



IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2022-002969
UI-2022-002970

First-tier Tribunal No: EA/14589/2021
EA/14598/2021

THE IMMIGRATION ACTS

Decision & Reasons Issued:

30th October 2023

Before

DEPUTY UPPER TRIBUNAL JUDGE L MURRAY

Between

**ABDUL GHAFAR
AZRA BEGUM
(NO ANONYMITY ORDER MADE)**

Appellants

and

**ENTRY CLEARANCE OFFICER
(NO ANONYMITY ORDER MADE)**

Respondent

Representation:

For the Appellant: No appearance

For the Respondent: Mr Parvar, Senior Home Office Presenting Officer

Heard at Field House on 9 October 2023

DECISION AND REASONS

Introduction

1. The Appellants who are husband and wife and citizens of Pakistan, born on 2 March 1946 and 1 January 1952 respectively, made applications for EU Settlement Scheme (EUSS) Family Permits under Appendix EU (Family Permit) to the Immigration Rules on the basis that they were 'family members of a relevant EEA citizen'. These applications were refused by the Respondent 13 October 2021 on the basis that that the Appellants were not related as claimed to the EEA citizen

sponsor's husband. First-tier Tribunal Judge Chana dismissed their appeals against the Respondent's decisions in a decision promulgated on 22 April 2022.

2. Permission to appeal was granted to the Appellants on 27 June 2022 by First-tier Tribunal Judge J M Dixon on the basis that it was arguable that the First-tier Tribunal Judge, for unknown reasons, appeared to have treated the applications as having been made under the Immigration (European Economic Area) Regulations 2016. Consequent on that, the Judge decided that there was no right of appeal and dismissed the appeals for want of jurisdiction. For the reasons set out in the grounds of appeal, the decision contained arguable material errors of law. It appeared that DNA evidence, showing the relationship, had been provided by the Appellants and the lack of evidence of relationship was the only reason the Respondent refused the applications.
3. The matter came before me to determine whether the First-tier Tribunal had erred in law, and if so whether any such error was material and the decision should be set aside.

The hearing

4. There was no appearance on behalf of the Appellants. My clerk made enquiries and although initially unable to get a response from West London Solicitors, established, after having spoken to an employee in the immigration department, that they were no longer acting. They had not, however, come off the record. I was satisfied that the notice of hearing had been properly served on the Appellants by post on 19 September 2023 to the address provided by them in accordance with paragraph 36 of the Upper Tribunal Procedure Rules. I exercised my discretion to proceed in their absence under paragraph 38 of the Rules as I concluded that it was in the interests of justice to proceed.
5. Mr Parvar confirmed at the hearing that there was no rule 24 notice. He conceded that there was a material error of law in the decision of the First-tier Tribunal for the reasons set out in the grounds seeking permission to appeal. For the reasons set out below, I find that the concession was properly made.
6. In relation to the question of whether the decision should be re-made in the Upper Tribunal or remitted to the First-tier Tribunal, he stated that he had not seen the Appellants' bundle that was before the First-tier Tribunal, and in particular, the DNA evidence relied on by the Appellants. I therefore sent him the Appellants' bundle and gave him time to consider it. After having considered the evidence he noted that although the DNA evidence confirmed the biological relationship between the EEA Citizen sponsor's husband, Safraz Hussein and the first Appellant, there was no confirmation of the relationship with the second Appellant. Although it was said in the DNA report that a sample was taken from her, no conclusion was reached on whether she was the true biological parent of Safraz Hussein.

7. He also stated that the second Appellant had made an asylum application and he wished to seek instructions on how the Respondent wanted to proceed. I allowed him time to take instructions and I received, over the luncheon adjournment, an application under Rule 15 (2A) to adduce the second Appellant's screening interview in which she claimed to be a widow with four children, and Safraz Hussain was not named as one of them. As the evidence was in relation to an application for asylum on 12 September 2022, around 6 months after the First-tier tribunal hearing it could not have been submitted to the First-tier Tribunal.
8. I determined at the hearing that there was a material error of law in the decision of the First-tier Tribunal such that the decision should be set aside with written reasons to follow.

Submissions – Error of Law

9. In the grounds of appeal the Appellant argues as follows.
10. Firstly, it is argued, that the First-tier Tribunal erred in law in deciding the appeal under the Immigration (EEA) Regulations 2016 ('the 2016 Regulations'). The Appellants had applied to enter the UK under Appendix EU of the Immigration Rules and not under the EEA Regulations. The Appellants' rights of appeals are therefore not governed by the EEA Regulations but by the Immigration (Citizens' Rights Appeals) (EU Exit) Regulations 2020 ('the 2020 Regulations').
11. The grounds assert that the Appellants have a right of appeal under Regulation 5 (a) of the 2020 Regulations because they made their family permit entry clearance applications after exit day. This is said to be consistent with the Respondent's own policy 'Rights of appeal Version 12.0' published on 29 March 2022 at page 44 which states "Anyone who makes a valid application for an EUSS Family Permit or Travel Permit on or after 11pm on the 31 January 2020 will have a right of appeal where their application is refused." It is also submitted that it is consistent with the Entry Clearance Officer's decisions which expressly granted the Appellants a right of appeal, which they exercised. There is said to be no question that the Appellants had a right of appeal.
12. It is further asserted that even if the appeal was being considered under the 2016 Regulations, the First-tier Tribunal's decision would be in error as they would have satisfied Regulation 7, and were not, as the First-tier Tribunal Judge found, extended family members under Regulation 8. The only issue before the First-tier Tribunal Judge was whether the Appellants were biologically related to their son. The Respondent's representative, Counsel instructed by the Respondent, was at pains to explain in court that this was the only issue and the Appellants had attended court with DNA evidence that conclusively addressed the issue. It was highly likely that, but for this error, the appeal would be allowed.

Conclusions – Error of Law

13. The First-tier Tribunal Judge set out at paragraph 1 of the decision that the applications were made under the EU settlement scheme for family permits. However, she then erroneously stated that the applications were as dependent family members pursuant to Regulation 8 (2) of the 2016 Regulations. She then, of her own motion, determined that she had no jurisdiction to hear the appeal “for a family permit under the EUSS scheme as an extended family member of the spouse of an EEA national”. She concluded that the Appellants did not have a right of appeal under Regulation 36 (4) of the EEA Regulations which required that extended family members were required to produce a family permit or residence card in addition to a valid passport to enjoy a right of appeal. She found, relying on the 2016 Regulations, that the Appellants were not ‘extended family members’ of the EEA national sponsor as they were father and mother in law. The Appellants were not issued with EEA family permits before the end of the transition period. She reasoned that as they were not issued with EEA family permits before the end of the transition period by 11pm on 31 December 2020 under the EEA Regulations 2016, and the application was made on 19 June 2021, after the three month deadline for submitting applications had expired, they had no right of appeal under the Withdrawal Agreement.
14. The basis of the Respondent’s refusal was that the Appellants’ son’s birth certificate was not produced around the time of his birth and was registered late. No documentation had been provided to suggest the reason for this late registration which had brought into question the validity of the relationship to the sponsor’s husband. The notice of decision states that the decision can be appealed to the First-tier Tribunal under the 2020 Regulations, on the basis that the decision was not in accordance with the EUSS Family Permit Rules, or that it breached the Appellants’ rights under the Withdrawal Agreement.
15. In his witness statement Mr Hussain explained that the gap between the birth of a child and the registration of their birth was common in countries like Pakistan, India and Bangladesh. His birth was registered on 1 March 2006 when he was almost 37 years old and the certificate was issued on 10 March 2012. He had requested his birth certificate to be registered under NADRA in Pakistan to renew his passport and national ID in the UK. He had now produced DNA evidence.
16. Under rule FP6(1) of Appendix EU (Family Permit), an applicant meets the eligibility requirements if he/she is the family member of a relevant EEA Citizen. “EEA citizen” is defined in Annex 1 to Appendix EU (Family Permit) and there is no issue that the Appellants’ daughter in law, as a Romanian national, met this requirement. The application was made before 1 July 2021 and thus “Relevant EEA citizen” is defined in Annex 1 to Appendix EU (Family Permit) as an EEA Citizen who has been granted indefinite leave to enter or remain or limited leave to enter or remain under (as the case may be) paragraph EU2 or EU3 of Appendix EU, which has not lapsed or been cancelled, curtailed, revoked or invalidated. There was no issue regarding this requirement. “Family member of a relevant

EEA citizen” is defined in Annex 1 of Appendix EU (Family Permit) under subparagraph (d) or (e) as the dependent parent of the relevant EEA citizen or their spouse or civil partner and the family relationship or relationships to the relevant EEA citizen (and, where relevant, their spouse or civil partner): existed before the specified date continue or continues to exist at the date of application. Again, there is no issue that this was the basis of the applications and it is clear from the definition that as parents-in-law of an EEA Citizen the Appellants came within the definition of family member.

17. Regulation 5 of the Immigration (Citizens’ Rights Appeals) (EU Exit) Regulations 2020 provides, in so far as is relevant to this appeal that:

Right of appeal against decisions made in connection with scheme entry clearance

5. A person may appeal against a decision made on or after exit day –

(a) where the person applies for scheme entry clearance on or after exit day, to refuse their application,

18. Regulation 2 (1) of the same regulations provides that “scheme entry clearance” means entry clearance granted by virtue of relevant entry clearance immigration rules and section 17 (2) of the European Union (Withdrawal Agreement) Act 2020 defines “relevant entry clearance immigration rules” as meaning “any immigration rules which are identified in the immigration rules as having effect in connection with the granting of entry clearance for the purposes of acquiring leave to enter or remain in the United Kingdom by virtue of residence scheme immigration rules.”

19. Having regard to the above Immigration Rules and Regulations is clear therefore that the applications were properly considered by the Respondent under Appendix EU (Family Permit) and as dependent parents-in-law the Appellants came within the provisions, provided they proved their case. The sole issue was proof of the relationship with the Appellants’ son. A right of appeal existed under Regulation 5 (a) of the 2020 regulations as the application was made after exit day and the decision was made to refuse the application. The First-tier Tribunal therefore materially erred in law in concluding that there was no jurisdiction to hear the appeals and I set the decision aside.

20. In relation to whether the appeal should be remade in the Upper Tribunal or remitted to the First-tier Tribunal, I canvassed with Mr Parvar that although the issue in this case was arguably narrow, the Appellants had been denied a fair hearing.

21. The second Appellant is in the UK and has claimed asylum. The evidence the Respondent wishes to rely on in the form of the second Appellant’s interview record was clearly not relevant to whether or not there was a material error of law but rather to the remaking of the decision (see Practice Directions of the Immigration and Asylum Chambers of the First-tier Tribunal and the Upper

Tribunal paragraph 4.2 (b)). It is relevant to the remaking of the decisions in the appeals given that the second Appellant does not claim in her interview to be the mother of the EEA citizen sponsor's husband in this case.

22. I have had regard to Part 3 of the Practice Direction, paragraph 7.2 of the Practice Statement and the relevant case law of Begum (Remaking or remittal) Bangladesh [2023] UKUT 00046 (IAC) and AEB v Secretary of State for the Home Department [2022] EWCA Civ 1512. In considering the question of whether the appeals should be retained or remitted I have taken account of the loss of the two-tier decision making process if the decision is reheard in the Upper Tribunal. The nature of the unfairness was such that no findings were made as the First-tier Tribunal erroneously concluded it had no jurisdiction. Further, the issue of deception has arisen in respect of the second Appellant. I therefore find that the absence of a hearing means that the general principle to remake in the Upper Tribunal should be departed from. Doubtless the Respondent will wish to rely on evidence that was not before the First-tier Tribunal on the last occasion.

Decision:

1. The making of the decision of the First-tier Tribunal did involve the making of an error on a point of law.
2. I set aside the decision.
3. I remit the decision to the First-tier Tribunal, not before Judge Chana.



Deputy Upper Tribunal Judge
Immigration and Asylum Chamber

16th October 2023