IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2022-002592
UI-2022-002593
UI-2022-002595
First-tier Tribunal No:
EA/11736/2021
EA/12310/2021
EA/12312/2021

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On the 23 May 2023

Before

UPPER TRIBUNAL JUDGE HANSON

Between

RUBINABANU SHARAFAT SHAIKH
RASIDABANU AKBAR GHANCHI
SAMIYA SHARAFATBHAIM SHAIKH
(NO ANONYMITY ORDER MADE)

Appellants

and

AN ENTRY CLEARANCE OFFICER

Respondent

Representation:

For the Appellant: Mr Ahmed instructed by M A Consultants (Blackburn).
For the Respondent: Ms Young, a Senior Home Office Presenting Officer.

Heard at Phoenix House (Bradford) on 12 May 2023

DECISION AND REASONS

1. The appellant's appeal with permission a decision of First-tier Tribunal Judge Ficklin ('the Judge'), promulgated on 11 March 2022, in which the Judge dismissed the appeals of the above appellants against the decision by an Entry Clearance Officer (ECO) who refused their applications for EU Settlement Scheme (EUSS) family permits, to enable them to enter the United Kingdom as family members of an EEA national exercising treaty rights.
2. The EEA national is said to be Mrs Allarakhu ('the Sponsor'), a Portuguese citizen living in the United Kingdom.
3. The Judge noted the appellants are all citizens of India, that the first appellant is the Sponsor's cousin, the second appellant the Sponsor's stepmother, and the third appellant the Sponsor's niece.

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4. The Judge sets out findings of fact from [10] of the decision under challenge. It does not appear to be in dispute that on 19 November 2022 the application under the EUSS was made.
5. The Judge records a submission made on the appellants behalf by Mr Ahmed that there had been “some kind of confusion” and the argument that as the applications were made prior to 31 December 2020 they should have been considered under the Immigration (European Economic Area) Regulations 2016 (‘the 2016 Regulations’) and that as the appellants met the requirements for extended family members, as the Sponsor had supported them since July 2018 and still does, the applications should have been granted.
6. The applications were refused by the ECO for the following reasons:

> “Your application has been refused because you have not provided adequate evidence to prove that you are a ‘family member’ – (a spouse; civil partner; durable 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.”

7. The Judge noted the applications were not made under the 2016 Regulations and that there was nothing before the Tribunal to indicate the Judge was able to consider the appeals under the 2016 Regulations when no application had been made on that basis. The Judge specifically finds at [13] “*that although at times the respondent erroneously considers applications under the EUSS that was not the case in this appeal*”. The Judge accepted the appellants did not fall into the category of being in a family relationship with the Sponsor as set out in Appendix EU (Family Permit), [14], and dismissed the appeal.
8. The appellant sought permission to appeal which was granted by another judge of the First-tier Tribunal on 16 May 2022, the operative part of the grant being in the following terms:

> 1. The application made by the appellants was made before the specified date. The application stated that the appellants were applying for a family permit under the EUSS provisions. The appeals were dismissed on the basis that the family relationships between the appellants and the sponsor were not included within the EUSS provisions. Given the date of the application, the in-time grounds assert that the Judge erred in failing to consider whether the appellants met the requirements of extended family members in accordance with the EEA Regulations 2016.
> 2. The judges failure to consider whether the appellants met the requirements of the 2016 Regulations is an arguable error of law.

<u>Preliminary issue</u>

9. Prior to the commencement of the appeal an application was received from Mr Ahmed seeking permission to rely upon an unreported determination of the Upper Tribunal, case number UI-2022-003123. The application was opposed by Miss Young at the start of the hearing.
10. Guidance on the citation of unreported determinations can be found at [11] of the Practice Direction of the First-tier and Upper Tribunal first published on 10 February 2010 and last amended on 18 December 2018. Paragraph [11] reads:

> 11. Citation of unreported determinations

11.1. A determination of the Tribunal which has not been reported may not be cited in proceedings before the Tribunal unless:

(a) the person who is or was the appellant before the First-tier Tribunal, or a member of that person's family, was a party to the proceedings in which the previous determination was issued; or
(b) the Tribunal gives permission.

10.2. An application for permission to cite a determination which has not been reported must:

(a) include a full transcript of the determination;
(b) identify the proposition for which the determination is to be cited; and
(c) certify that the proposition is not to be found in any reported determination of the Tribunal, the IAT or the AIT and had not been superseded by the decision of a higher authority.

11.3. Permission under paragraph 11.1 will be given only where the Tribunal considers that it would be materially assisted by citation of the determination, as distinct from the adoption in argument of the reasoning to be found in the determination. Such instances are likely to be rare; in particular, in the case of determinations which were unreportable (see Practice Statement 11 (reporting of determinations)). It should be emphasised that the Tribunal will not exclude good arguments from consideration but it will be rare for such an argument to be capable of being made only by reference to an unreported determination.

11.4. The provisions of paragraph 11.1 to 11.3 apply to unreported and unreportable determinations of the AIT, the IAT and adjudicators, as those provisions apply respectively to unreported and unreportable determinations of the Tribunal.

11.5. A party citing a determination of the IAT bearing a neutral citation number prior to [2003] (including all series of "bracket numbers") must be in a position to certify that the matter or proposition for which the determination is cited has not been the subject of more recent, reported, determinations of the IAT, the AIT or the Tribunal.

11.6. In this Practice Direction and Practice Direction 12, "determination" includes any decision of the AIT or the Tribunal.

11. There is no family connection between the appellants in this case and that in the unreported decision Mr Ahmed seeks to rely upon. It is therefore a case in which to rely on that document the Tribunal would need to give permission. Mr Ahmed has provided a full transcript of the determination. Although he claims the proposition for which the determination is to be cited is on all fours with the argument relied upon by the appellants, he is unable to certify that the proposition is not to be found in any reported determination and has not been superseded by the decision of a higher authority. This is because the status of a person who applied under the EUSS as a family member which was refused as they could not satisfy the definition of a family member, but who then claimed the application should have been considered under the 2016 Regulations, was considered by the Upper Tribunal in two cases referred to below in judgements which are contrary to the argument relied upon by the appellants in this appeal. It is not a case where the decision sought to be relied upon by Mr Ahmed would materially assist in determining these appeals in light of the later report decisions. The application for permission to cite the unreported determination is therefore refused.

Discussion and analysis

12. The situation faced by an individual who applied under the EUSS but who claim that the application should have been allowed under the 2016 Regulations was considered by the Upper Tribunal in Batool and Ors (other family members: EU

exit) [2022] UKUT 219 (IAC) ('Batool'). That appeal was heard on 31 March 2022 and the decision published on 10 August 2022 and so was not available to the parties in this appeal. The case does, however, deal with the proper interpretation of the relevant legal provisions considered by the Judge in this appeal.

13. The appellants in Batool applied to the respondent on 3 February 2020 under the EUSS by reference to Appendix EU (Family Permit) at the time when there were living in Pakistan with their grandparents. The applications were refused on 20 February 2020 on the basis that none of them met the eligibility requirements for an EUSS family permit.

14. In Batool it had been argued that the appellants fell within the scope of the expression "family members of the relevant EEA citizen in Appendix EU, that Article 18 of the Withdrawal Agreement required the UK to issue residence documents to family members and "other persons" which it was argued includes extended family members and those in a durable relationship, in addition to other points taken.

15. The Tribunal in Batool noted that from the formal introduction of the EUSS on 30 March 2019 until 31 December 2020 EEA citizens and their family members could still apply under either the 2016 Regulations or the EUSS. The Tribunal noted at [63] that it was evident from the websites that persons were told in plain terms that family members could apply as such for a family permit under the EUSS although in order to do so they must be close family members, an express contrast with an extended family member who could still apply under the 2016 Regulations for an EEA family permit until 31 December 2020. At [71] of Batool the Tribunal wrote:

> 71. The guidance on www.gov.uk, however, shows that the Secretary of State has been at pains to provide potential applicants with the relevant information, in a simple form, including highlighting the crucial distinction between "close family members" and "extended family members". That is a distinction which, as we have seen from the Directive and the case law, is enshrined in EU law. It is not a novel consequence of the United Kingdom's leaving the EU. It is, accordingly, not possible to invoke sub-paragraphs (e) and (f) of Article 18 as authority for the proposition that the respondent should have treated one kind of application as an entirely different kind of application.

16. Permission to appeal to the Court of Appeal was refused in relation to Batool.

17. A further case of relevance is that of Siddiqa (other family members: EU exit) v Entry Clearance Officer [2023] UKUT 00047 (IAC) heard by Mrs Justice Hill and Upper Tribunal Judge Kebede, the headnote of which reads:

> *(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.

18. Mr Ahmed accepted that in light of these decisions he was in great difficulty in advancing an argument on the appellants behalf which has realistic prospects of success. That is an accurate and professional assessment of the difficulties that he and the appellants face in light of the current legal landscape.
19. I find there is no merit in the appeal. The application was made under the EUSS. The ECO considered that application and dismissed it for reasons that have not been shown to be contrary to the law, perverse, irrational, or capable of being subject to a credible legal challenge. The appellants do not satisfy the definition of a family member in Appendix EU. There is no merit in the argument that the applications should have been considered on any other basis by either the ECO or the Judge. Accordingly, I dismiss the appeal.

Notice of Decision

20. No material legal error has been made out in the decision of the First-tier Tribunal. The determination shall stand.

C J Hanson

Judge of the Upper Tribunal
Immigration and Asylum Chamber

12 May 2023