



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

Appeal Numbers: UI-2022-003703
(EA/01125/2022)

THE IMMIGRATION ACTS

**Heard at Field House
On 21 November 2022**

**Decision & Reasons Promulgated
On 4 January 2023**

Before

UPPER TRIBUNAL JUDGE PITT

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

**MR MOHAMMED TOHA
(ANONYMITY DIRECTION NOT MADE)**

Respondent

Representation:

For the Appellant: Ms S Cunha, Senior Home Office Presenting Officer

For the Respondent: No representation

DECISION AND REASONS

1. This is an appeal against the decision issued on 6 June 2022 of First-tier Tribunal Judge S J Clarke which allowed the appellant's appeal against the refusal of an application for a family permit under the EU Settlement Scheme (EUSS).
2. For the purposes of this appeal I will refer to the Secretary of State for the Home Department as the respondent and to Mr Toha as the appellant, reflecting their positions before the First-tier Tribunal.

3. Mr Toha is a national of Bangladesh and was born on 4 October 2005. On 30 June 2021 he made an application for an EUSS family permit under Appendix EU(FP) in order to enter the UK to join his older sister and brother-in-law who is an EEA national.
4. The application was refused on 7 January 2022. The appellant appealed and his appeal came before First-tier Tribunal Judge Clarke on 27 May 2022. The First-tier Tribunal Judge found that the appellant had shown that he was financially dependent upon the EEA sponsor for his essential needs; see paragraphs 7 and 8 of the First-tier Tribunal decision.
5. In paragraph 9 of the decision the judge refers to the respondent's guidance issued in April 2022 regarding transitional provisions for the Immigration (European Economic Area) Regulations 2016. Page 11 of that guidance referred to a "grace" period extending to 30 June 2021 for applications to be made asserting European law rights.
6. In paragraph 10 of the decision the judge found that the appellant was "an extended family member following the Withdrawal Agreement" and that "he has the benefit of the period of grace to enjoy the wider definite of 'extended family member'".
7. The appeal was allowed "on EEA grounds".
8. The respondent appealed the decision. The respondent's first objection was that the appeal appeared to be allowed on the basis of the Immigration (European Economic Area) Regulations 2016 where the First-tier Tribunal did not have jurisdiction to consider such an appeal. The application and the decision were made under Appendix EU of the Immigration Rules and not the 2016 EEA Regulations. The right of appeal before the First-tier Tribunal arose from Regulation 8 of the Immigration (Citizens' Rights Appeals) (EU Exit) Regulations 2020. That limited the grounds of appeal to whether the decision was in accordance with the Immigration Rules or whether the appellant's rights had been breached under the Withdrawal Agreement.
9. The respondent's second ground was that the appellant was not someone who fell to benefit from the "grace period". The "grace period" referred to by the judge covered only certain individuals who could be considered to be "family members". The appellant clearly did not come within the definition of a family member.
10. By the time of the hearing before me the Upper Tribunal had issued the decision in Batool & Ors (other family members: EU exit) [2022] UKUT 00219 (IAC). The headnote of Batool states:
 - "(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”.
11. Batool confirmed that the respondent’s grounds had merit. The appellant was found by the First-tier Tribunal only to be an extended family member as defined by the Immigration (European Economic Area) Regulations 2016. That does not bring him within the category of “family member” for the purposes of Appendix EU(FP) and the Withdrawal Agreement. He does not come within the definition of “family member” for the purposes of Appendix EU(FP) and the Withdrawal Agreement because there was no “facilitation” as an extended family member as of 31 December 2020; see the headnote of Batool. He was not being facilitated and had not applied for facilitation of entry by 31 December 2020. The First-tier Tribunal was therefore not correct to find that he was within a category of persons entitled to rely on the Withdrawal Agreement and he was not someone who fell to benefit from the “grace” period identified in paragraph 9 of the First-tier Tribunal decision. The only appeal right that would have been available even if the appellant had shown that he was an “other family member” for the purposes of Appendix EU(FP) arose from the Immigration (Citizens’ Rights Appeals) (EU Exit) Regulations 2020 and not “EEA grounds” as indicated by the First-tier Tribunal.
12. It was therefore my conclusion that the decision of the First-tier Tribunal disclosed an error on a point of law such that it had to be set aside to be remade. The appeal was allowed on a jurisdictional basis not open to the First-tier Tribunal. The appellant did not meet the requirements for a family member as defined in Appendix EU(FP). There was no grace period available.
13. The same reasons show that the appeal must be remade as refused. Ms Cunha expressed the respondent’s sympathy with the situation of the appellant and his family in the UK who are clearly extremely close and where the family now in the UK are very concerned about the appellant’s wellbeing. Notwithstanding the difficulties the family are experiencing where the appellant is separated from his parents and sister and brother-in-law, his application under the EUSS cannot succeed.

Notice of Decision

14. The decision of the First-tier Tribunal discloses an error on a point of law and is set aside to be re-made.
15. I dismiss the appeal brought under the Immigration (Citizens’ Rights Appeals) (EU Exit) Regulations 2020.

Signed: S Pitt
Upper Tribunal Judge Pitt

Date: 20 December 2022