IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2022-003059

First-tier Tribunal No: EA/03707/2021

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On 12 June 2023

Before

UPPER TRIBUNAL JUDGE JACKSON

Between

IKECHUKWU MARK OKEKE
(NO ANONYMITY ORDER MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr R Solomon of Counsel, instructed by Masuad Solicitors
For the Respondent: Mr N Wain, Senior Home Office Presenting Officer

Heard at Field House by remote video means on 30 May 2023

DECISION AND REASONS

1. This has been a remote hearing which has not been objected to by the parties. The form of remote hearing was by video, using Teams. There were no technical difficulties for the hearing itself and the papers were all available electronically.

2. The Appellant appeals with permission against the decision of First-tier Tribunal Judge Cole promulgated on 4 November 2021, in which the Appellant's appeal against the decision to refuse his application for a Family Permit dated 6 February 2021 was dismissed.

3. The Appellant is a national of Nigeria, born on 21 February 1983, who made an application for a Family Permit (the nature of the application either under the European Settlement Scheme (the "EUSS") or under the Immigration (European Economic Area) Regulations 2016 (the "EEA Regulations") is in dispute) on 29 November 2020. The Respondent refused the application under Appendix EU (FP) of the Immigration Rules on the basis that the Appellant was not a 'family

member' of his Sponsor, the relationship of brother and sister not falling within the definition.

4. Judge Cole dismissed the appeal in a decision promulgated on 26 November 2011 on all grounds. The Appellant's case was that the application was made under the EEA Regulations, not under the EUSS and should have been considered on that basis. The First-tier Tribunal, in the absence of a copy of the application form (not having been included in the Appellant's bundle and no Respondent's bundle having been submitted, nor was there any representative for the Respondent in attendance at the hearing) it was not possible to decide the basis upon which the application was made, such that both possibilities were considered and a decision made by reference to both schemes. The Appellant's appeal could not succeed under the EUSS because the Sponsor was not a family member as defined therein. The Appellant's appeal was dismissed under the EEA Regulations on the basis that the Appellant was not dependent on the Sponsor for his essential needs. Although the Sponsor was considered to be a genuine and honest witness, the Sponsor's initial evidence was preferred that if she did not provide financial support the Appellant would be ok; rather than what is described as a 'slightly backtracked position' that her financial support was needed for school feees and food as the Appellant was financially struggling. The Judge also referred to the Appellant having his own business and the Appellant's wife working.

The appeal

5. The Appellant appeals on the ground that if, as is the Appellant's case, he made an application under the EEA Regulations, the First-tier Tribunal erred in law for failing to give adequate reasons for preferring the Sponsor's initial evidence when finding there was no dependency.

6. At the oral hearing, I raised with the parties the issue of whether the First-tier Tribunal had jurisdiction to consider the EEA Regulations at all given that the decision was made under the EUSS for which there were only two grounds of appeal, first, that the decision was not in accordance with Appendix EU (FP) of the Immigration Rules and secondly, that the decision was not in accordance with the Appellant's rights under the Withdrawal Agreement. There is no right of appeal against an EUSS decision by reference to the EEA Regulations. Although not before the First-tier Tribunal, a copy of the Appellant's application was available, as well as the cover letter to it (which was within the Appellant's documents before the First-tier Tribunal). I invited the parties to make submissions on this issue by reference to the application and accompanying documents.

7. On behalf of the Appellant, Mr Solomon submitted that in substance the Appellant had made an application under the EEA Regulations; that in substance the Respondent had made a decision under the EEA Regulations; that there was therefore a right of appeal under the EEA Regulations and that the First-tier Tribunal materially erred in law in failing to give adequate reasons for finding that the Appellant had not established dependency on the Sponsor. The First-tier Tribunal had not erred in law in taking a pragmatic approach in the absence of all of the documents and in any event, by reference to those documents, the nature of the application was clear despite the error in using an EUSS application form. In particular, the cover letter to the application dated 1 December 2020 made multiple references to applying for an 'EEA Family Permit' and to the Appellant being dependent on his sister as an extended family member. Although there

was no express reference to the EEA Regulations, the cover letter used the language and requirements therein in substance. Mr Solomon stated that the single sentence in the application form referring to the EUSS does not detract from the substance of what was submitted, it was simply that an application under the EEA Regulations had been wrongly labelled as an application under the EUSS. The case of Siddiqa (other family members: EU exit) [2023] UKUT 00047 (IAC) was relied upon for looking at the substance of the application and not just the form.

8. As to the right of appeal, Mr Solomon relied on the arguments made by Mr Biggs in paragraph 37 of Siddiqa by reference to the Court of Appeal decision in Khan v Secretary of State for the Home Office [2017] EWCA Civ 1755, that the language in regulation 2 of the EEA Regulations was broad, such that an EEA decision that "concerns … a persons entitlement to be admitted to the United Kingdom" was sufficient. The assessment of whether an EEA Regulations decision was made was also a question of fact within this broad definition. Mr Solomon therefore submitted that the Respondent's decision under appeal dated 6 February 2021 was a decision under the EEA Regulations and therefore there was a right of appeal under the same which the First-tier Tribunal had jurisdiction to consider.

9. As to the substance of the First-tier Tribunal's decision, the Judge found that the Sponsor was genuine and honest and in that context there was a lack of reasons for preferring the initial evidence that the Appellant would be ok without her financial support. Further, the reference to the Appellant running his own business and his wife working was not imcompatible with the Sponsor's financial support being for essential needs. The evidence before the First-tier Tribunal included evidence as to family relationship and then mainly bank statements for the Appellant, his wife, the Sponsor and the Sponsor's sister (through whom money was said to be sent) and the oral evidence of the Sponsor. There was no breakdown or details of the Appellant's financial circumstances, income or expenditure in Nigeria and no written statement from either the Appellant or the Sponsor.

10. On behalf of the Respondent Mr Wain submitted that this was an EUSS application, an EUSS decision and a right of appeal only under the Immigration Citizens' Rights Appeals (EU Exit) Regulations 2020 such that the First-tier Tribunal had no jurisdiction to consider the appeal under the EEA Regulations. In particular, the application form used was for a 'European Family Permit' with express confirmation within the form that this was an application for an 'EU Settlement Scheme Family Permit'. The cover letter at the top refers to both an EEA Family Permit and the EU Settlement Scheme and does not contain any express reference to the EEA Regulations or specific provisions therein. Factually this is very similar to the circumstances in Siddiqa in which the Upper Tribunal found that there was only an EUSS application.

11. The decision under appeal is clearly under the EUSS and is not a refusal under the EEA Regulations when looking at its express terms and also in substance – there is no consideration of family relationship beyond the requirements of Appendix EU (FP), no assessment of dependency and no extensive examination of personal circumstances as would be required under the EEA Regulations. It is not appropriate in this sort of application for the First-tier Tribunal to be the primary decision maker on such matters. Not only was this not a valid application pursuant to regulation 21 of the EEA Regulations, it was not a decision pursuant to regulation 2 either.

12. On the basis that there was no application or decision under the EEA Regulations, the findings of the First-tier Tribunal as to dependency are not material. In any event, the decision includes clear reasons considering the evidence in the round to conclude that dependency had not been established. These included an inconsistency in the Sponsor's evidence and that the Appellant owns his own business and his wife was working. There is implicitly a reference to the correct test that the Appellant needs to be dependent on the Sponsor for his essential needs.

Findings and reasons

13. The ground of appeal in this case is a narrow one as to the adequacy of reasons, however there is a more important issue to address first which is whether the First-tier Tribunal had jurisdiction to consider the issue of dependency under the EEA Regulations at all. If not, there can be no material error of law in any event. Whilst the Judge took what can be considered a pragmatic approach in deciding the appeal on the alternative bases of the EUSS and the EEA Regulations, that should not have been done without first considering whether there was jurisdiction to do so. The First-tier Tribunal was of course hindered by the lack of a Respondent's bundle and a lack of a representative on behalf of the Respondent, but I would suggest that the better course of action in this case would have been for directions for the application to be filed with the First-tier Tribunal, which should have been available from either party. The difficulty with the attempted pragmatic approach in this appeal is that a necessary finding of fact as to the nature of the application, with a positive finding that it was an EEA Regulations application, was required before there could even arguably be consideration of the appeal under the EEA Regulations. There is no dispute that neither the application nor the appeal could succeed under Appendix EU (FP) and there was no argument that the Withdrawal Agreement could assist the Appellant (nor could it as he is not within its personal scope).

14. As agreed with the parties at the hearing, it is necessary to first determine the nature of the application made and the nature of the decision made before considering the sole ground of appeal. I find that the Appellant made a decision under the EUSS for the following reasons. First, the application form used is one for an EUSS application, with express confirmation within it that it is a 'European Family Permit' being applied for and the application category states:

> *"Close family member of an EEA or Swiss national with a UK immigration status under the EU Settlement Scheme.*
>
> *I confirm I am applying for an EU Settlement Scheme Family Permit."*

15. The application form includes the Sponsor's EU Settlement Scheme identity document number and unique application number (neither of which would be required for an EEA Regulations application) and although not listed individually, there is reference to evidence of relationship and money transfer receipts or bank statements showing money transfers from the Sponsor to the Appellant. The application form itself is clearly one for the EUSS and includes express confirmation that is the scheme under which the application is made.

16. Secondly, the cover letter from the Sponsor does not expressly refer to or rely on the EEA Regulations, nor is it consistent in the use of terminology for one application or the other. The letter headings include 'EEA permit' and 'EU Settlement Scheme' as well as 'Letter to support application of my family

member's EEA permit'. Within the body of the letter there are references to an application for an 'EEA Family Permit', the family relationship and dependency as an extended family member. Although some of the terminology is consistent with that used in the EEA Regulations, there is also ambiguous language (the use of EEA is somewhat interchangeable) and an express reference to the EUSS.

17. Thirdly, there is nothing in the supporting documents that would indicate an application under the EEA Regulations as opposed to an application under the EUSS.

18. Fourthly, as the Upper Tribunal found in Batool and Ors (other family members: EU exit) [2022] UKUT 00219, there was clear guidance and information from the Respondent available on www.gov.uk distinguishing between the two different applications that could be made providing potential applicatns with relevant information as to which application to make.

19. Considering all of the documents in the round, this is a case more akin to the factual circumstances in Siddiqa where there was no clear reliance on an application under the EEA Regulations to undermine the form used which was expressly for an EUSS application. There was nothing unreasonable in all of the circumstances for the Entry Clearance Officer to treat the application as one under the EUSS and decide it as such.

20. In any event, the decision made was clearly under the EUSS, both in form and substance. The decision is by direct reference to the requirements of Appendix EU (FP) and contains no reference to or substantive consideration of the requirements of regulation 8 of the EEA Regulations. It can not on either view be considered as a decision under the EEA Regulations and does not meet the requirements of regulation 2 therein in which an EEA decision is defined as *"a decision under these Regulations that concerns a person's (a) entitlement to be admitted to the United Kingdom."* The decision was expressly not made under the EEA Regulations so fails to meet the first part of the definition, even if it could be said that in broad terms, the decision was about entitlement to be admitted (which could extend to many other decisions not under the EEA Regulations such as for a visit visa). The decision in Khan relied upon by the Appellant in Siddiqa is easily distinguishable given the broad definition approach in that case linked two different versions of essentially the same regulations made to implement essentially the same European law, between the Immigration (European Economic Area) Regulations 2006 and the later EEA Regulations made in 2016. In the current case, there are two entirely separate schemes, one in domestic law under the Immigration Rules and one that ceased to apply at the end of 2020 pursuant to regulations made to implement a European Directive.

21. For these reasons, the First-tier Tribunal only had jurisdiction to consider the appeal under the Immigration Citizens' Rights Appeals (EU Exit) Regulations 2020 which do not include a right of appeal under the EEA Regulations. The First-tier Tribunal erred in law in considering the appeal under the EEA Regulations in the absence of any finding of fact that there was an EEA Regulations application and decision under the same. Even if there was an inadequacy of reasons in the First-tier Tribunal's decision as to dependency, that is wholly immaterial to the outcome of the appeal as it is not in dispute that the Appellant could not succeed on either ground of appeal open to him, under Appendix EU (FP) or the Withdrawal Agreement.

22. In any event, even if I am wrong as to the nature of the application, the nature of decision and therefore the First-tier Tribunal's jurisdiction, I would not have found an error of law in the First-tier Tribunal's decision as to dependency. The fact that the Sponsor was found to be genuine and honest does not mean that one part of her evidence should be preferred over the other, there remained an inconsistency which the Judge was required to deal with and no detailed reasons are needed as to why the first answer should not be preferred in the context of considering the evidence in the round. This is particularly so given the evidence and finding that the Appellant owned his own business, his wife was working (such that there was other income to the family) and there was no breakdown of his financial circumstances to show income or outgoings, specifically to show that the financial remittances were required for his essential needs. In the absence of this evidence, the Tribunal could not realistically find that the Appellant had established financial dependency on the Sponsor for at least some of his essential needs. It was open to the Judge and rational to find that the Appellant had not established dependency on the evidence before the First-tier Tribunal.

Notice of Decision

The making of the decision of the First-tier Tribunal did not involve the making of a material error of law. As such it is not necessary to set aside the decision.

The decision to dismiss the appeal is therefore confirmed.

G Jackson

Judge of the Upper Tribunal
Immigration and Asylum Chamber

30th May 2023