



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

Case No: UI-2023-003556

EA/09622/2022

First-Tier Tribunal No:

**THE IMMIGRATION ACTS**

**Heard at Field House  
On 28 November 2023**

**Determination  
Promulgated**

21<sup>st</sup> December 2023

**Before**

**THE HONOURABLE MRS JUSTICE THORNTON  
UPPER TRIBUNAL JUDGE MANDALIA**

**Between**

**IMRAN KHAN**

Appellant

**and**

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

Respondent

**Representation:**

For the Appellant: Mr Z Nasim, counsel, instructed by Lee Valley Solicitors  
For the Respondent: Mr Nicholas Wain, Senior Home Office Presenting Officer

**DETERMINATION AND REASONS**

## Introduction

1. The Appellant appeals against the decision of the First Tier Tribunal dismissing his appeal against the decision of the Secretary of State refusing his application for an EU Settlement Scheme Family Permit. His application was made under Appendix EU (Family Permit) to the Immigration Rules on the basis he is a family member of a qualifying British citizen.
2. At the end of the hearing, we informed the parties of our decision to set aside the decision of the First Tier Tribunal and to remit the matter to the First Tier Tribunal for re-determination by a different judge. Our reasons for our decision are set out below.

## Background

3. The Appellant is a citizen of Pakistan. He married his wife, a British citizen, before 31 December 2020, when he was living in Spain. His wife moved to Spain and they lived there from November 2020 to May 2021. They later decided to relocate to the UK. His wife (and sponsor) returned to the UK on 08 May 2021 and started working (self-employed) whilst the Appellant submitted his application for an EU Settlement Scheme family permit on 11 June 2022, on the basis he was a family member of a qualifying British citizen. His application was refused by the Secretary of State on 13 September 2022.

## The Secretary of State's decision to refuse the application

4. The reasons for the Secretary of State's decision are as follows:

*"To be eligible for an EUSS family permit as the family member of a qualifying British citizen, you need to show that, before the specified date (2300 GMT on 31 December 2020) and generally also at the date of application, you and the qualifying British citizen satisfied the conditions in regulation 9 of the EEA Regulations.*

*This means that you need to show that the qualifying British citizen:*

- *lived for more than three months in the EEA host country and exercised free movement rights there under EU law as a 'qualified person' (a worker, self-employed person, self-sufficient person or student) before the specified date and at the date of application; or*
- *had the right of permanent residence under EU law in the EEA host country before the specified date, generally after five years' continuous residence there as a 'qualified person', and at the date of application.*

*You also need to demonstrate that you lived in the EEA host country with the qualifying British citizen, and that residence there was genuine with genuine family life being created or strengthened during the time of your joint residence, and not for the purposes of circumventing any immigration laws to which you would otherwise be subject.*

*You state that you resided with the qualifying British citizen in Spain, but you have not provided sufficient evidence to confirm this. Under the*

Immigration rules you must have been resident in the EEA state with your sponsor for three months prior to the specified date of 31 December 2020. However, the evidence supplied in your application form states you only moved to the EEA state November 2020 and therefore have not resided there for the three months required to meet the criteria under the Immigration rules. It is also unclear if your sponsor was resident for the three months required also.

Without further evidence, this office cannot accept you meet the requirements as specified above.

Therefore, I am not satisfied that you meet the eligibility requirements of Appendix EU (Family Permit), and your application for an EUSS family permit has been refused.”

(underlining is our emphasis)

### The decision of the First Tier Tribunal

5. The relevant parts of the decision provide as follows:

*“Findings of fact and credibility*

11 The only issue raised by the respondent within the decision notice was that the sponsor had not lived with the qualifying British citizen in the EEA host country for three months prior to the specified date of 31 December 2020.

12 Mr Jafar accepted that the appellant had moved to the EEA State in November 2020 but stated that EU law did not require a specific period and that their decision was therefore wrong as it failed to comply with the directives.

13 It is accepted that the appellant was living in Spain and that his wife, the British citizen, moved to Spain to exercise her treaty rights and they lived together in Spain from November 2020 to May 2021.

14 Although Mr Jafar within his skeleton argument has set out at paragraph 5 the relevant case law he wishes to rely on which does indicate that EU law does not require an EU citizen residing for any minimum period of time in another member state, the current regulations indicate that a period of three months prior to the relevant date namely 31 December 2020 is required.

*Conclusions*

15 The appellant accepts that he did not live with the sponsor for three months prior to the relevant date and in those circumstances applying the regulations as they stand, I must refuse the appeal.”

(underlining is our emphasis)

### Grounds of appeal

6. The grounds of appeal submitted on behalf of the Appellant contend, inter alia, that:
- (i) Regulation 9 of the EEA regulations and EU law do not require an EU citizen to have resided for any period of time in another Member State for their third-country family members to claim a derived right of residence in the UK;
  - (ii) that the fact that Spain had issued the appellant and his EEA-national British sponsor a residence document in confirmation of the appellant's right to reside in Spain as a family member of the sponsor was evidence that he was residing in Spain as a family member of an EEA national exercising Treaty rights in Spain; and
  - (iii) in dismissing the appeal in reliance upon the fact that the appellant had not lived with the sponsor for three months prior to 31 December 2020, Judge Cameron appears to have relied upon Articles 6 and 7 of Directive 2004/38 which, the grounds contend, are irrelevant.

Permission to appeal was granted by Upper Tribunal Judge Gill on 13 October 2023. Analysis

7. In his reasons for refusal, the Secretary of State states that to be eligible for an EUSS family permit as the family member of a qualifying British citizen, the appellant needs to show that, before the specified date (2300 GMT on 31 December 2020) and generally also at the date of application, the appellant and the qualifying British citizen satisfied the conditions in regulation 9 of the EEA Regulations. We assume this to be a reference to Regulation 9 of the Immigration (European Economic Area) Regulations 2016. The reasons also state that the Immigration Rules require the applicant to have been resident in the EEA state with the sponsor for three months prior to the specified date of 31 December 2020. At paragraph 14 of his decision, the First Tier Tribunal Judge stated that "the current regulations" indicate that a period of three months residence prior to the relevant date of 31 December 2020 is required and the judge rejected the submission to the contrary advanced on behalf of the Appellant. The Regulations the judge had in mind are not set out.
8. At the hearing, the Secretary of State's representative conceded that there is no requirement for three months residence in Regulation 9 of the EEA Regulations 2016. The First Tier Tribunal decision is inadequately reasoned as it does not specify which Regulations the Judge was referring to when concluding that there is a requirement for a minimum three-months residence in another EU state prior to 31 December 2020. The appellant does not know the legal basis on which his submissions to the contrary were rejected.
9. Having made the concession, Mr Wain sought to submit that a close analysis of Appendix EU (Family Permit) and Directive 2004/58/EC (on the right of citizens of the Union and their family members to move and reside freely within the territories of the Member States) establishes the requirement of a minimum three-month period of residence referred to by the Secretary of State.

10. Having concluded that the First-tier Tribunal Judge failed to give adequate reasons for the decision he reached, we did not consider it appropriate to allow the submissions to be advanced on the basis neither we or, more particularly, Counsel for the Appellant, had been given sufficient forewarning or understanding of the case now advanced by the Secretary of State.
11. In granting permission, the Upper Tribunal directed the Secretary of State to file and serve a skeleton argument explaining the basis upon which the decision-maker considered that the appellant and the sponsor had to show they had resided in Spain for a minimum period of 3 months prior to 31 December 2020, citing the relevant provisions and quoting them in full by way of an attachment.
12. The Secretary of State served a skeleton argument dated 30/10/23 which Counsel for the Appellant only saw shortly before the hearing started. The skeleton was of limited assistance to us and hard to decipher. It made no reference to the Immigration Rules or Appendix EU (Family Permit) or to the concessions made orally at the hearing. Instead, it directed the reader to “Article 21” of an unspecified legal instrument, recital 9 of Directive 2004/58/EC and Article 7 (headed “right of residence for more than three months”). No attachment setting out the provisions relied on in full was provided.
13. Accordingly, we expressed our provisional view to the parties that we considered it appropriate to remit the matter to the First Tier Tribunal for re-determination. Neither side objected to our proposal.
14. We highlight that given the lack of any clear reasons in the Secretary of State’s decision setting out how the requirement for a minimum three-months residence in another EU state prior to 31 December 2020 arises, the First-tier Tribunal will be assisted by a written skeleton argument filed and served before the hearing of the appeal. The skeleton argument should clearly explain the legal basis upon which the Secretary of State submits the appellant and sponsor had to show that they had resided in Spain for a minimum period of 3 months prior to 31 December 2020, citing the relevant provisions of any Rules, Regulation or Directive.

#### Decision

15. The decision of the First Tier Tribunal is set aside and the appeal is remitted to the First Tier Tribunal for hearing afresh with no findings preserved.

**Mrs Justice Thornton**  
**Upper Tribunal Judge Mandalia**

**14 December 2023**