



IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM
CHAMBER

Case No: UI-2022-004726

First-tier Tribunal No:
EA/017777/2022

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On 23rd of November 2023

Before

UPPER TRIBUNAL JUDGE LINDSLEY
DEPUTY UPPER TRIBUNAL JUDGE CHAPMAN

Between

MR. SYED MAHFUJ ALI MOON
(NO ANONYMITY ORDER MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Claimant

Representation:

For the Appellant: Mr P. Richardson, counsel instructed by Lawmatic solicitors

For the Respondent: Mr A. Melvin, Senior Presenting Officer (remote)

Heard at a hybrid hearing at Field House on 14 November 2023

DECISION AND REASONS

1. The Appellant is a national of Bangladesh, born on 1.9.04. He is autistic with learning difficulties. On 18.9.19 his mother died and thereafter the Appellant was cared for by his grandmother. On 31.10.20 applications for EUSS family permits were made for both the Appellant and his grandmother by his maternal uncle, Yusuf

Zakaria Khan, a national of Ireland living and working in the United Kingdom.

2. On 13 February 2021 the Appellant's application was refused on the basis that he is not a family member of an EEA national but an EFM. A family permit was granted for his grandmother, Ms Raziya Begum on 6 October 2021.
3. An appeal was lodged against the refusal to grant the Appellant a family permit and the appeal came before First tier Tribunal Judge Dean for hearing on 8 July 2022. Mr Richardson appeared remotely on behalf of the Appellant and the Sponsor gave oral evidence. There was no appearance by or on behalf of the Respondent Home Office.
4. In a decision and reasons promulgated on 20 July 2022, the Judge dismissed the appeal. He accepted that the Sponsor was a relevant EEA citizen exercising treaty rights in the United Kingdom [8] but he found discrepancies in the evidence relating to why the Appellant's grandmother would leave Bangladesh for the UK if she was his carer [9] and in relation to whether or not his father had left the family or simply did not provide care for him [10]. Consequently, at [11] the Judge found that the evidence was "*a narrative of convenience*". The Judge also found that the application made on behalf of the Appellant was not made on 31 October 2020 but rather on 31 December 2020 at 11.06 GMT, which he found went against the credibility of the claim that the applications for the Appellant and his grandmother were made at the same time. Ultimately, however, the Judge dismissed the appeal because, as the Sponsor's nephew, the Appellant is not a family member of a relevant EEA citizen under Appendix EU and was not in the categories of relative covered under the EUSS family permit.
5. An application for permission to appeal was made to the Upper Tribunal which argued *inter alia* that Article 3(2) of CD 2004/38/EC mandated that by seeking to come to the UK as the extended family member of his uncle the Appellant became entitled to facilitation of entry and to an extensive examination of his circumstances.
6. Permission to appeal was refused by the First tier Tribunal on 2 September 2022 but was granted on 7 November 2022 by Upper Tribunal Judge O'Callaghan in the following terms:

"However, I consider it is arguable that the Judge may have been required to consider whether the appellant is 'an extended family member'. It is unclear from the decision as to whether this submission was raised by the appellant at the hearing, though it is implicitly advanced by the sponsor's witness statement. The decision of Batool and Others (other family members; EU exit)

[2022] UKUT 00219 (IAC) is not necessarily determinative, as found by Judge O'Brien when refusing permission to appeal to this Tribunal, being concerned with those persons who had applied for facilitation of entry and residence after 23.00 on 31 December 2020. The appellant does not fall into this cohort."

7. In a rule 24 response dated 30 November 2023, the Respondent opposed the appeal on the basis that the SSHD was entitled to require a distinction to be made between applications for leave under the EUSS and under the Immigration (EEA) Regulations 2016 (hereafter the 2016 Regulations) *cf. Batool* [2022] UKUT 00219 (IAC) and the Appellant's residence would have had to have been facilitated under the 2016 Regulations prior to the UK's departure from the EU in December 2020 in order to qualify under the EUSS route as a close family member *cf. Celik* [2023] EWCA Civ 921 at [52], [53], [56]. Whilst the application was made prior to the deadline, it was not in accordance with regulation 26 of the 2016 Regulations as the application for leave was made under the EUSS framework.

Hearing

8. At the hearing before the Upper Tribunal, Mr Richardson sought to rely upon an argument put forward by one of the intervenors in *Celik* at [96] and [97] that an application made under the EUSS scheme should have been treated as a request for facilitation under the 2016 Regulations, however, the Court of Appeal declined to consider this argument as there had been no appeal to the Upper Tribunal on that basis and so the argument was not before them. Moreover, that application had been made after the specified date.
9. Mr Richardson maintained that any request made before the specified date ought to be treated as a request for facilitation, even if the wrong forms were used or an application did not comply with regulation 21 of the 2016 Regulations and this had been addressed in *Batool* at [62] onwards with reference to the Respondent's guidance. He maintained that the use of the words "such as" in the Respondent's EUSS guidance was misleading in that it implied further categories of relative whereas it was a definitive list and he respectfully disagreed with the rejection of this argument at [64].
10. Mr Richardson accepted that the First tier Tribunal Judge made adverse findings but failed to determine whether or not the Sponsor supported his nephew or whether the Appellant is dependent on him. Whilst there was evidence of money transfer receipts Mr Richardson accepted that these postdated the decision, albeit the Appellant asserts in his application form that he has been supported financially by his uncle long term.

11. In his submissions, Mr Melvin relied upon the Respondent's rule 24 response. He submitted that the Presidential Tribunals in *Batool* and *Celik* found against the Appellant on the legal issues. As to the second argument regarding dependency, Mr Melvin submitted that it was not material given the adverse findings made by the First tier Tribunal Judge.
12. We found no material error of law in the decision of the First tier Tribunal Judge in light of the judgments in *Batool* and also *Siddiqa* [2023] UKUT 00047 (IAC) and announced our decision at the hearing. We now provide our reasons.

Decision and reasons

13. *Siddiqa* is a case with strong similarities to this Appellant's case, in that the Appellant in that case was seeking to join her brother and made an application for a European Family Permit under the EUSF prior to the deadline of 31.12.20. A panel of the Upper Tribunal held that the Respondent has not made an EEA decision for the purposes of regulation 2 of the Immigration (EEA) Regulations 2016 and consequently the Tribunal was not obliged to determine the appeal with reference to those Regulations.
14. Whilst we understand that permission to appeal has been granted to the Court of Appeal in *Siddiqa* and it is listed to be heard in February 2024, we cannot see that this Appellant's case can be distinguished from *Siddiqa*, which we find is consistent with the approach taken by the Presidential panel in *Batool*, both of which represent the current state of the law.

Notice of Decision

15. We find no error of law in the decision and reasons of the First tier Tribunal Judge and dismiss the appeal.

Rebecca Chapman

Deputy Upper Tribunal Judge Chapman

14 November 2023