



**IN THE UPPER TRIBUNAL**  
**IMMIGRATION AND ASYLUM CHAMBER**

Case Nos: UI-2022-001443  
UI-2022-001444  
UI-2022-001445

First-tier Tribunal Nos: EA/09812/2021  
EA/09816/2021  
EA/09822/2021

**THE IMMIGRATION ACTS**

**Decision & Reasons Issued:**  
**On 4 June 2023**

**Before**

**UPPER TRIBUNAL JUDGE OWENS**  
**DEPUTY UPPER TRIBUNAL JUDGE CHAMBERLAIN**

**Between**

**ABDUL RAHIM WESAL**  
**AHSANULLAH ESSAKIL**  
**ABDUL GHAFOOR SHAH ABDUL QUDUS**

Appellants

**and**

**ENTRY CLEARANCE OFFICER**  
(Anonymity Direction not made)

Respondent

**Representation:**

For the Appellants: Not represented

For the Respondent: Mr. T. Lindsay, Senior Home Office Presenting Officer

**Heard at Field House on 17 May 2023**

**DECISION AND REASONS**

1. This is an appeal by the Appellants against a decision of First-tier Tribunal Judge S. Taylor, (the "Judge"), promulgated on 26 January 2022, in which he dismissed the Appellants' appeals against the Respondent's decisions to refuse to issue Family Permits under Appendix EU (Family Permit) to the immigration rules. The Appellants are nationals of Afghanistan who applied to join the Sponsor, the

brother of the first and second Appellants, and the son of the third Appellant. The Sponsor is a Belgian national.

2. Permission to appeal was granted by Upper Tribunal Judge Plimmer on 4 July 2022. She set out her reasons as follows:

“It is arguable that the FTT should have considered the appellants’ applications under the EEA Regulations even though they were made under the EUSS.

It is noted that the appellants do not have legal representation. In these circumstances and given the nature of the legal issue raised the respondent must file and serve a position statement 14 days before the error of law hearing (which if possible should be listed after the lead decision on this issue is promulgated).”

3. Mr. Lindsay provided a position statement at the hearing, apologising that it had not been served before.

### **The hearing**

4. The Appellants are not legally represented. The Sponsor did not attend the hearing. This was the second time that he had not attended. We were satisfied that notice of the time and place of the hearing had been sent to him at the postal address last notified to the Tribunal and also to his email. We considered that it was in the interests of justice to proceed with the hearing in the absence of the Appellants in accordance with rules 2 and 38 of the Tribunal Procedure (Upper Tribunal) Rules 2008. Mr. Lindsay made brief oral submissions.

### **Error of law**

5. When granting permission in July 2022, UTJ Plimmer did so on the basis that that it was arguable that the applications should have been considered under the Immigration (European Economic Area) Regulations 2016 (“the 2016 Regulations”). Since then, the Upper Tribunal has held in the case of Batool and others (other family members: EU exit) [2022] UKUT 00219 (IAC) that “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” [71].
6. This is further reinforced by the case of Siddiga (other family members: EU exit) [2023] UKUT 00047 (IAC) promulgated in January 2023 which states in the headnote:

*“(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](http://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 cc. 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.”*

7. The Appellants’ applications were made under the EU Settlement Scheme (the “EUSS”), not the 2016 Regulations. Mr. Lindsay provided copies of the applications at the hearing. Under the heading “Application category” each application form clearly states “I confirm that I am applying for an EU Settlement Scheme Family Permit”. There is no evidence before us, such as a covering letter sent with the applications, which indicates that the Appellants intended to apply under the 2016 Regulations. Accordingly, the Respondent was entitled to treat their applications as having been made under the EUSS and was not obliged to consider them under the 2016 Regulations. The Judge was therefore correct to find at [13] that:

“On examination of the application forms I find that the applications were clearly made under the EUSS. It was asserted that the respondent should have automatically looked at the application under the 2016 Regulations as the application was made before the end of 2020, but I found no authority for that proposition. I was not referred to any authority that the respondent was able to consider an application under the 2016 Regulations when an application is submitted under the EUSS. The appeal narrative in the appeal notices also make a similar assertion that the applications should have been considered under the 2016 Regulations, but the Grounds of Appeal cannot be used to alter the basis of the application. I am satisfied that the applications were made under the EUSS and the appeal relates to a decision under the EUSS regulations.”

8. We find that there is no error of law in the Judge’s consideration of the Appellants’ appeals under Appendix EU (Family Permit).

9. In relation to first and second Appellants, the Judge found at [15]:

“As a result, the first and second appellant are not in a category of family member which can make a first application under the EUSS and their applications must be refused. The only route for the first and second appellant to be granted leave under the EUSS is they previously had a family permit under the 2016 Regulations. In the absence of a previous family permit under the 2016 Regulations, their application under the EUSS must fail.”

10. We find that there is no error of law in his finding. The first and second Appellants had not been issued with Family Permits under the 2016 Regulations. They are not in a category of family member entitled to apply for a Family Permit for the first time under the EUSS.

11. In relation to the third Appellant, the Judge found:

“As I have found that the third appellant is the father of the sponsor, he may qualify for a family permit on the basis that he is a dependant parent. On examination of the submitted documents, I find no submitted documents which demonstrates that the sponsor sends fund to the third appellant. On the evidence before this Tribunal, I find no basis to concluded that the sponsor sends any funds to the third appellant or any other form of support. Apart from the assertion made in the sponsor’s statement that the appellants have been in difficulty since the Taliban took control in Afghanistan, no evidence has been submitted of the third appellant’s financial circumstances, which would demonstrate that he required any assistance from the sponsor. On the submitted evidence I cannot be satisfied that the third appellant is a dependant relative of the sponsor.”

12. The grounds state that this is wrong as the third Appellant was an “immediate family member” who did not need to show evidence of remittances “under regulation 7”. However, we have found above that the Judge did not err in finding that the application was made under the EUSS, not under regulation 7 of the 2016 Regulations. Accordingly, when considering the application under Appendix EU (Family Permit) he needed to be satisfied that the third Appellant was dependent on the Sponsor.

13. We have considered the evidence which was before the Judge and find that his assessment of that evidence contains no error of law. Even if the remittances sent to the first and second Appellants were also intended for the third Appellant we find, as submitted by Mr. Lindsay, that there was no evidence before the Judge of the third Appellant’s circumstances in Afghanistan to show that the funds sent were required to meet his essential needs. The third Appellant did not provide a witness statement and there was no supporting evidence from Afghanistan. The Sponsor’s witness statement did not give any detail as to the third Appellant’s circumstances in Afghanistan. There is no indication in the Judge’s decision that there was any oral evidence as to the circumstances of the third Appellant in Afghanistan. We find that there is no error of law in the Judge’s consideration of the third Appellant’s appeal.

14. In the third ground the Appellants state that the Judge should have exercised discretion, given the “present circumstances prevailing in Afghanistan and Home Office guidelines”. However, the Judge had no discretion. His jurisdiction was limited to considering whether the Appellants met the requirements of Appendix EU (Family Permit). Additionally, there is no evidence before us that the Appellants sought to raise Article 8 before the Tribunal. Ground 3 identifies no error of law.

**Notice of Decision**

1. The decision does not involve the making of a material error of law and we do not set it aside.
2. The decision of the First-tier Tribunal stands.

Appeal Number: UI-2022-001443  
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**Kate Chamberlain**

Deputy Judge of the Upper Tribunal  
Immigration and Asylum Chamber

23 May 2023