



**Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: UI-2022-002802
EA/04153/2021**

THE IMMIGRATION ACTS

**Heard at Field House
On the 21 October 2022**

**Decision & Reasons Promulgated
On the 30 November 2022**

Before

UPPER TRIBUNAL JUDGE ALLEN

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

**ANGELA CHRISTY LUKOSE ARULRAJ
(ANONYMITY DIRECTION NOT MADE)**

Respondent

Representation:

For the Appellant: Mr C Avery, Senior Home Office Presenting Officer
For the Respondent: Mr S Hingora of Wildan Legal Solicitors

DECISION AND REASONS

1. The Secretary of State appeals with permission to the Tribunal against the decision of the First-tier Tribunal promulgated on 28 March 2022 allowing the appeal of Ms Arulraj against the decision of 24 February 2021 refusing her application for settled status or pre-settled status under the EU Settlement Scheme.

2. I shall refer hereafter to Ms Arulraj as the appellant, as she was before the judge, and to the Secretary of State as the respondent, as she was before the judge.
3. The appellant is a national of India and her sponsor is her uncle Mr Quadri, an EEA national.
4. The notice of decision set out the reasons why it was decided that the appellant did not meet the requirements for settled status or pre-settled status. This was essentially on the basis that she had not provided sufficient evidence to confirm that she was Mr Quadri's dependent relative. It was noted that Home Office records did not show that she had been issued with a registration certificate, family permit or residence card under the EEA Regulations as a relative of an EEA national who is a dependent of the EEA national or of their sponsor or civil partner, a member of their household or in strict need of their personal care on serious health grounds. It was concluded therefore that she did not meet the requirements for settled status as a family member of a relevant EEA citizen. As regards whether she met the eligibility requirements for pre-settled status under the EU Settlement Scheme, it was noted that the relevant requirements were set out in Rule EU14 of Appendix EU to the Immigration Rules, but since she had not provided sufficient evidence to confirm that she was the dependent relative of Mr Quadri she did not meet the requirements for pre-settled status.
5. The judge was satisfied that the matter under appeal was under Regulation 8 of the Immigration (European Economic Area) Regulations 2016. He noted that at the time of the application on 2 November 2020 the EUSS and the EEA Regulations ran alongside each other. He was satisfied that notwithstanding the EUSS application form submitted that the intended application was under the EEA Regulations 2016. In this regard he took under consideration the covering letter from the appellant's then representatives, dated 2nd February 2021, which among other things said that the appellant wished to apply for residence application as an extended family member of Mr Quadri and quoted Regulation 8 and case law relevant to that Regulation. The judge also heard oral evidence of the appellant's clear intention for the application to be considered under Regulation 8. The judge was satisfied that the Secretary of State had unfairly/mistakenly omitted to consider dependency under Regulation 8. It was conceded that the appellant could not meet the requirements of the EUSS.
6. The judge went on to say that he was satisfied that the Home Office itself was aware of the unfairness in not considering cases under Regulation 2016, quoting from Home Office documentation relevant to this. The judge then went on to consider the matter under Regulation 8. He was satisfied that financial dependency in the context of that Regulation had been established and allowed the appeal.

7. The Secretary of State sought and was granted permission to appeal on the basis that notwithstanding what application the judge thought was meant to have been made the one considered, refused and appealed was for leave to remain under Appendix EU. It was argued that the appeal could only have succeeded on two grounds, first that the decision was not in accordance with the Scheme rules, which was explicitly conceded not to be the case, at paragraph 12 of the judge's decision, or by virtue of a breach of Withdrawal Agreement rights. The judge had not considered whether such rights existed and it was argued that from a proper reading of the relevant provisions of Article 10 they did not.
8. It was argued that the judge had erred in recasting the appeal as one against a refusal under the 2016 Regulations. It was said that at its highest the judge could have found that an application under the Regulations had been made and awaited a decision but it was not open to the judge simply unilaterally to change the basis of the decision in the statutory appeal.
7. The grounds went on to argue that even if the 2016 Regulations were of any relevance to the appeal they had been misconstrued in the determination. Establishing dependence before and after arrival would only have been a preamble to an extensive examination as to whether EEA documentation should be issued and that would have been the relevant document required by the Scheme rules. The point was made that such EEA documentation no longer existed anyway following the final repeal of the relevant Regulations on 30 June 2021.
8. Permission to appeal was granted on all grounds.
9. In his submissions Mr Avery adopted and developed the points made in the grounds. This was not an EEA Regulations case. The decision was under Appendix EU where there were different appeal provisions and there was no basis for the judge to consider the matter under the Regulations. He relied on the other issues referred to in the grounds also.
10. In his submissions Mr Hingora argued that the chronology was of relevance. The appellant had arrived in the United Kingdom in 2019 as a student and at the time of the decision she continued to live in the United Kingdom with leave. She had made the application under the EU Settlement Scheme in 2020. The judge was entitled to take into account that it was an application in fact for leave under the EEA Regulations.
11. Mr Hingora referred, as had the judge, to the covering letter taken into account by the judge and which he argued was important as it clearly set out the basis of the application and made it clear that it was under the 2016 Regulations and the accompanying evidence made that clear. For example it was confirmed in paragraph 1 that it was an application for a residence card as an extended family member which was the language of the 2016 Regulations and there were quotations from the Regulations and relevant case law.

12. Mr Hingora also relied on what had been said by the Upper Tribunal in Batool [2022] UKUT 00219 (IAC) in the final two sentences of paragraph 66. There we find the following:

“The appellants’ applications were not made on the basis that the Secretary of State should exercise discretion in their favour, as part of her obligations as identified by the CJEU in Rahman. The application material makes it crystal clear what the basis of the applications was. The appellants applied on the basis that they were family members.”
13. Mr Hingora argued that the letter was in effect asking for the exercise of discretion. The application had been made well before the closing of the transition period and it was not the appellant’s fault. The letter was sent on 2 February 2020 and predated the final decision on 24 February. It was therefore a matter for the Secretary of State to take into account. Batool was on all fours with this approach. It was for the judge to take into account.
14. If the Tribunal disagreed then the final sentence of paragraph 66, assisted the appellant. There was a contrast between form and materiality and it could be said that it was done on purpose, so despite the wrong form being used this showed that it was open to the judge to take into account the reality. As to how the judge had dealt with the appeal, it was clear from paragraph 67 in Batool that the basis of the application was accepted as being under the 2016 Regulations and so there was a right of appeal under the Regulations. So in effect when one took into account the Withdrawal Agreement and the protection it provided including proportionality, it was a decision open to the judge. The judge could find that the application was made under the Regulations which had been made and awaited a decision and this was what in fact he had done. It was for the Secretary of State to carry out the extensive examination of personal circumstances in the United Kingdom and to grant leave. The judge’s findings benefited therefore from the reasoning in Batool and it was open to the judge to conclude as he did. He had carefully weighed out the factors. It was not a leap of logic. There was no error of law in the decision.
15. By way of reply Mr Avery argued that the letter did not ask for an exercise of discretion by the Secretary of State. Pre-settled status had been sought under Appendix EU and the application was not under the Regulations. It was also clear the judge had not said there was an outstanding EEA application but made his own decision. There was no EEA Regulations appeal before the judge.
16. I reserved my decision.
17. The situation considered in Batool and referred to at paragraphs 66 and 67 is in my view materially different from the situation in this case. Although it is the case that the language of the 2016 Regulations is used to an extent in the covering letter of 2 February 2021, it is clear that the application made was for leave to remain under Appendix EU. It is clear

from Batool that the application that had been made was on the basis that the appellants in that case were family members. They argued that the application they had made was one for “facilitation of entry and residence” for the purposes of Article 10.3 of the Withdrawal Agreement, but, as the Tribunal pointed out at paragraph 66, it is plain that Article 10.3 encompasses those who apply for entry or residence as other family members. The applications in that case had not been made on the basis that the Secretary of State should exercise discretion in their favour and it was clear that the application was made on the basis that they were family members.

18. The situation in this case is materially different. The application was made, as I say, under Appendix EU and yet the judge chose to treat it as an application made under the 2016 Regulations. In my view that approach was not open to him. He could not decide the appeal on the basis of a set of Regulations which were not those in respect of which the application was made or the decision made. As is pointed out in the grounds, at its highest he could have found that an application under the Regulations had been made and awaited a decision but the judge did not choose to go down that route. In my view he materially erred in law in considering the matter under the 2016 Regulations. It was not open to him to treat what was said in the covering letter and the attached documentation as in some way justifying him in treating the application as being a different one from the one which was in fact made. Paragraph 71 of Batool is instructive in this regard, in response to the argument made set out at paragraph 69, that notwithstanding that the appellants in that case had applied under the EUSS rather than under the 2016 Regulations, the respondent ought to have treated their applications as being made under the Regulations. As is made clear at paragraph 71, it is not possible to invoke subparagraphs (e), (f) of Article 18 as authority for the proposition that the respondent should have treated one kind of application as an entirely different kind of application. Again, the context is somewhat different from the instant case, but I consider that the point set out there is applicable equally to the facts of this case.

Notice of Decision

19. Accordingly, I conclude that the judge materially erred in law. It will be necessary for the appeal to be reheard in its entirety and that will most appropriately be done in a rehearing at Taylor House before a different judge.

No anonymity direction is made.

A handwritten signature in black ink, appearing to be 'A. M.', written in a cursive style.

Signed

Date 16th November 2022

Upper Tribunal Judge Allen