



IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2024-003324

First-tier Tribunal No: EU/50361/2023
LE/00931/2024

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On 3rd December 2024

Before

DEPUTY UPPER TRIBUNAL JUDGE COTTON

Between

ROMAINE GAYANI SIRISENA WATHE WADUGE
(NO ANONYMITY ORDER MADE)

Appellant

and

SECRETARY OF STATE
FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr Hingora of counsel, instructed by Jein Solicitors
For the Respondent: Ms Lecointe, Senior Home Office Presenting Officer

Heard at Field House on 27 September 2024

DECISION AND REASONS

Introduction

1. The appellant appeals against the decision of First-tier Tribunal (FtT) Judge Rodger (the Judge) dated 5 June 2024. In that decision, the Judge dismissed the appeal against the respondent's decision not to grant pre-settled status under the EU Settlement Scheme (EUSS).
2. The appellant was given permission to appeal to the Upper Tribunal on two out of the three grounds advanced, namely:
 - a. Procedural irregularity in considering matters which were not in dispute; and

- b. Failure to take into account evidence of the submission of material to the respondent on 19 March 2021.
3. At the start of the hearing, the appellant addressed me on the point that the appellant's solicitors had only uploaded the appellant's bundle the day before the hearing. I was told that this was an administrative error and the appellant's solicitors had thought they had uploaded the documents but had in fact not.
4. The respondent took no issue with the late service and I judged that I could achieve a fair hearing and that we could proceed.

Submissions – Error of Law

5. On the procedural irregularity ground, the appellant submitted that the Judge assessed whether a covering letter had been before the respondent at the date of the respondent's decision which led to the appeal to the FtT.
6. The FtT was required to determine, says the appellant, whether the appellant had applied for an EEA residence card using the wrong form and, if so, whether the basis on which the application was made was clear from the covering letter and submitted material (para 5 of the appellant's skeleton argument in the FtT – the ASA). The appellant's grounds of appeal state that this was an agreed formulation of the issue, and that nothing is recorded within the determination which indicates either party sought a departure from that issue.
7. The appellant submits that the Judge misidentified that the substantive issue was whether the appellant had proved the respondent ought to have considered the covering letter dated 30 December in determining her application ([19] of the FtT determination).
8. The Judge erred, says the appellant, in that they sought to resolve the question of whether the covering letter dated 30 December 2020 was uploaded for the EUSS application. This was in error because it is not a natural extension of the issue outlined in the appellant's FtT skeleton argument, the Judge did not put the appellant on notice that this was an issue to address, and the appellant was therefore unable to formulate or put their case on this point. The appellant submitted that it was the effect of the covering letter that was in play, which has been re-cast by the Judge as a question of whether the covering letter was uploaded by the appellant at all.
9. The respondent submits that the Judge identified the issues in the case correctly and also recognised that the issue of whether the respondent should have considered the covering letter could only be determined by considering first whether the covering letter was sent by the appellant and received by the respondent.
10. The respondent points to [21] of the FtT determination as an indication that the appellant was on notice that this was an issue. [21] concerns the evidence of the appellant's solicitor on what documents were submitted to the respondent. The respondent's position is that the Judge considers the proof of posting in evidence and queried with counsel which covering letter was in the package for which there is proof of posting. The Judge goes on to find that the applications were neither posted nor submitted at [22].

11. With regards to the ground of appeal, the appellant's case is that the Judge failed to take into account that the appellant had produced evidence (in the FtT bundle) which confirmed that material had been uploaded to the respondent. The appellant states that the FtT failed to assess whether this may have contained the covering letter dated 30 December 2020. The appellant submits that this would have been directly relevant to the Judge's assessment of whether the respondent had received the covering letter.
12. The relevant part of the appellant's bundle, submitted the appellant, is from p15 of the bundle submitted by the appellant to the FtT after the deadline for doing so (as opposed to the bundle which the FtT administration had collated from material submitted by the deadline). This is also from p50 of the UT bundle. The document is the (apparently automated) email response confirming receipt of documents uploaded to the respondent on 19 March 2021.
13. The respondent points out that the relevant email does not contain any itemisation of what had been submitted.

Analysis and conclusions - Error of law

14. With regards to what the agreed issues were at the hearing, I note that neither party has chosen not to seek a transcript of the FtT hearing, which would either confirm or correct the assertion by the appellant that the issues in the case were agreed verbally.
15. In the ASA, the appellant identifies the first issue for the Judge as whether it was clear that the appellant had applied on the wrong form, based on the material that had been submitted to the respondent. It seems to me that the Judge would first be required to identify what material was available to the respondent in order to answer this question.
16. At [21] the Judge records that, prior to the start of the FtT hearing, counsel for the appellant was asked to take instructions about the two applications. This led to counsel informing the Judge that his instructions were that the covering letter in question was included in the paper EEA application. The appellant does not dispute the Judge's record of this interaction.
17. I consider that the Judge has made it sufficiently clear to the appellant, before the hearing started, that they are assessing what material was in front of the respondent by asking counsel (and through them their instructing solicitors) for details of the two applications. The Judge had thereby raised the content of the two applications before the hearing, and counsel had informed the Judge that the appellant's case was that the covering letter had been provided to the respondent.
18. The Judge then reflects on the evidence in the bundles and concludes at [22] that the appellant had not proved that the covering letters had been sent to the respondent. The Judge has sufficiently raised the issue with counsel, but simply finds against the appellant on this point. The Judge did not err in relation to the first ground of appeal.
19. Once counsel for the appellant had been asked by the Judge to clarify the appellant's case on the two applications (at [21]), and the Judge had delayed the start of the hearing to enable this to happen, counsel for the appellant was free to

apply for an adjournment to consider how to approach this aspect of their client's case if it had not been prepared before this point.

20. On the second ground of appeal, I note that the automated receipt from the respondent that the appellant relies on does not detail anything about what material had been uploaded.
21. Next, I look to [24] of the FtT determination. The Judge starts that paragraph by taking into account the evidence of the appellant's solicitor covering what material had been submitted to the respondent. This was done briefly (appropriately so in my judgment) in light of the fact that the solicitor did not attend the hearing and so had not given any evidence beyond their statement and was not cross-examined. Before coming to the conclusion that the evidence regarding online submission of the covering letter on 19 March 2021 is not reliable the Judge states that they have "assessed all of the evidence". I find that the Judge has made it sufficiently clear that they have taken into consideration the email receipt that the appellant draws my attention to and, in fact, all of the evidence. The Judge has, in fact, has assessed whether the material uploaded contained the covering letter in question, coming to a conclusion at [26].
22. I consider that the email relied upon before me was not worthy of treatment any greater than that which it was given in the Judge's determination. It does not itemise the evidence that had been uploaded. The Judge did not err in relation to the second ground of appeal.

Notice of Decision

1. The making of the decision of the First-tier Tribunal did not involve the making of an error on a point of law.
2. I do not set aside the decision.

D Cotton

Deputy Judge of the Upper Tribunal
Immigration and Asylum Chamber

26 November 2024