



IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM
CHAMBER

Case No: UI-2022-003297
First-tier Tribunal No: EA/09615/2021
Case No: UI-2022-003298
First-tier Tribunal No: EA/09616/2021

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On the 21 March 2023

Before

UPPER TRIBUNAL JUDGE JACKSON

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

And

JAWAD YUSOFI
NOORULHAQ YUSOFI
(NO ANONYMITY ORDERS MADE)

Respondents

Determined on the papers on 9 March 2023

DECISION AND REASONS

1. The Secretary of State appeals with permission against the decision of First-tier Tribunal Judge Phull promulgated on 13 June 2022, in which the appeals of Jawad and Noorulhaq Yusofi against the decisions to refuse their applications for an EUSS Family Permit dated 21 April 2021 were allowed. For ease I continue to refer to the parties as they were before the First-tier Tribunal, with Jawad and Noorulhaq Yusofi as the Appellants and the Secretary of State as the Respondent.
2. The Appellants are nationals of Afghanistan, born on 28 October 2007 and 24 April 1999, who made an application on 21 October 2020 for entry clearance as dependent family members of an EEA national under the EUSS.
3. The Respondent refused the applications the basis that the Appellants were not a 'family member' of a relevant EEA national, as brothers, their relationship was not within the definition such that they did not meet the eligibility requirements.

4. Judge Phull allowed the appeal in a decision promulgated on 13 June 2022 on the basis that the Respondent should have treated the applications made by the Appellants under the EUSS as applications for an EEA Family Permit under the Immigration (European Economic Area) Regulations 2016 (the application having been made on the wrong basis originally in error and the requirements of the latter being satisfied) and the failure to do so did not comply with Article 10(3) of the Withdrawal Agreement, supported by Article 18(o) of the Withdrawal Agreement requiring the Respondent to assist the Appellants..

The appeal

5. The Respondent appeals on the ground that the First-tier Tribunal erred in law in allowing the appeals under the Withdrawal Agreement when the Appellants were not within the personal scope of the same given that they have never sought nor had their residence facilitated in the United Kingdom.
6. Permission to appeal was granted by First-tier Tribunal Judge Handler in a decision dated 30 June 2022 on the basis that it was arguable that the Judge erred in relying on the Withdrawal Agreements when the applications were not within the scope of the same.
7. The First-tier Tribunal decision and grant of permission to appeal was prior to the decision of the Upper Tribunal in Batool and others (other family members: EU exit) [2022] UKUT 00219 (IAC) in which it was held:
 - (1) *An extended (ako 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.*
 - (2) *Such a person has no right to have any application they have made for settlement as a family member treated as an application for facilitation and residence as an extended/other family member.*
8. On 21 November 2022 I issued directions to the parties making reference to the case of Batool and indicating a preliminary view that for the reasons set out in that decision, there is a material error of law in the First-tier Tribunal's decision in applying the incorrect legal framework to applications under the EUSS and finding that the Respondent's decision was not in accordance with the Withdrawal Agreement in circumstances where the Appellants were not within the personal scope of the same as their entry and/or residence was not being facilitated before 31 December 2020, nor had either made any application for the same. In these circumstances, the Upper Tribunal was minded to find a material error of law in the decision of the First-tier Tribunal, set aside the decision of the First-tier Tribunal and substitute the decision on the appeals to dismiss the appeals. The parties were invited to make written submissions if opposed to the proposed course of action. Neither party has made any submissions objecting to the proposal and in the circumstances, it is in the interests of justice to issue a written decision on the papers pursuant to rule 34 of the Tribunal Procedure (Upper Tribunal) Rules 2008.

Findings and reasons

9. For the reasons already set out above, there was a material error of law in the First-tier Tribunal's decision for allowing the appeals under the Withdrawal Agreement when the Appellants were not within the personal scope of the same. For the reasons set out in Batool, Appellants could not possibly succeed on the facts of their appeals.

Notice of Decision

The making of the decision of the First-tier Tribunal did involve the making of a material error of law. As such it is necessary to set aside the decision.

I set aside the decision of the First-tier Tribunal.

The appeals are remade as follows:

The appeals are dismissed.

G Jackson

Judge of the Upper Tribunal
Immigration and Asylum Chamber

9th March 2023