There are two issues on appeal.
9. First, the Entry Clearance Officer submits that, as an adult, the appellant is not a “family member” as defined by the EU Withdrawal Agreement or the EUSS. It was not open to the judge to allow the appeal on that basis.
10. Secondly, the Entry Clearance Officer submits that the appellant was outside the personal scope of the EU Withdrawal Agreement. He had not applied for his residence to be facilitated by an application under the 2016 Regulations before 31 December 2020. He had instead applied under the EUSS. He was not entitled

to any rights conferred by the Withdrawal Agreement and could not benefit from the principle of proportionality.

The hearing before the Upper Tribunal

11. The appellant (who remains outside the UK) was not legally represented before the Upper Tribunal. He was represented by the sponsor, who appeared as a litigant in person. I took steps fully to explain the process of the hearing, and what we would need to consider, to him. I ensured that he had all relevant documents. I explained that, since he was appearing as a litigant in person acting on behalf of his brother, my role was to guide him through the process, and to provide him with extra assistance. I conducted the hearing on those terms.
12. At the hearing, I allowed the appeal of the Entry Clearance Officer, set the decision of the First-tier Tribunal aside, and remade the decision, dismissing the appeal. I explained my reasons at the time and said that I would also provide full written reasons.

First issue: the appellant is not a “family member of a relevant EEA citizen”

13. The appellant’s entry clearance application was refused because the Entry Clearance Officer did not accept that he was a “family member of a relevant EEA citizen”. That term has the meaning given by Appendix EU (Family Permit) of the Immigration Rules. The definition is lengthy. It is not necessary to set it out in full here; it is summarised in the Entry Clearance Officer’s decision. It includes spouses and civil partners, dependent children under the age of 21, and dependent parents. The term as defined does not include two adult brothers. That means there was no error in that part of the Entry Clearance Officer’s decision.
14. Two adult brothers are, of course, “family members” in the ordinary sense of the term. Under EU law relating to the free movement of persons, the appellant and the sponsor are “*other family members*”. Article 3(2) of Directive 2004/38/EC, which applied to the UK until 11PM on 31 December 2020, provided that “*other family members*” of EU citizens may have a right under EU law to accompany or join their EU citizen family members living in a Member State other than their Member State of nationality if a number of conditions are met. One of the conditions is that the other family member must be “dependent” on their EU citizen family member in the country from which they come. If they are dependent and will continue to be dependent upon them on arrival in the host Member State, under Article 3(2)(a) the other family member is entitled to have their residence “facilitated” on preferential terms by the host Member State. Importantly, just because someone is entitled to have their residence “facilitated” under Article 3(2)(a) does not mean that they will automatically be given a right to reside by the host Member State: a positive decision is still required by the host Member State.
15. The 2016 Regulations implemented Directive 2004/38/EC. Regulation 8 contained provisions relating to “other family members”, which (perhaps confusingly) it defined as “extended family members” (the appellant and sponsor in these proceedings are immediate, not extended family members, in normal parlance). The 2016 Regulations were revoked on 31 December 2020, when the “implementation period” following the UK’s withdrawal from the EU came to an end. The 2016 Regulations still apply in certain situations, such as where an application was made to the Entry Clearance Officer before 31 December 2020

which is still being considered, or where an appeal against a decision following an application made before that date is still being determined.

16. In order for an “other family member” within the meaning of Article 3(2) of the Directive to be granted entry clearance or leave under Appendix EU, it is necessary for that person first to have been recognised as an “extended family member” under the 2016 Regulations, or to have at least applied for a right to reside in that capacity, before 31 December 2020.
17. This appellant did not apply to be an “extended family member” under the 2016 Regulations before 31 December 2020. He applied for entry clearance as a “family member” under the EU Settlement Scheme, under Appendix EU (Family Permit). It was impossible for the appellant to have succeeded in that application, having not first applied or been recognised as an extended family member under the 2016 Regulations.

Second issue: Article 3 of Directive 2004/38/EC not a basis to allow the appeal

18. I now turn to why the judge was wrong to allow the appeal for the reasons he gave.
19. First, the judge was wrong to say that the Entry Clearance Officer’s decision failed to give effect to Article 3 of the Directive. The appellant had not applied for his residence to be facilitated under Article 3 of the Directive. He had not made an application under the 2016 Regulations before 11.00PM on 31 December 2020. Article 3(2) of the Directive was not capable of being engaged in these circumstances.
20. Secondly, Article 3(2) of the Directive would not have automatically led to the appellant’s appeal being allowed in any event. If the appellant met the requirements of Article 3(2), he would, at most, have been eligible to have his residence “facilitated” by the UK authorities. That means the Entry Clearance Officer would have considered whether to grant a right to reside, as a matter of domestic law, and would have conducted an “extensive examination of the personal circumstances” of the person concerned, and to justify any denial of entry or residence to such persons.
21. Thirdly, the appellant could not benefit from the principle of proportionality. He was not a beneficiary of the EU Withdrawal Agreement. That was because he had not had his residence facilitated under Article 3(2) of the Directive or applied for his residence to be facilitated in that capacity before 31 December 2020 (see Article 10(3) of the EU Withdrawal Agreement). In turn, the principle of proportionality contained in Article 18 of the Withdrawal Agreement does not apply to him.
22. The appellant had submitted to the judge that the Entry Clearance Officer should have treated the EUSS application as though it were an application under the 2016 Regulations. It is not clear whether the judge accepted that argument, because he recorded the appellant’s submissions in the alternative, concerning Article 3 of the Directive, in the same paragraph, and went on to allow the appeal on Article 3 grounds (see paragraph 9). Either way, it would have been an error to allow the appeal on that basis. The appellant did not apply for an EEA document, he applied for an EUSS Family Permit. This point was dealt with in *Batool and others (other family members: EU exit)* [2022] UKUT 219 (IAC) in these terms:

“(2) Such a person has no right to have any application they have made for settlement as a family member treated as an application for facilitation and residence as an extended/other family member.”

23. That approach was confirmed by *Siddiqa (other family members: EU exit)* [2023] UKUT 47 (IAC); the Secretary of State is not obliged to treat one type of application as though it were another.
24. It follows that the judge made an error of law by allowing the appeal. I set aside the decision, preserving all findings of fact.
25. There are no other findings of fact to be reached, so the most appropriate course is to retain the appeal in the Upper Tribunal and remake the decision acting under section 12(2)(b)(ii) of the Tribunals, Courts and Enforcement Act 2007.

Remaking the decision

26. The appellant had not applied for his residence to be facilitated as an extended family member before 11PM on 31 December 2020. That being so, his application for an EU Family Permit under the EUSS was incapable of succeeding; he is not a “relevant family member of an EEA national”, as defined by Appendix EU (Family Permit). Nor is his situation covered by the definition of “specified EEA family permit case”. There is no other basis upon which his appeal could be allowed. The appeal is dismissed.

Notice of Decision

The decision of Judge Morgan involved the making of an error of law.

The appeal of the Entry Clearance Officer is allowed.

I set aside the decision of Judge Morgan, and remake it, dismissing the appeal of the appellant before the First-tier Tribunal.

Stephen H Smith

Judge of the Upper Tribunal
Immigration and Asylum Chamber

26 May 2023