



IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case Nos:
UI-2023-001252, UI-2023-001253
UI-2023-001254, UI-2023-001255
First-tier Tribunal Nos:
EA/11460/2021, EA/11462/2021,
EA/11465/2021, EA/11467/2021

THE IMMIGRATION ACTS

**Decision & Reasons Issued:
On 1 September 2023**

Before

UPPER TRIBUNAL JUDGE PERKINS

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

**ABIODUN JANET SAMUEL-JOSEPH
OLUWASEUN PERPETUAL SAMUEL-JOSEPH
BIDEMI EMMANUEL SAMUEL-JOSEPH
OLUWASEYI ELIZABETH SAMUEL-JOSEPH**
(no anonymity order made)

Respondents

Representation:

For the Appellant: Ms A Everett, Senior Home Office Presenting Officer
For the Respondents: Ms K Turner, Counsel instructed by Pasha Immigration

Heard at Field House on 27 June 2023

DECISION AND REASONS

1. The appellant, hereinafter “the Secretary of State”, appeals a decision of the First-tier Tribunal allowing the appeal of the respondents, hereinafter “the claimants”, against a decision of the Secretary of State by an Entry Clearance Officer refusing their applications for an EU Settlement Scheme family permit.
2. It is important to consider exactly what the First-tier Tribunal did.
3. The First-tier Tribunal’s Decision and Reasons begins by identifying the claimants, correctly, as citizens of Nigeria who were born in December 1995, October 2002, December 2000 and June 2009 respectively. They are the nephews or nieces of their sponsor, Mrs Victoria Aisha Mustapha Da Silva, who is a citizen of Portugal and who was lawfully in the United Kingdom initially exercising treaty rights and now as a person permitted to stay under the

arrangements consequent on the withdrawal of the United Kingdom from the European Union.

4. The applications were refused by the Secretary of State on 26 June 2020 because the claimants had applied for an EU Settlement Scheme family permit but they are not family members within the definition in Appendix EU (Family Permit) and so none of the applications could succeed. The claimants do not contend that they are “family members” for the purposes of Appendix EU.
5. The claimants were informed of their right to appeal to the First-tier Tribunal in a standard notice saying that they:

“can appeal on the basis that the decision is not in accordance with the EUSS Family Permit rules, or that it breaches any rights you have under the Withdrawal Agreement, the EEA EFTA Separation Agreement, or the Swiss Citizens’ Rights Agreement.”
6. The decision clearly states that “you do not meet the requirements for a EUSS Family Permit” and the grounds of appeal assert that:

“THE REFUSAL DECISION IS NOT IN ACCORDANCE WITH THE PROVISIONS OF THE IMMIGRATION (EUROPEAN ECONOMIC AREA) REGULATIONS 2016 AS APPLICATION WAS MADE ON 31 DECEMBER 2020”

and

“THE REFUSAL DECISION FAILS TO CONSIDER THE COMPASSIONATE AND COMPELLING CIRCUMSTANCES OF THE APPELLANT. IT BREACHED SECTION 6 OF THE HUMAN RIGHTS ACT 1998”.
7. The claimants’ marked section 1 of the appeal form headed “Human Rights Decision, Please explain which article of the Human rights Act you are appealing under and give reasons to support your claim” with the letters “N/A” which I take to mean “not applicable”.
8. The First-tier Tribunal Judge did not make any decision on “human rights grounds” and has not been criticised. I find that I am not dealing with a “human rights” appeal.
9. The First-tier Tribunal noted, correctly, that the gist of the intended challenge was that although the claimants clearly did not satisfy the definition of family member and therefore could not succeed in the applications that the Secretary of State thought that they had made they had in fact made a different application, or at least should have been treated as having made a different application, under the EEA 2016 Regulations. Their case was that they did satisfy the requirements of those Regulations and produced evidence that tended to show that that was the case.
10. The First-tier Tribunal does not seem to have considered expressly the grounds of appeal that were before it and if they determined the scope of its functions.
11. The First-tier Tribunal was referred to an unreported decision of this Tribunal made by Upper Tribunal Judge Blundell sitting with Deputy Upper Tribunal Judge Doyle. It is the case of **Yorke and Cradock v Entry Clearance Officer**, UI-2022-002263 and UI-2022-002250. The decision was signed by Upper Tribunal Judge Blundell. I was not referred to the related case of **Entry Clearance Officer v Ahmed et al**, UI-2022-002804 which I consider later. This was also decided by Upper Tribunal Judge Blundell and Deputy Upper Tribunal Judge Doyle following a hearing on the same day as **Yorke** that covered essentially the same points but that decision was signed by Deputy Upper Tribunal Judge Doyle. For the avoidance of doubt, it is quite plain, as is required when judges sit together,

that the judges collaborated in their decisions. As far as I can see there is no difference whatsoever in the reasoning in the two decisions.

12. In the case that I now have to determine the First-tier Tribunal listened to preliminary submissions. There is a helpful summary at paragraph 6 where the judge said:

“This is a case where the unrepresented sponsor accessed the online application form from the drop box and selected EUSS rather than under the EAA 2016 Regulations which were in force at the time of the application and which the Appellants could apply for as the nephew and nieces of the sponsor. The sponsor has referenced her covering letter and supporting documents, but these were not included in the Respondent’s bundles, but are in the Appellant’s bundle. One of the documents was included in the Respondent’s bundle despite the extensive list. The covering letter sets out in detail the basis of the claim by the Appellants following the death of her brother and the father of the Appellants in 2017.”

13. I do not understand the sentence “One of the documents was included in the Respondent’s bundle despite the extensive list.” Otherwise it is plain what the judge thought the case was about.

14. I find it convenient at this point to consider the letter described above as “covering letter”. It is from Victoria Da Silva to the Entry Clearance Officer and is dated 31 December 2020. Again, for the avoidance of doubt, this was the last day on which an application could have been made in time under the 2016 Regulations. The letter, if I may so, is well written and identifies the claimants. Mrs Da Silva then drew attention to documentation confirming her status in the United Kingdom and then explained that the claimants are the children of her late brother who died in 2017 and provided DNA evidence confirming the asserted relationship. She went on to claim, rather troublingly, that the claimants had been destitute and

“surviving on funds that I send following the death of my brother who was the bread winner. The children are not going to school as the money that I send them only covers essential needs such as food, medication and clothing. I am employed by the Dr French Memorial Home Ltd as a carer and earn a monthly salary of £2130. I have enclosed my pay slips and NatWest bank statements”.

15. That letter then explained in some care how the money was sent and how it was needed. There is then a clear list of documents that were attached. The letter concludes with a request that the claimants are “issued family permits” for the reasons given.

16. That letter did not at any point refer to the 2016 Regulations.

17. The judge saw parallels between the facts of the present appeal and the facts in **Yorke**. The judge purported to follow the decision in **Yorke**. The judge recognised that the covering letter in this case did not mention the 2016 Regulations but said that the “thrust of the decision” in **Yorke** is that:

“An unrepresented applicant would not understand the choice offered in the drop down box between the EUSS and EEA family permit schemes and in this case, it must be obviously wrong to have chosen the EUSS given none of the applicants fall within the definition of ‘family member’ had the sponsor known the consequences of the choice.”

18. The judge went on to allow the appeal. She said at paragraph 12:

“Therefore, I accept the submission of Mr Raza [for the claimants], and I allow the appeal on the basis that the application was not considered under the EEA Regulations 2016 which is an error of law given the details of the application before the Respondent with the application in the covering letter and enclosures. The consequence of my decision is that there remains an outstanding application under the 2016 EEA Regulations to be considered.”

19. The judge then, under the heading “Decision”, said: “I allow the appeal on EEA grounds”.
20. The judge had not considered the evidence with a view to deciding if the requirements of the 2016 Regulations were met but made it quite plain that it was the consequence of her decision that there remained an outstanding application. Presumably it was her intention that the Secretary of State reconsidered the application and made a decision under the 2016 Regulations. Ms Turner did not suggest a different approach. This is not a case where the claimants were found to have satisfied any relevant Rules.
21. The Secretary of State’s grounds essentially make two points. They were not settled by Ms Everett. They state:
 - “1. The FTTJ has allowed the appeal under the EEA Regulations, despite the fact that they had concluded that there was an outstanding application under the EEA Regulations. This finding was made despite the fact that no application had been made under the EEA Regulations.
 2. No findings were made in respect to whether the appellants met the requirements of the EEA Regulations as family/extended family members as defined by the EEA Regulations.”
22. Ms Everett relied on the decision of this Tribunal in **Siddiga (other family members: EU exit) [2023] UKUT 00047 (IAC)**. This was the decision of Hill J. and Upper Tribunal Judge Kebede and was promulgated on 10 February 2023. Clearly it was not available to assist the judge in the present appeal. The first paragraph of the judicial headnote is relevant. It states:

“(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 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 Immigration (European Economic Area) Regulations 2016 (‘the 2016 Regulations’). 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.”
23. It will be remembered that **Ahmed** was the companion case to **Yorke**. I need to consider **Siddiga** carefully. Strictly it does not bind me because it is a decision of the Upper Tribunal but it is reported and was determined by a panel including a judge who is senior to me. These are both very good reasons for giving it a great deal of weight. It was an appeal against a decision dismissing the appeal of an applicant. Nevertheless, it was quite clear that it ruled that the Entry Clearance Officer was not to be criticised for taking an application at face value. Without in any way agreeing that **Ahmed** (and therefore **Yorke**) were decided correctly the Upper Tribunal ruled that the factual premise for engaging the reasoning in Yorke does not exist unless the Entry Clearance Office should have treated the application as an application under the 2016 regulations. I respectfully follow that ruling.

24. The claimants may not have intended to make the application that they did but what they did was to apply under the EU Settlement Scheme for a family permit. The application form requires the applicant to identify the “Type of Visa/Application” and the reply is given “European Family Permits”. This standard form then provides for further particulars. There is a heading “Application category” and this requires the applicant to “Select the category you are applying for”. The reply is “Close family member of an EEA or Swiss national with a UK immigration status under the EU Settlement Scheme”. Beneath that there is a further endorsement stating “I confirm I am applying for an EU Settlement Scheme Family Permit”.
25. It is very difficult to move from the face of that document and to conclude rationally that the applicant was doing anything other than applying for an “EU Settlement Scheme Family Permit” albeit one that was bound to fail.
26. There is a supporting letter dated 31 December 2020 but, at the risk of being annoyingly repetitive, this makes no reference to the 2016 Regulations.
27. The Skeleton Argument before the First-tier Tribunal (not Ms Turner’s) does not allege that the claimants at any point relied expressly on the 2016 Regulations. Rather it explains how it would have been advantageous to the claimants if that is what they had done.
28. Paragraph 11 of the First-tier Tribunal Judge’s Decision and Reasons is illuminating. The judge says:

“The covering letter is of significance here because if it had been considered by the [Secretary of State] together with the extensive enclosures, the [Secretary of State] could have elected to consider the alternative route which was still valid at the time of the application in much the same way that alternative routes are considered by the [Secretary of State] in other applications before her”.
29. The First-tier Tribunal Judge was plainly asking herself if the decision made was lawful. I find that her reasoning was wrong. With respect to the First-tier Tribunal Judge, the word “could” will not do. The First-tier Tribunal Judge’s reasoning only makes sense at all if she concluded that the Secretary of State “should” have determined the application as if it were under the EU Settlement Scheme. I respectfully agree with Hill J. and UTJ Kebede that the absence of an unequivocal indicator of an intention to apply under particular Rules makes it impossible to criticise the respondent fairly for not considering different Rules. The judge simply should not have concluded as she did. I appreciate that the judge was determining an appeal on the merits but it was not open to her to recategorize the application unless there was at least some equivocation in the way that it was framed.
30. For reason that I will endeavour to explain, I find the categorisation of the application to be of extreme importance here.
31. These cases were not argued before me but I am aware of the decision in **R v IAT and another ex parte Kwok on Tong** [1981] Imm AR 214 and the consideration of the case in **RM (Kwok on Tong: HC 395 para 320) India** [2006] UKAIT 00039. Put very loosely, these decisions suggest that the issue before the appellant tribunal was “does the appellant satisfy the rules?” and that can raise issues that had not been considered at all by the Entry Clearance Officer. However that approach was required by the terms of the statutory regime that created the appeals being determined. This was explained by the Deputy President in **RM** at paragraph 10 where he said:

“In Kwok On Tong (and also in R v IAT ex parte Hubbard [1985] Imm AR 110) the Court had to consider what the position was if a refusal of entry clearance was based on one element of the Rules, but by the time of the hearing it became apparent that there was some other requirement of the Rules which the appellant could not meet. Both those cases decide that the notice of refusal is not equivalent to a pleading; if new elements of the Immigration Rules come into play they are to be dealt with on the appeal, and the parties must be allowed any appropriate adjournment in order to avoid the injustice of being taken by surprise. The reason is the wording of s19. Even if the appellant shows that he met a particular requirement of the Immigration Rules that had been in issue at the appeal, the decision to refuse him is not a decision that was “not in accordance with the law including any applicable Immigration Rules” unless, at the time of the decision, he met the requirements of the Immigration Rules applicable to his case. To put it another way, an appellant can lose his appeal by failing to meet just one requirement of the Rules (whether specified or not in the notice of refusal), but he can win only by meeting all the requirements of the Immigration Rules (whether specified or not in the notice of refusal).”

32. Other than drawing attention to the importance of understanding the statutory basis for the appeal that has to be determined it is of little assistance in the present appeal. There is no “not in accordance with the law” ground available to an appellant or the Tribunal and, unlike the appellant in **Yorke**, these appellants did not seek to amend their grounds to include a challenge alleging interference with EU rights.
33. The appeal was against a decision expressed to be under the EU Settlement Scheme (EUSS) Family Permit that was refused because the appellants did not meet the requirements for an EUSS Family Permit. The appellants were told that they could appeal to the First-tier Tribunal under the Immigration Citizens’ Rights Appeals (EU Exit) Regulations 2020 and that they could appeal only on certain grounds. The EEA EFTA Separation Agreement and Swiss Citizens’ Rights Agreement are clearly not relevant. The other two permissible routes, that the decision was not in accordance with the EUSS Family Permit rules or that it breaches rights under the Withdrawal Agreement need more comment, although the right under the EUSS Family Permit rules can be considered swiftly. The appellants clearly do not satisfy those rules for the reasons given in the Secretary of State’s decision.
34. The permissible grounds of appeal are set out in regulation 9 of the Immigration (Citizens’ Rights Appeals)(EU Exit) Regulations 2020. The grounds identified in the Secretary of States refusal letter are a summary. Whilst that is, I find, sufficient for what choose to call the “EU rights grounds” the second permissible ground is the contention under regulation 8(3)(a) that the decision:

“is not in accordance with the provision of the immigration rules by virtue of which it was made.”
35. I find that the words “by virtue of which it was made” are significant and have the effect of letting the Secretary of State’s decision maker set the parameter of the challenge. The ground is narrower than “not in accordance with the rules”. The words “by virtue of which it was made” mean that the appeal is against the decision made. If the Secretary of State has categorised the claim irrationally she may be subject to judicial review.
36. The claimants did not seek to amend their grounds of appeal to the First-tier Tribunal.

37. I do not see how they could succeed on the grounds upon which they relied.
38. I also find that the judge has failed to explain how, in the event of her premise, that the decision was unlawful, being correct, that her findings translated into a successful appeal. I am aware that a route was identified in **Yorke** and find this must have been in effect urged by the representative before the First-tier Tribunal in this case by relying on grounds alleging failure to give effect to rights under the EU Settlement Scheme. The point is that an EEA national exercising treaty rights has a right to be heard in the event of an adverse decision. This is tenuous because the applicants are not EEA nationals and I do not know that I would have been persuaded. However, I do not have to take the point because the judge's decision does not get that far. I find there was no proper basis for the Tribunal to conclude that there was an application under the 2016 Regulations and no basis to treat the application that was made as if it were something else. Neither do the grounds of appeal to the First-tier Tribunal identify any arguable error.
39. It follows that I must set aside the decision of the First-tier Tribunal.
40. The case was argued on submissions. No evidence was called. It can be redetermined on the papers before me without a further hearing.
41. Ms Turner's strongest argument was that the detailed indications of dependency must have been intended to invoke the 2016 Rules and so the respondent really should have considered the application for what it was, not what it expressed itself to be. Dependency would be relevant under a 2016 Regulations claim.
42. With respect to the First-tier Tribunal and Ms Turner, I cannot see anything that justified a conclusion that the Secretary of State should have considered the application for anything other than it was. It is not sufficient that it is an application that could not have succeeded. People make inept or impossible applications for a variety of reasons.
43. I certainly understand that where there was an unequivocal assertion that a different kind of claim was being made, and the claim that was understood to have been made could not succeed, compounded with the clear assertion that a different kind of claim was made, could help support the conclusion that a different claim was intended but this is not such a case and, as explained above, is not within the scope of the grounds actually relied upon.
44. This is a case where the application was clear even if some of the words used to support it might be equivocal rather than contrary. There was no unequivocal claim that a different kind of claim was made. In the absence of that it was not open to me to decide that the application was anything other than what it purported to be and what the Secretary of State decided. The applications and the appeals cannot succeed.
45. It follows that I do not have to consider how the argument might have succeeded if it had been made out on the facts. There are difficulties in seeing how the alleged criticism could result in a successful ground of appeal but, because I am satisfied that the preliminary point could not have been resolved in the way that it was, I do not have to go further on that route.
46. I find that the appellants, probably to their lasting regret, made an application that could not succeed. The appeal against the refusal cannot succeed unless it can be shown, not that the facts might permit capable of supporting a conclusion that the Secretary of State ought to have treated this application as something else, and neither the facts nor the grounds support such a conclusion.
47. There are many examples of the law imposing time limits. The Limitation Act is perhaps the paradigm example and wherever there is a deadline or a border

there will, occasionally, be people who feel aggrieved because they are the wrong side of it but, for the reasons given above, I find that neither the applications nor the appeals could succeed.

Notice of Decision

48. It follows therefore that I find the First-tier Tribunal erred. I set aside its decision and I substitute a decision dismissing the claimants' appeals.

Jonathan Perkins

Judge of the Upper Tribunal
Immigration and Asylum Chamber
31 August 2023