IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2022-000252
First-tier Tribunal No: EA/07078/2021

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On the 03 July 2023

Before

UPPER TRIBUNAL JUDGE OWENS

Between

JIMMY MWESIGYE
(NO ANONYMITY ORDER MADE)

Appellant

and

ENTRY CLEARANCE OFFICER

Respondent

Representation:

For the Appellant: Mr S Karim, Counsel, instructed by Adukus Solicitors
For the Respondent: Ms S Cunha, Senior Presenting Officer

Heard at Field House on 23 May 2023

DECISION AND REASONS

1. This decision concerns the re-making of the appellant's appeal following my decision dated 29 May 2022 setting aside the decision of the First-tier Tribunal Judge Hussain for the reasons set out in the decision attached at Appendix A.

2. The appeal was adjourned to be listed after the Upper Tribunal guidance on the situation of extended family members who applied on the incorrect application form. Following the promulgation of Batool & Ors (other family members: EU exit) [2022] UKUT 000219, which on the face of it had the same factual scenario as this appeal, the appellant was asked in directions dated 2 December 2022 if he wished to pursue the appeal and if so to provide a detailed skeleton argument setting out how the appeal could succeed. On 9 December 2022 the appellant responded confirming that he wished to pursue his appeal. He submitted that his case could be distinguished from Batool because he had made an application under the EEA Regulations. The appeal was accordingly listed for hearing.

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3. The appellant is a citizen of Uganda who on 26 November 2020 applied for entry clearance as a family member of his half-brother, Mr Kakooza ("the sponsor"), a qualified EEA national on 26 November 2020 prior to the end of the transition period. The decision under appeal is a decision dated 9 March 2021. The respondent decided that the appellant did not meet the requirements of the EU Settlement Scheme ("the EUSS") because he did not fall within the definition of "family member".

4. It was conceded by Mr Karim on behalf of Mr Mwesigye that his appeal cannot succeed under Appendix EUSS (Family Permit) because a "half-brother" does not fall into the definition of "family member" at Annex 1. He concedes that the immigration rules were deliberately designed to prevent those previously known as "extended family members" under Regulation 8 of the EEA Regulations 2016 from applying under the new scheme after 31 December 2020.

Issues in the Appeal

5. Was the appellant's application dated 26 November 2020 an application under Regulation 8 of the EEA Regulations 2016 with regard to the principles set out in Siddiqa (other family members: EU exit) [2023] UKUT 0047 (IAC) or was it an application as a family member under the EUSS? If the former, the appeal could fall to be allowed on the basis that the decision breaches a right that Mr Mwesigye has by virtue of Title II of Part 2 of the Withdrawal Agreement to the extent that a decision is still awaited in respect of an EEA application made before 31 December 2020 because the application was wrongly considered under the EUSS. If the latter, the appeal falls to be dismissed under headnotes (1) and (2) of Batool.

6. Mr Karim also invited me to make factual findings in relation to the issue of dependency on the evidence before me.

Documentary Evidence

7. The documentary evidence consisted of the original respondent's bundle as well as the original appellant's bundle. In response to the error of law directions the appellant also produced two further supplementary bundles, one from page 98 to 129 and one from page 130 to page 190. There was also before me a skeleton argument prepared by Mr Karim.

8. The appellant submitted a Rule 15(2A) notice on the date of the hearing in respect of the additional evidence. It was submitted that the first supplementary bundle was filed and served in February 2023 and contains up-to-date evidence of money remittances, the Upper Tribunal's decision and directions as well as an updated statement from the appellant and sponsor clarifying their understanding about the application the appellant made in November 2020. Mr Karim stated that the issue about the type of application arose at the error of law stage, the evidence was served in response to the directions, in good time and causes the respondent no prejudice.

9. The second bundle was filed and served on 23 May 2023 and contains further evidence of money remittances and transfers to show continued dependency as well as the further evidence of the EEA sponsor's employment including NHS pay slips and P60s providing up-to-date evidence of the circumstances. This evidence is a continuation of previous evidence and does not present any new issues. The vast majority of these documents postdate the First-tier Tribunal appeal hearing

because they did not exist before that hearing and also cause no prejudice to the respondent. He submitted that the documents would assist the Upper Tribunal in reaching its decision especially in the absence of any skeleton argument from the Secretary of State.

10. Ms Cunha for the Secretary of State indicated that she did not oppose this application and having considered the notice and submissions I decided that it was fair and in the interests of justice to admit the further evidence.

Oral Evidence

11. The sponsor, Mr Francis Kakooza, gave oral evidence as follows:

12. He works as a nurse for the NHS. He has a salaried role and works additional hours as a bank nurse. He receives a salary of approximately £2,500 per month from his regular salary and an additional £1,000 per month from his bank work. His rent is £700 a month. He provides his ex-wife with £200 per month and sends approximately £400 a month in remittances to the appellant. Prior to coming to the United Kingdom in 2002 he lived with his family in Uganda including his mother and the appellant in their village. In 2009 he went to live with his wife in Ireland. He returned to the United Kingdom in 2015 and started university in September of that year to study a degree in nursing. He finished his course in 2018. During the time that he was studying on his degree course he was also working in the evenings for “Waking Night”, a company which provides care for children in their homes at night. In 2005, he purchased some land in Kampala and built a house on the plot. The property was finished in 2011 at which point his mother and the appellant moved into the property. The property is owned outright by the sponsor, and he pays ground rent as well as the bills.

13. The sponsor’s evidence is that he has always supported the appellant financially. He paid for his education when he was a child because he is a younger brother. His mother and father are separated, and his father has had nothing to do with him. He was supporting his mother and the appellant financially from his arrival in the United Kingdom, during the period that he was in Ireland and whilst he was a student and he continues to do so. His mother died in 2019. The sponsor candidly gave evidence that his brother had worked for a short period in Uganda as a cleaner between 2017 to 2019 prior to the Covid pandemic. He has not been able to find further work because it is very difficult to find employment in Uganda without any contacts or connections with government officials. When his brother worked, he earned approximately £80 per month but this was insufficient to pay for the ground rent and the bills and the basic essentials including food, clothing and transport which amounts to £300 to £400 per month.

14. The sponsor makes payments to Uganda through an application called Sendwave which is based in Boston, USA. He has provided evidence of all of the money remittances demonstrating that he sends money with regularity.

15. The sponsor was questioned about various entries in his bank account. He confirmed that he pays maintenance to his ex-wife of approximately £200 per month. He occasionally sends money to his son, for instance, to go to a football match. He has another account with Metro Bank that has a very low balance. He occasionally transfers money from that bank account into his NatWest account. His evidence was that his brother has no other source of income apart from the money that he sends to him.

16. Mr Kakooza also gave evidence about the application. He explained that the reason that he had waited until 26 November 2020 to make the application was because he was a student until 2019 and was preoccupied with studying. He did not read the Home Office guidance about the application but relied on the advice of his lawyer, who is of Ugandan origin and whom he has known him for some time. The lawyer has advised him on his immigration matters in the past. Mr Kakooza confirmed that as far as he knew the application was under the EEA and that the EEA is the “name” that he knew. This was specified in a covering letter to the application. He was asked about why he had carried out a DNA test. Mr Kakooza confirmed that he did provide a DNA test on the advice of his lawyer. He was asked why he only carried out the DNA analysis after he had put the application in November 2020, and he explained that he had been advised by his lawyer that he might need to show additional proof of the relationship over and above a birth certificate. He was not asked for this additional evidence by the Secretary of State. He did what he was advised by his lawyer. He explained it had been difficult to obtain the DNA because during this period the UK was in lockdown.

17. It was put to him that the truth was that his lawyer had lodged an application under the EUSS in November 2020, realised it was a mistake and tried to rectify that mistake in December 2020. Mr Kakooza insisted that the lawyer had not told him this. He confirmed that he had just provided the documents that he had been asked to by his lawyer. He also confirmed that his lawyer had told him that the application was very complicated. He read the electronic application and trusted the lawyer as he is not an expert in legal matters.

Submissions

18. Ms Cunha for the Secretary of State submitted that the application made by the appellant was an application under the EU Settlement Scheme (Family Permit) and as such cannot succeed under Appendix EUSS, nor can the appellant fall under the personal scope of Article 10 of the withdrawal agreement because he has not made an application for the Secretary of State to conduct an extensive consideration of his circumstances. She attempted to distinguish the factors in this appeal from those in the exception mentioned in <u>Siddiqa.</u> The application was made on 26 November 2020, checked over by the sponsor and submitted by his lawyer. There was no acknowledgment to the application. There was no positive action to address any mistake until 28 December 2020, one month and two days after the application was submitted. The appellant was represented. Ms Cunha submitted that at this point somebody realised that the application that had been submitted was not the right one which is why the letter was sent. The application that was submitted was intended to be an application under the EUSS and the covering letter confirming that the application was made under the EEA Regulations does not invalidate this. She submitted that this is what prompted the sponsor to obtain DNA because at that point he knew he would have to demonstrate his family relationship. The DNA consent was signed on 21 December 2020, DNA was taken on 24 December 2020 and arrived on 6 January 2021. In her submission it is clear that the original application was intended to be made under the EUSS.

19. In respect of dependency, she submitted that the appellant had been resident in Uganda studying and working. Whilst he did not earn enough to survive without additional support, this does not demonstrate that he was “solely dependent” on the sponsor for his essential needs. The support was not essential to meet the

everyday needs. The sponsor has not provided evidence that the house is owned by him. The lack of evidence in this respect reduces the amount of weight I can attach to it. There is no evidence to bring him within Article 3(2) of the Directive, Article 10 or Article 18(1)(o) of the Withdrawal Agreement.

20. Mr Karim relied on his skeleton argument. He pointed firstly to the fact that the test for dependency is not one of “sole dependency” but of some dependency in order to meet essential living needs. He submitted that Ms Cunha even in her submissions had conceded that despite the fact that Mr Mwesigye was working he was also receiving support from the sponsor in order to meet his essential needs and therefore could meet the test.

21. He submitted that the sponsor was credible, he gave clear, constant and forthright answers with no embellishment. He works for the NHS as a nurse, his financial circumstances are consistent with the fact that he is in a position to support his brother in Uganda, his P60 demonstrates that he earned just under £70,000 per year. He gave a breakdown of his expenses in oral evidence. He provided DNA samples to show that he took the application seriously. He explained his circumstances clearly and was open in admitting that the appellant had in fact worked at some point. There is evidence of financial dependence in terms of regular remittances of approximately £400 per month. Further in any event, the appellant lives in the sponsor’s household which is an alternative basis of dependency. There is sufficient evidence to persuade me on the balance of probabilities that the appellant is dependent on his brother the sponsor.

22. He posited two different scenarios in respect of the application. His first submission is that this application was always intended to be an application for a family permit under the EEA Regulations 2016. The sponsor gave clear evidence that this was his understanding. The application itself states that it is an “application for a Family Permit” and states that the appellant is relying on his dependent relationship with his brother. The representatives have erroneously picked the wrong drop down box. Further in any event, the representatives sent a covering letter to the Secretary of State clarifying that this was an application under the EEA Regulations 2016. The covering letter refers specifically to Regulation 8 of the EEA Regulations. He pointed to the fact that the existence of this covering letter is not disputed by the respondent and in fact appeared in the respondent’s bundle, it was not provided by the appellant. This he submits brings the case within the exception to Siddiqa.

23. His second submission was that even if the application was originally intended to be an application under the EUSS, that the covering letter which was submitted prior to the end of the transition period and prior to the decision on the application constituted a variation of the original application. The application was on the same form and there was no fee. There would have been no requirement to put in a second identical form. The only difference was that the original form itself refers to the application category as being “close family member of an Irish citizen” and the covering letter now confirms that the application category is “an application under Regulation 8 of the EEA Regulations”. The consequence of this is that either way the application made by the appellant was a valid application for facilitation of entry and residence prior to the end of the transition period on 31 December 2020 and therefore he falls within the personal scope of the withdrawal agreement.

Analysis and Discussion

24. The appellant had a right of appeal against the respondent's adverse decision under Regulations 3 and 8 of the Immigration (Citizens' Rights Appeals) (EU Exit) Regulations 2020 (the CRA 2020).

25. Regulation 8(2)(a) of the 2020 CRA states as follows:

"8. (1) An appeal under these Regulations must be brought on one or both of the following two grounds.

(2) The first ground of appeal is that the decision breaches any right which the appellant has by virtue of –

(a) Chapter 1, or Article 24(2) or 25(2) of Chapter 2, of Title II of Part 2 of the withdrawal agreement".

Article 10 under Part 2 of the withdrawal agreement states inter alia as follows:

"3. Paragraph 2 shall also apply to persons falling under points (a) and (b) of Article 3(2) of Directive 2004/38/EC who have applied for facilitation of entry and residence before the end of the transition period, and whose residence is being facilitated by the host State in accordance with its national legislation thereafter".

26. The appellant submits that facilitation includes an obligation on the respondent to consider the totality of information contained within the application and to determine whether Article 3(2) of Directive 2004/38 applies. That provisions states:

"Article 3

Beneficiaries

1. This Directive shall apply to all Union citizens who move to or reside in a Member State other than that of which they are a national, and to their family members as defined in point 2 of Article 2 who accompany or join them.

2. Without prejudice to any right to free movement and residence the persons concerned may have in their own right, the host Member State shall, in accordance with its national legislation, facilitate entry and residence for the following persons:

(a) any other family members, irrespective of their nationality, not falling under the definition in point 2 of Article 2 who, in the country from which they have come, are dependants or members of the household of the Union citizen having the primary right of residence, or where serious health grounds strictly require the personal care of the family member by the Union citizen;

(b) the partner with whom the Union citizen has a durable relationship, duly attested.

The host Member State shall undertake an extensive examination of the personal circumstances and shall justify any denial of entry or residence to these people".

27. I have also considered the guidance given in Siddiqa in this respect. Headnote 1 states:

> "(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".

28. I turn to the application itself. I take judicial note from Siddiqa and from Ahmed and Others UI-2022-002804, 000809, that the application for an EEA family permit under the EUSS and under the EEA Regulations 2016 were made on the identical online form which covered both types of application and that the category of application which an applicant wanted to make was determined by a series of drop-down menus. The appellant's application confirmed that the type of application was for a "European family permit". This would apply equally to both applications. On page 7 of the application form the appellant confirmed that his sponsor is his brother and later he also said that he was providing other document evidence that he was dependent on the sponsor Francis Xavier Kakooza, and was enclosing money transfer receipts and bank statements. I am therefore satisfied from the contents of the application that the appellant was asserting that he was a dependent family member of his brother.

29. The application importantly stated later on under the heading "Category of Application":

> "Close family member of an Irish citizen who does not have a UK immigration status under the EU Settlement Scheme, but would qualify for status under the EU Settlement Scheme were they to apply for it.
>
> I confirm I am applying for an EU Settlement Scheme".

30. From this dropbox and on the face of the application therefore it would appear that the appellant was making an application under the EU Settlement Scheme and Siddiqua applies unless there is any other reference to the EEA Regulations.

31. Importantly, in this appeal Mr Mwesigye's representatives sent a further letter to the Secretary of State dated 28 December 2020. I am in agreement with Mr Karim that this letter was received by the Secretary of State because it is included in the respondent's own bundle. This states:

> "**Application for a European Family Permit as the family member of a European Economic Area (EEA) national: Jimmy Mwesigye – 30 March 1985 – Uganda**
>
> We are instructed to forward the Applicant's application for a European family permit as a family member of an EEA national that is exercising his treaty rights".

32. Then the covering letter refers to Immigration (European Economic Area) Regulations 2006 stating that a "qualified person" is a jobseeker or a worker and that "an extended family member" under Regulation 8 is a person who is a relative of an EEA national residing in a country other than the United Kingdom and who is dependent on the EEA national or is a member of his household and

who is either accompanying the EEA national to the United Kingdom or wants to join the EEA national in the United Kingdom.

33. The letter then goes on to state:

> "**Extended family member**
>
> The Applicant is a brother to the sponsor. Please find the DNA test results attached.
>
> **Qualified person**
>
> Our client has enclosed a letter of employment, payslips, all for the brother evidencing that his sponsor is a qualified person on the basis that he is a worker, employed by the NHS".

34. I find that this covering letter was submitted to the respondent prior to the end of the transition period and prior to the decision being taken on the application. I find that this letter unambiguously asserts that the appellant qualifies for a Family Permit under Regulation 8 of the EEA Regulations and clarifies that the application should be considered under the Regulations. I find that if the representative had wanted to vary the original application this would have been explicitly stated in the letter.

35. I have taken into account the sponsor's evidence which is that he relied on his solicitor who had explained to him that it was a complex area of law but that his own understanding was that the application was made under the EEA Regulations.

36. I give no weight to Ms Cunha's submission that the timing of the submission of the DNA evidence goes to the type of application. The appellant believed that he was applying as a dependent of his half-brother and it is plausible that he would have been advised to get additional evidence. If anything this supports the argument that he believed he was applying under Regulation 8 because he could not apply as a family member under the EUSS.

37. Having considered all of this evidence together in its entirety, I am satisfied on the balance of probabilities that the appellant, the sponsor and his representatives intended to make an application under Regulation 8 of the EEA Regulations but completed the form incorrectly, indicating the wrong "category of application". There was clear confusion in the original application which referred to the appellant being a dependent family member, but this was clarified in the letter. It should have been clear to the decision maker that this was an application under the EEA Regulations and the decision should have been considered under the Regulations. I am therefore satisfied that the appellant made an application for facilitation of his entry and residence prior to the transition date.

38. Having made this finding, I see no need to consider the second argument that even were it the case that the original application was intended to be an application under the EUSS the fact that the representatives have sent a letter to the Home Office prior to the end of the transition date and prior to the decision, clarifying the category under which the application should be decided, that this would vary the application to one under the Regulations. Neither party addressed

me in detail on the correct procedure for varying an EUSS application in these circumstances.

Dependency

39. I found the sponsor to be an entirely credible witness. He gave thoughtful and forthright answers, he explained in some detail his personal circumstances. His evidence was internally consistent and plausible. It also was consistent with the supporting documentary evidence including his bank statements, remittances and documents confirming his employment and nationality. He was able to answer fully all those questions put to him. He was candid in stating that his brother had been employed in the past and did not seek to embellish or overstate his evidence. He came across as a very plausible and credible witness and I accept his evidence in its entirety.

40. Although he did not produce any supporting documentary evidence about the ownership of his land in Uganda his evidence was highly plausible and detailed in this respect.

41. For these reasons I accept that the appellant's financial circumstances are as described by the sponsor. I find that the appellant always lived as part of the sponsor's household and after his brother purchased land and built a house in Kampala, he moved there with his mother in 2011. I accept that for a brief time for two years he had a job earning £80 a month but I find that this on its own was not sufficient to cover his essential living needs and he was still reliant on the sponsor to assist him. I find that the sponsor in the United Kingdom pays for the ground rent, the household bills as well as supplying money for transport costs, food and clothing. In addition, I find that he financially supported the appellant through his education and finally that the sponsor also paid for his mother's medical treatment in Uganda. I therefore find that Mr Mwesigye was a member of the household of the sponsor until he left Uganda and that at all times since 2003, he has been dependent upon him and that that dependency is continuing until the date of the hearing.

42. Having made the above findings, I find that the decision maker wrongly considered the application under the EUSS, that Mr Mwesigye made an application under the EEA Regulations and that he falls within the "personal scope" of the withdrawal agreement because he made an application for facilitation of entry and residence before the transition date.

43. I allow the appeal to the extent that a lawful decision is awaited in respect of the EEA application made before 31 December 2020.

R J Owens

Judge of the Upper Tribunal
Immigration and Asylum Chamber

16 June 2023

ANNEX A

IAC-AH-KRL-V1

Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Numbers: UI-2022-000252
EA/07078/2021

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 25 April 2022	…………………………………

Before

UPPER TRIBUNAL JUDGE OWENS

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

JIMMY MWESIGYE
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:

For the Appellant: Mr T Lindsay, Senior Presenting Officer
For the Respondent: Mr S Karim, Counsel, instructed by Adukus Solicitors

DECISIONS AND REASONS

1. The Secretary of State appeals with permission against the decision of First-tier Tribunal Judge Hussain allowing Mr Mwesigye's appeal against a decision to refuse his application for a family permit under the EU Settlement Scheme on 9 March 2021.

2. Mr Mwesigye is a national of Uganda born on 30 March 1985. On 26 November 2020 he made an application for a Family Permit under the EU Settlement Scheme to join his half-brother, an Irish national in the United Kingdom.

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3. The Secretary of State decided that Mr Mwesigye did not meet the eligibility requirements for an EUSS family permit because he did not provide sufficient evidence to prove that he is a "family member" of a relevant EEA citizen which includes a spouse, civil partner, child, grandchild, great-grandchild under 21, dependent child, grandchild, great-grandchild over 21 or dependent parent, grandparent or great-grandparent.

4. The position of Mr Mwesigye before the First-tier Tribunal was set out in the skeleton argument prepared by Mr Michael West of Counsel. It was submitted that Mr Mwesigye could meet the requirements of the EU Settlement Scheme because he is a "dependent relative" before the specified date of a relevant EEA citizen and the dependency continues to exist at the date of application. The grounds of appeal before the original Tribunal did not assert that the decision breached any rights that Mr Mwesigye had under the Withdrawal Agreement.

The Decision of the First-tier Tribunal

5. On the day of the hearing before the First-tier Tribunal the appellant was represented by Mr Michael West of Counsel. At [6] the judge records that:

> "A detailed discussion took place between me and the representatives as to whether in principle the appellant meets the Immigration Rules. I indicated that I would determine this appeal on principle as to whether the appellant came within the EU Settlement Scheme. The merits of the application, that is to say whether the sponsor meets the relevant residence requirements as a matter of evidence and whether the appellant is able to prove dependency would be matters for the respondent to consider subsequently".

6. The judge then goes on at [8] to state:

> "the definition of a family member of a relevant EEA citizen is to be found in Annex 1 of Appendix EU to the Immigration Rules which at sub-paragraph (e) includes a dependent relative before the specified date of a relevant EEA citizen and the dependency continues to exist at the date of the application. The specified date for this purpose is 1 July 2021".

7. The judge found that a "family member" of a relevant EEA citizen is not limited to the class of relatives referred to in the notice of decision, but "can include any dependent relative so long as there is a dependency which existed before the specified date".

8. The "relevant EEA citizen" is defined to include an EEA citizen resident in the United Kingdom and Ireland for a continuous qualifying period which began before the specified date. The specified period is five years.

9. The judge then found that the sponsor is an Irish national by virtue of his birth in Ireland on 8 January 1972 and that he has been living and working in the United Kingdom since 4 June 2015, therefore he meets the definition of a "relevant EEA citizen". The judge concluded that "in principle the appellant comes within the purview of the EU Settlement Scheme Rules. He stated:

> "it is for the Secretary of State to decide whether the appellant's sponsor is eligible for indefinite leave or else has accrued the qualifying period and if so whether the appellant can establish dependency in the sense described above".

10. The judge allowed the appeal.

Grounds of Appeal to the Upper Tribunal

Ground 1

The judge gave weight to immaterial matters.

The judge allowed the appeal by focusing on the status of the sponsor, rather than addressing whether the appellant satisfied the requirements of Appendix EU (Family Permit) of the Immigration Rules.

Ground 2

Material misdirection of law on a material matter.

The judge failed to consider the requirements of the correct immigration rules when allowing the appellant's appeal. The judge erroneously referred to Appendix EU, rather than Appendix EU (Family Permit). The judge failed to address the issue of whether the appellant satisfies the requirements of Appendix EU (Family Permit).

Permission

11. Permission was granted by First-tier Tribunal Judge Thapar on 3 March 2022 on the basis that it is arguable that the judge relied on the incorrect immigration rules when determining the appeal and that it is not apparent from the decision whether the judge has found that the appellant meets the requirements for entry clearance under Appendix EU (Family Permit).

Rule 24 Response

12. Mr West of Counsel prepared a Rule 24 response. It is said that Mr Mwesigye had a right of appeal under Regulations 3 and 8 of the Immigration (Citizens' Rights Appeals) (EU Exit) Regulations 2020. It is asserted that whilst it is correct that the judge made an error because Mr Mwesigye's relationship to the sponsor did not fall within the definition of a "family member" of a relevant EEA citizen for the purposes of Annex 1 to Appendix EU (Family Permit), the error is immaterial.

13. It is argued that because Mr Mwesigye applied prior to the end of the Brexit transition period on 11 p.m. on 31 December 2020, the judge was entitled to consider the appeal on the basis of the old-style extended family member appeals under Regulation 8 of the Immigration (European Economic Area) Regulations 2016.

14. This is because the decision dated 14 April 2021 granted a right of appeal under Regulations 3 and 8 of the Immigration (Citizen's Rights Appeal s) (EU Exit) regulations 2020 ("CRA"). Article 10 under part 2 of the Withdrawal Agreement gives "personal scope "to persons falling under points (a) and (b) of Article 3(2) of the Directive 2004/38/EC who have applied for facilitation of entry and residence before the end of the transition period and whose residence is being facilitated by the host state in accordance with its national legislation thereafter.

15. His submission is that because Mr Mwesigye applied on 26 November 2020, before the end of the transition period, his appeal could be brought on the basis

of the Withdrawal Agreement and therefore Article 3(2) of Directive 2004/38/EC ("the Citizens Directive") which was transposed into domestic law by Regulation 8 of the EEA Regulations. Under Regulation 8 Mr Mwesigye as the dependent half-brother of the sponsor qualified as an extended family member. It was therefore open to the judge to consider the appeal on the basis of the old-style Regulation 8. Given that dependency was not taken issue with by the Secretary of State in the permission to appeal grounds or by the Presenting Officer at the hearing, the appeal had to have been allowed by reference to Article 3(2) of the Citizens Directive because Mr Mwesigye is an extended family member of his sponsor. Accordingly, there is no material error of law within the judge's determination. The Secretary of State's appeal should be dismissed.

16. It is further submitted that the Entry Clearance Officer should have addressed the issue of dependency and failed to do so because they did not consider when considering his application whether the Withdrawal Agreement would confer any rights on Mr Mwesigye.

Submissions

17. It was agreed by both parties that the judge had made an error of law in that he had failed to consider whether Mr Mwesigye met the correct provisions of Appendix EU (Family Permit). The judge erroneously considered Appendix EU. (This may have been because Counsel before him argued the appeal in this manner.)

18. It was also agreed by both parties that Mr Mwesigye's appeal could not have succeeded under Appendix EU (Family Permit) as there is no provision for "old-style" "extended family members" to apply under the EU Settlement Scheme in that Appendix.

Materiality

19. Mr Karim submitted that the error was not material because the appeal would have succeeded in any event had the judge considered whether Mr Mwesigwe could succeed under the Withdrawal Agreement. His argument is that Mr Mwesigwe as an "extended family member" falls within the scope of Article 10, part 2 of the Withdrawal Agreement which in turn refers to Article 3(2) of the Citizens Directive. He pointed to the fact the Secretary of State has not addressed the issue of dependency in the permission to appeal grounds or by the Presenting Officer at the hearing and the appeal would have had to be allowed by reference to Article 3(2) of the Citizens Directive.

20. Secondly on the morning of the error of law hearing, Mr Karim produced an amendment to the Immigration Rules, Appendix EU (Family Permit) "FP8A" and submitted that the appellant would have succeeded under this provision of the EU Settlement Scheme (Family Permit).

21. Mr Lindsay submitted that the judge's error is material to the outcome of the appeal and the decision should be set aside in its entirety for remaking. His submission was that it could not be said that "but for" the judge's error, the appeal could only have ever been allowed. At its height, the law set out by Mr Mwesigye is arguable but would not inevitably result in the appellant's appeal being allowed. He pointed to the fact that the arguments now put forward were not in the original grounds of appeal to the First-tier Tribunal. Further and even had it been incumbent on the judge to have considered the Withdrawal

Agreement ground of appeal, the Secretary of State's position is that Mr Mwesigye does not fall under the personal scope of Article 10(3).

22. Mr Lindsay pointed to the wording of the provision of Article 10(3). The appellant must not only be a dependent family member but also "and [one] whose residence is being facilitated by the host state in accordance with the national legislation". Mr Lindsay's argument was that it is a moot point whether the application for a family permit was made "in accordance with the national legislation" because the appellant applied under the wrong route. He argued that because of this Mr Mwesigye does not have personal scope under the Withdrawal Agreement and cannot obtain the outcome he seeks. It was for the judge to resolve this issue and the judge may have formed a different view to that argued by Mr Mwesigye.

23. Secondly, Mr Lindsay addressed the new provision provided on the morning of the hearing. Mr Lindsay's submission that FP8A was inserted to fix a lacuna in EEA Appendix EU family permit. It applies to those who applied before the specified date and, had the route not closed after 30 June 2021 would have been issued with an EEA Family Permit under Regulation 12 of the EEA Regulations. However, he submitted that the wording of the definition also refers to a "valid" application and this in his submission must mean an application made on the correct application form under the correct route.

24. I first consider the issue of materiality. In my view the judge's error was material to the outcome of the appeal. The error was fundamental. I am not satisfied that had the judge not made this error that the appeal would have been inevitably allowed on any other basis. I address both of Mr Karim's arguments.

Withdrawal Agreement argument

25. The appellant had a right of appeal under Regulations 3 and 8 of the CRA. The grounds of appeal are found in Regulation 8(2)(a) of the 2020 CRA and state as follows;

> 8. (1) An appeal under these Regulations must be brought on one or both of the following two grounds.
>
> (2) The first ground of appeal is that the decision breaches any right which the appellant has by virtue of
>
> (a) Chapter 1 or Article 24(2) or 25(2) of Chapter 2 of title 2 of part 2 of the withdrawal agreement; and
>
> (b) Chapter 1, or Article 23(2) or 24(2) of Chapter 2, of Title II of Part 2 of the EEA EFTA separation agreement, or

26. The withdrawal agreement, Article 10 under part 2 of the withdrawal agreement ("the WA") states inter alia as follows;

> 3. Paragraph 2 shall also apply to persons falling under points (a) and (b) of Article 3(2) of Directive 2004/38/EC who have applied for facilitation of entry and residence before the end of the transition period, and whose residence is being facilitated by the host state in accordance with its national legislation thereafter.

27. Although it is agreed that the appellant applied before the end of the transition period because the application was made on 26 November 2020, Article 3(2) of Directive 2004/38/EC states:

> **Beneficiaries**
>
> 1. This Directive shall apply to all union citizens who move to or reside in a member state other than that of which they are a national, and to their family members as defined in point 2 of Article 2 who accompany or join them.
>
> 2. Without prejudice to any right to free movement and residence the persons concerned may have in their own right, the host member state shall, in accordance with its national legislation, facilitate entry and residence for the following persons
>
> (a) any other family members, irrespective of their nationality, not falling under the definition in point 2 of Article 2 who, in the country from which they have come, are dependants or members of the household of the union citizen having the primary right of residence, or where serious health grounds strictly require the personal care of the family member by the union citizen.
>
> The host member state shall undertake an extensive examination of the personal circumstances and shall justify any denial of entry or residence to these people.

27. I agree with Mr Karim that the appellant could potentially fall within the definition of a "beneficiary" under Article 3(2)(a) as a dependent family member because potentially he comes within the personal scope of the Withdrawal Agreement by virtue of Article 10(3) because the application was made before the end of the transition period. Nevertheless, the issue as to whether the application needs to be "valid", that is under the correct route has not yet been resolved and further the judge would have needed to have been satisfied that the appellant was as a question of fact dependent upon his EEA national half-brother.

28. Indeed Mr Karim's argument in the Rule 24 response is that when the appellant made his original application the Entry Clearance Officer should have been obliged to consider whether there was any other basis on which the appellant was entitled to enter the United Kingdom, i.e. under the Withdrawal Agreement, as well as the Immigration Rules and this in my view would have involved consideration of whether the appellant was in fact dependent on his half-brother.

29. Since there was no consideration of the issue of "in accordance with the issue of national legislation or of the issue of dependency by the judge it cannot be said that Mr Mwegwi's appeal would inevitably have been allowed

FP8A

30. This states as follows

> "the applicant will be granted an entry clearance under this Appendix in the form of an EU Settlement Scheme family permit, where

(a) the Entry Clearance Officer is satisfied that the applicant is a "specified EEA family permit case"; and

(b) had the applicant made a valid application under this Appendix it would not have been refused on grounds of suitability under paragraph FP7.

"Specified EEA family permit case, a person who

(a) on the basis of a valid application made under the EEA Regulations before the specified date would, had the route not closed after 30 June 2021 have been issued an EEA family permit under Regulation 12 of the EEA Regulations

(1) (aa) as an extended family member under Regulation 8; and

(bb) where the relevant EEA national referred to in Regulation 12(4) was resident in the United Kingdom in accordance with Regulation 12(1)(a)(1) for the specified date; or

31. Firstly, this statement of changes was made on 15 March 2022 in Immigration Rule HC 118 and was not in place at the date that the appeal was heard, so it was not open to allow the appeal on this basis.

32. Secondly, the appellant would have needed to demonstrate that he was an "extended family member" under Regulation 8 of the 2016 Regulations which would have required him to demonstrate that he is dependent on the sponsor in the United Kingdom and the judge made no findings on dependency.

33. It cannot be said that the judge should have considered a provision which was not in existence and further the judge would not inevitably have allowed the appeal.

34. I am in agreement with Mr Lindsay. I am not persuaded that "but for" the error of the judge the appeal would have inevitably been allowed. I am satisfied that there were arguments to be made, but these would have not necessarily resulted in a positive outcome for Mr Mwesigye. The error is therefore material and the decision on that basis should be set aside in its entirety.

35. I do not reserve any findings as the judge made very few findings. The judge's ultimate conclusion was that "in principle" the appellant comes within the purview of the EU Settlement Scheme Rules and goes no further than that.

Disposal

36. It was agreed by both parties that because of the complex legal nature of this appeal it would be appropriate for the appeal to be determined at a remaking by the Upper Tribunal. There is also likely to be guidance issued in the near future on the legal position in respect of "old-style" extended family members or "dependent family members" who applied before the end of the transition period on the wrong application form. This guidance may well be determinative of the appellant's appeal.

Notice of Decision

37. The decision of the First-tier Tribunal involved the making of an error of law.

38. The decision of the First-tier Tribunal is set aside in its entirety.

39. The appeal is adjourned for remaking before the Upper Tribunal.

Directions

40. I issue the following directions.

(a) This appeal is to be adjourned to be listed after the promulgation of the UT guidance on “extended family members” and the correct approach to those who made applications in an incorrect form prior to the end of the transition period.

(b) The appeal will then be listed for a face to face hearing.

(c) No later than seven days prior to the resumed hearing, Mr Mwesigye will file and serve on the respondent and the Tribunal, a skeleton argument addressing the grounds of appeal and how it is said the appeal can succeed, as well as any further evidence in respect of the issue of dependency and/or the sponsor’s status, accompanied by the relevant Rule 15(2) notices.

(d) Within the same timeframe, the Secretary of State is to file and serve a skeleton argument on the respondent and Mr Mwegise addressing the same issues.

(e) Both parties have liberty to apply to amend these directions if necessary in the light of the forthcoming Upper Tribunal guidance.

Anonymity Direction

No anonymity direction is made.

Signed R J Owens Date 29 May 2022

Upper Tribunal Judge Owens