



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

Appeal Number: UI-2022-003429
EA/16549/2021

THE IMMIGRATION ACTS

**Heard at Field House
On 15th September 2022**

**Decision & Reasons Promulgated
On 9th November 2022**

Before

UPPER TRIBUNAL JUDGE KEITH

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

**MR PAHULPREET SINGH
(ANONYMITY DIRECTION NOT MADE)**

Respondent

Representation:

For the appellant: Mr S Kotas, Senior Home Office Presenting Officer
For the respondent: *Mr P Richardson*, instructed by Elegant Solicitors

DECISION AND REASONS

Introduction

1. These are the approved record of the decision and reasons which I gave orally at the end of the hearing on 15th September 2022.
2. This is an appeal by the Secretary of State, who was the respondent before the First-tier Tribunal, against the decision of First-tier Tribunal Judge Morgan (the 'FtT'). To avoid confusion, I will continue to refer to the appellant as the Secretary of State, and Mr Singh as 'the Claimant'. In the

appealed decision, promulgated on 18th May 2022, the FtT allowed the Claimant's appeal against the Secretary of State's refusal on 29th November 2021 of his application under the EU Settlement Scheme, as the nephew of an EEA (Spanish) national sponsor exercising treaty rights under the UK.

The FtT's decision

3. At §2 of his decision, the FtT noted that the Secretary of State was not satisfied that the Claimant met the requirements of the scheme, because the Claimant had not been issued with a valid residence card as an extended family member prior to the relevant date. It was, to use common terminology, the situation of an undocumented extended family member.
4. The FtT went on to consider the evidence, including whether the sponsor and Claimant were related as claimed. This included DNA evidence at §5. The FtT found that the evidence was broadly credible and consistent and at §7, found that the two were related as claimed, and that the sponsor had supported the Claimant in India for a long period of time. The family lived in India in a property owned by the sponsor. The sponsor had paid for the Claimant to travel to the UK in January 2020 and since his arrival, the Claimant had been not only dependent on the sponsor for support but had lived in his household.
5. The FtT concluded at §§10 to 11:
 - “10. I am persuaded by the appellant's submissions and find that the respondent's decision is incompatible with the withdrawal agreement. It was not in dispute that the appellant and his sponsor are related as claimed but for the sake of completeness I note the DNA evidence confirming this relationship. Dependency was not raised as an issue but again for the sake of completeness I find that the evidence before me demonstrates that the appellant has been dependent on his uncle prior to his arrival in the United Kingdom and has lived in his uncle's household since his arrival.
 11. In light of the findings above I find the appellant has satisfied me on the balance of probabilities that the appellant meets the requirements of [sic] withdrawal agreement because the respondent's decision is disproportionate.”

The grounds of appeal and grant of permission

6. The Secretary of State appealed the FtT's decision on the basis that the reasoning already cited did not explain why the Claimant was in scope of the Withdrawal Agreement, which the Secretary of State contested. In addition, the reasoning was said to be wholly unsatisfactory, particularly either in how the Claimant was in scope or why the Secretary of State's decision was disproportionate. The fact that the Claimant's dependence on the sponsor predated the end of the transition period had no bearing, where there was no application for facilitation under the Immigration (EEA)

Regulation 2016. Judge Saffer of the First-tier Tribunal granted permission on all grounds on 7th July 2022.

The hearing before me

7. I explored with Mr Richardson at the beginning of the hearing the authority of Batool and others (other family members: EU exit) [2022] UKUT 00219 (IAC). Whilst he was careful to make no concession, he was not in a position to advance any positive argument in response to the Secretary of State's appeal that in light of Batool, the FtT had err in law. It appeared that the FtT did not indicate why the Claimant could rely on the Withdrawal Agreement and indeed on the facts (where no application for facilitation of entry or residence had been made before 11pm GMT on 31st December 2020), these seemed to suggest that the Claimant was not in scope. However, he emphasised, should the Claimant wish to subsequently seek permission to appeal to the Court of Appeal, on the basis that Batool was wrongly decided (as to which he developed no arguments), that he made no concession that the FtT had erred in law.
8. Without any discourtesy to Mr Kotas, I was able to reach a decision on whether the FtT had erred in law, without needing to him to make submissions. Whilst this Tribunal's decision in Batool is not binding on me, there was no argument advanced against, nor any reason to depart from, one of its headnote principles, namely that:

“(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.”

Decision on whether the FtT erred in law

9. There is no suggestion the Claimant had applied for facilitated entry or residence and in the circumstances, the FtT's analysis by reference to the Withdrawal Agreement was an error of law. His reasons were also insufficiently explained. As a consequence, his decision is unsafe and cannot stand.
10. However, I was also invited to preserve the specific findings highlighted at §10 that first, the Claimant and the sponsor are related as claimed; second, there was pre-entry dependency; and third, that the Claimant has lived in his uncle's household since arrival. Mr Kotas did not object. In setting aside the FtT's decision, I preserve those findings.
11. I canvassed with the respective representatives whether I should retain remaking in the Upper Tribunal or remit back to the First-tier Tribunal. Both were agreed that I should retain remaking, given the narrowness of the issues, by reference to paragraph 7.2 of the Senior President's Practice

Statement and I therefore accordingly retain remaking in the Upper Tribunal.

Remaking decision on the Claimant's appeal

12. Mr Richardson invited me to remake the appeal today. The Claimant relied in no additional written evidence, nor was any oral evidence given. Mr Kotas did not object. I note the preserved findings. Mr Richardson has reserved the Claimant's position to seek permission to appeal to the Court of Appeal. However, he has not advanced any specific arguments as to why the guidance in Batool does not apply to the Claimant's case. He accepts that the factual circumstances in Batool are analogous to this case, specifically that there had been no application for a facilitated entry/residence before the relevant time. If Batool is correct, Mr Richardson accepted that the Claimant is not in scope to rely on the Withdrawal Agreement and that there is nothing that renders the Secretary of State's decision disproportionate. Mr Richardson also accepted that there had been no separate human rights claim which this Tribunal had any jurisdiction to consider.
13. In the circumstances, whilst Mr Richardson has reserved the Claimant's position, I apply the guidance in Batool and dismiss the Claimant's appeal.

Notice of Decision

The decision of the First-tier Tribunal contains material errors of law and I set it aside, subject to the preserved findings that the Claimant and sponsor are related as claimed; that the Claimant was dependent on the sponsor prior to entering the UK and has been a member of his household since his entry to the UK.

I remake the appeal by dismissing the Claimant's appeal.

No anonymity direction is made.

Signed J. Keith

Date: 26th September 2022

Upper Tribunal Judge Keith