Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: UI-2022-003696**

EA/02363/2022

THE IMMIGRATION ACTS

Heard at Field House
On the 18 November 2022

Decision & Reasons
Promulgated
On the 01 December 2022

Before

UPPER TRIBUNAL JUDGE SHERIDAN

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MOHAMED JALLOH

Respondent

Representation
For the Appellant: Ms Ahmed, Senior Home Office Presenting Officer
For the Respondent: Mr Eteko, instructed by Iras & Co.

DECISION AND REASONS

1. This is an appeal by the Secretary of State. However, for convenience I will refer to the parties as they were designated in the First-tier Tribunal.

Background

2. The appellant is a citizen of Sierra Leone, born in September 2005, who applied on 31 May 2021 for an EU Settlement Scheme Family Permit under Appendix EU (Family Permit) of the Immigration Rules. The application was refused on 24 January 2022. The appellant appealed to the First-tier Tribunal where his appeal came before Judge of the First-tier Tribunal Knight ("the judge"). In a decision promulgated on 29 June 2022 the judge allowed the appeal. The respondent now appeals against that decision.

3. The appellant lives in Sierra Leone with his mother who claims to be in a long-standing relationship with an EEA national residing in the UK ("the sponsor"). The respondent did not accept that the appellant's mother and the sponsor are "durable partners" as defined in Appendix EU (Family Permit). In addition, the respondent stated that even if they are durable partners, the appellant is not a "family member of a relevant EEA citizen" as defined in Appendix EU (Family Permit) and therefore is not eligible for entry clearance.

4. The judge found that the appellant's mother and the sponsor are durable partners and that the appellant and his mother are dependent on the sponsor. Having made these findings, the judge concluded that the respondent's decision refusing the application under Appendix EU (Family Permit) was not in accordance with the Immigration Rules and was contrary to the EU Withdrawal Agreement.

5. The grounds argue that the judge erred because (i) the appellant is not a family member of the sponsor under Appendix EU (Family Permit); and (ii) the judge failed to give any reasons explaining why he concluded that the respondent breached the EU Withdrawal Agreement.

Appendix EU (Family Permit)

6. Appendix EU (Family Permit) sets out the basis on which entry clearance will be granted to a person seeking to join "a relevant EEA citizen" in the UK.

7. In order to meet the eligibility requirements of Appendix EU (Family Permit), the appellant needs to be able to demonstrate that he is "a family member of a relevant EEA citizen". It is not disputed the sponsor falls within the definition of "a relevant EEA citizen". The issue in this appeal is whether the appellant is his "family member". "Family member of a relevant EEA citizen" is a defined term. The definition includes the child of a relevant EEA citizen and the child of the spouse or civil partner of a relevant EEA citizen; but it does not include the child of a durable partner of a relevant EEA citizen.

8. Before me, Mr Eteko submitted that the appellant falls within the scope of EU14 of Appendix EU. However, the appellant can only fall within EU14 if he is a "family member of a relevant EEA citizen" as defined in Appendix EU. And the definition of a "family member of a relevant EEA citizen" in Appendix EU, like the definition in Appendix EU (Family Permit), does not include children of a durable partner.

9. Accordingly, the appellant cannot succeed under Appendix EU (Family Permit) (or under Appendix EU) because he is not within the ambit of a family member as defined. The judge therefore fell into error by finding that the appellant satisfied the requirements of the Immigration Rules.

The EU Withdrawal Agreement

10. The focus of Mr Eteko's submissions was the EU Withdrawal Agreement. He argued that the appellant falls within the scope of Article 13(3). This stipulates:

> Family members who are neither Union citizens nor United Kingdom nationals shall have the right to reside in the host State under Article 21 TFEU and as set out in Article 6(2), Article 7(2), Article 12(2) or (3), Article 13(2), Article 14, Article 16(2), Article 17(3) or (4) or Article 18 of Directive 2004/38/EC, subject to the limitations and conditions set out in those provisions

11. He submitted that the term "family members" in Article 13(3) needs to be read broadly to encompass "other family members" as defined in Article 3 of Directive 2004/38/EC.

12. Ms Ahmed submitted that Mr Eteko's argument about Article 13(3) reflects a misunderstanding of the scope of the EU Withdrawal Agreement. I agree.

13. There are two fundamental difficulties with Mr Eteko's argument that the appellant has residence rights under Article 13(3). The first is that Article 13(3) only applies to "family members" as defined in Article 9(a) of the Withdrawal Agreement; and the definition of family members in Article 9(a) does not encompass children of a durable partner or "other family members" within the meaning of Article 3 of Directive 2004/38/EC.

14. The second fundamental difficulty with Mr Eteko's argument concerns the personal scope of the Withdrawal Agreement as set out in Article 10. The provisions of Article 10 applicable to "other family members" within the meaning of Article 3 of Directive 2004/38/EC are Articles 10(2) and (3). These provide:

> Persons falling under points (a) and (b) of Article 3(2) of Directive 2004/38/EC **whose residence was facilitated by the host State in accordance with its national legislation before the end of the transition period** in accordance with Article 3(2) of that

> Directive shall retain their right of residence in the host State in accordance with this Part, provided that they continue to reside in the host State thereafter.
>
> Paragraph 2 shall also apply to persons falling under points (a) and (b) of Article 3(2) of Directive 2004/38/EC **who have applied for facilitation of entry and residence before the end of the transition period**, and whose residence is being facilitated by the host State in accordance with its national legislation thereafter. [Emphasis added]

15. The appellant had not applied for facilitation of his entry and residence before the end of the transition period. Accordingly, he is not within the scope of the EU Withdrawal Agreement. This point is confirmed in *Batool and Ors. (other family members: EU exit)* [2022] UKUT 00219 (IAC), the headnote to which states:

> (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.

16. Accordingly, the judge fell into error by finding that the respondent's decision breached the EU Withdrawal Agreement.

Notice of Decision

17. For the reasons explained above, the judge erred in law because (i) the appellant does not meet the eligibility requirements of Appendix EU (Family Permit); and (ii) he does not fall within the personal scope of the EU Withdrawal Agreement.

18. I therefore set aside the decision of the First-tier Tribunal and remake the decision by dismissing the appellant's appeal.

Signed

D. Sheridan
Upper Tribunal Judge Sheridan

Dated: 28 November 2022