



**IN THE UPPER TRIBUNAL**  
**IMMIGRATION AND ASYLUM CHAMBER**

Case No: UI-2022-006503

First-tier Tribunal No: EA/00555/2022

**THE IMMIGRATION ACTS**

**Decision & Reasons Issued:**

8<sup>th</sup> December 2023

**Before**

**UPPER TRIBUNAL JUDGE KEBEDE**

**Between**

**AA**  
**(Anonymity Order made)**

Appellant

**and**

**ENTRY CLEARANCE OFFICER**

Respondent

**Representation:**

For the Appellant: Mr C Timson, instructed by Juris Solicitors Ltd

For the Respondent: Mr A McVeety, Senior Home Office Presenting Officer

**Heard at Field House on 30 November 2023**

**DECISION AND REASONS**

1. The appellant is a citizen of Pakistan born in February 2005. He appeals, with permission, against the decision of the First-tier Tribunal dismissing his appeal against the respondent's decision to refuse his application for an EU Settlement Scheme (EUSS) Family Permit.

2. The appellant applied on 22 June 2021 for an EUSS Family Permit, together with his parents, to join the sponsor, Shakeel Ahmed, a Belgian national settled in the UK. The sponsor's wife was the appellant's sister and the sponsor was also sponsoring their

parents. Their applications were all made as family members of a relevant EEA citizen. The appellant's parents' applications were successful and they were issued with EUSS Family Permits. However the appellant's application was refused, on 26 November 2021, on the basis that his relationship to the sponsor did not come within the definition of 'family member of a relevant EEA citizen' as stated in Appendix EU (Family Permit) to the Immigration Rules.

3. The appellant had a right of appeal against that decision under the Immigration (Citizens' Rights Appeals)(EU Exit) Regulations 2020 on the grounds that the decision was not in accordance with the EUSS rules or that it breached his rights under the Withdrawal Agreement. The appellant exercised his right of appeal, asserting in his grounds of appeal that the ECO's decision was contradictory, given that his parents' applications had been granted, and that the ECO should have considered the best interests of the child and the fact that he was a minor and was disabled.

4. The appellant's appeal was heard in the First-tier Tribunal by Judge Malik on 12 April 2022. The judge noted that there was no appearance by or on behalf of the appellant and proceeded to hear the appeal in the absence of any representative for the appellant. She had regard to the sponsor's statement and noted his evidence that the appellant had Down Syndrome and relied heavily upon his parents for physical and emotional support as he was unable to look after himself. She noted the sponsor's evidence that he had been supporting the appellant and his family since marrying his wife, the appellant's sister. The judge also had regard to the appellant's father's statement in which he explained that he had come to the UK since being granted leave to enter but his wife had had to remain with the appellant in Pakistan to provide him with care.

5. The judge noted that it had been conceded, in the appellant's skeleton argument, that the appellant did not come within the definition of a 'family member of a relevant EEA citizen' in Appendix EU (Family Permit) to the immigration rules. The judge noted that the thrust of the argument being made for the appellant was that consideration should have been given to whether the respondent's decision was in breach of Article 8, given the appellant's disability and reliance upon his parents and given that their applications for a family permit had been granted. The judge found, however, that Article 8 and exceptional or compassionate circumstances did not apply under the EUSS scheme. She concluded that the appellant did not meet the requirements for an EUSS Family Permit under Appendix EU (Family Permit) and she accordingly dismissed the appeal.

6. Permission to appeal to the Upper Tribunal was sought on behalf of the appellant on two grounds: firstly, that the judge ought not to have proceeded to hear the appeal in the appellant's absence, given the particular circumstances which had led to there being no attendance on his behalf; and secondly, that the judge had failed to take full account of the definition of a family member of a relevant EEA citizen in Annex 1 of Appendix EU, whereby the appellant could have qualified as a 'dependent relative' of the sponsor, or alternatively had failed to consider the best interests of the child under section 55 of the Borders, Citizenship and Immigration Act 2009.

7. Permission was refused in the First-tier Tribunal, but granted in the Upper Tribunal on a renewed application.

8. The respondent produced a detailed rule 24 response opposing the appeal.

9. The matter came before me for a hearing. Both parties made submissions. I address those below.

## Discussion

10. It was accepted by Mr McVeety that the absence of representation for the appellant at the hearing was a result of a misunderstanding and was through no fault of the appellant. It is evident, from email correspondence produced, that the appellant was represented by counsel who had attended with the sponsor on the day of the hearing, but had left the court building before the hearing on a mistaken understanding that the case had been taken out of the float list and adjourned and was to be heard on another day.

11. The relevant question, as Mr Timson accepted, was whether any arguable procedural unfairness arising from the judge proceeding in the absence of the appellant's representative was material, if the appeal could not have succeeded in any event. In other words, was there anything that could have been argued before the judge that would have possibly led to a different outcome for the appellant. Mr Timson appeared to accept that the appellant could not meet the definition for 'family member of a relevant EEA citizen' in the immigration rules. Indeed he was right to do so, not only because that had been properly conceded in the appellant's skeleton argument before Judge Malik, but also because it is clear from the definition in Annex 1 of Appendix EU (Family Permit) that the appellant did not fall within its scope. Although it was argued in the grounds of appeal that the appellant could have met the definition as a 'dependent relative' of the sponsor, the grounds mistakenly referred to Appendix EU, rather than the relevant immigration rules in Appendix EU (Family Permit) in that respect. In any event the respondent's rule 24 response provides a detailed explanation of why the appellant could not meet the definition of 'family member of a relevant EEA citizen' or of 'dependent relative' in Appendix EU.

12. Mr Timson's main point, which he accepted was the 'nub' of the case, was the question of the 'best interests of the child' which was pleaded in the grounds of appeal before Judge Malik but had not been considered by the respondent or by the judge. Mr Timson submitted that the 'best interests of the child' was a relevant issue under the EUSS and could be dealt with in an appeal under the EUSS. He relied upon the decision in Batool & Ors (other family members: EU exit) [2022] UKUT 219 in that regard, submitting that the Upper Tribunal's observations at [87] did not preclude section 55 being an issue in an appeal under the EUSS. He also relied upon the Home Office policy guidance "EU Settlement Scheme Family Permit and Travel Permit" Version 16.0 of 9 August 2023 which he said permitted for the 'best interests of the child' to be a consideration in entry clearance cases. It was Mr Timson's submission that there was room for such an argument to be made in an EUSS appeal and that the appellant had been deprived of an opportunity to make such an argument before Judge Malik, such that the case had to be remitted to the First-tier Tribunal to be heard again.

13. As I pointed out to Mr Timson, there were only two grounds of appeal under the Immigration (Citizens' Rights Appeals)(EU Exit) Regulations 2020, namely that the decision was not in accordance with the EUSS immigration rules in Appendix EU (Family Permit) and/or that it breached his rights under the Withdrawal Agreement, neither of which permitted reliance upon section 55. Section 55 was not a ground of appeal in itself but arose as part of an Article 8 proportionality assessment which, as Judge Malik had found, did not form part of an EUSS appeal. There had been no consent given by the respondent to argue Article 8 as a 'new matter' and it was therefore not a ground which was arguable in the appellant's appeal. I do not agree

with Mr Timson that the Upper Tribunal's observations in Batool or the Home Office guidance could possibly provide scope for section 55 to be argued in an appeal against a decision under the EUSS. On the contrary, I agree with Mr McVeety that the Upper Tribunal's finding at [87] of Batool, that *"The appellants have, however, failed to explain how the respondent's decisions under EUSS (FP) could conceivably have been different, merely because the appellants were children; **still less how section 55 can be a material factor in an appeal brought under the 2020 Appeal Regulations (leaving aside the issue of human rights, discussed above)**"* unequivocally disposes of Mr Timson's argument and certainly provides no support for it. That is further reinforced at [89]. The Home Office guidance at page 7, under the heading "The best interests of a child", makes it clear that the duty under section 55 applies only to children in the UK. Although it goes on to refer to the spirit of the duty applying to children overseas, that is in certain specific circumstances which simply do not apply to the appellant, irrespective of his vulnerability and the unfortunate situation in which he finds himself. Accordingly there was no prospect of the appellant succeeding on an argument based upon the 'best interests of the child' and there was nothing would he could have argued before the judge to lead to any other outcome than that which was reached.

14. I therefore agree with Mr McVeety that the appellant could not have succeeded on any basis in his appeal before Judge Malik and consider that the presence of the appellant's representative and sponsor could not have made any difference to the outcome of the appeal. For that reason, any procedural unfairness which may arguably have arisen from the appeal proceeding in their absence was immaterial to the outcome of the appeal and does not warrant the setting aside of the judge's decision. The judge reached the only decision open to her and accordingly I uphold her decision.

### **Notice of Decision**

15. The making of the decision of the First-tier Tribunal did not involve a material error on a point of law requiring it to be set aside. The decision to dismiss the appeal stands.

### **Anonymity**

The anonymity direction made by the First-tier Tribunal is maintained.

Signed: S Kebede  
Upper Tribunal Judge Kebede

Judge of the Upper Tribunal  
Immigration and Asylum Chamber

30 November 2023