



IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM
CHAMBER

Case No: UI-2021-001192
First-tier Tribunal No: EA/06741/2021

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On the 19 March 2023

Before

UPPER TRIBUNAL JUDGE PERKINS

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

HALIMA ALAM
(NO ANONYMITY ORDER MADE)

Respondent

Representation:

For the Appellant: Mr E Tufan, Senior Home Office Presenting Officer

For the Respondent: Not represented

Heard at Field House on 15 December 2022

DECISION AND REASONS

(extempore)

1. This is an appeal by the Secretary of State against a decision of the First-tier Tribunal allowing the appeal of the respondent, hereinafter the claimant, against a decision of the Secretary of State refusing leave to enter under the EU Settlement Scheme.
2. The claimant did not attend before me. Enquiries were made because this is a case where the solicitors before the First-tier Tribunal had done quite a lot of work and it did not have the feel of neglect but my clerk was told that the solicitors are no longer acting and they would not be attending. Notice of the hearing was given on 18 November 2022.
3. In the circumstances I am satisfied there was good service on the claimant by her representatives and, in the absence of any representations directly from the claimant I decided that it was right to continue with the hearing.

4. The Secretary of State did not appear before the First-tier Tribunal and so the Judge was not assisted by representations from the (then) respondent. Although it is for the Secretary of State to decide whether she wants to argue her cases it is difficult for a judge dealing with a fairly new area of law not to have the assistance of representations from both parties. However whether a party attends or not, a party is entitled to a fair decision and the Secretary of State says that the judge did not decide the case properly because the judge effectively applied the wrong Rules. There is a great deal of merit in that criticism.
5. The judge considered the 2016 Regulations for no obvious reason and seemed to find that the appellant would have satisfied them, which was not primarily a task for the judge. If an application had been made under the 2016 Regulations there would have been a discretionary element for the Secretary of State to decide if, in all the circumstances, leave should be granted so this is not a case where the judge could simply take over and decide what the Secretary of State would have done because he does not know.
6. But the big problem is that the claimant had not made an application under the 2016 Regulations. The application was under the EUSS Settlement Scheme and it is the Secretary of State's case that the application cannot succeed because the claimant is not qualified under that Scheme. I think that must be right. The reasons given by the Secretary of State in its decision are, I find, at least adequate and the whole appeal process has rather missed the point.
7. The possibility of confusion of this kind has been considered before by this Tribunal and particularly by the former President, Lane J, sitting with Upper Tribunal Judge Smith in a case reported as **Batool & Ors (other family members: EU exit) [2022] UKUT 219 (IAC)**. As Mr Tufan has pointed out the argument was considered from paragraph 61 and dismissed in fairly emphatic terms under paragraph 73 where the Tribunal said:

“The upshot is that the appellants cannot show that their rights under the Withdrawal Agreement were breached by the respondent's decisions. The appellants cannot show that these decisions were not in accordance with Appendix EU (FP). Accordingly, the First-tier Tribunal could not allow their appeals by reference to Regulation 8 of the 2020 Regulations”.
8. The point being made there is that the Secretary of State has to consider the application that is being made and the application made here was under the withdrawal scheme and the appellant does not satisfy its requirements.
9. It was explained in the refusal that the relationship relied upon does not come within the definition of family member in Appendix EU which is the appropriate appendix because that is the appendix that governs the application that was made. That really is all there is to it. It is an application that could not succeed.
10. I have already indicated I have considerable sympathy for the First-tier Tribunal Judge for the lack of assistance but I also note that the First-tier Tribunal's decision was before the decision in **Batool** had been reported and when things were very new. Nevertheless, it is quite clear to me that the appeal should not have been allowed and the judge erred.
11. I insert as a rider that I do realise there is a view amongst some judges in the Upper Tribunal that in very, very particular circumstances there might be room to say that the Secretary of State ought to have recognised an application from being something other than it purported to be. That is a controversial point but

might be justified when the facts are compelling but this is not how this case is argued or presented. It is simply an application made on a basis that could not succeed and the First-tier Tribunal should not have allowed it. The claimant's circumstances do not satisfy the definition in the rules.

12. I find the First-tier Tribunal erred.

Notice of Decision

13. I set aside the decision of the First-tier Tribunal and I substitute a decision dismissing the claimant's appeal against the First-tier Tribunal's decision.

Jonathan Perkins

Judge of the Upper Tribunal
Immigration and Asylum Chamber

17 January 2023