



**Upper Tribunal
(Immigration and Asylum Chamber) Appeal Numbers: UI-2022-003144
EA/11721/2021**

THE IMMIGRATION ACTS

**Heard at Field House
On the 2 November 2022**

**Decision & Reasons Promulgated
On the 21 November 2022**

Before

**UPPER TRIBUNAL JUDGE O'CALLAGHAN
DEPUTY UPPER TRIBUNAL JUDGE JARVIS**

Between

ENTRY CLEARANCE OFFICER, ABU DHABI

Appellant

and

**MS. AYZEL ALI KHAN
(ANONYMITY DIRECTION SET ASIDE)**

Respondent

Representation:

For the Appellant: Mr. E Tufan, Senior Presenting Officer

For the Respondent: No attendance

DECISION AND REASONS

1. "There is a way of being wrong which is also sometimes necessarily right", Edward Abbey, author and essayist (1927 - 1989).

Introduction

2. For the purpose of this decision, Ms. Khan is referred to as the claimant and the Entry Clearance Officer as the ECO.
3. The ECO appeals against a decision of the First-tier Tribunal sent to the parties on 28 March 2022 by which the claimant's appeal was allowed, not against the original decision to refuse her an EUSS family permit as the family member of her aunt, an EEA citizen and a Swedish national, but on human rights grounds.
4. Permission to appeal to the Upper Tribunal was granted by Judge of the First-tier Tribunal Easterman by a decision dated 5 July 2022.
5. The claimant has not cross-appealed the decision to refuse her EUSS appeal.
6. The claimant's mother and father attended the hearing before us, accompanied by their elder daughter and a family friend.

Anonymity Direction

7. The Judge made an anonymity direction, though provided no detail as to why such order was required in an entry clearance appeal.
8. The requirement that justice should be administered openly and in public is a fundamental tenet of the domestic justice system. It is inextricably linked to freedom of the press and so any order as to anonymity must be necessary *and* reasoned: *R. (Yalland) v. Secretary of State for Exiting the European Union* [2017] EWHC 630 (Admin). The public enjoys a common law right to know about court proceedings and such right is protected by article 10 ECHR.
9. *In re Guardian News and Media Ltd and Others* [2010] UKSC 1; [2010] 2 AC 697 the Supreme Court confirmed that where both articles 8 and 10 ECHR are in play, it is for the Tribunal to weigh the competing claims under each article. Since both article 8 and article 10 are qualified rights, the weight to be attached to the respective interests of the parties and family members will depend on the facts. In making an anonymity order a judge is obliged to provide reasons as to why article 10 rights are given less weight than those given to an appellant's article 8 rights. Such reasons may permissibly be short, with reference to Guidance Note 2022 No 2: Anonymity Orders and Hearings in Private which is concerned with anonymity orders, but they are required.
10. Whilst there were, at a point in time, difficulties in the marriage of the claimant's parents, we are satisfied there are not at the present time personal circumstances, including her age, that place the claimant's article 8 rights above those of the general public in respect of article 10.
11. We therefore set aside the anonymity order issued by the First-tier Tribunal.

Brief Facts

12. The claimant is a national of Pakistan and has recently turned two years of age. Her close family consist of her parents and an elder sister who is presently aged four years old.
13. In July 2019 the claimant's parents and elder sister applied for an EEA family permit under the Immigration (European Economic Area) Regulations 2016 as extended family members of the claimant's paternal aunt. The applications were refused by an ECO in August 2019, and appeal rights were exercised. A hearing was listed in the First-tier Tribunal on 15 February 2021, but prior to this date the refusal decision was withdrawn and a favourable decision was issued. They entered the United Kingdom in June 2021 and now enjoy pre-settled status in this country. Though the parents separated for a period of time, they have reconciled and reside with each other.
14. In the meantime, the claimant was born whilst her family's appeal was ongoing. She was not included in the original applications, and so an application was made on her behalf under the EUSS on 20 April 2021, with reliance upon compelling and compassionate circumstances. As the family wished to apply for pre-settled status before the deadline of 30 June 2021, they travelled to the United Kingdom leaving the claimant with her maternal grandmother and great-grandmother. The claimant's mother informed us that she expected the application to be successful, as the rest of the family were lawfully permitted to enter this country. However, the claimant's application was refused by a decision dated 19 July 2021, with reliance being placed upon her not being a 'direct' family member of her maternal aunt.
15. By grounds of appeal dated 26 July 2021 the claimant identified her challenge to the ECO's decision as (1) it was not in accordance with Appendix EU to the Immigration Rules, (2) it breached EEA protected rights, and (3) it was not in accordance with the law. Human rights were not expressly relied upon.
16. Following confirmation that the sponsor no longer wished to support the claimant in her appeal, and with the claimant's solicitors coming off the Tribunal record, a case management review hearing was held at Taylor House on 28 January 2022. A First-tier Tribunal Judge decided that the appeal was not withdrawn, as sought by the claimant's former solicitors, and so should proceed.
17. The appeal came before a First-tier Tribunal Judge at Taylor House by CVP on 24 March 2022. There was no appearance on behalf of the claimant. The Judge was aware from the case file that the claimant's mother believed the hearing to have been listed the day before. It is unfortunate

that the Judge took no steps for the claimant's mother to be contacted so that she could be present at the hearing.

18. The Judge records being informed by the presenting officer, Ms. Tuitt, that:
 - '11. There is no facility to import Article 8 ECHR, section 55 of the Borders, Citizenship and Immigration Act 2009 ('section 55') or its spirit akin to Mundeba, exceptional circumstances or consent to new matters to be considered by the Tribunal. In short there is no remedy for the appellant other than to make a fresh application in another, more suitable category. The respondent will not consider a review of her decision.'
19. The Judge briefly dealt with the EUSS appeal, noting that the claimant was not a direct family member of the sponsor, and dismissed the appeal on this ground.
20. However, the Judge concluded that the appeal brought under the Immigration (Citizens' Rights Appeals) (EU Exit) Regulations 2020 ('the 2020 Regulations') permitted consideration of human rights and further that in this matter article 8 was engaged. Consequent to a consideration of various factual circumstances, the appeal was allowed though there is an absence of any indication as to the successful statutory ground. We are satisfied, having read the decision with care, that it was allowed on human rights grounds, and this conclusion is supported by [34] of the decision:
 - '34. For all these reasons exceptional circumstances exist and the appellant's best interests are served by joining her mother in the UK; Zoumbas and Azimi-Moayed applied.'
21. The respondent appealed, with very detailed and helpful grounds prepared by Mr. Deller. Reliance was placed upon the First-tier Tribunal misapprehending the nature of the appeal before it.

Discussion

22. The First-tier Tribunal was correct to dismiss the EUSS appeal as the claimant is not a direct relative of her sponsor, as required by Appendix EU. Rather, she is an 'other family member' for the purposes of the Withdrawal Agreement.
23. The Upper Tribunal has recently confirmed in the reported decision of *Batool and others (other family members: EU exit)* [2022] UKUT 00219 (IAC) that an extended 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 2020 Regulations. The claimant falls into this category, as her application under the EUSS was not made until 20 April 2021. The Upper Tribunal further confirmed that 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.

24. We are satisfied that the material error made by the Judge was to conclude the existence of a human rights appeal as arising from an appeal made under the 2020 Regulations, without more. The Upper Tribunal has recently confirmed in the reported decision of *Celik (EU exit; marriage; human rights)* [2022] UKUT 00220 (IAC) that regulation 9(4) of the 2020 Regulations confers a power on the First-tier Tribunal to consider a human rights ground of appeal, subject to the prohibition imposed by regulation 9(5) upon the Tribunal considering a new matter without the consent of the respondent, in this matter the ECO:

- '92. The first question is to decide whether the First-tier Tribunal has jurisdiction, in an appeal of this kind, to consider human rights. The question arises because decision-making under residence scheme immigration rules (Appendix EU) does not involve a consideration of the applicant's (or any other person's) rights under Article 8 of the ECHR.
93. In order for regulation 9(4) to come into play, two requirements must be satisfied. There must be a "matter", in the sense of being the factual substance of a claim: *Mahmud (s.85 NIAA 2002 - 'new matters')* [2017] UKUT 00488 (IAC) at paragraph 29. Second, the matter must be "relevant to the substance of the decision appealed against". The interpretation of the words "relevant to the substance of the decision", as found in section 85(4) of the 2002 Act, was considered by the Supreme Court in *Patel & Others v SSHD* [2013] UKSC 72; [2014] Imm AR 456. Giving the lead judgment, Lord Carnwath (with whom Lord Kerr, Lord Reed and Lord Hughes agreed) upheld the "wide" construction of the words, which had been taken by the majority of the Court of Appeal in *AS (Afghanistan) v SSHD* [2011] EWCA Civ 833; [2011] Imm AR 832. Under this approach, the substance of the decision appealed against is no more than the decision to refuse to grant or vary leave to enter or remain (or entry clearance) as opposed to, for example, a "decision to refuse to vary leave to remain under rule x" (Sullivan LJ at paragraph 113).
94. Transposed to regulation 9 of the 2020 Regulations, the "decision appealed against", is, in the present case, the decision to refuse to grant the appellant leave to enter or remain generally, as opposed to a decision to refuse him leave to enter or remain under the EUSS rules specifically.
95. This means that regulation 9(4) confers a power on the First-tier Tribunal to consider a human rights ground, subject to the prohibition imposed by regulation 9(5) upon the Tribunal considering a new matter without the consent of the respondent.
96. Given what we have said about the nature of the respondent's decision-making under Appendix EU, the raising of a human rights claim will always be a "new matter", except where, for some reason, the respondent has already considered it.'

25. Without confirmation that the ECO consented to the consideration of the 'new matter', namely the proposed human rights (article 8) appeal, the Judge enjoyed no power to consider it. We have sympathy for the Judge, who had the personal circumstances of a child and mother at the forefront of their mind. However, Ms. Tuitt had clearly confirmed that consent was not given in respect of the new matter, and the lack of consent could not properly be bypassed in seeking to find a solution to the circumstances in which the claimant presently finds herself. In the circumstances, though the quote from Edward Abbey above may be considered by some to be apt on the facts arising, the decision must properly be set aside for material error of law.
26. That leaves us, as a panel, with a two-year old child residing apart from her parents and elder sibling, consequent to the personal impact of the United Kingdom's withdrawal from the European Union. No doubt has ever been raised in these proceedings as to the genuineness of parental love towards the claimant, and the strains separation is having upon the claimant's parents - lawfully present in this country - who separated from their younger child when she was months old. Over the course of the hearing, we saw the claimant's sibling wandering around our hearing room, eating crisps and charming us with her smile and humour. Her separation from the claimant was at the forefront of our minds; they are four and two years of age and could reasonably expect to be growing up and playing with each other, developing those close sibling bonds that can be a bedrock through life.
27. At our request, Mr. Tufan took instructions, and we were subsequently informed that consequent to the exceptional circumstances arising, the ECO was willing to consent to the Tribunal considering the human rights (article 8) appeal as a new matter. We express our gratitude to Mr. Tufan for his efforts.
28. This Tribunal is now seized of the claimant's human rights appeal. We acknowledge that our provisional view was that when assessing proportionality, the factors in favour of the claimant's entry into this country and being reunited with her family are of significant strength. However, we considered that neither party was in a position to fairly advance their cases before us, particularly the ECO who we considered may want time to assess their position. In these particular circumstances, we concluded that it was appropriate to remit the appeal back to the First-tier Tribunal where a fact-finding exercise, if required, can properly be undertaken.

Notice of Decision

29. The decision of the First-tier Tribunal promulgated on 28 March 2022 involved the making of a material error on a point of law in respect of the human rights assessment alone and on this ground is set aside pursuant

to section 12(2)(a) of the Tribunals, Courts and Enforcement Act 2007. The decision in respect of the EUSS appeal stands.

30. The matter is remitted to the First-tier Tribunal at Taylor House.
31. The respondent has given consent to the First-tier Tribunal considering the claimant's human rights (article 8) appeal as a new matter.
32. An anonymity order is set aside.

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

Date: 7 November 2022