



IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2024-003002 & UI-2024-003111

First-tier Tribunal No: EA/11205/2022

THE IMMIGRATION ACTS

**Decision & Reasons Issued:
On the 06 November 2024**

Before

UPPER TRIBUNAL JUDGE BULPITT

Between

Secretary of State for the Home Department

Appellant

and

Kelvin Kwabena Chechade

Respondent

Representation:

For the Appellant: Mr N Wain - Senior Home Office Presenting Officer

For the Respondent: Mr S Hingora - Counsel instructed by Jain Solicitors

Heard at Field House on 1 November 2024

DECISION AND REASONS

1. This is an appeal brought by the Secretary of State for the Home Department against the decision of First-tier Tribunal Judge S Taylor (the Judge) promulgated on 20 May 2024. To avoid confusion, although it is the Secretary of State who brings this appeal I will refer to the parties as they were in the First-tier Tribunal where Mr Chechade was the appellant and the Secretary of State the respondent.
2. The appellant is a citizen of Ghana and is thirty-one years old. He entered the United Kingdom as a visitor on 17 July 2018. Just over two years later, on 15 December 2020 he submitted the application that has led to this appeal. The precise nature of the application he made is the central issue to this appeal and is considered below. For the time being it is sufficient to note that the application was in the form of an application for pre-settled status (limited leave to remain) under the European Union Settlement Scheme (EUSS) as the family member of his cousin, a relevant EEA citizen (the sponsor). The respondent refused the application applying the EUSS on 12 May 2021.

The Judge's Decision

3. The appellant appealed against the respondent's decision and his appeal was heard by the Judge almost three years later on 9 May 2024. At that hearing it was argued on behalf of the appellant that although the application had been made using the form for an application under the EUSS, it was in fact an application for a residence card as the extended family member of the sponsor pursuant to the Immigration (EEA) Regulations 2016 (the 2016 Regulations). This it was argued, was made clear by a covering letter that was submitted to the respondent which indicated the correct nature of the application. It was argued that the fact the application had not been considered in accordance with the 2016 Regulations meant that the refusal of the application breached a right the appellant had under the Withdrawal Agreement and the appeal should be allowed on that basis.
4. In making those arguments the appellant relied on the decision of the Court of Appeal in Siddiq v Entry Clearance Officer [2024] EWCA Civ 248 in which it was held that "*applicants are expected to make the proper applications and the Secretary of State to determine them, it is not for the Secretary of State to "chase shadows" to see if the applicant intended to make a different application*", and therefore that an application made under the EUSS must be considered under the EUSS and doing so would not be contrary to the Withdrawal Agreement. The appellant relied on a passage at [67] of Siddiq in which the Court of Appeal in Siddiq recognised that an application made in the form of an EUSS application might in fact be an application under the 2016 Regulations. By way of example the Court of Appeal made reference to an unreported Upper Tribunal decision Entry Clearance Officer v Ahmed and others UI-2022-002804, a case where the Upper Tribunal found on the facts that an application made in the form of an EUSS application was in fact an application under the 2016 Regulations.
5. Having heard evidence and submissions from both parties the Judge found that the application made by the appellant on 15 December 2020 was an application under the 2016 Regulations. He explains that finding at [16] as follows:

This appeal falls a little in between the case of Siddique and that of Ahmed, because the appellant has completed the form under the EUSS, and has submitted a covering letter which is headed up as an EEA application and quotes the EEA Regulations in the letter. However, even though the application was prepared by a professional adviser, the cover letter refers in two places to a request for the appellant to be granted (sic) pre-settled status, which is an exclusively EUSS term. As submitted on the appellant's behalf, the cover letter is headed as an application under the EEA Regulations, all of the submissions and references to the law relate to the EEA Regulations and the references to case law are all connected to the EEA Regulations. Despite the two errors of referring to pre-settled status, on balance I consider that it is clear that the letter indicates an intention to apply under the 2016 Regulations and the case of Ahmed applies, and the application may be considered under the EEA Regulations.
6. Having made that finding, in the remaining two paragraphs of his decision the Judge set out why he was satisfied on the evidence the appellant was dependant on the sponsor both prior to his arrival in the United Kingdom and whilst living in the United Kingdom. Having done that, the Judge the moved directly to his "Notice of Decision" and recorded simply that "The appeal is allowed."

The appeal to this Tribunal

7. The respondent sought permission to appeal to this Tribunal against the Judge's decision on three grounds:
- (i) that the Judge's reliance on the decision of the Upper Tribunal in Entry Clearance Officer v Ahmed and others was contrary to the decision of the Court of Appeal in Siddiq v Entry Clearance Officer;
 - (ii) that the Judge's conclusion that the application was in fact an application under the 2016 Regulations overlooked the fact that the "covering" letter referred to by the Judge was in fact dated 4 March 2021 months after the application was made and after the 2016 Regulations had been preserved. The finding was therefore "against the weight of the evidence"
 - (iii) that having found that the application was one made under the 2016 Regulations, the Judge treated the appeal as one brought against a refusal under the Regulations when it was an appeal against a decision to refuse an EUSS application.
8. Permission to appeal on ground three was granted by First-tier Tribunal Judge Curtis who refused permission to appeal on the other two grounds. The respondent renewed her application for permission to appeal on grounds one and two and was granted permission to appeal on ground two by Upper Tribunal Judge Blundell, who refused permission to appeal on ground one on the basis that in Siddiq v Entry Clearance Officer the Court of Appeal had clearly proceeded on the basis that Entry Clearance Officer v Ahmed was correctly decided.

Legal Framework

9. Whilst the United Kingdom was in the European Union, Article 3(1) of Directive 2004/38/EC (the Citizens Directive) provided for EU citizens and their family members to reside in a Member State. The definition of a family member (sometimes described as close family member) did not include a cousin. Article 3(2) of the Citizens Directive provided that other family members of the EU citizen (sometimes called Extended Family Members) shall have their residence in a Member State facilitated by that Member State if after extensive examination of their personal circumstances they are found to be dependant on, or members of the household of the EU citizen. The Citizens Directive was transposed into United Kingdom law by the 2016 Regulations in which Regulation 18(4) provided that on application the Secretary of State may issue a residence card to an extended family member of an EU citizen if it appears to the Secretary of State appropriate to issue the residence card.
10. The United Kingdom left the European Union on 31 January 2020. In anticipation of that event a Withdrawal Agreement was signed by the United Kingdom and the member states of the EU. The Withdrawal Agreement included a "transition period" which ran from when the United Kingdom left the EU until 31 December 2020. Article 10(1) of the Withdrawal Agreement provided that EU citizens and their close family members who were resident in the United Kingdom prior to the end of the transition period could continue to reside there thereafter. Article 10(3) of the Withdrawal Agreement provided that extended family members of EU citizens who have applied for facilitation of residence before the end of the transition period could continue to reside in the United Kingdom thereafter, at least until their application was resolved. Article 18 of the Withdrawal Agreement provided for applications to be made for residence in the United Kingdom pursuant to the Withdrawal Agreement, this was transposed into United Kingdom law through the EUSS. At the end of the transition period the

right of free movement between the United Kingdom and the EU ended and the 2016 Regulations were revoked.

11. It follows from this that prior to 31 December 2020 there were two schemes available through which an extended family member of an EU national could apply for the right to reside in the United Kingdom: (i) an application for their residence to be facilitated via the 2016 Regulations; and (ii) an application for leave to remain via the EUSS.
12. These two relevant schemes were analysed by the Court of Appeal in Saddiq v Entry Clearance Officer. Mr Wain and Mr Hingora agreed that the following principles are established from that analysis and are relevant to this appeal:
 - I. An application under the EUSS made by the extended family member whose residence in the United Kingdom was not already being facilitated did not bring the applicant within the scope of the Withdrawal Agreement. An extended family member who did not already have a residence card, had to apply under the 2016 Regulations for facilitation **before** the end of the transition period to come within the scope of the Withdrawal Agreement: (See [63] – [65] of Saddiq v Entry Clearance Officer)
 - II. An application that has purportedly been made under the EUSS can, if it is found as a matter of fact to be an application made under the 2016 Regulations, be treated as such an application - (see [67] of Saddiq v Entry Clearance Officer). That was what happened in Entry Clearance Officer v Ahmed where an application made in the form of one under the EUSS was found as a fact to be an application for facilitation of residence under the 2016 Regulations and treated as such, notwithstanding its form.
 - III. In such a case, where the application was made before the end of the transition period (i.e. by 30 December 2020), it has the effect of bringing the applicant within the definition in Article 10(3) of the Withdrawal Agreement at least until the application is resolved. (see [65] of Saddiq v Entry Clearance Officer).
 - IV. Where such an application is refused by the respondent without it being considered under the 2016 Regulations, the application remains outstanding and the respondent's refusal under the EUSS involves a breach of a right the applicant has under the Withdrawal Agreement. In these circumstances an appeal against the refusal should be allowed by virtue of regulation 8 of the Immigration (Citizen Rights Appeals) (EU Exit) Regulations 2020 (ICRA).
13. Applying the above principles, it was common ground that the key issue to be resolved is the respondent's ground 2 (ii) and it was necessary for me to determine whether there was an error of law which meant that I should interfere with the Judge's finding that the appellant's application was in fact one under the 2016 Regulations. If there is no such error the parties agreed that I should remake the decision allowing the appeal on the basis that the respondent's decision involved a breach of a right the appellant has under the Withdrawal Agreement. If there was an error of law in the Judge's decision then the parties agreed that I should proceed to make my own finding of fact about the type of application that the appellant made on 15 December 2020 and to remake the decision in accordance with that finding.

Did the Judge's decision contain an error of law?

14. Mr Wain argued that the judge erred by overlooking a material matter of fact which was that the letter the Judge describes as a "covering letter" to the 15 December 2020 application was in fact written and submitted almost three months later on 4 March 2021. By the time the letter was submitted the 2016 Regulations had been revoked and there was no basis for an application under the 2016 Regulations. Mr Wain argued that there was accordingly a failure to consider a key part of the evidence and that this was a material mistake as had the Judge identified that the letter was not submitted with the application he would not have found that the application was in fact one under the 2016 Regulations.
15. Mr Hingora acknowledged that the fact the "covering" letter was written on 4 March 2021 is not something the Judge recognises in his assessment of the evidence. Mr Hingora referred to the confusion that existed in December 2020 about what are complex legal provisions, and submitted that this meant applicants needed time to provide clarity about their applications. He argued that the letter provided such clarification, identifying that the application made was an application under the 2016 Regulations. Mr Hingora pointed out that the respondent was represented at the hearing and did not raise the date of the letter as an issue. In the circumstance he argued the Judge's decision did not involve an error of law and should stand.
16. I have no hesitation in concluding that the Judge has erred by failing to take account of the material fact that the letter he described as a "cover letter" to the application was in fact written and submitted almost three months after the application was made and only after the 2016 Regulations had been revoked. It is very clear from the Judge's analysis that he placed significant weight on the "cover letter" as an indication of the true intention behind the application. That he did so without recognising that the letter was not submitted with the application and without assessing the impact of the significant lapse in time between the application and the letter is, in my judgment, a material mistake amounting to an error of law.
17. I am not persuaded by Mr Hingora's suggestion that the timing of the letter was not material and that the letter was clarifying the nature of the application that had been made. The question the Judge was required to resolve was what was the nature of the application that was made on 15 December 2020. In order to determine what application was made on 15 December 2020 it was imperative for the Judge to distinguish between the material that was submitted on 15 December 2020 and material that was submitted subsequently. The mistaken understanding that that the letter was submitted with the application was clearly material to the Judge's assessment of the nature of the application being made.
18. Given this was an adversarial hearing at which the respondent was represented one might well wonder why the date of the letter was not brought to the Judge's attention during the hearing. Whilst this does cause me some concern, it does not alter the fact that the Judge has assessed the key issue in the appeal on a mistaken basis. Doing so was in my judgment a clear error of law which requires me to set aside the Judge's decision with no findings of fact preserved. It is not possible to know what the Judge would have made of the evidence had the mistake not been made.
19. Having set the Judge's decision aside, I proceed to reconsider the fundamental question of what application was being made on 15 December 2020?

What type of application was made?

20. It is common ground that the application submitted on 15 December 2020 used the form for an application being made under the EUSS (see the appellant's skeleton argument at [2]). The application is produced in an unhelpful format at pages 181 - 191 of the hearing bundle from which it is apparent that the answer to the first question in the application states unambiguously that this is an application for pre-settled status, which is a term unique to the EUSS. The form of the application and answers given within the application therefore clearly and explicitly identify this as an application under the EUSS and not an application under the 2016 Regulations.
21. It is apparent from the content of the application that it was completed with the assistance of an immigration advisor from Jein Solicitors. The witness statement from the sponsor states that the appellant's legal representative from Jein Solicitors "applied for him" but neither the appellant nor anyone from Jein Solicitors provide any evidence about how that application was completed. There is for example no explanation in the evidence for why, if this were an application under the 2016 Regulations it was submitted in the form of an EUSS application and there is no indication whether it was the lawyer who inputted the information. It is hard to comprehend how a professional legal advisor could have submitted an application under the 2016 Regulations in the form of an application under the EUSS and without any reference to the 2016 Regulations.
22. Neither is there any evidence to suggest that anything was submitted to the respondent on 15 December 2020 to accompany the application form to indicate that this was anything other than an application being made under the EUSS as it appears.
23. In summary therefore, all the evidence from 15 December 2020 indicated that the application submitted was explicitly and unequivocally one for pre-settled status under the EUSS.
24. Mr Hingora submitted that the letter on 4 March 2021 provided clarification that, despite appearances, the type application that had originally been made by the appellant was one under the 2016 Regulations. I am unpersuaded that it would be possible three months after the application has been submitted to "clarify" that an application made in the form of an EUSS application and referring to a status unique to the EUSS was in fact an application under the EEA Regulations. The type of application being made must be assessed on the basis of what was submitted when the application was made which provides the only reliable indication of what the was the true purpose of the application. As noted already, here the material submitted on 15 December unambiguously indicated that this was in fact an application under the EUSS and not an application under the 2016 Regulations.
25. In any event, far from providing clarification the letter of 4 March 2021 was even at that stage ambiguous about the type of application that the appellant wanted the respondent to consider. The letter begins by referring to an EEA (EFM) application, then refers to an application for pre-settled status, before making reference to the Immigration Rules and then quoting the 2016 Regulations and case law dealing with those Regulations.
26. Overall, the evidence does not demonstrate that this is a case where, contrary to its form and content the application made on 15 December 2020 was in fact one made under the Regulations. I find as a fact that the application made was an application for pre-settled status which was to be considered under the EUSS.

The respondent's decision

27. The respondent considered the application in accordance with the EUSS and concluded that the appellant did not meet the requirements for being granted leave to remain in the United Kingdom because he did not have a relevant document demonstrating that his residence was being facilitated in the United Kingdom. That is the only conclusion that could properly be reached applying the EUSS. It is common ground that the appellant, who came to the United Kingdom as a visitor in 2018 and did not make any further application for leave to remain until the one dated 15 December 2020, was not having his residence facilitated by the United Kingdom. The respondent's decision to refuse the application was entirely consistent with the rules of the EUSS and did not breach a right the appellant had under the Withdrawal Agreement. As such the appellant's appeal against the respondent's decision must be dismissed.

Conclusion

28. The decision of the Judge contained a material error of law and must be set aside. The Judge mistakenly considered a letter sent three months after the application was made, to be a covering letter accompanying the application.

29. Having considered all the evidence I find that the application made by the appellant on 15 December 2020 was an application under the EUSS. That was the form in which it was submitted and it was how it described itself. The ambiguous letter sent by the appellant's representatives almost three months later does not alter the fact that the application had been made under the EUSS.

30. The respondent was right to refuse the appellant's application by reference to the EUSS as the appellant's residence in the United Kingdom was not being facilitated prior to the end of the transition period. The respondent's decision did not breach a right the appellant had under the Withdrawal Agreement as the appellant did not come within the scope of the Withdrawal Agreement.

Notice of Decision

The decision of the Judge contained an error of law and is set aside.

I remake the decision and dismiss the appellant's appeal against the respondent's refusal of his EUSS application.

Luke Bulpitt

Upper Tribunal Judge Bulpitt

Judge of the Upper Tribunal
Immigration and Asylum Chamber

6 November 2024