



IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM
CHAMBER

Case No: UI-2022-001434, UI-2022-
001436
UI-2022-001437 UI-2022-001435
UI-2022-001438
First-tier Tribunal No: EA/06907/2021
EA/06912/2021 EA/06916/2021
EA/06911/2021 EA/06920/2021

THE IMMIGRATION ACTS

**Decision & Reasons Issued:
On 17 August 2023**

Before

**UPPER TRIBUNAL JUDGE RIMINGTON
DEPUTY UPPER TRIBUNAL JUDGE BAGRAL**

Between

**MR MUHAMMAD ALI KHAN
MRS KHAWAR MASROOR
MR DILAWAR KHAN
MR ELIA KHAN
MR HILMAND KHAN**

(NO ANONYMITY ORDER MADE)

Appellants

and

THE ENTRY CLEARANCE OFFICER

Respondent

Representation:

For the Appellant: Mr K Ahmed, instructed by Chamber of Ahmad Barrister
For the Respondent: Mr C Avery, Home Office Presenting Officer

Heard at Field House on 27 July 2023

DECISION AND REASONS

1. The appellants applied for permission to appeal the decision of First-tier Tribunal Judge Andrews (the judge) who dismissed their appeals against the refusals by the Entry Clearance Officer (ECO) dated 7th January 2021¹ of their applications dated November 2020 for family permits under the Immigration (European Economic Area) Regulations 2016. The First-tier Tribunal hearing took place on 15th November 2021 and the decision was promulgated on 15th December 2021.
2. The appellants are husband and wife and three children who are nationals of Pakistan. They made their applications on the basis that they were extended family members of their cousin Mr A H Mirza a German national said to be exercising his treaty rights in the United Kingdom.

The Grounds of Appeal

3. Ground (i) asserted a failure to consider the evidence on the intention of the sponsor to accompany the appellants as per the witness statements of the appellants and sponsor.
4. Ground (ii) asserted there was an incorrect interpretation of regulation 12(1)(a)(ii) of the EEA regulations in relation to the qualification of the sponsor. There was a plan and intention of the sponsor and appellants to travel which was in existence at the time of the applications and because of the refusal of the ECO, the appellants had not been able to act on the plan of travel. The sponsor was entitled to travel at any time in accordance with regulation 13 of the EEA regulations.
5. Ground (iii) there was no power for the judge to raise the issues she did in relation to regulation 12 at the hearing, and there should have been an extensive examination of the issues. This was in accordance with regulation 12(3) and 12(5) of the Regulations 2006 (sic) and article 3(2)(b) of the Directive 2004/38/EC (the Directive). It was incumbent upon the ECO to give an extensive examination of the personal circumstances of the appellants and reasons justifying the refusal. Under Article 3 of the Directive the host member State also needed to justify denial of entry. The judge had no power to conduct an extensive examination or to raise new issues at the hearing. The ECO did not raise the issue of qualification of the sponsor.
6. Ground (iv) an issue was raised by the judge in violation of the Surendran guidelines and in questions of credibility the judge was duty-bound to invite the appellants to deal in submissions and or call evidence and the judge could not adopt an inquisitorial role.
7. Ground (v) the judge gave no indication that the qualification of the sponsor was determinative of the appeal and failed to give the appellants a proper opportunity to deal with the issue. The lack of request for an adjournment did not grant jurisdiction to the judge to adopt an unfair

¹ There was some confusion over the dates of the refusal but it was determined by the First-tier Tribunal these were the dates and that did not appear to be challenged.

procedure. As such the judge treated the parties unfairly and ignored the fact that directions (of the Tribunal) were not complied with.

8. Ground (vi) the judge gave an incorrect interpretation at [40] and [41] of the determination by stating that the obligation to conduct an extensive examination only arose if the appellants were accepted as EFM. This was contrary to regulation 12(4). The obligation under Section 86 of the Nationality Immigration and Asylum Act 2002 was applicable. The appeal was allowable under the 'Banger' principle.

The Hearing

9. Mr Ahmed submitted at the hearing that regulation 12 was not properly raised in the ECO's decision and the respondent had confirmed in response the Tribunal directions that she was only relying on the refusal letters. The argument was thus confined to what was said in the refusal letters. Even if he were wrong on that submission, regulation 12 and the 'will be' contained in regulation 12(1) (a) (ii) only referred to an 'intention' to travel and otherwise the entire system would be futile, and all applicants would fail. Most plans were delayed. The judge had also ignored regulation 13. Even if he were wrong on this, the judge had failed to refer or consider the parts of the statements where the appellants and sponsor had evinced their intention to come to the UK at the time of the applications. Reasons should come from the decision maker (the ECO) and not the judge. The applicant had the right to have all circumstances considered by the judge. Mr Ahmed then seemed to correct this submission by referring to the ECO. New reasoning could not be raised by the respondent at the hearing. There was a discretion within the regulations (unlike the immigration rules) to allow the application even if not all the rules were fulfilled.
10. Mr Avery confessed that he struggled with the arguments raised. There were two parts to the regulation 12(1)(a)(ii), the whole of which was clearly in issue in the refusal and the appellants given every opportunity to address the matter. It was evident from the decision that counsel for the appellants could have sought an adjournment and did not do so. The judge was entitled to take account of the evidence which related to the position at the time of the application, the decision and the hearing, and did so in order to look at the position of the sponsor. There was no procedural error. There was simply no real evidence to support the view that the sponsor was intending to exercise his treaty rights and the judge properly reasoned that point. Intention to travel is only part of the requirement and the fact that they had not travelled shed light on the intentions of travel at the relevant time. There had to be an engagement of an EEA right for an extensive examination and that was simply not engaged. The sponsor, critically, was not in attendance to give evidence at the hearing. The evidence was lacking.

Conclusions

11. The grounds were intertwined and repetitive and we have addressed the grounds as we consider logical albeit we have attempted to cover them comprehensively. We note that the refusal letters were couched in similar terms and thus the arguments and our conclusions relate to each of the appellants.

12. We cite the key provisions from the EEA regulations in so far as material for convenience and highlight the relevant sections in bold as follows:

8.—(1) In these Regulations “extended family member” means a person who is not a family member of an EEA national under regulation 7(1)(a), (b) or (c) and who satisfies a condition in paragraph (2), (3), (4) or (5).

(2) The condition in this paragraph is that the person is—

(a) a relative of an EEA national; and

(b) residing in a country other than the United Kingdom and is dependent upon the EEA national or is a member of the EEA national’s household; and either—

(i) is accompanying the EEA national to the United Kingdom or wants to join the EEA national in the United Kingdom; or

(ii) has joined the EEA national in the United Kingdom and continues to be dependent upon the EEA national, or to be a member of the EEA national’s household.

Issue of EEA family permit

12.—(1) An entry clearance officer must issue an EEA family permit to a person who applies for one if the person is a family member of an EEA national and—

(a) the EEA national—

(i) is residing in the United Kingdom in accordance with these Regulations; or

(ii) will be travelling to the United Kingdom within six months of the date of the application and will be an EEA national residing in the United Kingdom in accordance with these Regulations on arrival in the United Kingdom; and

(b) the family member will be accompanying the EEA national to the United Kingdom or joining the EEA national there.

(2) An entry clearance officer must issue an EEA family permit to a person who applies and provides evidence demonstrating that, at the time at which the person first intends to use the EEA family permit, the person—

(a) would be entitled to be admitted to the United Kingdom because that person would meet the criteria in regulation 11(5); and

(b) will (save in the case of a person who would be entitled to be admitted to the United Kingdom because that person would meet the criteria for

admission in regulation 11(5)(a)) be accompanying to, or joining in, the United Kingdom any person from whom the right to be admitted to the United Kingdom under the criteria in regulation 11(5) is derived.

(3) An entry clearance officer must issue an EEA family permit to—

(a) a family member who has retained the right of residence; or

(b) a person who is not an EEA national but who has acquired the right of permanent residence under regulation 15.

(4) An entry clearance officer may issue an EEA family permit to an extended family member of an EEA national (the relevant EEA national) who applies for one if—

(a) the relevant EEA national satisfies the condition in paragraph (1)(a);

(b) the extended family member wants to accompany the relevant EEA national to the United Kingdom or to join that EEA national there; and

(c) in all the circumstances, it appears to the entry clearance officer appropriate to issue the EEA family permit.

(5) Where an entry clearance officer receives an application under paragraph (4) an extensive examination of the personal circumstances of the applicant must be undertaken by the Secretary of State and if the application is refused, the entry clearance officer must give reasons justifying the refusal unless this is contrary to the interests of national security.

(6) An EEA family permit issued under this regulation must be issued free of charge and as soon as possible.

(7) But an EEA family permit must not be issued under this regulation if the applicant or the EEA national concerned is not entitled to be admitted to the United Kingdom as a result of regulation 23(1), (2) or (3) or falls to be excluded in accordance with regulation 23(5).

(8) An EEA family permit must not be issued under this regulation to a person (“A”) who is the spouse, civil partner or durable partner of a person (“B”) where a spouse, civil partner or durable partner of A or B holds a valid EEA family permit.

13. Ground (iii) and Ground (v). We do not accept that the judge raised issues at the hearing which she was not permitted to do. Regulation 12 of the EEA regulations was squarely raised in the decision letter which stated

‘• You have applied to accompany your EEA sponsor in the UK, however, it is noted that your EEA sponsor currently resides/works in Germany and there is no evidence to suggest that he intends to remain in the UK upon arrival and continue to support you as required. If you intend to remain in the UK permanently, we would expect to see proof that your sponsor plans to reside with or support you going forward.

I therefore refuse your EEA Family Permit application because I am not satisfied that you meet all of the requirements of **regulation 12** (see ECGs EUN2.23) of the Immigration (European Economic Area) Regulations 2016’

14. We drew Mr Ahmed’s attention to the specific citation in the reasons for refusal letter which noted the application of regulation 12. As can be seen regulation 12 contains the key elements of requirements an extended family member must fulfil, and these depend on the position also of the EEA national.
15. We also note that Mr Ahmed’s skeleton argument to the Upper Tribunal on the one hand argued that regulation 12 was not raised at all and on the other hand acknowledged that it was raised during the hearing by the Home Office Presenting Officer before the First-tier Tribunal. In his submissions Mr Ahmed told us that, when representing before the FtT, he decided to confine his arguments in the First-tier Tribunal to the issues raised in the reasons for refusal letter. He did, however, make submissions on regulation 12 as can be seen from paragraph 22 of the decision.
16. In response to the Tribunal Directions the respondent merely confirmed, we agree, that she intended to rely on her refusal letter but as we have indicated the refusal letter placed in contention the relevant issues.
17. First, as we have stated, regulation 12 was raised in the decision letter, secondly, from the decision at [21] we can see Mr Fazli made submissions on regulation 12 and so did Mr Ahmed and thirdly it is open to the judge to discuss relevant issues of law. There was no procedural unfairness. The position of the sponsor was squarely before the Tribunal.
18. Grounds (i) and (ii). We reject the assertion that the judge failed to address the relevant evidence of the ‘intention’ to come to the UK or that her interpretation was flawed.
19. The judge recorded she had considered all the witness statements. Indeed, there were numerous references by the judge to considering all the evidence and a careful reading of the decision indicated that she did so, for example see [14] and [23].
20. The sponsor’s evidence, which is critical, was considered specifically at [28]. The sponsor did not attend despite there being an opportunity to request an adjournment, as the judge recorded at [10] (i), and no application was made. Indeed, the appellants’ representative took instructions on this. The judge actually indicated that

'there were live issues in these cases. As such I said to Mr Ahmad that it may be in the appellants' interests for their sponsor to give oral evidence. We had a short recess, in order for Mr Ahmad to seek instructions. On his return he told me that his instructions were to proceed with the hearing.'

21. The judge said at [24] in relation to the absence of the sponsor

'I can decide this case only on the basis of the documents before me and on both representatives' oral submissions. And, plainly the weight I can attach to the sponsor's evidence is reduced by reason of the absence of any opportunity to cross examine him'.

22. In our view the judge could not have been clearer as to the relevance and importance of the sponsor's evidence, and it is manifest that the judge did consider all the evidence given in relation to either residence of the sponsor or his intention of coming to the UK.

23. It was also asserted that the judge's interpretation of regulation 12 was incorrect as she had not considered the *intention* of the sponsor, as identified in his witness statement. Having considered the statements and noting the paucity of evidence, the judge did not accept that the sponsor had either intended to at the date of application or did in fact exercise his treaty rights by coming to the UK as a German national.

24. At [28]-[29] the judge addressed the sponsor's residence in the UK and acknowledged the sponsor made an application under the EUSS, but no decision had been made. As Mr Avery observed, an application under the EUSS does not denote exercising treaty rights, and did not show 'residence in accordance with the EEA regulations' as required by the EEA regulations. The sponsor's EUSS application in terms of regulation 12 of the EEA regulations therefore was not relevant. Additionally, there had not even been a decision on that application. As the judge therefore reasoned correctly at [28] (i) the mere making of the application did not assist.

25. It was, in fact, asserted by the sponsor in his statement of 8th November 2021 that he had moved to UK but as the judge also recorded at [28] (ii), there was no evidence to that effect. The judge properly reasoned that there was

'no real evidence that he [the sponsor] was employed or self employed in the UK. No one gave oral evidence at the hearing which means that I heard no oral evidence in support of the sponsor's claims'.

26. The judge was entitled to state she had concerns about the evidence and to conclude *'in view of the lack of material supporting evidence, the appellants have not satisfied me on the balance of probabilities that their sponsor is currently residing and working in UK (whether on an employed or self-employed basis)*. That, as Mr Avery submitted must also shed light on their intention at the date of application and date of decision.

27. The appellants needed to show two elements under regulation 12(1)(a)(ii); that the sponsor (a) 'will be travelling to the United Kingdom within six months of the date of the application and (b) will be an EEA national residing in the United Kingdom in accordance with these Regulations on arrival in the United Kingdom. Even if 'will be' encompasses intention, the judge was clearly not satisfied on the evidence that the sponsor had produced evidence of intention to travel to and reside in the UK. The appellants needed to show that the sponsor 'will be' travelling within six months of the application and there was no satisfactory evidence in relation to such an intention or that he was here at all: mere assertions on the part of the appellants and sponsor without, for example evidence of a job in the UK (as the judge noted) would be insufficient. There was a time limit of six months from the date of application in relation to the travel and minimal evidence of even intention to travel on the part of the sponsor within the six months from the date of application. As the judge reasoned at [29]:

"Taking everything into account, I do not have enough information to make a finding as to when the sponsor started residing in the UK (assuming that has in fact happened). Specifically, the appellants have not satisfied me, even on the balance of probabilities, that their sponsor travelled to the UK and resided here, within six months of the date of the appellants' applications (as referred to in EEA Regulation 12(1)(a)(ii))."

28. Mr Ahmed submitted that the refusals had prevented the appellants from accompanying or joining the sponsor but refusal of the applications do not prevent the *sponsor* from travelling within six months of the applications if that was his intention or indeed showing his intention to do so. The judge clearly did not accept that the applicant had come to the UK when stating at [28] (ii)

"The sponsor's 8 November 2021 statement says that he has now moved to the UK, and has started working here. If that were true, I would expect the appellants to be able to provide supporting evidence of this."

29. There was no demonstration that the sponsor had even visited or had resided in the United Kingdom at all, save for the instructions of Mr Ahmed, and thus regulation 13 does not assist the appellants.

30. The judge specifically acknowledged and recorded at [32] Mr Ahmed's submission that she should consider the appellants' and their sponsor's intentions at the time of the applications. Thus, having found there was no evidence that the appellants' sponsor fulfilled regulation 12(1)(a)(i), the judge then stated at [34]:

"Regulation 12(1)(a)(ii). As stated in paragraph 29 above, the appellants have also not satisfied me that their sponsor travelled to the UK and resided here, within six months of the date of the appellants' applications. The first appellant's and sponsor's November 2020 statements state that the sponsor intended to travel to the UK, with the appellants, within 2

weeks of their visas being issued. *But it is not stated that – at that time (or at the time of the appellants’ applications) - the sponsor intended to travel and reside in the UK within 6 months of the date of the appellants’ applications (i.e., irrespective of whether the appellants’ visas had been issued by then). Taking all this into account, the appellants have also not satisfied me that the sponsor meets the requirements of EEA Regulation 12(1)(a)(ii).*”

31. On the evidence presented, the judge found therefore the appellants did not satisfy in regulation 12(1)(a)(ii) either for the sound reasons given. There was no evidence to support either the two limbs required under regulation 12(1)(a)(ii) save for the assertions in the witness statements and bare assertions are not sufficient. As the judge noted, there was no evidence of residence in the UK by the sponsor which supports the contention that there was no intention on the part of the sponsor to exercise treaty rights. Thus, even if, the thrust of regulation 12(1)(a)(ii) encompasses merely an *intention* to travel on the part of the sponsor at the date of application, there was insufficient evidence on the part of the sponsor even of such intention. Bearing in mind the absence of the sponsor who presence was flagged as important by the judge and who could have answered questions on relevant issues, the approach of the judge in criticising the lack of evidence and her identification of the paucity of the evidence, her approach was without error.
32. Ground (vi). Mr Ahmed relied on Banger to the extent that the ECO should have conducted an extensive examination of the personal circumstances of the appellants but there was no apparent evidence before the judge that the ECO did not conduct an extensive examination of the appellants’ circumstances and he unarguably applied the correct regulation. The submission of a failure to make an extensive examination was then extended by Mr Ahmed to the judge. However, critical to this appeal is regulation 12. Even if the respondent relied only on the refusal letter that was sufficient to engage consideration of regulation 12 and if the appellants, at the outset, cannot show that the EEA national was going to comply with Regulation 12 then, the appellants have no lynchpin on which to found their application and appeal and a consideration of extensive circumstances. We accept therefore that the judge was entitled to halt her consideration of regulation 12 on the basis of the failure of the sponsor to show he had ever resided in the UK. Nothing in the personal circumstances in relation to dependency affects the evidence in relation to the sponsor’s status of exercising treaty rights (or intention to) in the UK in accordance with regulation 12 (or indeed regulation 13).
33. Consideration of regulation 12 is therefore axiomatic to the extensive examination and is a precondition to any extensive examination’. If the sponsor is not evidenced to be either here or intending to be in the UK exercising treaty rights then the appellants’ eligibility under Regulations 8 and 12 must fail.

34. Ground (iv). The Surendran guidelines relate to the failure of the Home Office Presenting Officer to attend the hearing; that was not the case in this hearing as pointed out and this ground is not sustainable. Overall, we find no procedural error in the judge's decision.
35. We thus find no error of law in the judge's approach and reasoning and the decision of the First-tier Tribunal will stand.

Helen Rimington

Judge of the Upper Tribunal

Immigration and Asylum Chamber

9th August 2023