Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: UI-2022-003265
[EA/16825/2021]

THE IMMIGRATION ACTS

Heard at Field House, London	**Decision & Reasons Promulgated**
On Monday 12 December 2022	**On Friday 17 February 2023**

Before

UPPER TRIBUNAL JUDGE SMITH

Between

ENTRY CLEARANCE OFFICER

Appellant

and

USMAN IRSHAD

Respondent

Representation:
For the Appellant: Mr S Whitwell, Senior Home Office Presenting Officer
For the Respondent: Mr A Chohan, Legal Representative

DECISION AND REASONS

1. This is an appeal by the Entry Clearance Officer. For ease of reference, I refer to the parties as they were before the First-tier Tribunal. The Respondent appeals against the decision of First-tier Tribunal Judge K Swinnerton promulgated on 17 May 2022 ("the Decision"). By the Decision, the Judge allowed the Appellant's appeal against the Respondent's decision dated 23 November 2021 refusing his application for a family permit under the EU Settlement Scheme ("EUSS"). It is pertinent here to note that the Respondent made two decisions on 23 November 2021. The second was in response to the application itself

which was for a family permit under the Immigration (European Economic Area) Regulations 2016 ("the EEA Regulations"). Both Respondent's decisions attracted a right of appeal (although the Respondent now says that the right of appeal in relation to the EUSS may have been conferred in error). Both were appealed and grounds of appeal were lodged against both decisions. Accordingly, the appeal before Judge Swinnerton concerned refusals of applications for a family permit under both the EUSS and the EEA Regulations.

2. The Appellant is a national of Pakistan. He seeks to join his brother, sister-in-law and father in the UK. His sister-in-law, Ms Monika Knutowska, ("the Sponsor") is a Polish national with settled status under the EUSS. His brother, her spouse, is a family member and also entitled to remain under the EUSS. His father has been granted a family permit under the EUSS as the Sponsor's father-in-law.

3. The Respondent refused the Appellant's application under the EUSS as the Appellant did not fall within the categories of "family member" under the EUSS and was not eligible for entry under that scheme. She refused the application under the EEA Regulations on the basis that the Appellant had not shown that he was related to the Sponsor as claimed and that he had not shown that he was dependent on her as he asserted.

4. Mr Whitwell very fairly accepted that the Respondent had included in her bundle only the decision letter relating to the EUSS scheme. That may be why the Judge indicated at [2] of the Decision that the appeal was only against that decision. However, the Respondent had mentioned the refusal also of the EEA Regulations application and it is clear from the Appellant's appeal form that he was appealing both decisions at the same time.

5. Having recorded that the basis of the appeal was the application under the EUSS and noted the reasons why that was refused ([3]), the Judge went on to say this about the submissions received from the Respondent's Counsel:

> "8. Ms Dogra explained that two refusal letters had been provided and that the Respondent was relying upon the refusal letter which called into question the nature of the relationship between the Appellant and the sponsor and also that of dependency."

6. Thereafter, the Judge heard evidence from the Appellant's brother. He heard submissions from both representatives. Ms Dogra for the Respondent repeated what is recorded at [8] of the Decision. Mr Chohan said this:

> "13. Mr Chohan for the Appellant submitted that it appeared that the nature of the relationship of the Appellant to the sponsor was not challenged and that the sponsor is his sister-in-law. The Appellant is a minor, aged 16, and forms part of a family unit that is financially supported by the sponsor and her husband…"

7. The Judge then went on to make his findings which I set out below so far as relevant:

> "17. On the basis of the evidence given that was accepted or unchallenged, I find that the Appellant is a national of Pakistan. His date of birth is 29.10.2005 and he is aged 16. The sponsor, Monica Knutowska, was born on 28.4.1993 and is aged 29. The sponsor is a national of Poland. The sponsor was granted indefinite leave to remain in the UK on 9.10.2019. She works at Charles Tyrwhitt Shirts. The sponsor is married to Mr Muhammad Zohaib Irshad. They married on 20.10.2015. He was born on 5.5.1987 and is aged 35. He was granted indefinite leave to remain in the UK on 27.10.2020. The Appellant's father, Mr Irshad Ali, was born on 14.3.1959 and is aged 63. He was granted an EUSS Family Permit on the basis of his relationship with the sponsor on 10.6.2021. He was granted pre-settled status on 11.2.2022 valid until 31.12.2024.
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> ...
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> 19. In respect of whether or not the Appellant and the sponsor are related as claimed, the family registration certificate details that Mr Irshad Ali is the father of the Appellant and the father of Mr Muhammad Zohaib Ali. The birth registration certificate of the Appellant's brother (Mr Muhammad Zohaib Ali) states that his father is Mr Irshad Ali. The passport of the Appellant states that his father is Mr Irshad Ali. The death registration certificate issued on 20.2.2018 details that Sajida Parveen died on 11.6.2001 and that her husband was Mr Irshad Ali. Based upon the evidence provided, I find that Mr Irshad Ali is the father of both the Appellant and Mr Muhammad Zohaib Ali and that the Appellant is the brother-in-law of the sponsor.
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> 20. With respect to dependency, I was provided with a number of money transfer remittances detailing payments made by the sponsor (and at times her husband) to Mr Irshad Ali via BP Remit Ltd, Small world, and MCB Bank Ltd. Those remittances cover a large period of time. On behalf of the Appellant, it was submitted that he is a minor and that payments for his benefit could not be sent to him, given that he is a minor, but were sent to his father and used for the benefit of the Appellant. I was provided also with a letter dated 5.4.2022 from the PAEC Foundation School, Faisalabad, Pakistan which states, amongst other points, that the sponsor and her husband bear all the tuition costs of the Appellant. I have no reason, and was not provided with any reason, to doubt the authenticity of this letter. I accept that it is genuine. I find, therefore, that the tuition expenses of the Appellant are being met by his brother and the sponsor. I find also, based upon the documentation provided and the evidence given at the hearing, that the Appellant's brother and the sponsor financially support the Appellant and that the Appellant is financially dependent upon them in order to meet his essential living expenses.
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> 21. In summary, I find that the Appellant and the sponsor are related as claimed and that the Appellant is financially dependent

> upon the sponsor. I find, therefore, that the Appellant is a family member of a relevant EEA citizen."

8. Having made those findings, the Judge found that "the Appellant does satisfy the requirements of the Immigration Rules". He did not say which of the immigration rules ("the Rules") he considered applied and were satisfied.

9. The Respondent's grounds challenging the Decision are brief and in order to set my conclusions in context, it is appropriate to set them out in full:

> "The Judge of the First-tier Tribunal has made a material error of law in the Determination. It is not apparent from the determination exactly what criteria were considered to be met. Here an application for an EEA family permit made just before the deadline of 11pm GMT on 31 December 2020 was considered after 30 June 2021 when a document if issued would not have been valid for travel. The Judge considers that two versions of a letter refusing the same application had been provided where I [sic] fact one was refusal of the EEA family permit application and one was refusal under the criteria for an EUSS Family Permit undertaken unilaterally in accordance with a Ministerial concession. It is open to conjecture whether the latter ought properly to have attracted a right of appeal as it did not flow for an application for Scheme entry clearance, but this is academic as neither route had requirements fully met by the Judge's findings. The Judge indicates that the requirements of the rules were met by the (unchallenged) findings on relationship and dependence, but this ignores the fact that as an extended family member under regulation 8(2) the appellant could only meet Appendix EU (FP) by way of holding a relevant document. Even if, contrary to appearances, the Judge had determined a regulation 36 appeal preserved by the Consequential SI that could not alone have led to a conclusion that an EEA family permit would have been issued, only that extensive examination would have followed under regulation 12(4)(c).
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> In all the circumstances the Judge has therefore not clearly indicated what appeal against what decision has succeeded on what basis."

10. Permission to appeal was granted by First-tier Tribunal Judge Bartlett on 20 June 2022 for the following reasons (so far as relevant):

> "… 3. I find that there is an arguable error of law.
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> 4. In relation to the first ground there is no mention of the appellant holding a relevant document. This may be because this was not a ground of refusal in the respondent's refusal letter but there is no mention of a conclusion of the respondent on this point either way. The Decision states that the Refusal Letter concludes that the Appellant does not meet the requirements of Appendix EU but goes on to find that the Appellant does meet the requirements. As the Decision makes no reference to a relevant document it is arguable that there is an error of law."

11. At the outset of his submissions, I asked Mr Whitwell to explain why the Appellant could not succeed in his appeal under the EEA Regulations given the findings made in particular at [19] to [21] of the Decision which

the Respondent's grounds confirm are not challenged. Mr Whitwell indicated that the main complaint is that the Judge clearly understood the appeal to be against the decision under the EUSS and had allowed the appeal on that basis. Paragraphs [2] and [22] read together suggest that the Appellant meets Appendix EU (FP) to the Rules which he does not.

12. I asked whether, if I were to set aside [2] and [22] of the Decision and to re-make the Decision making clear that the appeal was under the EEA Regulations and was allowed on the basis that the Appellant meets paragraph 8 of those regulations, that would overcome the Respondent's complaint. The findings made by the Judge confirmed the Appellant's relationship and dependency on the Sponsor in his home country. That therefore overcame the reasons why the application made under the EEA Regulations was refused. Whilst recognising that the author of the grounds has made the valid point that an extended family member is only entitled to have his entry facilitated under the EEA Regulations, that is a matter for the Respondent. I also accept as is said in the grounds that the EEA Regulations have since been revoked and the Respondent can no longer issue a family permit under those regulations. However, the way in which the Respondent implements an allowed appeal is a matter for her. The only issue for me is whether the Appellant's appeal stands to be allowed under the EEA Regulations as they were (and as preserved for appeals purposes by Citizens' Rights (Application Deadline and Temporary Protection) (EU Exit) Regulations 2020 – "the 2020 Regulations") based on the findings which were made by the Judge. Mr Whitwell indicated that he could see no objection to that course. Mr Chohan understandably did not object to what was suggested.

13. I therefore found there to be an error of law insofar as Judge Swinnerton purported to allow the appeal on the basis that it was under the EUSS and that the Appellant met Appendix EU (FP). I set aside the Decision in particular paragraphs [2] and [22] for that reason. However, I preserve the findings made. Based on the issues which the parties submitted were the relevant ones and those findings, I conclude that those show that the Appellant was an extended family member under the EEA Regulations. The appeal is therefore allowed on the basis that he meets those regulations (as preserved by the 2020 Regulations). It will be a matter for the Respondent how she gives effect to that outcome given the revocation of the EEA Regulations in relation to issue of family permits.

DECISION

I am satisfied that the Decision involves the making of a material error on a point of law. I set aside paragraphs [2] and [22] of the decision of First-tier Tribunal Judge K Swinnerton promulgated on 17 May 2022. I preserve the decision, in particular the findings made, and submissions recorded as to the relevant issues.

I re-make the decision. I allow the appeal on the basis that the Appellant satisfies paragraph 8 of the EEA Regulations.

Signed L K Smith Dated: 14 December 2022
Upper Tribunal Judge Smith