IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2022-002868
UI-2022-002869
UI-2022-002870
UI-2022-002071
UI-2022-002872
First-tier Tribunal No: EA/07514/2021
EA/08856/2021
EA/07581/2021
EA/07487/2021
EA/07827/2021

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On 10 August 2023

Before

UPPER TRIBUNAL JUDGE HANSON

Between

ENTRY CLEARANCE OFFICER (SHEFFIELD)

Appellant

and

BUSHRA PARVEEN
IMAN FATIMA
MAHAM FATIMA
SAJAD HAIDER
ALI HAIDER
(NO ANONYMITY ORDER MADE)

Respondent

Representation:
For the Appellant: Mr McVeety, a senior Home Office Presenting Officer.
For the Respondent: Mr Broachwalla instructed by MCR Solicitors.

Heard at Manchester Civil Justice Centre on 28 June 2023

DECISION AND REASONS

1. The Entry Clearance Officer (ECO) appeals with permission a decision of First-tier Tribunal Judge Choudhury ('the Judge') promulgated on 12 April 2022, following a hearing at Manchester, in which the Judge allowed the appeals of the above named respondents, all citizens of Pakistan. The first respondent is said to

be the sister of a Shaheen Akhtar ('the Sponsor') a Dutch citizen exercising treaty rights in the UK.

2. An application was made online on 24th November 2020 for leave to enter the United Kingdom as family members of the Sponsor under the European Union Settlement Scheme (EUSS).

3. The Judge records that the sole issue to be determined was whether the above respondents were to be considered under Regulation 8 of the Immigration (European Economic Area) Regulations 2016 ('the 2016 Regulations') or under the EUSS Family Permit provisions.

4. The application was considered by the ECO under the EUSS but refused as none of the above respondents can satisfy the definition of a family member. That is a sustainable finding.

5. In relation to the submission made on the above respondents' behalf that notwithstanding the applications having been made under the EUSS it should have been considered under the 2016 Regulations, the Judge finds that this is what should have occurred, as per an alleged concession, and that the above respondents are extended family members for the purposes of regulation 8 of the 2016 Regulations, leading to the appeal being allowed.

6. The ECO sought permission to appeal on two grounds, Ground 1 asserting the Judge has made a material misdirection of law in recasting the appeals as if made against a refusal under the 2016 Regulations when there was no legal basis for doing so, and in finding he was entitled to consider the appeal under the 2016 Regulations when there was no proper legal basis for doing so, and, that even if the Judge was correct the Judge failed to provide adequate reasons or findings in relation to the alleged dependency upon the EU national sponsor as required by the Regulations. Ground 2 asserts a failure to provide adequate reasons for findings on a material matter, asserting the Judge failed to provide any reasons to support the finding the above respondents are family members for the purposes of regulation 8(2) of the 2016 Regulations as no evidence-based reasons were provided in relation to dependency of the above respondents on the EU national sponsor. It is argued the Judge's bare statement on this issue is not sufficient.

Discussion and analysis

7. The Secretary of State's grounds are made out. There has since the determination was promulgated been two relevant decisions of the Upper Tribunal.

8. In Batool and Others [2022] UKUT 000219 it was found there was no jurisdiction to consider an application made under the EUSS on any different basis. Permission to challenge this decision has been refused by the Court of Appeal.

9. The headnote of Batool reads:

> (1) An extended (oka other) family member whose entry and residence was not being facilitated by the United Kingdom before 11pm GMT on 31 December 2020 and who had not applied for facilitation of entry and residence before that time, cannot rely upon the Withdrawal Agreement or the immigration rules in order to succeed in an appeal under the Immigration (Citizens' Rights Appeals) (EU Exit) Regulations 2020.
> (2) Such a person has no right to have any application they have made for settlement as a family member treated as an application for facilitation and residence as an extended/other family member.

10. The second case is that of Siddiqa [2023] UKUIT 000347 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.

11. It is important to note in this appeal that the applications were made, without any ambiguity as to intention, under the EUSS. It is not a case in which the application form or any covering correspondence to which I have been referred, indicates what was intended is an application to the 2016 Regulations.

12. Mr Broachwalla accepted on behalf of the above respondents that he was in some difficulties with the application. Although arguing in his skeleton argument that, in reality, it was an application under the 2016 Regulations, that is not made out on the documentation considered. There was nothing before the decision maker or the Judge to show this was anything other than an application for a Family Permit under the EUSS rather than an application for entry to be facilitated as Extended Family Members under the 2016 Regulations.

13. I find the Judge has erred in law for the reasons set out in the grounds seeking permission to appeal and grant of permission to appeal. I accept the submission of Mr McVeety that the Judges decision "flies in the face of Batool". The position as set out in the reported decisions referred to above is that there is no right to have an application made under the EUSS considered on an alternative basis. I find this is particularly so whether is no indication that such a course of events would be appropriate. The unreported decision referred to by Mr Broachwalla appears to be based upon a different factual matrix and does not undermine the reported decisions referred to above.

14. Having considered the matter I find that the Judge has erred in law in a manner material to the decision to dismiss the appeal. I set the decision of the Judge

aside. In light of the authorities referred to above I find the only outcome is to substitute a decision to dismiss the appeal.

Notice of Decision

15. The Judge has erred in law in a manner material to the decision to allow the appeal. I set the decision of the Judge aside. I substitute a decision to dismiss these appeals.

C J Hanson

Judge of the Upper Tribunal
Immigration and Asylum Chamber

31 July 2023