



**Upper Tribunal
(Immigration and Asylum Chamber)**

Appeal Number: UI-2022-001622
[EA/10337/2021]

THE IMMIGRATION ACTS

**Heard at Field House
On 26 September 2022**

**Decision & Reasons Promulgated
On 3 December 2022**

Before

UPPER TRIBUNAL JUDGE KOPIECZEK

Between

**HASHIR RASHID KHAN
(ANONYMITY DIRECTION NOT MADE)**

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr P Richardson, Counsel instructed by Addison & Khan
Solicitors

For the Respondent: Mr T Melvin, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellant is a citizen of Pakistan, born in 1997. He made an application on 7 December 2020 for an EU Settlement Scheme (“EUSS”) Family Permit. That application was refused in a decision dated 11 April 2021.
2. The appellant appealed against that decision and his appeal came before First-tier Tribunal Judge Paul (“the FtJ”) at a hearing on 23 November 2021,

following which the appeal was dismissed. The appellant has appealed against that decision to the Upper Tribunal.

The Ftj's decision

3. The Ftj referred to the appellant's grounds of appeal to the effect that the appellant had applied under the Immigration Rules for the family permit rather than making the application under the Immigration (European Economic Area) Regulations 2016 ("the EEA Regulations") which was the appropriate route up until 11pm on 31 December 2020. The appellant's application was made on 7 December 2020.
4. After considering very detailed written and oral submissions, the Ftj accepted in principle the proposition that with reference to the Withdrawal Agreement, including Articles 9 and 10, the application could be dealt with as if it had been made under the EEA Regulations.
5. The respondent's decision was made on the basis that the appellant was not the family member of a relevant EEA citizen, as required under the EUSS. In fact, the appellant claimed to be the extended family member of his uncle, a French citizen who now held pre-settled status under the EUSS.
6. In considering the extent to which the appellant was able to establish that he was an extended family member who was dependent on his uncle the Ftj came to the following conclusions. At [24] he referred to the argument that dependency had never been challenged, although also pointing out that the respondent's decision was made on the basis that the wrong application was made; it should have been made under the EEA Regulations. He said, however, that he was nevertheless required to consider the issue of dependency.
7. At [25] and [26] he said as follows:
 - "25. Whilst I pay tribute to Ms Pinder's diligence in putting together all the materials to assist me in relation to the Law, she was handicapped by the fact that - in my view - utterly inadequate evidence had been provided to show dependency. The sponsor's own evidence was that the money sent was partially for his nephew and partly for his family, and the distinction between the two was never properly identified.
 26. But most importantly, as the Guidance and common sense indicates, some more coherent breakdown of the financial circumstances was required. Simply to assert that he was in receipt of money on a relatively occasional basis, without any reference to what his outgoings were (or indeed what were the particular needs of his host family) in my view does not go anywhere near establishing dependency. The mere fact that payments are made, does not establish dependency. Unfortunately, there was a dearth of evidence in this case to demonstrate that the monies received from the sponsor were critical to the well-being of the appellant, and in truth it appears that the money was being provided on an *ad hoc* basis, possibly to provide support for

the whole family including the sponsor's sister and her husband. What that does not mean, though, is that dependency has been established in relation to the appellant."

8. The FtJ dismissed the appeal on the basis that "the decision was in accordance with the EEA Regulations 2016 and/or EU Family Permit Rules".

Grounds of appeal and submissions

9. The grounds of appeal in relation to the FtJ's decision are threefold. Ground 1 argues that there was a failure on the part of the FtJ to make findings of fact on relevant evidence in relation to the issue of dependency. Ground 2 contends that the wrong test as to dependency was applied. Ground 3 alleges irrationality in the FtJ's assessment of dependency.
10. So far as ground 1 is concerned, it is argued that as well as the written and documentary evidence the sponsor gave oral evidence to the effect that he had previously provided funds to the appellant when visiting Pakistan and thus the money transfer receipts did not evidence all the occasions when funds had been provided. Further evidence was that the appellant was living in a home provided by the sponsor's wife, and that some part of the money sent by the sponsor was used in connection with the appellant's father's health, he having a heart condition. Other funds were provided for household expenses. Other evidence was that the appellant did not work. The grounds contend that none of this evidence was challenged at the hearing, the sponsor only having been asked who the appellant lived with.
11. Thus, in concluding that the evidence was "utterly inadequate" and that there was a "dearth of evidence" the FtJ had failed to make findings on the sponsor's oral evidence.
12. As regards ground 2, at [26] of his decision the FtJ referred to the "dearth of evidence" to demonstrate that the monies received from the sponsor "were critical to the well-being of the appellant". This, it is argued, is contrary to the well-established test, namely whether the applicant needs the financial support of the sponsor to meet their 'essential needs'. The FtJ had applied an incorrect test and demanded a higher threshold. The grounds point out that the FtJ was addressed in detail on the correct test for dependency.
13. As to ground 3, the claimed irrationality of the FtJ's conclusions on the question of dependency to some extent overlaps grounds 1 and 2. In addition, however, it is argued that the FtJ's finding that the appellant was in receipt of money "on a relatively occasional basis" and was provided on an "ad hoc" basis was contrary to the evidence that funds were remitted at least on a quarterly basis and sometimes monthly, over a two year period. Thus, the FtJ's decision was irrational.

14. In oral submissions Mr Richardson reiterated aspects of the grounds with reference to the Ftj's decision. In summary, it was submitted that in various respects the Ftj had not undertaken a proper assessment of the issue of dependency.
15. Mr Melvin relied on written submissions dated 31 August 2022 provided in response to directions from an Upper Tribunal Judge in terms of the assertions as to what was said in oral evidence at the hearing before the Ftj. In particular, however, it was submitted that regardless of any argument as to the Ftj's assessment of dependency, the fact is that the Ftj was wrong to accept the proposition that the appeal could be decided under the EEA Regulations, in the light of the decision in *Batool and others (other family members: EU exit)* [2022] UKUT 00219 (IAC). The Ftj's decision was, therefore, wrong in any event. The Ftj had no power to consider the appeal as if it had been made under the EEA Regulations.
16. Otherwise, it was submitted that the Ftj had not applied the wrong test and the appellant's argument was mere semantics. The Ftj was entitled to conclude that the evidence was vague and lacking in detail. There was no irrationality in his decision, it was submitted.
17. Mr Richardson, understandably, was concerned about the fact that there was no 'rule 24' response from the respondent advancing the *Batool* argument, although the written submissions on behalf of the respondent were provided to him at the hearing.
18. He submitted that the conclusions in *Batool* would only be relevant in any event on any re-making. It was submitted that if I found that the Ftj had erred in law in his assessment of dependency, his decision should still be set aside. It was further contended that the decision in *Batool* may be overturned by the Court of Appeal.

Assessment and Conclusions

19. I am satisfied that there is merit in the arguments advanced on behalf of the appellant in terms of the Ftj's assessment of the issue of dependency. To summarise, the Ftj's conclusions on this issue do not engage with the detail of the evidence given at the hearing before him, and the conclusion that funds were provided on an *ad hoc* basis minimises the extent of the financial support that is demonstrated by the funds remitted, illustrated at [25] of the appellant's skeleton argument that was before the Ftj. This identifies the evidence that shows funds provided at least on a quarterly basis, and sometimes monthly, over a two year period.
20. In those circumstances, I am satisfied that grounds 1 and 3 are made out. It is not necessary for me to express a concluded view in terms of whether the Ftj applied too high a threshold.
21. Section 12(2) of the Tribunals, Courts and Enforcement Act 2007 ("the 2007 Act") provides as follows:

“12 Proceedings on appeal to Upper Tribunal

(1) Subsection 2 applies if the Upper Tribunal, in deciding an appeal under section 11, finds that the making of the decision concerned involved the making of an error on a point of law.

(2) The Upper Tribunal -

(a) may (but need not) set aside the decision of the First-tier Tribunal, and

(b) if it does, must either -

(i) remit the case to the First-tier Tribunal with directions for its reconsideration, or

(ii) re-make the decision.”

22. Having found that the FtJ’s decision involved the making of an error on a point of law, I may, but need not, set aside the decision of the First-tier Tribunal and then either remit the case to the First-tier Tribunal for its reconsideration or re-make the decision.

23. The Upper Tribunal’s decision in *Batool* is encapsulated in the headnote as follows:

“(1) An extended (oka other) family member whose entry and residence was not being facilitated by the United Kingdom before 11pm GMT on 31 December 2020 and who had not applied for facilitation of entry and residence before that time, cannot rely upon the Withdrawal Agreement or the immigration rules in order to succeed in an appeal under the Immigration (Citizens’ Rights Appeals) (EU Exit) Regulations 2020.

(2) Such a person has no right to have any application they have made for settlement as a family member treated as an application for facilitation and residence as an extended/other family member.”

24. At [69]-[71] they said as follows:

“69. In the alternative, the appellants contend that, notwithstanding they applied under EUSS rather than under the 2016 Regulations, the respondent ought to have treated their applications as being made under those Regulations.

70. Mr De Mello seeks to draw support from Article 18.1(e) of the Withdrawal Agreement, whereby the host State ‘shall ensure that any administrative procedures for applications are smooth, transparent and simple, and that any unnecessary administrative burdens are avoided’. Mr De Mello also relies upon Article 18.1(f), which requires application forms to be ‘short, simple, user-friendly and adapted to the context of this Agreement’.

71. The guidance on www.gov.uk, however, shows that the Secretary of State has been at pains to provide potential applicants with the relevant information, in a simple form, including highlighting the crucial distinction between 'close family members' and 'extended family members'. That is a distinction which, as we have seen from the Directive and the case law, is enshrined in EU law. It is not a novel consequence of the United Kingdom's leaving the EU. It is, accordingly, not possible to invoke sub-paragraphs (e) and (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."
25. Having considered what the Tribunal said in *Batool*, and my being in agreement with its reasoning, it is clear that the Ftj was not entitled to decide the appeal on the basis of the EEA Regulations.
26. Notwithstanding that this was not a matter raised in a rule 24 response on behalf of the respondent, it is nevertheless a matter that I must take into account in deciding what should follow from my conclusion that the Ftj erred in law in his assessment of the issue of dependency. The mere conclusion that the First-tier Tribunal made an error on a point of law does not inevitably mean that the decision must be set aside. S.12(2)(a) of the 2007 Act makes that plain.
27. In my view, the outcome of the appeal before the Ftj could not have been anything other than a decision to dismiss the appeal, following the analysis in *Batool* with which I am in agreement. The question though, is whether it is appropriate to set aside the Ftj's decision only for the decision to be re-made dismissing the appeal. Mr Richardson acknowledged that in a re-making of the decision the outcome must inevitably be, should I follow the analysis in *Batool*, that the appeal would fall to be dismissed.
28. Having considered the matter carefully, I do consider that the appropriate course is to set aside the decision of the First-tier Tribunal in order to make it clear, if it is not already, that the Ftj's analysis of the issue of dependency is legally flawed and to indicate that for that reason the decision ought not to stand.
29. Accordingly, I set aside the decision of the First-tier Tribunal. For reasons already explained, in the light of the decision in *Batool* and my agreement with its reasoning on the point in issue, I re-make the decision by dismissing the appeal.

Decision

30. The decision of the First-tier Tribunal involved the making of an error on a point of law. Its decision is set aside and I re-make the decision by dismissing the appeal.

A.M. Kopieczek
Upper Tribunal Judge Kopieczek

29/10/2022