Upper Tribunal (Immigration and Asylum Chamber)

Appeal Number: EA/00500/2021
UI-2021-001227

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 18 March 2022	**On 14 July 2022**
Written submissions on 1 April 2022	

Before

UPPER TRIBUNAL JUDGE BLUNDELL
DEPUTY UPPER TRIBUNAL JUDGE MALIK QC

Between

ENTRY CLEARANCE OFFICER, ISLAMABAD

Appellant

and

ADNAN SHOUKAT

Respondent

Representation:
For the Appellant: Mr T Lindsay, Senior Presenting Officer
For the Respondent: Neither present nor represented

DECISION AND REASONS

1. The Entry Clearance Officer appeals, with permission granted by the First-tier Tribunal ("FtT"), against the decision of Judge C Scott, who allowed Mr Shoukat's appeal against the decision to refuse his application for an EEA family permit.

2. To avoid confusion, we will refer to the parties as they were before the FtT: Mr Shoukat as the appellant and the Entry Clearance Officer as the respondent.

Background

3. The appellant is a Pakistani national who was born on 2 February 1986. He has made two applications for a family permit as the extended family member of an EEA national.

4. The first application was made on 19 December 2019. The appellant stated in that application that he wished to join his brother, Faizan Shoukat, and his brother's wife, Agnes Sztojika, in the UK. His brother was a Pakistani national. His brother's wife was a Hungarian national.

5. The first application was refused for reasons which may be summarised as follows. Although a marriage certificate had been provided showing that Faizan Shoukat and Agnes Sztojka were married, there was no evidence to show that the appellant and Faiuzan Shoukat were related as claimed. Nor was it accepted that the appellant was dependent on the EEA national; there was limited and recent evidence of dependency and it was thought to have been contrived in order to facilitate the appellant's entry to the UK. The ECO also expressed concern about the absence of any evidence of the appellant's own financial circumstances, which might have showed that he was using the money which was sent from the UK. Further, the respondent concluded that there was insufficient evidence to establish that the sponsor was exercising her Treaty rights as a worker or self-employed person in the UK.

6. The appellant did not appeal against the first decision. Instead, on 19 October 2020, he made the second application for a family permit as the extended family member of an EEA national. He stated again that he wished to join his brother and his sister-in-law in the UK. They were both said to be working, with a combined income in excess of £30,000 per annum. The appellant stated that he had previously been married with three children but that he had developed mental health problems in 2018, as a result of which he had been unable to support his family and had become dependent upon his brother and the sponsor in the UK. The appellant's sister-in-law was said to send him £200 per month.

7. The respondent refused the application on 21 November 2020. Fewer reasons were given than in the first decision. Under the sub-heading "The Decision", the respondent concluded as follows:

> You stated that your sister-in-law is a Hungarian national. You have provided evidence that your sponsor holds a Hungarian passport.
>
> Home Office records show that your sponsor has a husband and at least one dependent children [sic]. The submitted evidence shows that she works and from this employment earns a net income of approximately £142 per week. Due to her low income, I am not satisfied that it is sustainable for your sponsor to financially support you while meeting his own needs and the needs of any family members already reliant upon her.

> I therefore refuse your EEA Family Permit application because I am not satisfied that you meet all of the requirements of regulation 12 (see ECGs EUN2.23) of the Immigration (European Economic Area) Regulations 2016.

The Appeal to the First-tier Tribunal

8. The appellant appealed to the First-tier Tribunal on 23 December 2020. He was representing himself, then as now, and we intend him no discourtesy in providing only an outline of the detailed grounds of appeal. He explained that his brother was the director of a dry-cleaning company and his sister-in-law was also working part-time as well as taking care of the couple's son. Their income was more than sufficient to support the appellant. In concluding otherwise, the ECO had failed to consider all of the evidence submitted.

9. In support of the appellant's appeal, the sponsor and her husband provided a bundle of documents which included what was effectively a written submission in response to the ECO's decision. We need not summarise that document at any length. It suffices to note that it provided details of the sponsor's financial position and submitted, with reference to the documents provided, that she and her husband were capable of supporting the appellant in the UK.

10. The grounds of appeal stated that the appellant wished his appeal to be determined without an oral hearing. On 19 October 2021, therefore, the papers were placed before the judge in chambers. The judge's findings were concisely expressed and were as follows (reproduced verbatim):

> [10] There is no issue taken by the respondent, either with the appellant being an extended family member of the sponsor (on the basis that he is the brother of Mr Shoukat who is married to the sponsor), or that he is dependent on the sponsor.
>
> [11] The sole issue raised by the respondent is that the sponsor would not be able to financially support the appellant, whilst meeting her own needs or the needs of other family members who are already reliant on her.
>
> [12] Upon scrutiny of the requirements of Reg 8 of the EEA Regs, I find that there is no requirement for the sponsor to demonstrate that she is able to financially support the appellant after he arrives in the UK. In order to meet the requirements of reg 8(2), the appellant must demonstrate that he is (a) residing in another country, and (b) dependent on the EEA national at that time. As such, I find that the appellant meets the requirements of reg 8 of the EEA regs as an extended family member.

The Appeal to the Upper Tribunal

11. The single ground of appeal is that the judge misdirected herself in law. The respondent submitted that it had been incumbent on the judge to consider whether it would be appropriate in all the

circumstances to grant a family permit: regulation 12(4)(c) refers. Those circumstances included an assessment of whether the appellant was likely to become a burden on the social assistance system of the UK, under regulation 13(3). Given that this was likely, it was not appropriate to issue a Family Permit and the judge had erred in failing to consider this issue. Regulations 8 and 12 'go hand in hand for entry clearance applications', submitted the respondent.

12. At the outset of Mr Lindsay's submissions, we provided him with a copy of Upper Tribunal Judge Blum's unreported decision in Mushtaq v ECO EA/05697/2019. In that appeal, it had been accepted by a different Senior Presenting Officer that the respondent ECO had not been lawfully entitled to refuse to issue a Family Permit on the basis that the appellant may, in the future, become an unreasonable burden on the UK's social assistance system: [11]. Judge Blum had decided that appeal accordingly.

13. Mr Lindsay had only recently been provided with the papers in this appeal and had been minded to make submissions in development in the grounds of appeal. He submitted that the likelihood of an applicant becoming a burden on the social assistance system of the United Kingdom was a relevant consideration in the examination required by regulation 12(4)(c). Mr Lindsay was not able to direct us to any authority in support of his submission. Nor, although he made reference to relevant policy documents, was he able to provide any extant policy or guidance issued by the respondent which suggested in terms that the scope of regulation 12(4)(c) was as wide as he suggested. We asked whether he was able to provide us with a copy of EUN2.23, as cited in the respondent's decision. He was not, although he had made some enquiries about this.

14. We invited Mr Lindsay to make further enquiries and indicated that we would be interested to receive a copy of EUN2.23 together with any written submissions he wished to make. We afforded him two weeks in which to make any submissions he wished to make.

15. On 1 April, Mr Lindsay filed and served concise written submissions which might properly be reproduced in full:

> [1] At the appeal hearing on 18th March 2022, the appellant ECO was requested by the Tribunal to provide further information in respect of the "ECGs" referred to in the decision made on 21st November 2020 to refuse entry clearance to Mr Shoukat. Upon investigation the author's understanding is as follows.
>
> [2] ECGs is an initialism for Entry Clearance Guidance; this is guidance provided to ECOs and ECMs on assessing applications. EUN2.23, referred to in the decision, is a reference to paragraph 23 of EUN02. EUN02 was Entry Clearance Guidance relating to the consideration of applications for EEA family permits.
>
> [3] Modernised guidance (incorporating the ECGs and other sources of guidance) superseded the ECGs, including EUN02, in November 2016. A version of EUN02, originally published

on 13th November 2013, is archived here. It has not been possible to ascertain whether this was the latest version of EUN02 published, having been archived on 9th February 2016.

[4] It is noted that paragraph 23.8 of EUN02 (that is to say, EUN2.23.8) refers to the scope for member states to determine the terms of entry and residence in accordance with domestic legislation, and that the UK is therefore 'allowed to set terms on when it will accept extended family members and allow them to reside in the UK as family members of an EEA national'.

[5] It is submitted that this accurately reflects the position at law, and is consistent with the ECO's position at the appeal hearing. It may be that this provision of EUN02 was what the decision-maker had in mind. However, it is not clear why the ECO's decision refers to the ECGs specifically, given they have been superseded by and incorporated into modernised guidance.

[6] The ECO continues to rely upon the grounds of appeal and submissions made at the hearing, and respectfully invites the Upper Tribunal to allow the appeal.

Legislative Framework

16. The fifth recital to the Citizens Directive (2004/38/EC) recorded the intention of the Member States of the European Union that the family members of Union citizens should automatically have the same right to move and reside freely within the Union as their principal.

17. The sixth recital recorded the intention in respect of other family members in the following way:

> (6) In order to maintain the unity of the family in a broader sense and without prejudice to the prohibition of discrimination on grounds of nationality, the situation of those persons who are not included in the definition of family members under this Directive, and who therefore do not enjoy an automatic right of entry and residence in the host Member State, should be examined by the host Member State on the basis of its own national legislation, in order to decide whether entry and residence could be granted to such persons, taking into consideration their relationship with the Union citizen or any other circumstances, such as their financial or physical dependence on the Union citizen.

18. Article 3 of the Directive is titled 'Beneficiaries' and makes provision at Art 3(1) for Union Citizens and their family members. Article 3(2) is as follows:

> (2) Without prejudice to any right to free movement and residence the persons concerned may have in their own right, the host Member State shall, in accordance with its national legislation, facilitate entry and residence for the following persons:
>
> (a) any other family members, irrespective of their nationality, not falling under the definition in point 2 of Article 2 who, in

the country from which they have come, are dependants or members of the household of the Union citizen having the primary right of residence, or where serious health grounds strictly require the personal care of the family member by the Union citizen;

(b) the partner with whom the Union citizen has a durable relationship, duly attested.

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.

19. Having set out the duty to facilitate the entry and residence of other family members in accordance with national legislation, the Directive is otherwise silent on the situation of other family members, thereby leaving the operation of that duty in the hands of Member States.

20. The Immigration (EEA) Regulations 2016/1052 ("the 2016 Regulations") were revoked on 31 December 2020. The judge noted, correctly, at [4] of his decision that regulation 8 of the 2016 Regulations continued to apply to an appeal which was pending on Implementation Period Commencement Day, by virtue of paragraphs 5 and 6 of Schedule 3 to the Immigration and Social Security Co-ordination (EU Withdrawal) Act 2020 (Consequential, Saving, Transitional and Transitory Provisions) (EU Exit) Regulations 2020/1309.

21. We note that regulations 12 and 13 were not preserved, and that the family permit route in fact closed on 30 June 2020, but no point is taken in that regard by the ECO before us, presumably because she is required by Article 10(3) of the Withdrawal Agreement to issue a 'product' to all those whose EEA family permit applications were successful, including on appeal, even though the family permit route close after 30 June 2020: p11 of the respondent's guidance entitled *EU Settlement Scheme Family Permit and Travel Permit*, version 12, refers. (See also [7]-[10] of Begum v SSHD [2021] EWCA Civ 1878.)

22. Between 15 August 2019 and 30 December 2020 (and therefore when this appellant's application for a family permit was made and refused), regulation 8 of the 2016 Regulations defined the range of individuals who might be considered to be the 'extended family members' of an EEA national. Since it was accepted (or not doubted) by the ECO that the appellant fell within the definition in reg 8(2), it is unnecessary to set out any part of that provision other than reg 8(8). That provision was inserted by reg 2(5)(f) of the Immigration (European Economic Area) (Amendment) Regulations 2019/1155 on 15 August 2019 and was as follows:

(8) Where an extensive examination of the personal circumstances of the applicant is required under these Regulations, it must include examination of the following—

(a) the best interests of the applicant, particularly where the applicant is a child;

(b) the character and conduct of the applicant; and

(c) whether an EEA national would be deterred from exercising their free movement rights if the application was refused.

23. Before its revocation on 30 December 2020, regulation 12 of the 2016 Regulations made provision for the issuance of family permits by Entry Clearance Officers. Regulation 12(4)-(5) made specific provision for extended family members in the following terms:

> (4) An entry clearance officer may issue an EEA family permit to an extended family member of an EEA national (the relevant EEA national) who applies for one if—
>
> (a) the relevant EEA national satisfies the condition in paragraph (1)(a);
>
> (b) the extended family member wants to accompany the relevant EEA national to the United Kingdom or to join that EEA national there; and
>
> (c) in all the circumstances, it appears to the entry clearance officer appropriate to issue the EEA family permit.
>
> (5) Where an entry clearance officer receives an application under paragraph (4) an extensive examination of the personal circumstances of the applicant must be undertaken by the Secretary of State and if the application is refused, the entry clearance officer must give reasons justifying the refusal unless this is contrary to the interests of national security.

24. Before its revocation, Regulation 13 provided for an EEA national or their family member to have an initial right of residence in the United Kingdom for a period of three months from their first admission to the UK. That right was however subject regulation 13(3), which was as follows:

> (3) An EEA national or the family member of an EEA national who is an unreasonable burden on the social assistance system of the United Kingdom does not have a right to reside under this regulation.

Analysis

25. When the appellant made his first application for a family permit, the respondent clearly did not accept that Ms Sztojika was a qualified person, that he was related to her as claimed, or that he was dependent upon her such as to satisfy the definition of an extended family member in regulation 8(2). Upon the appellant submitting additional evidence in support of the second application, these concerns fell away and the only ground of refusal was as reproduced at [7] above.

26. The sole ground of refusal was therefore that the ECO was not satisfied that the appellant met ‘all of the requirements of regulation 12’. Before we come to consider the grounds of appeal against the FtT’s decision, it is necessary to reflect on the nature of an appeal against a decision such as this.

27. Regulation 12(4) confers a discretion on the respondent to issue a family permit if 'in all the circumstances, it appears to the entry clearance officer appropriate' to do so. There can be no doubt that there is a right of appeal against a refusal to exercise that discretion in an applicant's favour but that is not to say that the Tribunal (whether the FtT or the Upper Tribunal) may step into the shoes of the respondent in the course of such an appeal and undertake for her the discretionary consideration required by regulation 12(4)-(5). As the regulations themselves make clear, it is for the entry clearance officer (and not the Tribunal on appeal) to be satisfied that it is appropriate to issue the family permit sought by the applicant.

28. In FD (EEA discretion: basis of appeal) (Algeria) [2007] UKAIT 49, the AIT (the then Deputy President and Senior Immigration Judge Grubb) concluded that the Asylum and Immigration Tribunal had jurisdiction to review the equivalent discretion in the Immigration (EEA) Regulations 2006 and to substitute a decision allowing the appeal if it considered that the discretion should have been exercised differently. That decision was followed in MO (reg 17(4) EEA Regs) [2008] UKAIT 61 and YB (EEA reg 17(4) – proper approach) (Ivory Coast) [2008] UKAIT 62; [2009] Imm AR 18.

29. Those decisions of the AIT belonged to a different statutory and jurisprudential era. As is clear from FD (Algeria), it was critical to the AIT's reasoning that a Tribunal considering an appeal against a discretionary refusal under regulation 17(4) was required to allow that appeal 'in so far as it thinks that … a discretion exercised in making a decision against which the appeal is brought … should have been exercised differently'. That power was conferred expressly by section 86(3) of the Nationality, Immigration and Asylum Act 2002 ("the 2002 Act"), which was removed as part of the overhaul of appeal rights wrought by the Immigration Act 2014.

30. By paragraph 1 of Schedule 2 to the 2016 Regulations, the only ground of appeal available in an appeal of this nature was that the decision breached the appellant's rights under the EU Treaties in respect of entry to or residence in the United Kingdom. Section 86 of the 2002 Act, as amended, also applied to such an appeal because of paragraph 1 of Schedule 2 but it merely required the Tribunal to determine any matter raised as a ground of appeal or any matter which it was required to consider by section 85. The statutory foundations upon which the AIT based the decisions listed above were therefore swept away by the Immigration Act 2014.

31. The importance of those statutory changes is apparent from the decision of the Supreme Court in Begum v SIAC & SSHD [2021] UKSC 7; [2021] Imm AR 879. The background to that decision is sufficiently well known that we need not set it out. In considering Shamima Begum's appeal against the decision to remove her British citizenship on national security grounds, one of the issues before the Supreme Court was the scope of an appeal to the Special Immigration Appeals Commission under section 2B of the Special Immigration Appeals Commission Act 1997. At [38]-[81] of his judgment, Lord Reed considered that question in detail, with reference to a range of earlier

authority. At [68], Lord Reed stated that "appellate courts and tribunals cannot generally decide how a statutory discretion conferred upon the primary decision-maker ought to have been exercised, or exercise the discretion themselves, in the absence of any statutory provision authorising them to do so". He added that such appellate bodies are

> "… in general restricted to considering whether the decision-maker has acted in a way in which no reasonable decision-maker could have acted, or whether he has taken into account some irrelevant matter or has disregarded something to which he should have given weight, or has erred on a point of law: an issue which encompasses the consideration of factual questions…"

32. At [69], Lord Reed emphasised that SIAC's jurisdiction was appellate and that references to a supervisory jurisdiction were apt to confuse. Nevertheless, he explained,

> "… the characterisation of a jurisdiction as appellate does not determine the principles of law which the appellate body is to apply. As has been explained, they depend upon the nature of the decision under appeal and the relevant statutory provisions. Different principles may even apply to the same decision, where it has a number of aspects giving rise to different considerations, or where different statutory provisions are applicable. So, for example, in appeals under section 2B of the 1997 Act against decisions made under section 40(2) of the 1981 Act, the principles to be applied by SIAC in reviewing the Secretary of State's exercise of his discretion are largely the same as those applicable in administrative law, as I have explained. But if a question arises as to whether the Secretary of State has acted incompatibly with the appellant's Convention rights, contrary to section 6 of the Human Rights Act, SIAC has to determine that matter objectively on the basis of its own assessment."

33. We consider these dicta to be of direct application to the scope of an appeal against a refusal by an Entry Clearance Officer to exercise her discretion under regulation 12(4) in favour of an applicant. The statute does not expressly confer upon the Tribunal the jurisdiction to consider whether the discretion ought to have been exercised differently and it must confine itself to considering whether the decision breached the applicant's rights under the EU Treaties. As an extended family member, the appellant's only right under the EU Treaties was, as we have seen, to an extensive examination of his personal circumstances in accordance with national legislation so as to decide whether to facilitate his entry to the United Kingdom. In our judgment, the Tribunal may not consider for itself whether the discretion conferred upon the Secretary of State should have been exercised differently; it is instead confined to reviewing the exercise of that discretion so as to ensure that the limited right conferred by the Directive has not been breached.

34. It is on that basis that we return to the respondent's decision in this case and the FtT's consideration of it. It is on our judgment immediately apparent that the respondent's decision was not a lawful one, and that the FtT did not err in law in so concluding. We reach that conclusion for a number of reasons.

35. Firstly, the Entry Clearance Officer unlawfully applied the test in regulation 13(3) in concluding that the appellant would represent an unreasonable burden on the social assistance system of the United Kingdom. That provision was inapplicable, both because it clearly refers to those who have *already* entered the United Kingdom and have become a burden on the social assistance system and because it refers in terms only to EEA nationals and their family members.

36. Secondly, the Entry Clearance Officer made no reference to any provision of national legislation by which she was entitled to justify her denial of a family permit. She might properly (as envisaged in YB (Eritrea), cited above) have referred to the Immigration Rules and to the general requirement that those who join family members in the United Kingdom should be adequately maintained and accommodated. But she did not do so, and the way in which she expressed her refusal leaves us in no doubt that the only provision of national legislation to which she might have referred was regulation 13(3).

37. Thirdly, as highlighted by Mr Lindsay's helpful researches, the respondent relied on an out of date policy in reaching her decision. The EUN2, cited by the respondent in the decision under challenge, was part of the Entry Clearance Guidance which was replaced by Modernised Guidance as long ago as November 2016. We note that paragraph EUN 2.23 contains 'Suggested refusal wordings'. The wording in the refusal notice in this case does not appear under that sub-heading. In EUN 2.7, however, there is an instruction that an EEA family permit may be refused where

> "maintenance and accommodation requirements aren't met, for example, the non-EEA national's admittance would result in recourse to public funds."

38. We were not directed by Mr Lindsay to any more recent or extant guidance which replicates that instruction. It is notable, in our judgment, that the respondent has not sought to repeat this instruction if it was thought to be correct. Equally, it is notable that the list of considerations which appeared at regulation 8(8) of the 2016 Regulations did not include any reference either to the applicant being able to maintain himself or to the likelihood of his becoming a burden on the social assistance system of the United Kingdom after entry.

39. Fourthly, even if we were to assume that the judge below (and Judge Blum in the unreported decision which we drew to Mr Lindsay's attention) was wrong, and that the likelihood of the applicant becoming a burden on public funds was a relevant consideration in the exercise of the respondent's discretion, it is apparent from the decision that she failed to take any other matters into account. The respondent failed, in particular, to consider the best interests of the applicant, who is said to be dependent upon the EEA national as a result of mental health

problems which have prevented him from working since 2018 and have led to the collapse of his marriage. And she also failed to consider whether the EEA national would be deterred from exercising her free movement rights in the event of refusal. The substance of the decision focuses solely, and to the exclusion of any other considerations, on the respondent's concern about the likely burden on public funds. That is not what is required by regulations 8(8) and 12(5).

40. Fifthly, it appears from the wording of the refusal notice that the respondent considered that regulation 12 contained a list of 'requirements', all of which had to be satisfied before the respondent could exercise her discretion in the appellant's favour. To proceed on that basis was to err in law; the only relevant requirements, properly so called, were that the EEA national was a qualified person and that the appellant wished to join her here. The remaining consideration required by the Regulations was discretionary.

41. We have not lost sight of Mr Lindsay's written submission that the EUN2 guidance accurately records the position at law, that it is for Member States to 'determine the terms of entry and residence in accordance with domestic legislation'. We note that recent decisions of the Court of Appeal underline the correctness of his submission in that regard. In Begum v SSHD [2021] EWCA Civ 1878, for example, Andrews LJ (with whom Jackson and Singh LJJ agreed) recalled at [16] that an EU Member State is 'merely required to *facilitate* the entry and residence of such persons under its domestic legislation, and to provide justification to them for the refusal of entry or residence.' At [17], Andrews LJ went on to note that Member States 'have a wide discretion as to the factors to be taken into account when examining applications for entry and residence submitted by the family members of a Union Citizen who are envisaged in Article 3(2) of the Directive' so long as the domestic requirements did not deprive Article 3(2) of its effectiveness.

42. What Andrews LJ said in that regard was based squarely on the decision of the Grand Chamber of the CJEU in SSHD v Rahman & Ors [2013] QB 249, at [24] in particular. We are prepared to assume, without deciding, that a Member State might legitimately take account of the fact that an extended family member would be likely to represent a burden on its social assistance system if granted a family permit. But that factor *must* be considered alongside the others mandated by regulations 8(8) and regulation 12(5). The respondent failed in the decision under appeal to undertake the analysis required of her. She failed to do so because she relied on an outdated policy, which she appears to have misunderstood in any event.

43. In the circumstances, we conclude that the judge in the First-tier Tribunal reached the correct conclusion, albeit that we have given rather more fulsome reasons for that conclusion. Like the judge, we conclude that the decision was in breach of the applicant's rights under the EU Treaties. For the reasons we have given at [27]-[33] above, we consider that our jurisdiction in this appeal is limited to expressing that conclusion, and that we are not able to consider whether the respondent's discretion ought to have been exercised differently. The

respondent's appeal is therefore dismissed and the decision of the FtT shall stand but the effect of our decision is that no lawful consideration of regulation 12 has been undertaken. As we understand the position, the respondent will therefore consider, with reference to Article 10(3) of the Withdrawal Agreement, whether she should grant a document to the applicant, who is accepted to be (or to have been) the extended family member of a qualified person.

Notice of Decision

The respondent's appeal is dismissed. The decision of the FtT, allowing the appellant's appeal on EEA grounds, shall stand.

No anonymity direction is made.

M.J.Blundell

Judge of the Upper Tribunal
Immigration and Asylum Chamber
24 May 2022