Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: UI-2022-002443
First-tier Tribunal: EA/10544/2021

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 10 January 2023	**On 21 March 2023**

Before

UPPER TRIBUNAL JUDGE O'CALLAGHAN

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant/Respondent

and

MD FOYAGE AHMED
(ANONYMITY DIRECTION NOT MADE)

Respondent/Appellant

Representation:
For the Appellant: Ms. S Lecointe, Senior Presenting Officer
For the Respondent: Ms. R Akhter, Counsel, instructed by Westgate Solicitors

DECISION AND REASONS

Introduction

1. For the purpose of this decision, the parties are as above, but I refer to the Secretary of State for the Home Department as the respondent and to Mr. Ahmed as the appellant, reflecting their positions before the First-tier Tribunal.

2. The respondent appeals against a decision of Judge of the First-tier Tribunal Ripley ('the Judge') sent to the parties on 1 March 2022.

Background

3. The appellant is a national of Bangladesh and is presently aged 41. His sponsor is his brother, Mr. Anamul Hoque, a citizen of Italy who resides in the United Kingdom. The appellant made his application for a family permit on 24 December 2020. There is dispute between the parties as to the substance of the application. The respondent states that it was an application for a family permit under the European Union Settlement Scheme ('EUSS'). The appellant contends that there was a mistake in the process of the application, and he sought to apply for an EEA family permit under the Immigration (European Economic Area) Regulations 2016.

4. The generated application form details the application as having been made for a 'European Family Permit' and the application category identified as 'an EU Settlement Scheme Family Permit'. An accompanying statement from the appellant, dated 15 March 2021 identifies the application as one under 'EEA-FP', and confusingly sets out various provisions of the 2016 Regulations and paragraphs of Appendix EU (Family Permit). Thus both, separate, means of application are identified in this document. However, within the statement the appellant seeks to establish dependency upon the sponsor and details various judicial authorities relevant to the consideration of dependency under the 2016 Regulations. In support of his application the appellant provided identity documents relating to himself and his sponsor, money remittances and evidence of the sponsor's employment in the United Kingdom.

5. Treating the application as one made for an EUSS family permit, the respondent refused it by means of a decision dated 23 November 2021. In her brief reasons the respondent observed, *inter alia*:

> 'Your application has been refused because you have not provided sufficient evidence to prove that you are a 'family member' - (a spouse, civil partner, child, grandchild, great-grandchild under 21; dependent child, grandchild, great-grandchild over 21; or dependent parent, grandparent, great-grandparent) - of a relevant EEA or Swiss citizen or of their spouse or civil partner as claimed.
>
> As your relationship to the sponsor does not come within the definition of 'family member of a relevant EEA citizen' as stated in Appendix EU (Family Permit) to the Immigration Rules, you do not meet the eligibility requirements.'

6. Having considered the matter under the EUSS, there was no requirement for the respondent to consider the issue of dependency.

First-tier Tribunal Decision

7. The appellant appealed to the First-tier Tribunal and the hearing before the Judge was conducted as a CVP remote hearing held at Hatton Cross on 18 February 2022. The appellant, who resides in Bangladesh, relied upon a witness statement. The sponsor attended and gave evidence. He

explained that the appellant submitted the application himself and failed to identify the difference between an application made under the 2016 Regulations and one made under the EUSS. However, the intention was to make an application under the 2016 Regulations, as clearly conveyed by attendant documents. The appellant relied upon a genuine mistake having been made.

8. The Judge found, *inter alia*:

> '20. I accept Mr. Shafi's [the appellant's representative] submission that this was a simple error made by the appellant and, using the only available application form, he erroneously chose the wrong category within that application form. I have considered his argument relying on regulation 21(6) of the EEA Regulations, but I would find it a stretch of interpretation to state that the appellant's understandable mistake was 'beyond his control', as required by regulation 21(6). However, there is also an argument that the appellant did use the correct form but that he chose the wrong sub-category. There may therefore be an argument that he made a valid application which the respondent should have determined under both the EEA Regulations and the EUSS.'

> '26. I am satisfied that the respondent's failure to clearly signpost potential applicants as to the correct application form fails to comply with the requirements of Article 18 [Withdrawal Agreement]. Additionally, the failure to indicate that an extended family member needs to choose the EEA Family Permit option on the form, unless he already has one, is a failure to facilitate his application under Article 3(2) as addressed in Rahman [S*ecretary of State for the Home Department v Rahman* (C-83/11) [2013] Q.B. 249]. I am satisfied that the respondent should have facilitated the appellant's application by considering whether or not he was eligible for entry by carrying out an extensive examination of his relationship to the sponsor and authorising his entry if satisfied that the relationship met the criteria of regulation 8.'

9. As to the issues of relationship, the Judge found that the appellant is the sponsor's younger brother, at [29].

10. The Judge concluded:

> '29. No other issues in relation to regulation 8 have been raised by the respondent. It has been consistently argued that the appellant has some learning difficulties and that he has been dependent on the sponsor for a long time. There is evidence of money remittance to the appellant and to his mother. The sponsor has claimed that the appellant relies on him to meet his essential living needs and that has not been disputed. The sponsor has provided evidence that he is a qualified person. In these circumstances, I am satisfied that the respondent should have considered the application of regulation 8 of the EEA regulations and that the appellant satisfies those criteria.'

11. The appeal was allowed under the 2016 Regulations. No decision was issued in respect of the EUSS appeal.

Grounds of Appeal

12. The core of the respondent's challenge as advanced by her grounds of appeal is that the Judge misdirected herself by allowing the appeal under the 2016 Regulations when the appellant had in fact made no application under those Regulations. Further, in respect of the EUSS appeal, the appellant's reliance upon *Rehman* was misplaced.

13. Judge of the First-tier Tribunal Swaney granted permission to appeal on all grounds by a decision dated 28 April 2022.

Discussion

14. At the outset of the hearing, I provided the representatives with a copy of an unreported judgment of this Tribunal (Upper Tribunal Judge Blundell and Deputy Upper Tribunal Judge Doyle) in *Ahmed et al* (UI-2022-002804 + 4) promulgated on 6 November 2022. I considered this decision would materially assist me: paragraph 11 of the Practice Directions of the Immigration and Asylum Chambers of the First-tier Tribunal and the Upper Tribunal (amended 18 December 2018).

15. Ms. Akhter sought permission to rely upon a decision of the same panel in *Yorke et al* (UI-2022-002263 + 1) which was heard on the same day and promulgated on 1 November 2022. For the reasons detailed in the paragraph above, I granted permission for the appellant to rely upon the unreported decision.

16. I observe the following paragraphs of *Yorke et al,* consistent with the approach adopted in *Ahmed et al*:

> '25. There are, as Mr. Pipe submitted, two questions which are to be considered in the first appellant's case. The first is whether the first appellant's application was made under Appendix EU (FP) or the 2016 Regulations, or both …
>
> 26. As to the first question, it is fair to say that we were at times very much persuaded by Mr. Kotas's submissions, which were based squarely on certainty and administrative workability. It was common ground before us that there is one online application form for both types of applications. It was also common ground that the only entry on the application form which determines the ultimate 'route' which it takes (under the 2016 Regulations or Appendix EU (FP)) was selected from a drop-down menu. In the case of the second appellant, the entry selected was 'Family member of an EEA national', whereas in the case of the first appellant, the entry selected was 'Close family member of an EEA or Swiss national with a UK Immigration status under the EU Settlement Scheme'.

27. Mr. Kotas submitted that the choice of the wrong category was fatal, in and of itself, and that the respondent was unarguably correct to consider only whether the first appellant could succeed under Appendix EU (FP). We consider that submission in the context of the guidance given by the President in *Batool* [*Batool and others (other family members: EU exit)* [2022] UKUT 219 (IAC)] and in the context of the enormous number of applications received by the Secretary of State as the UK was in the process of leaving the European Union. We accept that clear advice was given to applicants and that, as the President said at [72] of *Batool*, the respondent is entitled to operate a system which 'determines applications by reference to what an applicant is specifically asking to be given'

28. The real question, however, is what such an applicant is specifically asking to be given and we do not accept Mr. Kotas's stark submission that the choice made in the form is determinative in all cases. An extreme example will illustrate why that cannot be so.

29. A self-representing applicant seeks to enter the United Kingdom in order to join their uncle. They complete the form themselves, without legal assistance. They select the 'EU Settlement Scheme Family Permit' application category on the first page of the application form. The application form clearly demonstrates that the applicant is relying on their dependency on their family member. The application is submitted with a letter in which the applicant states, in terms, that they are applying under the 2016 Regulations because they appreciate that their relationship to their uncle cannot fall within the scope of Appendix EU (FP). Could it be right, in those circumstances, for the respondent to fold her arms and to treat the application as being made, and only made, under the Immigration Rules, purely because of the choice made in the drop-down menu? We come to the clear conclusion that it would not be. The respondent obviously has a discretion to consider the application under both routes and is required to exercise that discretion with a modicum of intelligence, common sense and humanity, as Sullivan J said in *R (Forrester) v SSHD* [2008] EWHC 2307 (Admin).

30. We recognise that there are important differences between the fictitious example immediately above and the case of the first appellant. He was not acting alone and has had the benefit of legal advice throughout. There was no letter which accompanied the application. In circumstances such as this, and given the obvious desirability of administrative certainty, Mr. Kotas is plainly entitled to submit that the respondent should have taken the first appellant as he found him and decided his application only under Appendix EU (FP). With some hesitation, however, we have concluded that the respondent should have considered the application under the Immigration Rules and the 2016 Regulations. We reach that conclusion for the following reasons.

31. Firstly, there can be no doubt that the application was a valid application under regulation 21 of the 2016 Regulations, and Mr.

Kotas did not attempt to suggest otherwise. It was common ground, as we have noted, that the application was submitted online, using the relevant pages of www.gov.uk, as required by regulation 21(1)(a). Equally, it was common ground that the application was complete and that it was accompanied by the required evidence establishing the sponsor's Italian nationality, as required by regulation 21(2). There is no basis for saying that the application was invalid under regulation 21(4) simply because the wrong entry on the drop-down menu was selected.

32. Secondly, it should have been apparent even from the contents of the application form itself that the first appellant was seeking to establish a case that he was the extended family member of the sponsor. Under the sub-heading 'Documents' the form itself showed that the appellant was providing evidence to establish his financial dependency on the sponsor.

33. Thirdly, and most importantly, the application was made at the same time as the second appellant's, and in reliance on the statutory declaration made by both sponsors. As we have recorded above, that declaration made reference to the application being under the EEA Regulations and clearly sought to establish a case that both appellants were related to the sponsors and were either dependent upon their sponsors or that they were members of their households. The 2016 Regulations was the only instrument cited in the declaration; there was no suggestion that the appellants were applying under the Immigration Rules.

34. Fourthly, it is also relevant to observe, when considering the fact that the two applications were seemingly made under different routes, albeit on the same evidence, that the first appellant's application was doomed to fail in the event that it was made under Appendix EU (FP). He was not, as Mr. Pipe has readily accepted throughout, within the category of 'family member' as defined in that Appendix. Whilst not impossible, it was inherently unlikely that the appellants' solicitor would simultaneously and intentionally make one application which might succeed and one which, on any view of the applicable provisions of the Immigration Rules, could not.

35. Mr. Kotas submitted at one point that it was not for the respondent to 'rake through' the application in order to discern the basis upon which it was made. We consider him to be correct in that submission, but only to a point. It is obviously incumbent upon the respondent to consider the application form submitted and all of the supporting evidence provided with it. In the case of the first appellant, there was enough in the application form to cast doubt on the intention stated by selecting the EU(FP) option on the drop-down menu. By the time a reasonable caseworker came to the opening paragraphs of the statutory declaration, however, there could be no doubt that this was intended to be an application under the EEA Regulations. The respondent was not required to 'rake through' the papers, pondering the type of application before her.

> 36. We therefore conclude that the application made by the first appellant was a valid application for an EEA Family Permit and that it should have been considered as such. In failing to consider the application under the 2016 Regulations, and in considering it only as a wholly misconceived application under the Immigration Rules, the respondent erred.'

17. The starting point in this matter is the lawfulness of the Judge's conclusion that the appellant chose the wrong category when working through the drop-down boxes. I am mindful of the guidance provided by Lord Bingham as Master of the Rolls in *Sahota v Immigration Appeal Tribunal* [1995] Imm AR 500, at 506, that an appellate judge should resist the temptation to stray into adopting their own view when considering whether a judge misdirected themself. Similar advice was given by Baroness Hale in *AH (Sudan) v Secretary of State for the Home Department* [2007] UKHL 49; [2008] 1 A.C. 678, at [30]. I am satisfied that the Judge considered the evidence before her, including the sponsor's evidence and gave cogent reasons for her conclusion. There is no misdirection in her reasoning as to genuine mistake, at [20] of her decision. Noting the confused nature of the witness statement that accompanied the application, which flip-flopped between references to the 2016 Regulations and Appendix EU, it may well be that another judge may have reached a different conclusion. However, and being mindful as to the evidence of dependency submitted with the application, I conclude that it cannot be said that a reasonable judge, properly directing themselves, could not have reached the same conclusion. In the circumstances, the Judge did not materially err in respect of a genuine mistake having occurred during the application process.

18. At that point of the decision, there was no need for the Judge to proceed much further. The appeal against the EUSS decision could not properly succeed as the appellant could not fall within the definition of family member of a relevant EEA citizen established by Annex 1, Appendix EU to the Immigration Rules. The appeal should properly have been refused, with a judicial observation that there was an outstanding application under the 2016 Regulations to be considered by the respondent.

19. However, the Judge proceeded, and she materially erred in law in allowing the appeal under the 2016 Regulations. As established by the Presidential panel decision in *Batool and others (other family members: EU exit)* [2022] UKUT 00219 (IAC), applications under the 2016 Regulations and the EUSS are separate matters, generating unrelated decisions. There was no decision issued in respect of the 2016 Regulations, and any consideration by a tribunal of the appellant under these Regulations would constitute a new matter, which under the 2020 Regulations is defined in the same way as for other immigration appeals under section 85 of the Nationality, Immigration and Asylum Act 2002, and would require the respondent's consent under section 85(5), (6) of the Act: *Alam v Secretary of State for the Home Department* [2012] EWCA Civ 960, *Oksuzoglu (EEA appeal – "new matter")* [2018] UKUT 00385 (IAC). Ms. Leconite observed before me

the respondent's position that she would wish to initially consider the issue of dependency. It was implicant from her observation that consent would not be granted to consideration of a new matter.

20. Even if the Judge had jurisdiction to consider an appeal under the 2016 Regulations, the approach adopted was materially erroneous in law. As noted at [29] of the Judge's decision, the respondent had raised no issue as to the 2016 Regulations in her decision of 23 November 2021. This is unsurprising as the decision solely concerned consideration of the appellant under the EUSS, to which the 2016 Regulations were irrelevant. The respondent was not placed on notice that she was required to address an application that, until promulgation of the Judge's decision, she had not considered to have been made. Further, the Judge proceeded to find relevant requirements of the 2016 Regulations satisfied with no adequate reasoning as to the relevant requirement of dependency. For this reason, the factual assessment in respect of the 2016 Regulations cannot stand. It will be for the respondent to consider the issue of dependency afresh when considering the outstanding application under the 2016 Regulations.

21. I am satisfied that the decision issued under the EUSS was a nullity, there being no application made by the appellant under the EUSS. Consequently, it does not engage article 10(3) of the Withdrawal Agreement as the appellant's application under the 2016 Regulations remains outstanding.

22. The proper course for this Tribunal to adopt is as follows: (1) to set aside the decision of the First-tier Tribunal to allow the appeal under the 2016 Regulations as there was no extant appeal under these Regulations before the Tribunal, (2) to set aside the decision of the First-tier Tribunal in respect of the EUSS appeal consequent to that Tribunal failing to make a decision on the appeal, and (2) to dismiss the appellant's appeal under the EUSS.

23. Consequent to the decisions detailed both above and below, the Upper Tribunal confirms that the appellant's application for a family permit under the Immigration (European Economic Area) Regulations 2016 remains outstanding to be considered by the respondent and has been since the making of the application on 24 December 2020. I further confirm the judicial findings as to the appellant and sponsor being siblings.

Notice of decision

24. The decision of the First-tier Tribunal involved the making of an error on a point of law and the decision promulgated on 1 March 2022 is set aside pursuant to section 12(2)(a) of the Tribunal, Courts and Enforcement Act 2017.

25. The decision is remade and the appeal under the European Union Settlement Scheme is dismissed.

Signed: *D O'Callaghan*
Upper Tribunal Judge O'Callaghan
Date: 11 January 2023