



IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2022-001690

First-tier Tribunal No: EA/10153/2021

THE IMMIGRATION ACTS

Decision & Reasons Issued:

9th January 2024

Before

DEPUTY UPPER TRIBUNAL JUDGE MAHMOOD

Between

Mr Muhammad Amjad Ali
(NO ANONYMITY ORDER MADE)

Appellant

and

The Secretary of State for the Home Department

Respondent

Representation:

For the Appellant: Mr M Fazli, Counsel instructed by Privilege Solicitors Limited

For the Respondent: Ms S Cunha, Senior Home Office Presenting Officer

Heard at Field House on 13 November 2023

DECISION AND REASONS

Introduction

1. This is my decision which I delivered orally at the hearing today. No anonymity was sought and none is required in any event when taking into account the principles of open justice.
2. In this matter the Appellant appeals against the decision of First-tier Tribunal Judge Davies (“the judge”) who, sitting at the Manchester Hearing Centre on 8th November 2021, heard the Appellant’s appeal against the Secretary of State’s decision relating to an EU Settlement Scheme (“EUSS”) application. The decision was promulgated on 5th January 2022. Pursuant to grounds of appeal drafted by Mr Fazli, permission to appeal was granted by First-tier Tribunal Judge Mulready.

Permission to Appeal

3. The grant of permission was in respect of all grounds, noting as follows:

“The grounds assert that the Judge erred in (i) failing to treat the Appellant’s application, made under the EU Settlement Scheme, as if it had been made under Regulation 8 of the Immigration (EEA) Regulations 2016; (ii) failing to recognise that the Respondent erred in failing to correct the Appellant’s mistake and (iii) finding that the principle of equivalence does not assist the Appellant. The grounds also state that this application raises a point of principle facing many Appellants and so Upper Tribunal guidance would be of assistance.

The position as to the duties of the Respondent where an Appellant obviously erroneously makes an EUSS application which is bound to fail is not clear, and this is a question which is clearly material to the outcome of this appeal. This decision therefore does contain an arguable error of law which is material to the outcome of the appeal.”

The Decision of the First-tier Tribunal

4. The First-tier Tribunal Judge’s decision noted as follows. That the Appellant had appealed against the refusal of his application for pre-settled status. The refusal was dated October 2020. Paragraph 16 notes further that,

“There is no dispute that the Appellant did not make any application for a residence card as an extended family member. He potentially qualified from sometime in January 2020. The Appellant previously had leave to remain in the UK as he was in a relationship with a partner. The Appellant confirmed during cross-examination that he had never applied for a residence card as an extended family member. During re-examination he stated that he had been helping his brother even when the latter was with his girlfriend. I have no details of such support. Moreover, in his witness statement the Appellant stated he was a member of his brother’s household and financially dependent upon him since September 2020.”

5. The judge said at paragraph 18 “On the face of it, the failure to apply for a residence card is fatal to the Applicant. However, Mr Fazli urged me to consider what he described as the principle of the EEA law of equivalence and he cited several authorities”. At paragraph 21 the judge said:

“I am satisfied that the Appellant does not qualify under the EUSS Scheme. Mr Fazli stated in his submission that the Appellant was dependent upon the sponsor in Pakistan and in the UK. That does not appear to be in dispute and certainly there is no doubt that the two brothers live together and have done so from around January 2020.”

At paragraph 23 the judge said:

“The United Kingdom decided to end the free movement of people, one of the four freedoms of the single market. The system in place for dealing with

extended family members prior to the UK's exit from the EU was part of the architecture of free movement of labour and of removing obstacles to it. ... I am satisfied that the principle of equivalence does not assist the Appellant in this appeal because the landscape has changed. It was open to the Appellant to apply under the 2016 Regulations but he did not do so even after his application was rejected in October 2020 under the EUSS.

And then at paragraph 24, the judge said he had considered the authorities referred to by Mr Fazli, including:

“FA (Iraq) v SSHD [2011] UKSC 22 when the Supreme Court was concerned with the relationship between two rights that enabled non-nationals to remain in the UK...

...The position has changed with the UK's exit from the European Union and the position is now as set out in EUSS. It was open to the Appellant to apply for a residence card but he did not so during the transitional period.”

The Grounds of Appeal and the Hearing Before Me.

6. Ground 1 of the Appellant's grounds of appeal contends that the judge erred by failing to treat this application as if it were an application made for an EEA residence card pursuant to the 2016 Regulations. Ground 2 contends that the Tribunal erred in not recognising that the Respondent erred in failing to correct the deficiency within the application. It was contended that the Appellant had been wrongly advised. Ground 3 contends that the Tribunal erred in concluding that the principle of equivalence does not assist the Appellant.
7. I heard extensive submissions from both parties in respect of this matter. In addition to the original bundle, which was provided to the First-tier Tribunal, I was also provided today with a one and a half page written submission from Mr Fazli dated 13th November (seeking to expand the original grounds) and a copy of an unreported decision in the case of **Ahmed**, appeal number UI-2022-002804. On behalf of the Secretary of State I was provided today with the reported decision in **Geci (EEA Regs: transitional provisions; appeal rights) [2021] UKUT 285 (IAC)** and the Court of Appeal's decision in **Celik v Secretary of State for the Home Department [2023] EWCA Civ 921**.
8. In relation to ground 1, Mr Fazli said that the cases of **Celik** and **Batool** mean that his first ground was very substantially weakened and that although there was no copy of the Respondent's bundle, there was evidence of dependency whereby the Appellant was heavily depending on an EEA citizen and thereby the 2016 Regulations. Mr Fazli said that it was reasonably clear that the Appellant had intended to make an application as a dependant on his brother and not under the EUSS.
9. Mr Fazli said he did not have the covering letter submitted when the application was made, and his instructing solicitors do not have it either. He said that the Respondent has not been able to access it either. Mr Fazli said the point that he had sought to make was that it was the Appellant's intention to make an application under the EEA Regulations. The only point that was taken against the Appellant was that he, the Appellant, had ticked the wrong box. Mr Fazli said that a similar issue arose in the case of **Siddiq** (**other family members: EU exit**)

[2023] UKUT 00047 (IAC). I note that was a decision of Mrs Justice Hill and Upper Tribunal Judge Kebede. Mr Fazli submitted that the Upper Tribunal **Siddiqa** distinguished the unreported case of **Ahmed**. Mr Fazli submitted, if the Appellant had known and if he was aware that an application needed to be made then he would have done so as it was intention to do so.

10. In respect of ground two, Mr Fazli said this was not something that he could pursue with vigour and it had been settled by case law.

11. I deal here with the case of **Siddiqa**. The Upper Tribunal comprehensively dealt with the arguments in that case which are being repeated today before me. In the decision of Mrs Justice Hill and UT Judge Kebede it is clear from the judicial headnote that the instant Appellant's arguments have no merit. I can therefore understand why Mr Fazli said his arguments could not be pursued with vigour. Indeed, the judicial headnote in **Siddiqa** makes clear that the Appellant's arguments cannot be raised with any hope at all. The judicial headnote is worth setting out in full because it provides an answer to the appeal before me today,

“(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.

(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.

(3) Annex 2.2 of Appendix EU (Family Permit) enables a decision maker to request further missing information, or interview an applicant prior to the decision being made. The guidance given by the respondent as referred to in **Batool** at [71] provides “help [to] applicants to prove their eligibility and to avoid any errors or omissions in their applications” for the purposes of Article 18(1)(o). Applicants are provided with “the opportunity to furnish supplementary evidence and to correct any deficiencies, errors or omission” under Article 18(1)(o). In accordance with **Batool**, Article 18(1)(o) did not require the respondent to go as far as identifying such deficiencies, errors or omission for applicants and inviting them to correct them. This is especially so given the “scale of EUSS applications” referred to in **Batool** at [72]. This provides a good reason for Article 18(1)(o) to be read narrowly to exclude errors or omissions of this sort, and this was the effect of the approach taken by the Upper Tribunal in **Batool**.”

12. Mr Fazli said that ground three related to equivalence which helped the Appellant. The Appellant had lawful residence and leave when he had applied pursuant to the EUSS and on basis of his relationship with his partner. He said that the Principle of equivalence assists the Appellant because he should not be treated differently. Equivalence assists because in this case, the EU right is given more favourable treatment under domestic national legislation and in those circumstances, it is discriminatory to prevent the Appellant from relying on that as if it was leave under the regulations and if a residence card and he was here lawfully.
13. Me Fazli said that Paragraph 18 of **FA (Iraq)** of the Supreme Court's decision was set out in the grounds. The Secretary of State was prioritising or treating differently with those with lawful leave and excluding them in a way in which the principle of equivalence was not being followed. I was referred to paragraphs 19 and 21 of **FA (Iraq)** too.
14. I refer to those paragraphs relied upon by Mr Fazli from **FA (Iraq)** now for completeness, but in my judgment, this case does not assist the Appellant as has been explained within it. I will deal with this a little further too in that the Appellant was not pursuing the residence card aspect as is clear from Mr Fazli's attendance as counsel at the First-tier Tribunal:

"18. This formulation recognises the primacy of the role of the domestic legal system in providing the necessary protection for Community rights, with what has become known as the principle of equivalence being a qualification on that autonomy. Its purpose is to ensure that there is no dilution of the adequacy of the protection of the relevant rights and in that sense it is complementary to the principle of effectiveness.

19. The principle of equivalence received somewhat fuller consideration by the Court of Justice in the case of Case C-326/96 Levez v T. H. Jennings (Harlow Pools) Ltd [1998] ECR I-7835. One of the questions referred to the Court of Justice by the Employment Appeals Tribunal in that case sought guidance on how the expression "similar domestic actions" should be interpreted in the field of equal pay legislation. Advocate General Léger described the aim of the principle of equivalence in para 26 of his opinion:

"The aim of this principle is that domestic law remedies should safeguard Community law 'without discrimination' that is to say, exercise of a Community right before the national courts must not be subject to conditions which are more strict (for example, in terms of limitation periods, conditions for recovering undue payment, rules of evidence) than those governing the exercise of similar rights derived wholly from domestic law."

21. Similar expressions can be found in earlier jurisprudence of the Court of Justice. In Joined Cases 205 to 215/82 Deutsche Milchkontor GmbH v Federal Republic of Germany [1983] ECR 2633, para 19 the court said that "national legislation must be applied in a manner which is not discriminatory compared to procedures for deciding similar but purely national disputes. (emphasis supplied)". The expression "purely internal" in relation to the national measure was also used in the later case of Case C-34/02 Pasquini v Istituto Nazionale della Previdenza Sociale, judgment of 19 June 2003."

15. In relation to the Appellant's first ground of appeal of appeal, the Respondent set out in a Rule 24 response dated 29th April 2022 that:

“As regards Ground One it is not self-proving that simply because the application could have been made on a different basis on the same facts that that was the obvious intention. The application was made in the correct form to be one under the Settlement Scheme. Whilst on its face a Scheme application was doomed for the reasons given, it is not the case that one under the Regulations would necessarily have succeeded on the basis alone of dependence on the EEA national at the relevant time(s). This would have been considered against regulation 8(2) and would still have required an extensive examination before the ensuing discretionary documentation would have been issued.

Moreover, it is not the case that it was open to the judge to cure any issue by treating the application as having been made, refused and appealed on the alternative basis claimed. No basis is identified on which the Judge could, let alone should, have recast the entire appeal as being one under a completely different statutory scheme.”

16. Ms Cunha made further oral submissions today in respect of the Appellant’s grounds of appeal. She said that in any event ground one was not particularly relied on by the Appellant and thereby she said did not feel it necessary to go into any detail in respect of it. In relation to ground two the Appellant’s said that the Tribunal erred in not recognising that the Respondent erred in failing to correct the deficiency within the application. The Appellant’s argument was that pursuant to Article 18 of the UK EU Withdrawal Agreement that the Respondent did not properly consider the application by failing to do enough “to correct any deficiencies, errors and omissions” in the application which was made. This ground of appeal has alleged,

“It was an easy error to make. Instead of clicking the category that says residence card, the mistaken category of EUSS was clicked on. The A was wrongly advised. The Respondent should have brought this error to his attention, especially given the application was made in March 2020 and it was refused in October 2020.”

17. Ms Cunha referred me to some of the documents in the Respondent’s bundle, which was before the First-tier Tribunal. Firstly, at pages I1 and I2. In I1 and I2 it is noted in the letter dated 23rd July 2020 it states, “This certificate of application confirms receipt of your application under the EU Settlement Scheme”. Then at page A1 in the original Respondent’s bundle it notes as follows “Thank you for your application under the EU Settlement Scheme” and then at A2 in the decision dated 23rd October 2020, that states, at the bottom:

“Home Office records do not show that you have been issued with a family permit or residence card under the EEA Regulations as a relative of an EEA national who was a dependant of the EEA national or their spouse or civil partner, a member of their household or in strict need of their personal care on serious health grounds, and you have not provided a relevant document issued on this basis by any of the Islands.”

It goes on further on page A3 “However for the reasons already explained, you have not provided sufficient evidence to confirm that you are a dependent relative of a relevant EEA citizen. Therefore, you do not meet the requirements for pre-settled status on this basis.”

18. Ms Cunha said that this was suggestive of the Secretary of State already having taken into account the EEA Regulations and that thereby this was not within EU14. Ms Cunha took me to the Upper Tribunal's decision in **Geci** *supra* and particular subparagraph (ii) which says as follows:

“(2) Many of the provisions of the EEA Regulations are preserved (although subject to amendment) for the purposes of appeals pending as at 31 December 2020 by the Immigration and Social Security Co-ordination (EU Withdrawal) Act 2020 (Consequential, Saving, Transitional and Transitory Provisions) (EU Exit) Regulations (SI 2020 1309), ('the EEA Transitional Regulations').

(3) The effect of the amendments is that the sole ground of appeal is now, in effect, whether the decision under appeal breaches the appellant's rights under the EU Treaties as they applied in the United Kingdom prior to 31 December 2020.”

19. Ms Cunha also took me to the Court of Appeal's decision in **Celik** *supra* which dealt very substantially with the many grounds of appeal, which were raised and dealt with by the Court of Appeal. She referred me in particular to paragraphs 13 onwards. Paragraph 13, in part states:

“Article 3(2) did not oblige a Member State to grant a right of entry and residence to extended family members, including durable partners, but only to facilitate entry and residence. Rather, Article 3(2) meant that Member States had to confer a certain advantage on applications made by persons who have a relationship with a Union citizen, as compared with applications for entry and residence by nationals of third states. Any right to reside was granted by the Member State in accordance with its national legislation and the Member State had a wide discretion as to the factors to be taken into account in deciding whether to grant a right to reside to an extended family member.”

20. Page A2 said that “Home Office records do not show that you have been issued with a family permit or residence card under EEA Regs as a relative of an EEA national who was dependant on the EEA nationality...” This had considered whether the person had some sort of leave or not. Ms Cunha said that the reading of this suggest that this was taken into account by the Secretary of State and even on the evidence the requirements were not demonstrated and so it did not come within EU14.

21. Again, I refer to the full judicial headnote. In **Geci** that being by Upper Tribunal Judge Rintoul whereby it deals with matters in full which are raised before me today for completeness,

(1) *The Immigration (European Economic Area) Regulations 2016 (“the EEA Regulations”) were revoked in their entirety on 31 December 2020 by paragraph 2(2) of Schedule 1(1) to the Immigration and Social Security Co-ordination (EU Withdrawal) Act 2020.*

(2) *Many of the provisions of the EEA Regulations are preserved (although subject to amendment) for the purpose of appeals pending as at 31 December 2020 by the Immigration and Social*

Security Co-ordination (EU Withdrawal) Act 2020 (Consequential, Saving, Transitional and Transitory Provisions) (EU Exit) Regulations (SI 2020 1309), (“the EEA Transitional Regulations”). The preserved provisions and amendments made are set out in paragraphs 5 and 6 of Schedule 3 to the EEA Transitional Regulations.

- (3) *The effect of the amendments is that the sole ground of appeal is now, in effect, whether the decision under appeal breaches the appellant’s rights under the EU Treaties as they applied in the United Kingdom prior to 31 December 2020.*
- (4) *The issue of a residence card is an administrative matter. Although the Secretary of State does have power under the EEA Regulations to refuse to issue a residence card on grounds of public policy, public security or public health, she does not have the right to do so under Directive 2004/38/EC or the EU Treaties.*

22. Similarly, as was clear during the submissions, paragraphs 13 to 19 of the Court of Appeal’s decision in **Celik** dealt with the matters raised before me in full. Again for completeness, I set out an extensive part of judgment of Lewis LJ, with whom Moylan and Singh LJ agreed. It makes things very clear that the various ways in which the Appellant now seeks to make his arguments has no merit,

“13. Article 3(2) did not oblige a Member State to grant a right of entry and residence to extended family members, including durable partners, but only to facilitate entry and residence. Rather, Article 3(2) meant that Member States had to confer a certain advantage on applications made by persons who have a relationship with a Union citizen, as compared with applications for entry and residence by nationals of third states. Any right to reside was granted by the Member State in accordance with its national legislation and the Member State had a wide discretion as to the factors to be taken into account in deciding whether to grant a right to reside to an extended family member. The criteria used had to be consistent with the normal meaning of “facilitate” and “dependence” and could not deprive them of effectiveness, and the individual was entitled to a judicial remedy to ensure that the national legislation remained within the limits set by the Directive. See Case C-83/11 *Secretary of State for the Home Department v Rahman* [2013] QB 249 especially paragraphs 21 to 25 of the judgment of the Court of Justice of the European Union, and also Case C-129 *SM (Algeria) v Entry Clearance Officer (Coram Children’s Legal Centre and another intervening)* [2019] 1 WLR 5505 especially at paragraphs 57 to 73. Other principles of EU law may also apply such as the need to ensure an effective judicial remedy against a refusal: see, e.g. case C-89/17 *Secretary of State for the Home Department v Banger* [2019] 1 WLR 845 especially at paragraphs 47 to 51.

14. The provisions of the Directive were implemented by the Immigration (European Economic Area) Regulations 2016 (“the Regulations”). The Regulations recognised the right to enter and reside in the United Kingdom conferred on EU nationals and their family members (as defined in regulation 7 which reflected the provisions of Article 2 of the

Directive). Such persons had to be given a family permit under regulation 12 to enter the United Kingdom. They had a right to reside recognised by regulations 13, 14 and 15, and they had to be issued with a residence card under regulation 18.

15. Extended family members were defined in regulation 8 of the Regulations. They included certain dependent relatives and, material for present purposes, durable partners. A “durable partner” was defined in regulation 8(5) as follows:

“(5) A person satisfies the conditions of this paragraph if the person is a partner of an EEA national (other than a civil partner) and can prove to the decision maker that he is in a durable relationship with the EEA national.”

16. An entry clearance officer had a discretion to grant (“may issue”) a family permit under regulation 12(5) permitting the extended family member to join an EU national residing in the United Kingdom if certain conditions were satisfied and if “in all the circumstances it appears to the entry clearance officer appropriate to issue the EEA family permit”. Furthermore, the Secretary of State had a discretion to issue a residence card, valid for five years, under regulation 18(4) to an extended family member. That regulation provided so far as material that:

“(4) The Secretary of State may issue a residence card to an extended family member on application if -

(a) the application is accompanied or joined by a valid passport;

(b) the relevant EEA national is a qualified person or an EEA national with a right of permanent residence under regulation 15; and

(c) in all the circumstances it appears to the Secretary of State appropriate to issue the residence cards.”

17. In summary, therefore, the Secretary of State could exercise the discretion to issue a residence card to a third country national (that is, someone who was not a national of the United Kingdom nor of an EU Member State) if she was satisfied that (a) the person was in a relationship with an EU national (b) that relationship was durable and (c) it was appropriate to issue a residence card. There was guidance indicating that a relationship would be considered “durable” if the applicant produced evidence of cohabitation for two years although the guidance indicated that there could be circumstances where the couple had not been in a relationship for two years but where the relationship would still be considered durable. An example given in the guidance was of a couple who had a child together, as evidenced by a birth certificate showing shared parentage, and evidence of living together.
18. An application for a residence card had to be made online or by post using a particular form: see regulation 21 of the Regulations. We were shown a copy of the form. We were told that it contained questions designed to elicit the information that the Secretary of State needed in

order to determine if the applicant met the conditions for the grant of a residence card and to enable the Secretary of State to decide if it was appropriate to grant it.

The Provisions of the Withdrawal Agreement

19. As the recitals make clear, the Withdrawal Agreement was intended to “ensure an orderly withdrawal of the United Kingdom from the Union”. It was recognised that it was “necessary to provide reciprocal protection for Union citizens and for United Kingdom nationals, as well as their respective family members, where they have exercised free movement rights before a date set in this Agreement”.
23. Ms Cunha also said that she noted that the Appellant was represented by Mr Fazli on 5th January 2022 at the First-tier Tribunal and that neither he as the Appellant’s counsel nor the Appellant had sought to make an application for a residence card as an Extended Family Member. She also referred me to paragraph 16 of the judge’s decision which said that “there was no dispute” that the applicant did not make an application for a residence card as an EFM.
24. In reply Mr Fazli said that his notes did not assist him with what he had said at the First-tier Tribunal, but that he had indeed represented the Appellant then too. He said it was obvious that the matter should have been dealt with differently. In addition, the Appellant had always intended to make an application in a way in which he was legally qualified to do so. He said that various cases were on further appeal and he invited me to allow the appeal.

Overall Analysis with Robinson Obvious Principles Considered

25. Having set out matters in some detail, it is also important for me to remind myself of the principle of **Robinson** obvious and indeed I had invited Mr Fazli to assist me on this point during his submissions.
26. The grounds which were not raised in a hearing but are then later raised need an explanation and I invited Mr Fazli to assist me with whether the points which were referred to were **Robinson** obvious or not. Mr Fazli said firstly one needs to look at the Appellant’s witness statement before the FtT, which had said at paragraph 18 “I submit that I meet the requirements as laid down under the EU Settlement Scheme and the Immigration (European Economic Area) Regulations 2016 for the grant of pre-settle status or a Residence card” and that thereby this was a matter that needed to be considered. Mr Fazli said he acknowledged it was a defect in this case and it had not been raised correctly in the documentation. He said his submission was that it was intended by the Appellant that he was making an application under the EEA Regulations, the Appellant was not legally qualified and he thought that he met the requirements of the Regulations. Mr Fazli said the law was developing ‘quite a bit’ at the time and this case was pre the Court of Appeal’s decision in **Celik**. Mr Fazli said that a decision on permission to appeal was pending at the Supreme Court in respect of **Celik**. Mr Fazli said that even if the matter of the EEA Regulations had not been raised adequately previously and even if it was not **Robinson** obvious the Appellant had never had the opportunity to challenge the decision and had not had the opportunity to have it considered by the First-tier Tribunal.

27. In relation to paragraph 16 of the FtT's decision which said, "There is no dispute that the Appellant did not make any application for a residence card", Mr Fazli said that he agreed that was no dispute that the Appellant had not actually made any application for a residence card as an extended family member.
28. In my judgment it is well-established that a Tribunal does not need to address issues that were not raised by a party unless the issue was **Robinson** obvious. This was explained in the decision of **Lata (FtT: principal controversial issues) [2023] UKUT 00163 (IAC)** where it is said in the headnote in part as follows:
- "4. It is a misconception that it is sufficient for a party to be silent upon, or not to make an express consideration as to, an issue for a burden to then be placed upon a judge to consider all potential issues that may favourably arise, even if not expressly relied upon. The reformed appeal procedures that now operate in the First-tier Tribunal have been established to ensure that a judge is not required to trawl through the papers to identify what issues are to be addressed. The task of a judge is to deal with the issues that the parties have identified.
- ...
7. Unless a point was one which was **Robinson** obvious, a judge's decision cannot be alleged to contain an error of law on the basis that a judge failed to take account of a point that was never raised for their consideration as an issue in an appeal. Such an approach would undermine the principles clearly laid out in the Procedure Rules."

Although in a different context, in **WA (Pakistan)** at paragraph 63 it was stated "A Tribunal is not required to address unformulated alternatives on its own initiative".

29. In my judgment, taking the appeal as a whole and the individual grounds, it really comes to this. What the Appellant correctly says that the law appears to be developing in relation to EUSS and EEA Regulation cases. Mr Fazli contends that had the Appellant had the opportunity he might have said things differently and he might have put his case in a different way.
30. In my judgment the case was fully, fairly and squarely presented correctly on behalf of the Appellant by Fazli, experienced counsel, and his instructing solicitors. The fact that the Appellant now seeks to contend for a different argument has to meet the **Robinson** obvious test, or at the very least, some further basis which has not been identified to me. Although I acknowledge that there is reference to evidential flexibility within one written part of the documentation and I am very familiar with the Supreme Court's decision in relation to evidential flexibility in the case of **Mandalia v Secretary of State for the Home Department** [2015] UKSC 59, that is of a very different type of case compared to this case. In any event, nothing focused or specific was relied on before me to make good such a submission. In that case Lord Wilson, with whom the other Supreme Court Justices agreed, was dealing with a specific policy instruction. Here there is no such submission before me. The guidance here does not offer to identify the omission for an applicant in any event. I note further that even if the matter was further considered under the EEA Regulations it is not possible to say that it would have succeeded, as Ms Cunha identified.

31. So, in the circumstances, although one may have sympathy for the Appellant and the situation which he finds himself in, my task is to consider whether there is a material error of law.
32. In my judgment there is no error of law in the decision of the judge. For the sake of completeness, in relation to ground 1, I conclude that there is no basis upon which I can accept that there was a material error of law on the basis that the Appellant had 'intended' to make a different type of application. In any event I conclude that it is very clear what application was made because it was made under the EUSS as the application form to the Home Office shows. The witness statement to the Tribunal was much later. In relation to ground 2, I simply see no basis upon which the deficiency alleged against the Secretary of State is something that needed to be corrected by the Respondent rather than by the Appellant himself. The Regulation 8(2) dependent family member route was not imported into the scheme or the agreement and so in the circumstances I see no basis upon which that could succeed and indeed in **Celik**, the judgment of Lord Justice Lewis with whom the rest of the Court of Appeal agreed, very comprehensively and fully deals with all those arguments.
33. In relation to ground 3, the position here in relation to the Withdrawal Agreement is also fully and comprehensively dealt with. The Upper Tribunal in **Siddiq** has dealt with all possible permutations of the arguments represented to me today and expanded upon. In any event, in my judgment, the decision in the unreported **Ahmed** case was of a very different nature compared to the decision which is before me today. In the **Ahmed** case it is plain at paragraph 25 that there was the mere making of a clerical error with the click of a computer mouse, however, in this instant matter before me, as has been highlighted by Section A1 to A4 of the Respondent bundle and then Section I1 to A3 of the application that the Appellant fully and clearly applied under the EUSS Scheme. In any event, I simply have no evidence from the Appellant. I do not, for example, have a witness statement from him setting out his intentions or the basis upon which the appeal is now being put and I note that Mr Fazli appeared as counsel at the FtT put the case fairly and squarely as it then was and which I refer to above.
34. In the circumstances, despite the comprehensive submissions made by Mr Fazli and whilst I appreciate that the way the law stood at the time of the judge's decision may have led Mr Fazli to make the submissions that he did, is not a sufficient basis to enable me to conclude that the decision of the judge is wrong in any material manner. The law has become even clearer in for example, **Celik**, shows that the Appellant's application before me has no merit. Finality is important too. It may well be that both sides at some stage 'wished' or 'intended' they had put their case differently, but that is not a sufficient basis for me to find that there is a material error of law in according with the **R(Iran)** principles.
35. In the circumstances, I do not find that there is a material error of law in the decision of Judge Davies, that the decision of Judge Davies dismissing the Appellant's appeal stands.

Notice of Decision

There is no error of law in the decision of the First-tier Tribunal.

The decision of the First-tier Tribunal dismissing the Appellant's appeal stands.

I do not make an anonymity order.

Abid Mahmood
Deputy Judge of the Upper Tribunal
Immigration and Asylum Chamber

13 November 2023