



**Upper Tribunal  
(Immigration and Asylum Chamber)  
002788**

**Appeal Number: UI-2022-  
EA/15690/2021**

**THE IMMIGRATION ACTS**

**Heard at Field House  
On 28 September 2022**

**Decision and Reasons  
Promulgated  
On 13 November 2022**

**Before**

**Upper Tribunal Judge RIMINGTON  
Deputy Upper Tribunal Judge MANUELL**

**Between**

**THE SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Appellant

**and**

**J U  
(ANONYMITY DIRECTION)**

Respondent

**Representation:**

For the Appellant: Ms A Nolan, Senior Home Office Presenting Officer  
For the Respondent: Mr T Shah, Solicitor  
(Taj Solicitors)

**DECISION AND REASONS**

1. Permission to appeal was granted by First-tier Tribunal Judge Grimes on 11 May 2022 against the decision to allow the Respondent's appeal made by First-tier Tribunal Judge C Scott in a decision and reasons promulgated on 28 March 2022.

The Respondent had applied under for pre-settled status under Appendix EU claiming to be within the definition of family member of a relevant EEA citizen. The judge had allowed her appeal under the Withdrawal Agreement.

2. The Respondent is a national of Bangladesh, born on 15 July 2008, a minor. Her parents had been granted pre-settled status as dependent family members. The Respondent and her brother had been refused. Her parents had then come to the United Kingdom with their children. The Respondent had entered the United Kingdom as a child visitor under the Immigration Rules on 29 November 2020. She then applied for pre-settled status under the EUSS on the basis that she was the dependent sister of Mr Kabir Uzzaman, an Italian national, who had sponsored her parents. The Respondent's application was refused on 22 March 2021. She then made a fresh application in similar terms which was refused on 9 November 2021, the subject of the appeal before Judge Scott. It was accepted at the appeal hearing on the Respondent's behalf that she was unable to meet Appendix EU of the Immigration Rules, but she contended successfully that she had rights under the Withdrawal Agreement.
3. Permission to appeal was granted because it was considered arguable that the First-tier Tribunal Judge had erred by allowing the appeal in circumstances where the Appellant was not residing in the United Kingdom in accordance with Union law at the time of her application.
4. Ms Nolan for the Appellant relied on the grounds of appeal submitted and the grant of permission to appeal. Because the Appellant had entered the United Kingdom on a child visit visa issued under the Immigration Rules, this was outside the EU Settlement Scheme. There was no "facilitation" of her presence. Batool and Others (other family members: EU exit) [2022] UKUT 00219 (IAC) [2022] UKUT 00219 (IAC) applied. The Withdrawal Agreement had no application. There was a misunderstanding by the judge and the decision should be set aside, remade and dismissed, as it had to be.
5. Mr Shah for the Respondent submitted that while it had been accepted that the Respondent was unable to satisfy Appendix EU, nevertheless her best interests had to be taken into account which was part of the proportionality assessment required. Her parents were present in the United Kingdom and her best interests were not to be separated from them. The Home Office guidelines were contradictory. Proportionality had been a live issue and the judge's decision was correct and should stand.

6. The Tribunal noted that the Respondent's EUSS application was made after 31 December 2020. Human rights issues had not been raised at any stage previously in the application or appeal and would in any event have been a new matter for which consent was needed and which had not been sought, let alone granted: see Celik (EU Exit; marriage, human rights) 00220 (IAC). Because the Respondent's presence in the United Kingdom had not been facilitated by the Appellant under any relevant EU provision, the Respondent had no separate rights accruing under the Withdrawal Agreement, which had no application to her.
7. The Tribunal accordingly ruled that the First-tier Tribunal Judge had misdirected herself. The point on which the Respondent had succeeded was not available to her. The appeal was allowed and the decision was accordingly set aside.
8. As no further findings of fact were required, the decision was remade. Ms Nolan indicated that she considered that she need not make any additional submissions as the situation was clear and the appeal must fail.
9. Mr Shah requested that the Tribunal draw attention to the guidelines.
10. The Tribunal ruled that the decision and reasons were subject to material error of law, for the reasons given at [6], above. The Respondent was not subject to removal directions and a best interests assessment did not arise. Judge Scott did not have the benefit of the guidance provided in Batool (above), decided after her decision, which applies by analogy:
  - (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. It follows that the Respondent had no rights under the Withdrawal Agreement. (At all times her applications had been made under the EUSS not under the Immigration (European Economic Area) Regulations 2016). The Home Office guidelines which refer to children's best interests assessments

apply only where an application falls within the EU Settlement Scheme, which the Respondent's application did not because she did not meet the qualifying definitions of "family member of a relevant EEA citizen" or of "dependent relative, as Judge Scott correctly explained at [20] of her decision. Proportionality did not arise (because the Respondent did not fall within the personal scope of the Withdrawal Agreement) and human rights were not raised at any stage. The appeal must be dismissed.

**DECISION**

The appeal by the Secretary of State to the Upper Tribunal is allowed.

There were material errors of law in the First-tier Tribunal's decision and reasons, which is accordingly set aside.

Following a summary rehearing, the original decision was remade.

The original appeal is dismissed.

**Signed**

**Dated** 29 September 2022

**Deputy Upper Tribunal Judge Manuell**