



IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

UI-2022-005199
& 005200, 005201, 005202,
005203, 005204 & 005248
First-tier Tribunal No's: EA/14123,
14124,14125,14131,14137/2021

THE IMMIGRATION ACTS
The Tribunal Procedure (Upper Tribunal) Rules 2008

Decision & Reasons Issued:
On 30th of January 2024

Before

UPPER TRIBUNAL JUDGE MACLEMAN

Between

REYMART RESURECCION and six others
(no anonymity order)

Appellants (in the FtT)

and

ENTRY CLEARANCE OFFICER

Respondent (in the FtT)

and

AIRE CENTRE and HERE FOR GOOD
Interveners

Heard at Belfast on 17 January 2024

For the appellants: Mr T Jebb, instructed by MBM, Solicitors
For the ECO: Mrs R Arif, Senior Home Office Presenting Officer
For the interveners: Ms S Marmion, of Phoenix Law, Solicitors (watching brief only)

DECISION

1. This is the ECO's appeal against the decision of FtT Judge Sethi dated 6 June 2022, but parties are referred to herein as they were in the FtT.
2. Representatives were present at the hearing as above. The sponsor and his partner attended. The hearing was by submissions only. A remote link to the hearing was provided for observers.
3. The relationships of the appellants and the sponsor are as set out in the FtT's decision at [1 - 3].

4. On 9 November 2020 each of the appellants applied under the EUSS for a family permit under appendix EU of the immigration rules for admission to the UK as a "close family member of an Irish citizen".
5. The ECO refused the applications for absence of evidence that the appellants' relationship to the sponsor fell within the definition of "family member of a relevant EEA citizen". Accordingly, the eligibility requirements of appendix EU were not met.
6. The ECO was not represented at the hearing in the FtT. That is regrettable, in a case which involved voluminous evidence and consideration of quite complex rules, regulations, and guidance.
7. The lines of argument for the appellants, set out at [12] of Judge Sethi's decision, were (i) that the appellants met the eligibility requirements, being within the family member definition, taking account of the sponsor (Mr Herron) being a "specified relevant person of Northern Ireland" ("RPONI") and (ii) alternatively, the decisions were unlawful or disproportionate under article 10 of the Withdrawal Agreement ("WA").
8. The grounds of appeal under the Immigration (Citizens' Rights Appeals) (EU Exit) Regulations 2020, regulation 8, are set out at [18 - 19] of the decision - in brief, they are (i) breach of a right under the WA and (ii) decision not in accordance with the rules.
9. At [34] the Judge found that the 1st, 2nd, 3rd, 6th and 7th appellants (the five adult appellants) did not meet the eligibility criteria (submission (i), ground (ii)), and that their appeals were to be considered under the alternative of the WA.
10. At [35] the Judge found that the 4th and 5th appellants (the two minor appellants) met the eligibility criteria as "direct descendants under the age of 18 of the durable partner" of the sponsor, and the decisions in their cases were not in accordance with the rules; and further that they fell to be considered as the "direct descendants of the durable partner" of a RPONI at the date of the hearing, although not at the "date of application or decision" [by the ECO], which was relevant to proportionality in terms of ground (i).
11. The Judge noted at [36] the preservation in the WA, for a limited time, of rights of free movement under the 2004 Directive, and at [37], the obligation under article 3 to facilitate entry and residence of certain family members who were dependants or members of the household of the Union citizen having the primary right of residence, and the requirement in article 3 (2) (b) that the host member state "shall undertake an extensive examination of the personal circumstances and shall justify any denial of entry or residence to these people".
12. At [38 - 42], the Judge considered that although the applicants had not applied under the 2016 Regulations, which transposed the 2004 Directive, and although she did not "endeavour to predict the outcome" of applications not made, they "would have had prospects of a more favourable outcome".
13. The Judge at [44] cited article 18 (1) (o) of the WA: ...

'the competent authorities of the host State shall help the applicants to prove their eligibility and to avoid any errors or omissions in their applications; they shall give the applicants the opportunity to furnish supplementary evidence and to correct any deficiencies, errors or omissions.'

14. At [46-47] she held that the ECO had been obliged to alert the appellants to the more advantageous route, and had failed in the above duties. At [48], she cited article 18 (1) (r) on access to redress procedure to ensure that decisions are not disproportionate, and allowed the appeals.
15. The ECO's grounds of appeal to the UT raise two main points:
 - (i) the adult appellants were not within the scope of the WA, which applies by article 10 (3) to persons "who have applied for facilitation of entry and residence before the end of the transition period, and whose residence is being facilitated by the host State in accordance with its national legislation thereafter";
 - (ii) the minor appellants, in several respects, overlooked by the Judge, were not within the scope of dependency on a RPONI.
16. FtT Judge O'Brien granted permission on 26 October 2022.
17. The appellants' solicitors (then acting) filed a response dated 26 July 2023 (p 38/598, UT bundle) arguing that in terms of policy guidance and on the authority of Geci (EEA Regs) (transitional provisions; appeal rights) [2021] UKUT 285 IAC the appellants did have rights under the WA; there was satisfactory evidence regarding the RPONI; and the appellants "have an article 8 right to be considered" in line with Batool and others (other family members; EU exit) [2022] UKUT 00219 (IAC). Alternatively, the UT is invited, if there is an error, to remit to the FtT "for appropriate redress considering the evidence required by the RPONI".
18. The UT has made various directions for the disposal of the appeal (the hearing of which was previously adjourned) including a direction dated 2 January 2024 permitting the interveners to make written and oral representations. The scope of their intervention was to be as set out at page 2 of their letter dated 2 October 2023:- to focus on whether the FtT correctly concluded that the appellants fell within the scope of the WA, and "in particular" on whether the ECO had an obligation under article 3 (2) of the 2004 Directive "to facilitate the appellants' residence".
19. The ECO's primary position is consolidated into an updated skeleton argument lodged on 12 January 2024. This again contends that none of the appellants had rights under the WA and that the Judge did not adequately consider whether eligibility to join a RPONI was shown. The UT is asked to set aside the decision of the FtT and to dismiss the original appeals.
20. The appellants filed a skeleton argument (prepared by Mr Jebb) dated 14 January 2024, arguing as follows. Even if the adult appellants had no rights under the WA, they should be granted entry clearance along with the minor appellants in line with PD and others [2016] UKUT 108. The sponsor, as a dual citizen, was "clearly a Union citizen" within the scope of the WA. His partner was also within that definition. The requirement to facilitate is mandatory, and failure to do so was contrary to the WA. Even if the sponsor "did not meet the criteria of an EEA citizen under the 2016 Regulations, the 5 adults had rights under the WA and the decision of the [ECO] was in breach of same". The minor children fell within the definition relating to a RPONI. The Judge could not be criticised for not dealing with contentions on that matter which were not made for the ECO in the FtT.

21. The ECO's addendum dated 15 January 2024 clarifies that all 7 appeals are pursued, and contends thus. The minor appellants were not within the scope of the WA. As it now emerges that the sponsor is a dual UK and Irish citizen, the residence card issued to his partner was never valid. Accordingly, there was no route to entry as the dependant of a RPONI. The reason that being a RPONI was not previously challenged is that it had not been relied upon. PD and others, being concerned with article 8 ECHR, is no authority on whether the ECO's decisions breach any rights of the adult appellants under the WA or appendix EU (Family Permit). The UT is asked to reverse the outcome also for the minor appellants, or to remit "for the FtT to consider properly whether the requirements of Appendix EU (Family Permit) are met".
22. The interveners advised by an email of 15 January 2024 from their solicitors that having seen the submissions for the appellants they had nothing to add and would maintain only a watching brief.
23. The submissions of Mrs Arif were along the lines of the skeleton argument and addendum.
24. On ground 1, as to the adult appellants, she further founded on McCarthy v Secretary of State for the Home Department [2011] 3 CMLR 10 (Case C-434/09) and on De Souza (Good Friday Agreement: nationality) [2019] UKUT 00355 (IAC) as showing that the sponsor's dual nationality did not enable him to be treated as an EEA national for present purposes. The outcome of their appeals should be reversed.
25. On ground 2, as to the minor appellants, she argued that they were not in the scope of the WA, for the same reasons as the adults; and as the facts now emerge, the sponsor being a dual citizen, his partner's residence card and pre-settled status were both invalidly granted. The ECO never had the opportunity to consider where the appellants should benefit from the sponsor being a RPONI. The FtT gave the matter no adequate consideration. The evidence did not establish that case.
26. Mr Jebb relied on the arguments outlined above, and further said that the ECO now sought to complicate a case which had arrived in the FtT as a straightforward evidential question of dependency. There was no dispute over the FtT's resolution of that factual matter in the appellants' favour. The ECO now effectively raised a fresh, unanticipated challenge. The applications made by the appellants, before the end of the transition period, brought them within the scope of the WA, and their entry should have been facilitated.
27. I reserved my decision.
28. The FtT was plainly right to find that the adult appellants did not meet the eligibility criteria.
29. One aspect of the UT's directions was whether this case should be stayed behind Siddiga CA-2023-001050, appealing the decision of the UT (the Hon Mrs Justice Hill and UT Judge Kebede), [2023] UKUT 47 (IAC). The respondent on 6 November 2023 resisted a stay, on the view that irrespective of what the Court of Appeal might decide on whether an ECO should have treated an application for an EUSS family permit as an application under the 2016 Regulations, this case was defeated by the sponsor being a dual national who had never exercised free movement rights.

30.The UT decided not to stay behind Siddiqua.

31.The UT's findings in Siddiqua, and the earlier relevant case law, are set out 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 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 .

32.As observed above, it is unfortunate that the Judge did not have the benefit of submissions from a representative of the ECO. It is obvious that she took considerable care over the arguments put to her; but as matters now emerge more fully, it is clear that those arguments (i) glossed over legal and evidential difficulties in the appellants' path and (ii) have, to a significant extent, been resolved by later case law of the UT.

33.The appellants have not shown that the UT should depart from that case law. The principal matter before the UT - ground (i) - is settled by Siddiqua.

34.Accordingly, I find that the ECO was under no obligation to treat the applications under the EUSS as if they were applications for residence cards under the 2016 Regulations. The FtT erred on that point.

35.The case did not turn on a straightforward factual issue of dependency.

36.(I observe in passing that the finding of "prospects of a more favourable outcome" under the Regulations is not a very clear foundation for the appellants to succeed, even if the FtT had been right in principle about consideration in terms of the Regulations.)

37.The appellants argue that the sponsor is within the scope of the WA because article 2 (c) defines a Union Citizen as any person holding the nationality of a member state, and article 2 (b) lists Ireland as one of those.

38. That is defeated by article 10 (1) (a): the WA applies to *“Union Citizens who exercised their right to reside in the UK in accordance with Union law before the end of the transition period and continue to reside there thereafter”*. The sponsor does not fall within that definition. Being a dual citizen, he has never exercised such a right.
39. The appellants have (rather faintly) attempted an argument (paragraph 13 of their skeleton) that the sponsor’s partner falls within the definition of article 10 (1) (e), but that is defeated for similar reasons.
40. The appellants have provided no answer to the point that the sponsor’s partner was never entitled to a residence card.
41. The appellants criticise the ECO for not taking any point in the FtT that the sponsor is not a RPONI. They say that excuses any lack of consideration by the FtT. That is an ingenious attempt, but not sustainable. It was the appellants who first raised this argument in the FtT, but they failed to substantiate it as they should have done. Nor, despite the long history of this case, have they done so before the UT.
42. The UT’s various directions (i) reminded parties of the presumption that in the event of setting aside, the UT would proceed to remake the decisions at the same hearing, and (ii) required them to assemble the evidence, including any additional evidence, on which they proposed to rely.
43. The minor appellants have not produced the evidential links by which they might have shown that they are the direct descendants of the durable partner of a RPONI.
44. For all that has emerged so far, it is unlikely that those links exist.
45. The appellants have had ample opportunity to make their case. There is no reason either to remit, or to fix a further hearing in the UT.
46. The wider argument which was raised by reference to PD and others does not get off the ground. As pointed out for the ECO, PD was an instance of “conjoined Article 8 ECHR claims of multiple family members”. This is not an appeal on human rights grounds. Article 8 has no purchase.
47. Drawing the above together, the ECO’s grounds and submissions have shown that the FtT erred by finding that the appellants were within the scope of the Withdrawal Agreement, and by overlooking the several respects in which the minor appellants were not within the scope of dependency on a RPONI.
48. The FtT’s decision is **set aside**, and remade thus: all the appeals, as originally brought to the FtT, are **dismissed**.

Hugh Macleman

Judge of the Upper Tribunal
Immigration and Asylum Chamber
25/1/24