IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2022-001757
First-tier Tribunal No: EA/09131/2021
Case No: UI-2022-001760
First-tier Tribunal No: EA/09132/2021
Case No: UI-2022-001763
First-tier Tribunal No: EA/09133/2021

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On the 28 May 2023

Before

UPPER TRIBUNAL JUDGE JACKSON

Between

HUMERA FARDOAS
HUSSEIN MUHAMMAD
FATIMA ADAN
(NO ANONYMITY ORDERS MADE)

Appellants

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellants: Ms H Masih of Counsel, instructed by Optimus Law
For the Respondent: Ms S Cunha, Senior Home Office Presenting Officer

Heard at Field House by remote video means on 23 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 Appellants appeal with permission against the decision of First-tier Tribunal Judge Mack promulgated on 19 December 2021, in which the Appellants' appeals

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against the decisions to refuse their applications for a Family Permit (the specific nature of which is in dispute) dated 8 April 2021 were dismissed.

3. The Appellants are nationals of Pakistan comprising a mother and her two dependant children, born on 1 June 1989, 20 November 2017 and 15 November 2016 respectively. The Appellants applied for a Family Permit on 16 December 2020 (although there was some confusion as to the date initially as the Respondent relied in the refusal letters of the date on which biometrics were provided of 21 March 2021, the earlier date was accepted before the First-tier Tribunal) on the basis that they were dependent on the First Appellant's sister-in-law, an EEA national residing in the United Kingdom.

4. The Respondent refused the applications under the EU Settlement Scheme (the "EUSS") as set out in Appendix EU(FP) on the basis that they were not 'family members' of the EEA Sponsor as this was limited to a spouse; civil partner; child, grandchild, great-grandchild under the age of 21; dependent child, grandchild, great-grandchild over 21; or dependant parent, grandparent, great-grandparent. The relationships of sister-in-law for the First Appellant and aunt/uncle for the minor Appellants was not included within the EUSS.

5. Judge Mack dismissed the appeal in a decision promulgated on 19 December 2021 on all grounds. The Appellants claim was that at the time of application, there were two options available, to apply under the EUSS or under the Immigration (European Economic Area) Regulations 2016 (the "EEA Regulations") and their intention had been to apply under the latter as extended family members. On the online application system, they stated that there was no category of extended family member available, so they chose the 'close family member' option and within the application referred to an application for an 'EEA Family Permit' and the nature of relationship relied upon. The Appellants claim was that the Entry Clearance Officer should have identified that this was an application under the EEA Regulations and decided it as such (with a right of appeal under the EEA Regulations) and in any event the Entry Clearance Officer was required to assist the Appellants correct any defects in their application and the failure to do so was a breach of Article 18(f) of the Withdrawal Agreement.

6. Judge Mack found that the Appellants had made an application under the EUSS, not the EEA Regulations and rejected the claim that the Entry Clearance Officer should have considered the Appellants' intentions rather than what application was actually made. In any event the Judge found that there was no breach of the Withdrawal Agreement. I return below to the reasoning for these conclusions.

The appeal

7. The Appellants appeal on five grounds as follows. First, that the First-tier Tribunal erred in law in relying on the wrong form being submitted by the Appellants when they had a clear intention to make an application under the EEA Regulations and therefore erred in failing to consider the appeal under the EEA Regulations. Secondly, that the First-tier Tribunal erred in law in failing to consider whether there was a breach of the Withdrawal Agreement by the Respondent in failing to help the Appellants make the correct application by pointing out the error in the form used. Specifically the Appellants fall within the scope of the Withdrawal Agreement within Article 10 because they had applied for facilitation of their residence and Article 18(1)(o) of the same was breached. Thirdly, the First-tier Tribunal erred in law in failing to give anxious scrutiny to the application made and failing to adhere to the principles in Rehman (EEA Regulations 2016 –

specified evidence) [2019] UKUT 195 (IAC). Fourthly, the First-tier Tribunal erred in law in taking into account irrelevant considerations, namely references to DWP benefits. Finally, the First-tier Tribunal erred in law in failing to do justice for these Appellants who had not been given a fair hearing.

8. At the oral hearing, Ms Masih relied on the grounds of appeal and focused in her submissions on the two key issues, first what application the Appellants made and secondly, their rights under the Withdrawal Agreement. On the first issue, it was submitted that the Judge placed too much weight on the application form used and insufficient weight on the substance of the application. In substance, the application referred to an 'EEA Family Permit', the nature of the relationship with the EEA Sponsor which could only be as an extended family member under the EEA Regulations and the accompanying documents supported an EEA Regulations application by including identity documents and evidence of financial dependency.

9. The case of Siddiqa (other family members: EU exit) [2023] UKUT 00047 (IAC) is distinguishable from the present appeal on its facts as that case referred to an application which in substance did not identify an application beyond that of a close relative and here, the Appellants expressly referred to an application under the EEA Regulations. The Appellants' applications met the requirements of regulation 21 of the EEA Regulations for a valid application and was made before 'Exit Day' on 31 December 2020.

10. Ms Masih accepted on behalf of the Appellants that they made a mistake in their application by choosing the wrong option in the drop down menu with paragraph 18 of the decision under appeal recording how the mistake occurred. Notwithstanding the mistake, it was incumbent on the Respondent and the Judge to look at the application as a whole, the title of the application made not being determinative and in these appeals, it could reasonably be concluded that the applications were intended to be made under the EEA Regulations.

11. On the second issue, it was submitted that the Appellants fell within the scope of the Withdrawal Agreement pursuant to Article 10(3) as they had applied for facilitation of their entry and residence by making applications under the EEA Regulations. If there was any difficulty in the form used for that application, Article 18(1)(o) of the Withdrawal Agreement required the Entry Clearance Officer to assit the Appellants. The skeleton argument before the First-tier Tribunal also relied on Article 18(f) of the Withdrawal Agreement which the Judge failed to consider in substance. Further, if there is an outstanding application under the EEA Regulations, that needs to be considered, and that of itself would be a breach of the Withdrawal Agreement as the Respondent's decision would not be proportionate if not decided under the EEA Regulations. The cases of Siddiqa and Batool and others (other family members: EU exit) [2022] UKUT 00219 (IAC) are distinguishable from this appeal as the appellants in those cases did not fall within the personal scope of the Withdrawal Agreement.

12. On behalf of the Respondent, Ms Cunha relied on the rule 24 response which stated that the First-tier Tribunal was correct to find that the Appellants had made an EUSS application, that there was no valid appeal under the EEA Regulations and the only right of appeal available to the Appellants under the Immigration Citizens' Rights Appeals (EU Exit) Regulations 2020 had no prospect of success because the Appellants could not meet the requirements of Appendix EU(FP), were not within the scope of the Withdrawal Agreement and in any event there was no breach of Article 18 of the Withdrawal Agreement.

13. Ms Cunha submitted that the Entry Clearance Officer could only consider the applications made and in these cases, the applications were expressly under the EUSS, relying on the Sponsor having settled status in the United Kingdom. The Appellants must have been aware that there were two different applications routes because the Sponsor had applied under the EUSS. The Respondent decided the applications on that basis and the right of appeal is against those decisions. It was not accepted that the Appellants had made a valid application under the EEA Regulations because the wrong form was used and there was a lack of supporting evidence; in any event they could not have succeeded in such an application given there was insufficient evidence with the applications of dependency on an EEA national exercising treaty rights in the United Kingdom. The evidence submitted included a birth certificate, family registration certificate and money transfer receipts that post-dated ‘Exit Day’ on 31 December 2020 (submitted after the initial application with the appeal documents).

14. In reply, Ms Masih accepted that it was unclear what documents were originally submitted with the applications to the Respondent, but in any event, if there was a deficiency then the Appellants should have had the opportunity to correct this pursuant to Article 18(o) of the Withdrawal Agreement. Given that it was not clear on the face of documents available which supporting documents were submitted with the original applications, I allowed the Appellants seven days in which to provide any evidence of this to the Upper Tribunal. In response to this, a copy of the Appellants’ bundle before the First-tier Tribunal was submitted, albeit a copy of this was already available and as per the discussions at the hearing, did not identify what documents were submitted when, beyond it being apparent that those available in the Respondent’s bundle must have been sent to the Respondent before or with the appeal.

Findings and reasons

15. The key issue in this appeal is whether the First-tier Tribunal erred in law in finding that the Appellants made an application under the EUSS and not under the EEA Regulations; given that if not, the other grounds of appeal must also fail as without a valid application under the EEA Regulations, it is accepted that they do not fall within the scope of Article 10 of the Withdrawal Agreement nor could the provisions of Article 18 therefore assist them for the reasons given in Batool and Siddiqa.

16. The First-tier Tribunal’s decision sets out in some detail the arguments made on behalf of the Appellants, which it is fair to say evolved somewhat from the initial position to a second skeleton argument and submissions made at the hearing. There was an initial acceptance that a mistake was made in applying using the EUSS form (the wrong form) to the later position that the Appellants had actually made an application under the EEA Regulations by reference to their being ‘other family members’ or ‘extended family members’ by stating the relationship with the EEA Sponsor was as ‘sister-in-law’ and the evidence submitted established that relationship with the requisite dependency. The submission was also that there was no requirement to use a particular application form and regulation 21 of the EEA Regulations was satisfied. There was also reliance on the Respondent making it unjustifiably difficult and complex for the Appellants to make their applications in December 2020. The Respondent’s position before the First-tier Tribunal was that the Appellants expressly made an application under the EUSS as can be seen in the application forms themselves and that there was an available option that they could have applied under the EEA Regulations if they so chose.

17. The discussion as to the issue is contained in paragraphs 58 to 62 of the First-tier Tribunal decision. In paragraph 58, the Judge refers to the Appellants' position at the hearing that no EUSS application had been made at all and that there was sufficient information in the form that was completed for the Respondent to deal with the application the Appellants wanted to make. In essence, the Judge considered that the submission amounted to a suggestion that there could never be a wrong form and the Respondent should ask the question 'what does this person actually want to apply for' as opposed to 'what have they applied for'. The Judge then considers the administrative legislative and procedural framework operating in the United Kingdom and by analogy considers applications made to DWP for benefits, which are tailored to specific forms to ensure the applications go to the right people to deal with and the possibility of mistakes as to what a person intended to claim for. The Judge considered the situation within the Home Office, if as suggested on behalf of the Appellants, to be unworkable if decision makers had to ignore the actual application made and instead use discretion to view the contents of an application to determine what an applicant meant in any particular case.

18. In paragraph 60 the Judge found that there was guidance to applicants and different forms available as to an application under the EUSS or under the EEA Regulations, such that the Appellants were never deprived of an opportunity to make an EEA Regulations application. In paragraph 61, the Judge considered the requirements of regulation 21 of the EEA Regulations and the reference to using a form using the relevant pages of www.gov.uk. She found that there is a plethora of forms and information available to applicants to make their application. The mere fact that the Appellants used one particular form, without the respondent being able to point to the 'particular form' did not mean that the Applicants had made an EEA Regulations application, it was found that they made an EUSS application.

19. In conclusion in paragraph 62, the Judge referred to the evolution of the Appellants' case and found *"I am asked to find that the appellant's did submit the correct or a correct application, but if not then it should have been obvious what they meant and in any event when a section is not completed in line with the requirement, such as the family relationship between Ms Fardoas and the sponsor, then that does not matter either as the decision maker should really make a decision based on what he or she thinks the application is for as opposed to what has been detailed in the form. In my view this is more than a step too far and for the sake of clarity and completeness I reject the argument of the appellants in this case and on these facts. …"*

20. The reasoning in the decision focuses not on the title of the form submitted but also on the substance of what was contained and what the Respondent should be required to do when faced with an application. The Appellants submissions focused on their intentions in making the application, said to be clear when considering it as a whole with the supporting documentation rather than on the form used. The Judge found that there is no such requirement and it would be administratively unworkable to expect such an approach to be taken.

21. Although not expressly referred to in the final section of the decision, there is reference earlier on to the applications made and their contents; which is worth considering in slightly more detail. First, the application form itself. The header includes the basic information about the application and the type of visa/application is "European Family Permit" and in a following section as to application category, when selecting the category applied for the answer was:

"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."

22. Later in the application, the Sponsor's details are given together with her EUSS identity document number and unique application number and the financial support given per month. In the additional information section the First Appellant stated:

> *"My application is being submitted with my two children Muhammad Hussain and Miss Adan Fatima who are being sponsored by my brother Mr Zahid Farooq Ahmad and his EEA national wife Mrs Tsveta Ylianova Dzhanova. Please note that my EEA sponsor Mrs Tsveta Yulianova Dzhanova is the wife of my real brother Mr Zahid Farooq Ahmad and is a Bulgarian national currently residing in the United Kingdom since December 2012. I am a separated from my husband and currently living with my two children Master Muhammad Hussain and Miss Adan Fatima who are also applying with me as my dependants with this EEA Family permit applications for your kind consideration."*

23. As to the supporting documents submitted with the application, the mandatory documents listed are the Appellant's passport and national identity card; and proof of relationship to the EEA Sponsor. The other documents are not specifically listed but are said to be evidence that the Appellants are dependent on the EEA sponsor, for example, money transfer receipts or bank statements showing money transfers or evidence of accommodation provided.

24. Neither party have been able to state with any clarity which documents were submitted with the application form. It would appear that at least the birth certificates, family registration certificate and a marriage certificate were included initially given that these are referred to in the application form, the Appellant's statement on the appeals and are contained in the Respondent's bundle. As to money transfer receipts, it is stated that these were submitted but it can not have been those contained in the Respondent's bundle as these all date from 2021, after the date of application and crucially for the purposes of an EEA Regulations application, after 'Exit Day'. The Appellant's bundle contains money transfer receipts from 2020 and a range of other documents including a tax return, payslips, bank statements and utility bill (all of which date from 2021), a council tax bill from March 2020 and details of a property purchase in 2017 in the United Kingdom. From the dates of documents, it is clear that not all were submitted with the original application form in December 2020 (as they did not exist at that date) but neither party could identify whether the additional documents which existed prior to the application were sent with it, or if they were sent with the notice of appeal, or if submitted for the first time to the First-tier Tribunal as part of the bundle of evidence to be relied upon. The submission that the accompanying documents supported an EEA Regulations application is difficult to substantiate given the uncertainty as to which documents were actually included.

25. The First-tier Tribunal's reasoning as to the finding that the Appellants had made EUSS applications is based primarily on matters of principle rather than by reference to the specific documents; albeit that appears to be how the case was primarily put. I have considered that reasoning in the context of the actual documentation, much of which is expressly referred to in the decision and readily

inferred that it was taken into account. As a whole, I do not find any error of law in the finding that the Appellants made EUSS applications, both in form and substance, and were not applications under the EEA Regulations for the following reasons.

26. The applications did not include any express reference to the EEA Regulations and at best referred to an 'EEA Family Permit' in the additional information, a term which is itself rather ambiguous given the interchangeability of terms between the different application routes, both of which include references to an EEA national and that the application itself refers to the type of visa/application as a 'European Family Permit'. There was no cover letter referring to the EEA Regulations themselves and no reference in any of the documentation to any specific provision of the EEA Regulations relied upon, let alone the EEA Regulations themselves. On its face, the application expressly states a confirmation that the Appellants are applying for an EU Settlement Scheme Family Permit and there is nothing of substance which directly contradicts that within the form itself. The First-tier Tribunal was right to find, at least implicitly in the reasoning that the reference to 'EEA Family Permit' was not sufficient to make this an application under the EEA Regulations.

27. There is no clarity as to the documentation submitted with the application forms themselves, but in any event, it would be difficult for the Appellants to show that the documents were solely directed at an EEA Regulations application and not an EUSS application given that for both categories a person would need to establish family relationship and dependency. Ms Masih was unable to identify what the differences would be to make good the point that the documents supported the conclusion that it was an EEA Regulations application only. To the contrary, considering all of the documents before the First-tier Tribunal, the evidence does not tend to suggest an EEA application given that only the EEA Sponsor's EUSS references are given (and it is not said whether she had settled or pre-settled status until later in the written statements before First-tier Tribunal, with no documentary evidence of the same) and there is no other evidence of exercise of treaty rights or permanent residence in the United Kingdom prior to 31 December 2020 which would be required for an EEA Regulations application.

28. The only other matter relied upon is that the claimed relationship could only be for an application as an extended/family member under the EEA Regulations as it could not fall within the definition of family member under the EUSS scheme. I am not persuaded that this takes the Appellants' claims much further given that people regularly make applications which are not and could never have been successful. Whilst there was evidence that a mistake was made as to the application, there was a lack of corresponding statement that the Appellants knew that an application under the EUSS was bound to fail because of the family relationship.

29. It is in this context that the decision contains further reasoning as a matter of principle as to whether the Respondent should or could have considered that in substance something different was applying for. The First-tier Tribunal found as a matter of principle that was not the case and that is consistent with the findings in Batool and Siddiqa that there is no requirement on the Respondent to consider an application made for settlement as a family member to be treated as an application for facilitation and residence as an extended/other family member; and that an applicant who had selected the option of applying for an EU Settlement Scheme Family Permit and whose documentation did not otherwise

refer to having made an application for an EEA Family Permit under the EEA Regulations did not have a decision or right of appeal under the latter.

30. For these reasons, the First-tier Tribunal did not err in law in finding as a matter of fact that the applications made by these Appellants were under the EUSS, considering both the form used and the substance of the applications. That was a rational conclusion open to the Judge on the evidence before her and having taken into account matters of the substance of the application, not just the title of the form and as a matter of principle. On the evidence before the First-tier Tribunal, there was simply insufficient evidence to find that the Appellants made an EEA Regulations application. Further, even if the wrong form was used by mistake, the First-tier Tribunal did not err in law in finding that the Respondent was not required to consider the intentions of the Appellants which did not in any event clearly refer to an application being intended under the EEA Regulations rather than an application as the form used implied, under the EUSS.

31. There can be no error of law on the second issue as to the Withdrawal Agreement in circumstances where an application was made under the EUSS and not under the EEA Regulations. In the absence of an EEA Regulations application the Appellants can not fall within the personal scope of the Withdrawal Agreement and in any event for the reasons given in Batool and Siddiqa could not benefit from the provisions in Article 18 as there is no requirement on the Respondent to treat one kind of application as a completely different one; nor to require the Respondent to go as far as identifying any deficiency, error or omission in an application to invite an applicant to correct it. The appeal under the Withdrawal Agreement was bound to fail and there was no error of law in the First-tier Tribunal dismissing the appeal on this basis and not going further to examine the substance of Article 18, it simply could not assist the Appellants on the basis of the findings made.

32. The other more minor or specific points set out in the written grounds of appeal were not the subject of any oral submissions and in any event are covered within the ambit of the discussion above as to the two key issues. There is nothing separately identified that forms a distinct ground of appeal or identifies any error of law in the First-tier Tribunal's decision.

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

25th May 2023