Upper Tribunal
(Immigration and Asylum Chamber) Appeal Numbers: UI-2022-003123
EA/09144/2021

THE IMMIGRATION ACTS

Heard at Cardiff Civil Justice Centre	**Decision & Reasons Promulgated**
On 1 December 2022	**On 19 February 2023**

Before

MR C M G OCKELTON, VICE PRESIDENT
UPPER TRIBUNAL JUDGE GRUBB

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MUHAMMAD HUSSAIN

Respondent

Representation:
For the Appellant: Ms S Rushforth, Senior Home Office Presenting Officer
For the Respondent: Mr R Ahmed, Fawad Law Associates

DECISION AND REASONS

1. Although this is an appeal by the Secretary of State, for convenience we will refer to the parties as they appeared before the First-tier Tribunal.

Introduction

2. The appellant is the cousin of the sponsor, Mr Irfan Ul Haq who is a Swedish national living in the UK.

3. On 2 December 2020, the appellant made an on-line application to join the sponsor in the UK. That application was made by a friend of the appellant. Under the heading 'Application Category', the appellant selected "family member of an EEA national" as the category under which he was applying. That was an application which relied upon the EU Settlement Scheme ("EUSS") in Appendix EU (FP) of the Immigration Rules. The appellant had no prospect of succeeding in an application under the EUSS as his relationship with the sponsor, namely his cousin, did not fall within the definition of "family member" in the Annex to Appendix EU (FP).

4. On 20 January 2021, the appellant sent an email to the UK Visas and Immigration pointing out that he had "inadvertently" selected the category of "Family member under the EU Settlement Scheme" when he had intended to make an application under the Immigration (EEA) Regulations 2016 (SI 2016/1052 as amended) ("the EEA Regulations") as an extended family member. The email is in the following terms:

> "I am writing you to inform that I being dependent extended family member of an EEA national submitted online application GWF060488628 under Immigration EEA Regulations 2016 and this application was submitted before 31 December 2020. Now I have realised that inadvertently I selected family member under EU Settlement Scheme. Therefore, you are requested that my inadvertent error be ignored and my application may kindly be considered under Regulations 2016".

5. In response to that email, UK Visas and Immigration replied on 20 January 2021 acknowledging the appellant's email in the following terms:

> "Thank you for the information you have provided.
>
> We escalated your case to the relevant department. You should be contacted regarding your case within 15 working days from the date of escalation".

6. Thereafter, on 6 March 2021, the ECO refused the appellant's application under the EUSS and Appendix EU (FP) of the Immigration Rules on the basis that the relationship of the appellant to the sponsor, as his cousin, did not fall within the definition of a family member under the EUSS.

The Appeal to the First-tier Tribunal

7. The appellant appealed to the First-tier Tribunal. Judge O R Williams allowed the appellant's appeal under the EEA Regulations. The judge's reasons are at paras 10–16. First, the judge was satisfied that the application made by the appellant was intended to be under the EEA Regulations. Second, as a result there was an appeal before the First-tier Tribunal under the EEA Regulations. Third, the judge was satisfied, on the evidence, that the appellant was dependent upon the sponsor and, therefore, he was an "extended family member" under reg 8 of the EEA Regulations. On that basis, the judge allowed the appeal.

The Appeal to the Upper Tribunal

8. The ECO appealed to the Upper Tribunal. The grounds of appeal contend: first, the judge erred in law in considering that there was an appeal under the EEA Regulations; second, the ECO's decision was made under the

EUSS and the appeal was, therefore, under reg 8 of The Immigration (Citizens' Rights Appeals) (EU Exit) Regulations 2020 (SI 2020/61) ("the 2020 Regulations"); third, under the EUSS appeal provisions, the grounds of appeal were limited to whether the decision was in accordance with the Immigration Rules(which it was) and whether the appellant's rights under the Withdrawal Agreement (2019/C 384 101) were breached (which they were not).

9. On 4 July 2022, the First-tier Tribunal (Judge Easterman) granted the ECO permission to appeal.

10. On 5 July 2022, the appellant filed a rule 24 notice seeking to uphold the judge's decision.

11. At the appeal hearing on 1 December 2022, the ECO was represented by Ms Rushforth who relied upon the grounds of appeal and a skeleton argument dated 31 October 2022. We heard oral submissions from both Ms Rushforth and Mr Ahmed who represented the appellant.

Discussion

12. Prior to 31 December 2020, a family member wishing to join an EU national in the UK could make an application under the EUSS contained in Appendix EU (FP) or under the EEA Regulations. As we understand it, an individual could rely on either route or, indeed, both routes. The EEA Regulations ceased to have effect on 31 December 2020 such that, thereafter, applications could only be made under the EUSS. There are transitional provisions retaining the EEA Regulations for applications that were pending before 31 December 2020 or in relation to appeals against decisions made prior to 31 December 2020.

13. Both types of applications were, we were told, made on-line on a single website where, by clicking on a dropdown box, an individual would select that their application was under the EUSS Scheme or the EEA Regulations.

14. In this case, it is common ground that the appellant (or more accurately his friend who assisted him in completing the on-line application) clicked on the dropdown box such that the application, on its face, was made under the EUSS.

15. The appeal rights against decisions made under the EUSS or the EEA Regulations are different. The appeal rights in relation to the former are contained in Part 2 of the 2020 Regulations. There are two relevant grounds of appeal in reg 8. Ground 1 is that the decision breaches any rights of the appellant by virtue of certain provisions under the Withdrawal Agreement, including importantly for the purposes of this appeal Art 10. Ground 2, so far as relevant, is that the decision is not in accordance with the Immigration Rules. The appeal is, of course, against a decision taken under the EUSS.

16. By contrast, an appeal under the EEA Regulations is brought under reg 36 and is against an "EEA decision" defined in reg 2 of the EEA Regulations as "a decision under these Regulations" and which concerns, so far as

relevant to this appeal, “a person’s entitlement to be admitted to the UK” or their “entitlement to be issued with” an EEA family permit. Appeals under the EEA Regulations are limited to the sole ground that the decision breaches the “appellant’s rights under the EU Treaties in respect of entry to or residence in the United Kingdom” (see Sched 2, para 1).

17. We should, for completeness, point out that if a s.120 notice (or its equivalent) has been served in relation to any decision taken under the EUSS or EEA Regulations, then additional grounds, such as human rights grounds, may be raised in an appeal.

18. The core of Ms Rushforth’s submissions in this appeal is that the ECO made a decision under the EUSS and the appellant’s grounds of appeal were limited to those set out in the 2020 Regulations under which the appeal was brought. The judge was wrong in law to conclude that he was dealing with an appeal under the EEA Regulations since no decision had been made under those Regulations which could be appealed under reg 36. It was not a ground of appeal against a decision under the EUSS that the appellant was entitled to be considered as an “extended family member” under the EEA Regulations.

19. Mr Ahmed accepted that the appellant could not succeed in establishing that he met the requirements of the EUSS as a ‘family member’ as a cousin of the sponsor. He also accepted that in an appeal against an EUSS decision the judge was wrong to allow the appeal under the EEA Regulations as if he were hearing an appeal under those Regulations.

20. Mr Ahmed submitted, however, that the appellant’s application made, on the face of it, in his on-line application as one under the EUSS had, in fact, been an application under the EEA Regulations for a family permit as an “extended family member”. He submitted that the appellant’s email of 20 January 2021 made clear that the appellant had mistakenly, and inadvertently, clicked the part of the dropdown box raising the rubric of it being an EUSS application in error. Given the appellant’s subsequent email, and that it was clear from the appellant’s application that he was seeking entry as a dependent relative, the appellant’s application was, and should have been considered by the ECO, to be under the EEA Regulations. That application, Mr Ahmed submitted, remained outstanding as the ECO had wrongly treated the application as an application under the EUSS. He submitted that the appellant had a right to that application, which was for facilitation of entry and residence made before the end of the transition period on 31 December 2020, being properly considered under EU law as required by Art 10(3) of the Withdrawal Agreement. Failure to do so, breached the appellant’s right under Art 10 which fell within the first ground of appeal under reg 8(1) and (2)(a) of the 2020 Regulations.

21. In support of his submission that the appellant’s error, as identified in his email of 20 January 2021, should have resulted in the ECO treating the appellant’s application as one intended to be made (and in fact) under the EEA Regulations, Mr Ahmed relied on the unreported decision of the Upper

Tribunal in Yorke and Cradock v ECO (1 November 2022) (UTJ Blundell and DUTJ Doyle). Mr Ahmed invited us to conclude, as the UT had in that case, that the judge had erred in law in allowing the appeal under the EEA Regulations and to substitute a decision that the appellant's application under the EEA Regulations remained outstanding to be determined in accordance with those Regulations.

22. In response, Ms Rushforth did not accept that the appellant's on-line application should be treated as an application under the EEA Regulations. She sought to distinguish the decision in Yorke and Cradock on the basis that there, unlike the present appeal, it was perfectly plain that an error had been made because in that case a further family member had made a contemporaneous application under the EEA Regulations and it was clear that the application by the appellant made on-line by clicking on the drop box as an EUSS application was, therefore, a mistake.

23. In substance, we accept Mr Ahmed's submissions. We agree that the judge erred in law in allowing the appellant's appeal under the EEA Regulations. Leaving aside for the moment Mr Ahmed's submissions as to whether the appellant's application should have been treated as one under the EEA Regulations, the fact of the matter is that the respondent made a decision under the EUSS. It was against that decision that the appellant appealed and his appeal rights were under the 2020 Regulations and governed by the grounds of appeal in reg 8. That did not include that he met the requirements for a family permit as an extended family member under the EEA Regulations. The judge's decision that he did cannot stand and is set aside.

24. Second, we are satisfied that the appellant, by his email of 20 January 2021 and the circumstances of his application, did make an error and, in fact, intended to make an application for a family permit under the EEA Regulations. Judge Williams accepted that was what had happened at para 12 of his judgment which, in no material way, is challenged in the present grounds. There he said:

> "Second, I am satisfied, notwithstanding the EUSS Application form submitted, that the intended application was under the EEA Regulation[s] 2016, the sponsor confirmed that whilst the application was pending an email was sent (AB 200) to the ECO pointing out the error in the application and that it should be considered under the EEA [R]egulations 2016 – this was acknowledged (AB 202). Moreover, my finding is fortified by the consistent and credible evidence from the sponsor who confirmed that the original application was intended to be under the EEA Regulations 2016".

25. Each case is fact-sensitive in requiring a determination of what application was intended by the individual. We agree with the UT's position stated in [28] of Yorke and Cradock, rejecting the ECO's submissions in that case, that: "the choice made in the form is determinative in all cases". As we have said, Judge Williams made a factual finding that the appellant intended to make an application under the EEA Regulations. It was accepted before us that the appellant had, with his application, provided supporting documentation to establish his relationship with his cousin,

through his birth certificate and that of his mother and the sponsor. Further, it is clear from the appellant's application that he sought to establish his dependency upon his sponsor, consistent with an application under the EEA Regulations as an extended family member. In our judgment, the appellant's application was accompanied by the required evidence for an application under the EEA Regulations and there is no basis for saying that, as such an application, it was invalid under reg 21 due to a failure to provide required documents or because the wrong entry on the dropdown menu was initially selected.

26. Although Ms Rushforth sought to distinguish the facts of Yorke and Cradock, Judge Williams' finding is not subject to any reasoned challenge and we see no basis upon which we can disturb it as a factual finding. That means, in our judgment, that the ECO, by the time he came to make a decision on the application, should have considered the appellant's application as being one made under the EEA Regulations. No decision has been taken on that application. In our judgment, the appellant has, therefore, applied for facilitation of entry before the end of the transition period which fell within the scope of the Withdrawal Agreement.

27. There is an appeal before the UT (as there was before the FtT) under the 2020 Regulations against a decision made under the EUSS. However, the appellant's application, properly considered to be under the EEA Regulations, engages the ground of appeal under reg 8(2)(a) (by reference to Art 10(3) of the Withdrawal Agreement). The proper disposal of the appeal is, therefore, to set aside the First-tier Tribunal's decision and to re-make the decision allowing the appellant's appeal on the basis of reg 8(2)(a) of the 2020 Regulations. The appellant's application under the EEA Regulations remains outstanding before the ECO to determine in accordance with the EEA Regulations.

Decision

28. The First-tier Tribunal's decision to allow the appellant's appeal involved the making of an error of law. That decision is set aside.

29. We re-make the decision allowing the appellant's appeal on the basis set out above in para 27.

Signed

Andrew Grubb

Judge of the Upper Tribunal
19 January 2023

TO THE RESPONDENT
FEE AWARD

As we have allowed the appeal, we make a full fee award of any fees paid or payable.

Signed

Andrew Grubb
Judge of the Upper Tribunal
19 January 2023