



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

Case No: UI-2022-002312

First-tier Tribunal No: EA/12059/2021

**THE IMMIGRATION ACTS**

**Decision & Reasons Issued:**  
**On 11 June 2023**

**Before**

**UPPER TRIBUNAL JUDGE HANSON**

**Between**

**AN ENTRY CLEARANCE OFFICER**

Appellant

**and**

**MOHD ABUTARAB SHAIKH  
(NO ANONYMITY ORDER MADE)**

Respondent

**Representation:**

For the Appellant: Mr Bates, a Senior Home Office Presenting Officer.  
For the Respondent: Mr Rachid, the Sponsor.

**Heard at Birmingham Civil Justice Centre on 30 May 2023**

**DECISION AND REASONS**

1. The Entry Clearance Officer ('ECO') appeals with permission a decision of First-tier Tribunal Judge Dhaliwal ('the Judge'), promulgated on 15 March 2022, in which the Judge allowed Mr Shaikh's appeal against the refusal of his application for a Family Permit under the EU Settlement Scheme (EUSS).
2. Mr Shaikh is a citizen of India born on 4 May 1999 who applied on 18 December 2020 and whose application was refused on 5 July 2021.
3. The Judge's assessment of the evidence and findings are set out from [7] of the decision under challenge. The Judge set out the two issues to be determined in the appeal being (i) whether Mr Shaikh is a qualifying family member within the scope of the EUSS and thus whether the decision is not in line with the Immigration Rules and/or (ii) whether the ECO's decision breaches the Withdrawal Agreement.
4. The Judge was clearly aware of the requirements for an individual to succeed with an application for a Family Permit under the EUSS and finds that as Mr Shaikh did not fall within any of the definitions and could not satisfy the Immigration Rules and failed under the EUSS. That decision is legally correct, has not been challenged, and stands.

5. The Judge moved on to consider the second issue, the Withdrawal Agreement, from [11], setting out what were considered the relevant parts from [12].
6. At [17] the Judge writes:
  17. I accept that even within the Withdrawal Agreement, the Appellant does not fall within the definition of a family member. However, it cannot be ignored that the Withdrawal Agreement was designed to, amongst other things, protect the rights held by EEA nationals as well as their family members prior to the withdrawal of the UK from the EU and to ensure that they continue to be protected after Withdrawal (see Preamble to the Agreement). As this was an application made before the specified date, I understand that to mean that the Withdrawal Agreement was designed to equally protect the rights of the EEA national, even as a Sponsor, as in this case. The decision by the Respondent only to consider the application under EUSS and not also consider under The Immigration (EEA) Regulations 2016 is in effect breaching the very rights of an EEA citizen, that the Withdrawal Agreement is designed to protect. Prior to 31 December 2020, the EEA Sponsor was entitled to sponsor entry clearance of an extended family member who was 'dependent' on him. It follows in my view that in protecting the rights of an EEA national, Article 18 also imposes a duty on the Respondent to also consider the application under the 2016 Regulations which she failed to do.
7. The Judge accepts that the relationship between Mr Shaikh and the sponsor, as brothers-in-law, does not fulfil the definition of a family member under the Withdrawal Agreement either, but goes on to consider whether Mr Shaikh was dependent upon the Sponsor [20]. Having considered the evidence the Judge finds Mr Shaikh is dependent on the Sponsor to meet his essential needs in India as a result of which his appeal succeeds on the second ground, that there will be a breach of the Withdrawal Agreement.
8. The ECO sought permission to appeal which was granted by another judge of the First-tier Tribunal, the operative part of the grant being in the following terms:
  2. The grounds assert that the Judge erred in finding that the decision under appeal breached the withdrawal agreement. It is noted that the judge accepted that the Appellant did not fall within the definition of a family member [17] yet found that the Appellant was entitled to protection by proxy due to the Sponsor's lawful residence.
  3. It is arguable that this overextends the impact of the Withdrawal Agreement which does specifically define those who can benefit from it.
  4. The grounds also argue that the tribunal was wrong to hold that the Respondent was required to consider the EEA Regulations because to do otherwise would be contrary to protections he was entitled to under the Withdrawal Agreement.
  5. It is arguable that if the Appellant does not expressly benefit from the Withdrawal Agreement, it is wrong to infer any obligation to consider the Regulations separately.
9. At the date when the determination was promulgated, 15 March 2022, there was no guidance from the Upper Tribunal in relation to the correct interpretation and application of the Withdrawal Agreement. Three cases have now been reported being Celik [2022] UKUT 00220 on 9 June 2022, Batool [2022] UKUT 00219, and Siddiq [2023] UKUT 00047.
10. Although permission to appeal to the Court of Appeal has been granted in Celik permission was refused in relation to the challenge to Batool.

### Discussion and analysis

11. The guidance provided by the Upper Tribunal confirms the requirement for a person to establish entitlement within a defined category. The purpose of the Withdrawal Agreement is to preserve the rights that existed in EU law at the

relevant time. The application as a family member under the EUSS properly failed as Mr Shaikh could not satisfy the definition set out in the relevant provisions. He was, and he has always been, an extended family member of his EU national sponsor.

12. The application was, however, not made under the 2016 Regulations. It was found in Batool and Siddiq that there is no obligation upon the ECO to consider an application made on one basis on a completely different basis. The arguments in relation to Article 18 of the Withdrawal Agreement, relating to discretion, have not been found to be interpreted as widely as the Judge believed it could be in the determination.
13. Extended family member under the 2016 Regulations had no right to enter the UK. If they were able to establish dependency or membership of the EEA national sponsor's household, they would only succeed if the Member State, the UK, decided to exercise discretion in their favour to facilitate their entry. Applications made before 11 PM on the 31 December 2020 under the 2016 Regulations would be considered on that basis. The difficulty for Mr Shaikh in this appeal is no such application was made by the relevant time under the 2016 Regulations as an Extended family member, so there was nothing the ECO was required to consider in relation to whether entry should be facilitated or not.
14. The Judges decision effectively confers protection upon Mr Shaikh under the terms of the Withdrawal Agreement where no such protection exists in law.
15. I find the Judge has erred in law for the reasons set out in the grounds seeking permission to appeal, grant of permission to appeal, and above. I find the legal error material and set the decision aside.
16. In light of the correct interpretation of the relevant legal provisions I substitute a decision to dismiss the appeal.

### **Notice of Decision**

17. The First-tier Tribunal materially erred in law. I set the determination aside.
18. I substitute a decision to dismiss the appeal.

**C J Hanson**

Judge of the Upper Tribunal  
Immigration and Asylum Chamber

**31 May 2023**