



IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2023-002998
First-tier Tribunal No: EA/09107/2022

THE IMMIGRATION ACTS

Decision & Reasons Issued:

15th January 2024

Before

UPPER TRIBUNAL JUDGE GLEESON

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

HUMYARA BEGUM POLY
(NO ANONYMITY ORDER MADE)

Respondent

Representation:

For the Appellant: Mr Amerjit Basra, a Senior Home Office Presenting Officer
For the Respondent: Ms Sonia Ferguson of Counsel, instructed by Novells Legal Practice

Heard at Field House on 9 January 2024

DECISION AND REASONS

Introduction

1. The Secretary of State challenges the decision of the First-tier Tribunal allowing the claimant's appeal against his decision on 16 September 2022 to refuse her application for settlement or pre-settled status pursuant to the EU Settlement Scheme (EUSS) and rules EU11, EU11A, EU14 and EU14A in Appendix EU of the Immigration Rules HC 395 (as amended).
2. The claimant is a citizen of Bangladesh.

11. The claimant's brother joined the rest of the family in the UK on 30 December 2020 and applied under the EUSS the next day, 31 December 2020. He has been granted pre-settled status.
12. No EUSS application was made for the claimant or her mother at that stage. On 7 January 2021, the claimant's father died, the cause of death being recorded as idiopathic pulmonary fibrosis, which the claimant says was the consequence of his contracting Covid-19.
13. The claimant and her mother did not embark for Portugal on 3 May 2021 as originally planned. On 30 June 2021, the applicant made an EUSS application, after the specified date (she was 19 years old now). Her mother also made an application and on 7 February 2022, she was granted pre-settled status as the sponsor's parent.

Refusal letter

14. On 16 September 2022, the Secretary of State refused the claimant's application. The claimant was unable to show 5 years' continuous qualifying residence in the UK and Islands. The Secretary of State had attempted to contact the claimant 'numerous times' by email and telephone between 18 November 2021 and 9 February 2022 to ask for the needed evidence, but had been unable to reach her.
15. The claimant was not a family member of the sponsor (as defined by Annex 1 of Appendix EU), which as defined extended only to ascendants and descendants, and spouses or partners. The Secretary of State erroneously treated the claimant as only a half-sibling of the sponsor. She did not qualify for settled status.
16. The claimant could not meet the requirements for pre-settled status on the basis that she was completing a continuous qualifying period of 5 years which began before the specified date. The evidence adduced satisfied the Secretary of State that the claimant had been residing in the UK between 16 January 2021 and 30 November 2021, a period which fell entirely after the specified date of 11 p.m. on 31 December 2020.
17. The claimant exercised her right of appeal to the First-tier Tribunal.

First-tier Tribunal decision

18. The First-tier Judge noted that the claimant accepted that she had not lived in the UK for 5 years, but she was a minor, her late father was a British citizen, and she was still a minor when the application was made. The claimant had been dependent on her brother since 2014, on her account in the First-tier Tribunal. If the EUSS appeal failed, the claimant asked that her appeal be allowed on Article 8 ECHR grounds, since she had 'no realistic family ties' to Bangladesh and was living in the UK with all of her family members.

19. The First-tier Judge erroneously directed himself that the claimant had made her application when a minor, and correctly, that she was the daughter of a (deceased) UK citizen. She was the sponsor's full sibling. He did not engage directly with the provisions of Appendix EU but concluded as follows:

"24. The burden of proof is upon the Appellant and the standard of proof is of the balance of probabilities.

25. I have carefully considered all of the evidence in this case set against the refusal decision dated 16/9/22.

26. Having done so, I conclude that the Appellant is the family member of an EEA national who has pre settled status within the UK.

27. There is good evidence that she entered the UK prior to the specified date and that she was living with and dependent upon the EEA national with whom she continues to reside.

28. She was also a minor when she made this application and is the daughter of a UK citizen.

29. Contrary to what is stated in the Refusal decision, I find that she is the full sibling of the EEA national and in this, I rely upon the submitted birth certificates and DNA Report.

30. It is quite clear that the Appellant has lived in a family unit both before the specified date in Bangladesh and then Portugal and then after it in the UK. At all times, she has lived with and was and is dependent upon the sponsor. Her Mother also lives within the UK and has been granted pre settled status.

31. It follows therefore that the appeal is allowed. I find that she is the family member of an EEA national who has been granted pre settled status in the UK."

That is all of the reasoning in the First-tier Tribunal decision.

20. The Secretary of State appealed to the Upper Tribunal.

Permission to appeal

21. Permission to appeal to the Upper Tribunal was granted as follows:

"1. ...The grounds argue that the judge failed to make any findings and correctly address the requirement of Appendix EU to hold a relevant document and to have obtained facilitated residence prior to the specified date. It is noted that whilst the Applicant may have entered the UK prior to the specified date there was no application made prior to that date for facilitated residence, therefore it is submitted that the Tribunal has overlooked the essential requirement of the Immigration Rules when allowing the Applicant's appeal. Reliance is placed on the findings of the

Upper Tribunal in *Batool & Ors (other family members: EU exit)* [2022] UKUT 00219 (IAC).

2. The grounds in support of the application for permission to appeal raise an arguable error of law. The fact remains that the Applicant is the sister of the relevant EEA national and as rightly stated by the Respondent an extended family member and therefore would have needed to have been facilitated via a successful pre-31st December 2020 application for a residence card in accordance with Article 3.2(a) of the 2004 Directive. The fact remains that the Applicant was an extended family member and not a family member. The classification by the judge of the Applicant as a family member is an error of law. The fact remains that the Applicant had not made application for facilitation of entry and residence before the end of the transition period within the meaning of the withdrawal agreement. There is an arguable error of law.”

Rule 24 Reply

22. There was no Rule 24 Reply on behalf of the claimant.
23. That is the basis on which this appeal came before the Upper Tribunal.

Upper Tribunal hearing

24. The oral and written submissions at the hearing are a matter of record and need not be set out in full here. I had access to all of the documents before the First-tier Tribunal.
25. For the claimant, Ms Ferguson placed weight on the claimant having been recognised as a dependant by the Portuguese authorities and given a Portuguese EEA residence card. The claimant had been granted entry to the UK on 11 December 2020 on EEA Regulations grounds.
26. The claimant’s application for EUSS had not been included in the bundle for the First-tier Tribunal and is not before me. If the claimant’s appeal failed on the basis of the EUSS, she might have a *Surrinder Singh* right to entry based on her time in Portugal with her late father.

Conclusions

27. The First-tier Judge made errors in his consideration of the factual matrix at a level which meets the ‘rationally insupportable’ test in *Volpi & Anor v Volpi* [2022] EWCA Civ 464 (05 April 2022) at [65]-[66] in the judgment of Lord Justice Lewison, with whom Lord Justice Males and Lord Justice Snowden agreed.
28. The First-tier Judge erred in treating the claimant as a minor: having been born on 6 March 2002, the claimant had reached majority on 6 March 2000, nine months before she came to the UK. She was no longer a child on 11 December 2020, nor in July 2021 when the application the subject of this appeal was made, and her January 2000 application was made to join her British citizen father, not her sponsor brother.

29. The Portuguese residence card issued to her on 4 October 2019 (page 26 of the claimant's bundle) is not evidence of her dependency on her sponsor brother. It states that it is for temporary residence. It is accompanied by a letter dated 28 January 2019 from the President of the Parish Council of Santa Maria Maior, Lisbon, confirming that the claimant is the child of her parents and lives with them. The claimant's father was an EEA citizen exercising Treaty rights in Portugal and she was of course a family member in relation to him. It is clear to me that the Portuguese residence card was based on that relationship, not on her relationship to the present sponsor.
30. The claimant entered the UK on 11 December 2020 intending to stay for 6 months, on the basis of her Passenger Location Form, completed by her late father. She made no application under the EUSS before the specified date, though the sponsor did (just in time, on the last day). If the claimant were part of the sponsor's household, it would have been logical for an application to be made for the claimant and her mother at the same time. In fact, both applied in 2021, and the claimant waited until June 2021 before she made the application.
31. Overall, the First-tier Judge's reasoning is sparse and inadequate. There is no engagement with the definition of 'family member' or 'dependant' in Annex 1 of Appendix EU.
32. **I have concluded that there is no alternative but to set aside and remake the First-tier Tribunal decision.**
33. I find, on the evidence before me, that the claimant was dependent, not on her brother but on her father, when she made her application in January 2020, which was not successful, when she entered the UK in December 2020 (for a visit, during Covid-19), and when in 2019 she was granted a temporary EEA residence card in Portugal.
34. The only application where she claimed as the sponsor's dependant was the one made in June 2021, after her late father's Covid-related death in January of that year. The claimant is the sponsor's whole, not half-sister, but in either case, she is an extended family member and not a direct family member in relation to him. Both EU11 and EU 14 apply only to 'family members' not extended family members.
35. The Annex 1 definition of 'joining family member' requires the claimant to show that before the specified date she was the dependent relative of a relevant EEA citizen. She cannot show that. Nor can the claimant bring herself within the definition of a 'family member of a qualifying British citizen' at the date of application, her British citizen father having died 6 months earlier.
36. The definition of 'family member of a relevant EEA citizen', upon which the claimant is forced now to rely, requires her to have been dependent on her sponsor brother *before* the specified date of 31 December 2020. In fact,

the evidence she has adduced points to her having been dependent on her father until his death on 7 January 2021.

37. The sponsor was not in the UK until 30 December 2020. The claimant's application as his dependant was not made until June 2021, long after the specified date. The claimant has not discharged the burden on her of showing that she can bring herself within the relevant definitions in Annex 1 of Appendix EU, or that EU11, EU11A, EU14 or EU14A apply to her.
38. I therefore set aside the decision of the First-tier Tribunal and substitute a decision dismissing the claimant's appeal.

Notice of Decision

39. For the foregoing reasons, my decision is as follows:

The making of the previous decision involved the making of an error on a point of law.

I set aside the previous decision. I remake the decision by dismissing the appeal.

Judith A J C Gleeson
Judge of the Upper Tribunal
Immigration and Asylum Chamber

Dated: 9 January 2024