IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case Nos: UI-2022-002289
First-tier Tribunal No:
EA/14742/2021

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On the 10 March 2023

Before

UPPER TRIBUNAL JUDGE McWILLIAM

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

ASIM WASEEM
(NO ANONYMITY ORDER MADE)

Respondent

Representation:
For the Appellant/ Secretary of State: Mr T Melvin, Senior Home Office Presenting Officer
For the Respondent: Mr S Karim, Counsel instructed by AWS Solicitors

Heard at Field House on 10 January 2023

DECISION AND REASONS

1. I shall refer to the Respondent as the Appellant as he was before the First-tier Tribunal. He is a citizen of Pakistan. His date of birth is 15 December 1989.

2. On 25 April 2022 the Secretary of State was granted permission to appeal against the decision of the First-tier Tribunal (Judge Rastogi) to allow the Appellant's appeal against the decision of the Secretary of State on 3 October 2021 to refuse his application (made on 24 May 2021) for pre-settled status under the EU Settlement Scheme (EUSS) as the partner of Gabriella Bocris, a Romanian national ("the Sponsor").

3. The matter came before me in order to determine whether the First-tier Tribunal made an error of law initially on 13 October 2022. Mr Karim's submission on that occasion was that the judge allowed the appeal under the Immigration Rules which is not a matter which is properly challenged in the Secretary of State's grounds of appeal and therefore it was not open to the Upper Tribunal to interfere with the decision of the judge. The Tribunal adjourned the matter to enable the Secretary of State to amend the grounds and deal with the reported decisions of the Upper Tribunal, Celik [2022] UKUT 00220 and Batool [2022] UKUT 00219.

The Decision of the First-tier Tribunal

4. The Secretary of State's case before the First-tier Tribunal was that the Appellant could not meet the requirements of Appendix EU because he had not been issued with a document confirming his right to reside by 11 p.m. on 31 December 2020 and nor had he applied for a document.

5. The judge accepted that the Appellant and the Sponsor who have a child together have been in a relationship since at least June 2020. The judge found that the Appellant did not apply for a residence document before the specified date. He found that the decision was in accordance with the law and that it was not in breach of the withdrawal agreement.

6. The following paragraphs of the decision of the First-tier Tribunal should be set out in full:-

> "39. The appellant has failed to satisfy me that the respondent's decision is a disproportionate one given that he does not meet the criteria to reside in the UK as the durable partner of his sponsor as defined within Article 10(2) or (3) of the Withdrawal Agreement. As I do not find the appellant to have such a right, I do not find that the respondent's decision to refuse to grant him pre-settled status to be in breach of his rights in the Withdrawal Agreement.
>
> 40. As to the issue of the best interests of the child, page 12 of the Guidance says as follows:-
>
> *The best interests of a child*
>
> *The duty in section 55 of the Borders, Citizenship and Immigration Act 2009 to have regard to the need to safeguard and promote the welfare of a child under the age of 18 in the UK, together with Article 3 of the UN Convention on the Rights of the Child, means that consideration of the child's best interests must be a primary consideration in immigration decisions affecting them. This guidance and the Immigration Rules it covers form part of the arrangements for ensuring that we give practical effect to these obligations.*
>
> *Where a child or children in the UK will be affected by the decision, you must have regard to their best interests in making the decision. You must carefully consider all the information and evidence provided concerning the best interests of a child in the UK and the impact the decision may have on the child.*

41. It is not clear to me how the respondent proposes to discharge its duty in EUSS cases where, in situations such as the appellants, there appears to be little flexibility within the EUSS. However, in this case, the refusal letter makes no reference to this duty or indeed to the appellant's child. That is despite the fact that the respondent was in possession of both the child's birth certificate and the DNA report. By failing to do so the respondent appears not to have complied with her statutory duties pursuant to the 2009 Act or her published policy as set out above.

42. For this reason, notwithstanding the rest of my findings in this determination, I do not find the respondent's decision to be in accordance with the EUSS when read alongside her published policy.

Notice of Decision

The appeal is allowed as not in accordance with the Rules".

The Grounds of Appeal

7. The grounds contend that the judge made a "material misdirection of law on any material matter" Under this heading it is submitted that the First-tier Tribunal materially erred in law by finding that the refusal of the Appellant's application under Appendix EU of the Immigration Rules is not in accordance with the law.

8. The First-tier Tribunal found that the Respondent's duty under s55 of the Borders Act 2009 has not been complied with. An appeal under the Immigration Citizens Rights Appeals (EU Exit) Regulations 2020 (the Exit Regulations 2020) has two available grounds: that the decision was not in accordance with the Scheme rules and/or that the decision breached the Appellant's rights under the Withdrawal Agreement.

9. The First-tier Tribunal dismissed the Appellant's appeal under the Immigration Rules at [25] of the determination. The First-tier Tribunal also dismissed the Appellant's appeal under the Withdrawal Agreement at [39] of the determination. As a result, it is respectfully submitted that the First-tier Tribunal should have dismissed the appeal.

10. It is submitted that the First-tier Tribunal materially erred in law by disposing of the appeal on the basis that the decision is 'not in accordance with the law'. It is asserted that this is not a permissible disposal power under the Exit Regulations 2020.

The Legal Framework

11. This Appellant has a right of appeal by virtue of Regulation 3 of the Exit Regulations 2020. The grounds of appeal that are available to him are those set out in Regulation 8 of the same subject, to Regulation 9. The Appellant appealed on the ground that the decision is in breach of the withdrawal agreement.(The judge found that there was no breach of the withdrawal agreement and there is no cross-appeal to this finding.) The second ground of appeal available to this Appellant is that the decision is not in accordance with the residence scheme Immigration Rules.

12. The headnote of Celik [2022] UKUT 00220 reads as follows:-

> "*(1) A person (P) in a durable relationship in the United Kingdom with an EU citizen has as such no substantive rights under the EU Withdrawal Agreement, unless P's entry and residence were being facilitated before 11pm GMT on 31 December 2020 or P had applied for such facilitation before that time.*
>
> *(2) Where P has no such substantive right, P cannot invoke the concept of proportionality in Article 18.1(r) of the Withdrawal Agreement or the principle of fairness, in order to succeed in an appeal under the Immigration (Citizens' Rights) (EU Exit) Regulations 2020 ('the 2020 Regulations'). That includes the situation where it is likely that P would have been able to secure a date to marry the EU citizen before the time mentioned in paragraph (1) above, but for the Covid-19 pandemic.*
>
> *(3) 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 Secretary of State".*

13. It was agreed that the guidance to which the judge referred and which he did not identify was that relied on in the skeleton argument before the First-tier Tribunal, namely EU Settlement Scheme: EU, other EEA Swiss citizens and their family members, version 15.0. This is a 236 page document published for Home Office staff on 9 December 2021. Neither party could confirm that this was the relevant guidance at the date of the decision. However, Mr Karim submitted that the earlier policy was in the same terms and Mr Melvin did not challenge this.

Conclusions

14. Before the First-tier Tribunal there was a skeleton argument prepared by Mr Karim which in essence contained two arguments. The first was that the Appellant met the requirements of Appendix EU with reference to condition 1, namely that he is a family member of an EEA citizen or in the alternative he fulfilled the Respondent's guidance with reference to the requirement to hold a document.

15. The second issue raised in the grounds was whether the refusal is disproportionate and contrary to s.55 of the BCIA 2009. This ground of appeal was framed in terms of the Withdrawal Agreement and the requirement for proportionality contained therein together with the Respondent's guidance relating to the best interests of the child.

16. Paragraph 14 of the grounds of appeal read as follows:-

> "The Appellant submits that given his wife has pre-settled status and they have a child, a decision to refuse him, which leave (sic) him exposed to the 'hostile environment' and at risk of removal, together with the impact of Covid, on delaying things, such as marriages etc, means that the decision is not proportionate and contrary to the Respondent's s.55 obligations and would not be in the best interests of the child".

17. Mr Karim's submission was that the judge allowed the appeal under the Rules on the basis that there was no application by the Secretary of State of the guidance. His submission to me was that this conclusion was not open to challenge because the original grounds and indeed the amended grounds which deal with Celik and Batool, do not challenge the decision of the First-tier Tribunal allowing the appeal under the Rules.

18. In my view the judge allowed the appeal having considered the issues raised in the skeleton argument. The basis of the judge having allowed the appeal is not entirely clear, the grounds adequately identify the complaint. The Secretary of State was entitled to take the view in their grounds that the judge had allowed the appeal as not being in accordance with the law. The judge clearly dismissed the appeal under the Withdrawal Agreement. He said the following at para 25:-

> "It would appear, therefore, that if the appellant wishes to avail himself of the EUSS as the durable partner of his sponsor, he would need to leave the UK and apply as a joining family member (durable partner). He has not done this. On the face of it, therefore, the respondent's decision appears not to be otherwise than in accordance with the EUSS".

19. What the judge said at para 25 strongly suggests that he did not find that the Appellant met the requirements of Appendix EU (the Rules). However, the judge went on to allow the appeal. The point made in the grounds is that the judge did not have jurisdiction to allow the appeal on the basis that he did. In my view the decision of the First-tier Tribunal lacks clarity and does not make it clear the basis on which the appeal was allowed.

20. Mr Karim sought to persuade me that the judge allowed the appeal under the Rules and was entitled to. To support his submission he said that the guidance, relied on by the Judge was part of the Rules. He relied on HM and others (PBS - legitimate expectation - paragraph 245ZX. It was decided in HM and others that although policy guidance has not been laid before parliament before the inception of the points-based system and cannot be relied upon by the Secretary of State it can give rise to a legitimate expectation that the Secretary of State will adhere to the guidance when considering an Appellant's claim.

21. The guidance in the case of HM was guidance concerning the application of the Immigration Rules and how they should be applied which gave rise to a legitimate expectation for applicants. The guidance is not part of the Rules. The guidance/duty relied on by this Appellant is not of a kind that explains how the Rules are met. Moreover the argument now advanced was not an argument made in the grounds of appeal before the First-tier Tribunal.

22. The Secretary of State has a duty to consider the best interests of a child *where a child in the United Kingdom will be affected by the decision*. The Secretary of State was aware that there was a child of the relationship, but I was not referred to material before the Secretary of State which supported that it had been submitted to the Secretary of State that the decision would have an adverse effect on the child. This was argued by the Appellant before the First-tier Tribunal with reference to the guidance. However, the argument was advanced in terms of proportionality in the context of the Withdrawal Agreement. However, the judge dismissed the appeal under the Withdrawal Agreement. There is no jurisdiction to allow the appeal under s.55 and/ or the guidance. If the judge's intention was to allow the appeal on either basis, it was not open to him.

23. If the judge, having found that the Appellant could not meet the strict letter of the Rules, (there is no challenge to the findings of the judge at para 25 or assertion that the Appellant meets the requirements of Appendix EU) allowed the appeal under the Rules with reference to the Secretary of State's policy guidance concerning the best interests of the child, this is a material error. The judge materially erred if he considered the guidance to be part of the Rules.

24. Furthermore, If the judge allowed the appeal on the basis that the decision-maker had not in his view applied the policy guidance (which clearly did not form part of the Rules), there is no jurisdiction to allow the appeal on the basis that a decision is not in accordance with the law.

25. The Secretary of State did not consider the best interests of the child within the decision. However, arguably there was no requirement for her to do so in the absence of the decision affecting the child. There was no removal decision in respect of the Appellant. The Sponsor has the right to be here as does the child. The argument that the decision affected the Appellant's very young child (and that her best interests went beyond remaining with her parents, one of whom has settlement and the other has a right to make an application under Article 8 ECHR) is at best tenuous. Moreover, I take into account the child was born in early 2021 and was just over 1 year old at the date of the hearing before the First-tier Tribunal.

26. The decision of the First-tier Tribunal to allow the Appellant's appeal is set aside. I re-make the appeal and dismiss it under the Rules. The decision of the First-tier Tribunal to dismiss the appeal under the Withdrawal is not infected by error. The appeal is dismissed on both grounds.

27. Mr Karim's application for costs is refused. There is no support for the Secretary of State having acted unreasonably and conducting these proceedings and seeking an adjournment.

Joanna McWilliam

Judge of the Upper Tribunal
Immigration and Asylum Chamber

6 February 2023