



**Upper Tribunal  
(Immigration and Asylum Chamber)  
001894**

**Appeal Number: UI-2022-**

**EA/07855/2021**

**THE IMMIGRATION ACTS**

**Decision & Reasons Issued:  
On the 19 March 2023**

**Before**

**UPPER TRIBUNAL JUDGE O'CALLAGHAN**

**Between**

**KULDEEP SINGH  
(ANONYMITY DIRECTION NOT MADE)**

Appellant

**and**

**ENTRY CLEARANCE OFFICER, LIVERPOOL**

Respondent

**Representation:**

For the Appellant: No attendance

For the Respondent: Mr D Clarke, Senior Presenting Officer

**Heard at Field House on 15 November 2022**

**DECISION AND REASONS**

**Introduction**

1. The appellant is a national of India and presently aged forty-three. His appeal is brought under the Immigration (Citizens' Rights Appeals) (EU Exit) Regulations 2020.

2. He challenges a decision of the respondent to refuse to issue him with a European Union Settlement Scheme ('EUSS') family permit as an 'other family member' of a Union Citizen exercising EEA Treaty rights, namely his sister-in-law Mrs Tsvetanka Miteva, a national of Bulgaria.
3. The appellant's appeal was initially dismissed by Judge of the First-tier Tribunal Malone following a paper consideration undertaken on 25 February 2022. The appellant was subsequently granted permission to appeal to the Upper Tribunal and I set aside the decision of the First-tier Tribunal having identified a material error of law.

### **Non-Attendance**

4. Neither the sponsor nor a legal representative instructed by the appellant attended the error of law hearing held before me at Field House on 11 August 2022. Prior to that hearing the Upper Tribunal had been informed on 3 August 2022 that the appellant's solicitors had applied to come off the Tribunal record as they were without instructions.
5. I directed that the notice of the resumed hearing was to be sent directly to the last known address of the sponsor, and I have seen documentation confirming that my direction was complied with by HMCTS court staff. The resumed hearing came on before me at 12 noon. Prior to this, my clerk had on four occasions taken steps to ascertain whether the sponsor and/or a legal representative had attended the hearing centre at Field House on behalf of the appellant. On each occasion, no-one came forward.
6. Mr Clarke informed me that he had telephoned the sponsor's home the day before the resumed hearing and had spoken to the appellant's brother, Balvinder Singh, who confirmed that he was aware of the listed hearing.
7. Consideration was given at the hearing to whether to proceed in the absence of the appellant in accordance with rule 38 of the Tribunal Procedure (Upper Tribunal) Rules 2008. I was satisfied that the appellant had been properly notified of the hearing having observed written confirmation provided by HMCTS court staff as to the sending of the hearing notice. I also noted Mr. Clarke's confirmation as to his discussion with the appellant's brother the previous day. I concluded that it was in the interests of justice to proceed with the hearing.

### **Brief Facts**

8. Mrs Miteva arrived in the United Kingdom in 2004 and was issued with a residence card on 1 December 2018. She was subsequently issued with a permanent residence document on 12 March 2019. At the date of the appellant's application, and at the date of the respondent's decision, she remained a Bulgarian citizen, and it is understood by this Tribunal that she remains so to date.

9. Mrs Miteva married the appellant's brother, Balvinder Singh, and he was subsequently granted indefinite leave to remain in this country under the EUSS.

10. The appellant applied for an EUSS family permit on 4 December 2020. The application was refused on 20 January 2021, with the respondent detailing, *inter alia*:

'Your application has been refused because you have not provided a Home Office reference number (or the equivalent in the Islands) to show that your EEA or Swiss citizen family member has settled or pre-settled status under the EU Settlement Scheme. Further checks have been made and it is noted that the EEA citizen sponsor, as detailed in your application, has not made an application for settled or pre-settled status under the EU Settlement Scheme.

As your sponsor cannot be considered to be a 'relevant EEA citizen' until they are issued settled or pre-settled status under the EU Settlement Scheme you do not meet the eligibility requirements as stated in Appendix EU (Family Permit) to the Immigration Rules.'

11. The First-tier Tribunal dismissed the appellant's appeal. I set aside the decision as both the respondent and the First-tier Tribunal had failed to observe that the respondent enjoyed a discretion to consider whether the sponsor would, during the grace period, secure settled status. The discretion is identified in a guidance document entitled "EU Settlement Scheme Family Permit and Travel Permit" (version 6.0) (31 December 2020).

12. In any event, as I confirmed in my error of law decision, the sponsor had enjoyed permanent residence since 12 March 2019 and was therefore properly to be considered as being able to secure settled status during the grace period. Mr Clarke informed me that in preparation for the resumed hearing he had ascertained that Ms. Miteva had successfully applied to be naturalised, the decision being made on 21 January 2020. I note that this is the day following the respondent's refusal of the appellant's EUSS family permit application.

### **Immigration Rules**

13. The EUSS is an immigration regime of the United Kingdom introduced by the respondent in 2019, by means of Appendix EU of the Rules, to enable EU, EEA and Swiss citizens, and their family members, resident in the United Kingdom by 31 December 2020, to obtain the immigration status required to continue to work and live in this country.

14. The EUSS family permit enables the holder to join in, or accompany to, the United Kingdom their relevant EEA citizen family member, as defined in Annex 1 to Appendix EU (Family Permit).
15. Appendix EU (Family Permit) to the Rules details, as relevant:

### **Purpose**

FP1. This Appendix sets out the basis on which a person will, if they apply under it, be granted an entry clearance:

(a) In the form of an EU Settlement Scheme Family Permit – to join a relevant EEA citizen or a qualifying British citizen in the UK or to accompany them to the UK; or

(b) In the form of an EU Settlement Scheme Travel Permit – to travel to the UK.

FP2. This Appendix has effect in connection with the granting of entry clearance for the purposes of acquiring leave to enter or remain in the UK by virtue of Appendix EU to these Rules.

...

### **Requirements and Procedure**

FP6. (1) The applicant meets the eligibility requirements for an entry clearance to be granted under this Appendix in the form of an EU Settlement Scheme Family Permit, where the entry clearance officer is satisfied that at the date of application:

(a) The applicant is a specified EEA citizen or a non-EEA citizen;

**(b) The applicant is a family member of a relevant EEA citizen;**

(c) The relevant EEA citizen is resident in the UK or will be travelling to the UK with the applicant within six months of the date of application;

(d) The applicant will be accompanying the relevant EEA citizen to the UK (or joining them in the UK) within six months of the date of application; and

(e) The applicant (“A”) is not the spouse, civil partner or durable partner of a relevant EEA citizen (“B”) where a spouse, civil partner or durable partner of A or B has been granted an entry clearance under this Appendix, immediately before or since the specified date held a valid document in that capacity issued under the EEA Regulations or has been granted leave to enter or

remain in the UK in that capacity under or outside the Immigration Rules.

[Emphasis added]

16. Family member of a relevant EEA citizen is defined at Annex 1 to Appendix EU (Family Permit):

‘a person who has satisfied the entry clearance officer, including by the required evidence of family relationship, that they are:

(a) the spouse or civil partner of a relevant EEA citizen, and:

(i)(aa) the marriage was contracted or the civil partnership was formed before the specified date; or

(bb) the applicant was the durable partner of the relevant EEA citizen before the specified date (the definition of ‘durable partner’ in this table being met before that date rather than at the date of application) and the partnership remained durable at the specified date; and

(ii) the marriage or civil partnership continues to exist at the date of application; or

(b) the specified spouse or civil partner of a Swiss citizen; or

(c) the durable partner of a relevant EEA citizen, and:

(i) the partnership was formed and was durable before the specified date; and

(ii) the partnership remains durable at the date of application; and

(iii) the date of application is after the specified date; and

(iv) where they were resident in the UK and Islands as the durable partner of the relevant EEA citizen before the specified date, the definition of ‘durable partner’ in this table was met before that date as well as at the date of application, and the partnership remained durable at the specified date; or

(d) the child or dependent parent of a relevant EEA citizen, and the family relationship:

(i) existed before the specified date (unless, in the case of a child, the person was born after that date, was adopted after that date in accordance with a relevant adoption decision or after that date became a child within the meaning of that

entry in this table on the basis of one of sub-paragraphs (a) (iii) to (a)(xi) of that entry); and

(ii) continues to exist at the date of application; or

(e) the child or dependent parent of the spouse or civil partner of a relevant EEA citizen, as described in subparagraph (a) above, and:

(i) the family relationship of the child or dependent parent to the spouse or civil partner existed before the specified date (unless, in the case of a child, the person was born after that date, was adopted after that date in accordance with a relevant adoption decision or after that date became a child within the meaning of that entry in this table on the basis of one of sub-paragraphs (a)(iii) to (a)(xi) of that entry); and

(ii) all the family relationships continue to exist at the date of application; or

(f) a person who the entry clearance officer is satisfied by evidence provided by the person that they would, if they had made a valid application under Appendix EU to these Rules before 1 July 2021, have been granted (as the case may be) indefinite leave to enter under paragraph EU2 of that Appendix or limited leave to enter under paragraph EU3 and that leave would not have lapsed or been cancelled, curtailed, revoked or invalidated before the date of application under this Appendix (and, in respect of that application, the requirements in paragraph FP6(1)(c) and (d) of this Appendix do not apply):

(i) as a family member who has retained the right of residence by virtue of a relationship with a relevant EEA citizen (as defined in Annex 1 to Appendix EU); or

(ii) on the basis that condition 6 of paragraph EU11 of Appendix EU is met; or

(g) the dependent relative of a specified relevant person of Northern Ireland

in addition, where the person is a child born after the specified date or adopted after that date in accordance with a relevant adoption decision, or after the specified date they became a child within the meaning of that entry in this table on the basis of one of sub-paragraphs (a)(iii) to (a)(xi) of that entry (and with the references to 'parents' in subparagraph (a) below construed to include the guardian or other person to whom the order or other provision referred to in the relevant sub-paragraph of (a)(iii) to (a)(xi) of that entry relates), they meet one of the following requirements:

(a) (where sub-paragraph (b) below does not apply), one of the following requirements is met:

(i) both of their parents are a relevant EEA citizen; or

(ii) one of their parents is a relevant EEA citizen and the other is a British citizen who is not a relevant EEA citizen; or

(iii) one of their parents is a relevant EEA citizen who has sole or joint rights of custody of them, in accordance with the applicable rules of family law of the UK, of the Islands or of a country listed in sub-paragraph (a) of the entry for 'specified EEA citizen' in this table (including applicable rules of private international law under which rights of custody under the law of a third country are recognised in the UK, in the Islands or in a country listed in subparagraph (a) of the entry for 'specified EEA citizen' in this table, in particular as regards the best interests of the child, and without prejudice to the normal operation of such applicable rules of private international law); or

(b) where they were born after the specified date to (or adopted after that date in accordance with a relevant adoption decision by or after that date became, within the meaning of the entry for 'child' in this table and on the basis of one of sub-paragraphs (a)(iii) to (a)(xi) of that entry, a child of) a Swiss citizen or their spouse or civil partner (as described in the first sub-paragraph (a) in this entry), the Swiss citizen or their spouse or civil partner is a relevant EEA citizen.'

17. There is no reference to a brother-in-law or sister-in-law being a 'family member' within the definition established by Annex 1.

### **Discussion**

18. I have considered all the documents filed with the Upper Tribunal and I am satisfied that this application is properly to be refused because the appellant has been unable to satisfy all relevant requirements in respect of an EUSS family permit from the very outset of his application. This is because he is not a 'family member' of a relevant EEA citizen as defined in Annex 1 to Appendix EU (Family Permit). The appellant is the brother of Balvinder Singh, and not Mrs Miteva. Consequently, he is unable and has always been unable to meet the relevant criteria, as Mrs Miteva cannot sponsor her brother-in-law under the EUSS. The appeal must properly be dismissed.

### **Notice of Decision**

19. The decision of the FTT was previously set aside for material error of law, with no findings of fact preserved.
20. The decision is remade. The appeal is dismissed.

Signed: *D O'Callaghan*  
**Upper Tribunal Judge O'Callaghan**

Date: 9 January 2023

**TO THE RESPONDENT**  
**FEE AWARD**

I have dismissed the appeal and therefore there can be no fee award.

Signed: *D O'Callaghan*  
**Upper Tribunal Judge O'Callaghan**

Date: 9 January 2023