IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No.: UI-2023-005047

First-tier Tribunal Nos:
EU/50261/2023
LE/00268/2023

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On 25 June 2024

Before

UPPER TRIBUNAL JUDGE CANAVAN
DEPUTY UPPER TRIBUNAL JUDGE MONSON

Between

ENTRY CLEARANCE OFFICER

Appellant

and

ZT (a child)
(ANONYMITY ORDER MADE)

Respondent

Representation:
For the Appellant: Mr T Lindsay, Senior Home Office Presenting Officer
For the Respondent: Mr R Sharma, Counsel instructed by Adam Bernard Solicitors Ltd

Heard at Field House on 20 May 2024

Although the Entry Clearance Officer is the appellant in this appeal to the Upper Tribunal, for ease of reference we will hereafter refer to the parties as they were before the First-tier Tribunal.

Order Regarding Anonymity

Pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008, the appellant is granted anonymity.

No-one shall publish or reveal any information, including the name or address of the appellant, likely to lead members of the public to

identify the appellant. Failure to comply with this order could amount to a contempt of court.

DECISION AND REASONS

1. The Specialist Appeals Team appeals from the decision of First-tier Tribunal Judge Adio promulgated on 1 September 2023 ("the Decision"). By the Decision, Judge Adio allowed the appeal of the appellant, then two years old, against the decision of an Entry Clearance Officer made on 9 December 2022 to refuse to grant her leave to enter under the EU Settlement Scheme.

Relevant Background

2. The appellant is a national of Pakistan, whose date of birth is 1 August 2021. At the time of her birth, her parents, also nationals of Pakistan, were pursuing an appeal against the decision of the Entry Clearance Officer made on 2 April 2021 to refuse to issue them with a family permit under the Immigration (EEA) Regulations 2016 as extended family members of her father's brother, Mr M, a Dutch national exercising Treaty rights in the UK.

3. The appeals of the appellant's parents came before First-tier Tribunal Judge Veloso sitting at Hatton Cross on 14 February 2022. After taking into account both the documentary evidence and the oral evidence of the sponsor, Judge Veloso found that the appellant's parents had shown on a balance of probabilities that they had been since 2019, and remained to date, dependent upon the sponsor to meet their essential living needs. He went on to allow their appeals on the ground that the refusal decision breached the EEA national sponsor's rights under the EU Treaties in respect of his residence in the UK.

4. Following the outcome of their appeals, the appellant's parents were issued with family permits under the EUSS as dependent relatives of Mr M.

5. On 28 September 2022 the appellant's solicitors submitted an application on her behalf for a family permit under Appendix EU to the Immigration Rules on the basis that she was a "*family member of a relevant EEA citizen*". In the application form, it was stated that she was currently being supported by her uncle, Mr M, in Pakistan at a rate of £200 per month.

6. On 9 December 2022 the respondent gave reasons for refusing the application. Her relationship with her sponsor did not come within the definition of "*family member of a relevant EEA citizen*" as stated in Appendix EU to the Immigration Rules, and so she did not meet the eligibility requirements.

7. The appellant's case on appeal to the First-tier Tribunal was set out in an ASA dated 21 July 2023, which was settled by Mr Hingora of Clarendon Park Chambers. Mr Hingora submitted that the appellant's parents had arrived in the UK on 2 October 2022 and had been granted pre-settled status under the EUSS. However, the appellant remained in Pakistan, separated from her parents. Therefore, the issue in the appeal was

whether the appellant was able to join her parents who had been granted status in the UK, despite her not falling within the definition of a family member of an EEA citizen pursuant to Appendix EU. As her parents had a substantive right under the Withdrawal Agreement, the decision under challenge must comply with proportionality pursuant to Article 18.1(r) of the Withdrawal Agreement.

8. He acknowledged that in *Celik* it was found that, in a case where marriage had not been conducted before the specified date, the claimant could not benefit from Article 18.1(r). But the facts in this appeal were entirely different and included the best interests of a minor child who was not born at the date of her parents' refusal, but was born at the date of the implementation of her parents' successful appeal. To require her to make an entry clearance application under the Immigration Rules would be discriminatory, contrary to Article 12 of the Withdrawal Agreement.

9. Mr Hingora went on to invite the Tribunal to allow the appeal either on the basis that the decision was not in accordance with the EUSS, or that the decision breached the appellant's rights under the Withdrawal Agreement.

10. In the response review dated 9 August 2023, the Pre-Appeal Review Unit addressed the arguments raised in the ASA. Article 8 considerations were not within the scope of the EUSS. It was open to the appellant to make the appropriate application to join her parents in the UK. It was maintained that the appellant did not meet the eligibility requirements for admission as a family member of a relevant EEA citizen as stated in Appendix EU.

The Hearing Before, and the Decision of, the First-Tier Tribunal

11. The appellant's appeal came before Judge Adio sitting in the First-tier Tribunal at Hatton Cross on 14 August 2023. Both parties were legally represented. Mr Broachwalla of Counsel appeared on behalf of the appellant, and Ms Huber, Home Office Presenting Officer, appeared on behalf of the Entry Clearance Officer.

12. In the Decision at para [5], the Judge said that the representatives had agreed at the outset of the hearing that the only issue in dispute was whether the appellant was a family member of the relevant EEA citizen: *"However, Ms Huber in response to my question conceded that the appellant was dependent on the EEA sponsor, [Mr M], in view of Judge Veloso's decision in respect of the present appellant's parents which was promulgated on 11 March 2022."*

13. In his findings of fact, the Judge at para [14] accepted that the existence of the present appellant was raised in the proceedings before Judge Veloso, although she was not a party to that appeal. In the light of Mr Huber's concession, he found that the appellant was dependent upon the sponsor at the date of the hearing before Judge Veloso, and that this dependency had continued to the present day. The Judge continued:

> Adopting the findings of Judge Veloso concerning the appellant's parents which with reference to the appellant in the appeal would have included her

> being a dependant of the EEA sponsor, I find that this is a matter relevant to the present appeal. Whilst I accept the appellant is not a family member of the relevant EEA sponsor, in this case she qualifies as a dependent relative of the relevant EEA national, [Mr M], on the basis of the facts applicable to her parents … I do not find any of the other arguments put forward by Mr Broachwalla applicable. In view of my findings above I am satisfied the appellant meets the requirements for pre-settled status under Appendix EU (family permit).

The Grounds of Appeal to the Upper Tribunal

14. The grounds of appeal to the Upper Tribunal were settled by Peter Deller of the Specialist Appeals Team. He submitted that Judge Adio had erred in law in applying individual concepts of Rules based on an *en passant* finding of dependence by Judge Veloso in allowing the appeals under the EEA Regulations of ZT's parents. The fact that dependence may have existed and/or be conceded in respect of ZT overlooked the fact that her application was not under Regulation 8(2) of the 2016 Regulations as were her parents. This did not alone make her a dependent relative under that definition in Appendix EU, as this could only apply to dependent relatives of qualifying British citizens and persons of Northern Ireland. There was no parallel to be drawn with the success of her parents, who by view of the timing and nature of their applications fell to be treated differently.

The Reasons for the Grant of Permission to Appeal

15. On 20 December 2023 Upper Tribunal Judge Stephen Smith granted permission to appeal, as it was arguable that the definition of a family member of a relevant EEA citizen in Annex 1 to Appendix EU did not encompass the appellant, who was the niece of the EU citizen sponsor and arguably not one of the family members specified in the definition. Whereas the Presenting Officer before the First-tier Tribunal appeared to have conceded that the appellant was dependent upon the sponsor, arguably that was of no purchase, as a person in the position of the appellant was arguably incapable of meeting the relevant definition in Annex 1 in any event. Arguably, the parties before the First-tier Tribunal and the Judge confused the question of dependence on the one hand, with relationship status on the other.

The Rule 24 Response

16. In a Rule 24 response dated 30 January 2024, Mr Sharma advanced reasons for opposing the appeal. He submitted that there was no good reason to depart from a concession that was properly made and recorded, following *Kalidas (Agreed facts - best practice) Tanzania* [2012] UKUT 327 (IAC).

17. The refusal letter referred to the requirement to establish the relationship as a "*dependent child*". Given the concession that ZT was dependent upon the sponsor, and the fact that a dependent child was not defined within Annex 1, the Judge was entitled to approach the matter in the way he did.

The Hearing in the Upper Tribunal

18. At the hearing before us to determine whether an error of law was made out, Mr Lindsay developed the grounds of appeal. The question for the Judge was whether the appellant was a family member of an EEA citizen as defined by the Immigration Rules relating to the EUSS. A family member, as defined in Annex 1 to Appendix EU could include a dependent relative, but crucially, in order to come under that part, dependency needed to be shown before the specified date. ZT was not born before 31 December 2020, and so clearly it was not the case that dependency could have been shown before that date.

19. On behalf of the appellant, Mr Sharma said that the point made by the Entry Clearance Officer about the definition of a family member was a good point, and the Judge appeared to be aware that the definition could not be met. In answer to a question from us as to why, therefore, the Judge had allowed the appeal under the Immigration Rules, Mr Sharma said that all he could say was that there was a concession properly made, on the basis of which the Judge had made a finding that was open to him. In the basis of an absence of a definition of the term 'dependent child' in Annex 1, the Judge was entitled to find that ZT was a dependent child.

20. After a short break to confer, we announced our decision that a material error of law was made out. We indicated our reasons for this conclusion in short form, and our full reasons are set out below.

21. The discussion then moved onto the question of remaking. Mr Lindsay submitted that there was no justification for a further hearing, and that the only possible outcome was that the decision should be remade in the Entry Clearance Officer's favour.

22. However, Mr Sharma maintained the position that he had taken in his Rule 24 response, which was that, if a material error of law was made out, Judge Adio appeared to have dismissed alternative arguments in one short sentence with no reasoning or explanation, and therefore the matter should be remitted to the First-tier Tribunal for a *de novo* hearing in order for such arguments to be properly considered.

23. We asked Mr Sharma what these arguments were, and he said that he didn't know, as he did not have the ASA. Accordingly, we provided him with a copy of the composite bundle containing the ASA, and adjourned the case for some 40 minutes to enable him to consider the contents of the ASA.

24. On the resumption of the hearing, Mr Sharma maintained his request that the appeal should be remitted to the First-tier Tribunal for a fresh hearing, on two grounds. Firstly, it was submitted in the ASA that as the appellant's parents fell within the personal scope of the Withdrawal Agreement, this meant that the appellant also fell within the personal scope of the Withdrawal Agreement. This submission had not been dealt with by the Judge. Secondly, it was open to the Secretary of State to grant consent for Article 8 to be looked at in any remitted appeal.

25. We decided to reserve our decision on remaking.

Reasons for Finding a Material Error of Law

26. We consider that there is manifest error of law in the Judge's reasoning which flows from the fact that the Judge misdirected himself as to the legal effect of Ms Huber's concession. All that Ms Huber purported to concede was that at the time of the hearing before Judge Veloso, and subsequently, ZT was financially dependent upon the sponsor. She did not thereby concede that the appellant was an extended family member of the sponsor for the purposes of Regulation 8 of the EEA Regulations 2016. In order to potentially qualify as an extended family member of the sponsor, the appellant would have needed (a) to have been born before the specified date, and (b) included in her parents' application under the EEA Regulations 2016 made on 21 December 2020.

27. Ms Huber did not concede that the appellant qualified for a grant of entry clearance under the EUSS, either by reference to the Withdrawal Agreement or by reference to the residence scheme Immigration Rules. On the contrary, Ms Huber maintained the position taken in the refusal decision and the respondent's review, which was that the appellant was not a family member of a relevant EEA citizen, and that applying *Celik*, both in the Upper Tribunal and in the Court of Appeal, proportionality was not intended for a person who did not have a right to reside in the UK.

28. Accordingly, the Decision cannot be salvaged on the first basis outlined by Mr Sharma in his Rule 24 response, which is to the effect that Ms Huber had conceded that the appellant was a dependent child for the purposes of the EUSS. Ms Huber had done no such thing, and so this line of argument falls away.

29. As to Mr Sharma's second line of argument, it falls away for the same reason. Ms Huber did not in terms concede that the appellant was a dependent child for the purposes of the EUSS. Mr Sharma accepts that the appellant does not meet the definition of a child in Annex 1, as she is not the child of the sponsor. Mr Sharma also accepts that the appellant does not in the alternative meet the definition of a dependent relative of a relevant EEA citizen, as her dependency on the sponsor does not extend further back than her date of birth, and thus she was not dependent upon the sponsor before the specified date, which is an essential requirement to qualify as a dependent relative under Appendix EU.

30. The upshot is that the Judge was clearly wrong to find that the appellant qualified for entry clearance under the EUSS for the reasons which he gave.

Remaking

31. We consider that there is no merit in the submission that the appeal should be remitted to the First-tier Tribunal for a fresh hearing. No further fact finding is required, and the course of action proposed by Mr Sharma breaches the principle that neither party should treat the hearing in the

First-tier Tribunal as a dress rehearsal, rather than the main event. It is also contrary to the overriding objective.

32. We accept that when he settled the Rule 24 response, Mr Sharma had not seen the ASA. But we do not accept that placed him at a disadvantage, as the case put forward in the ASA was developed by Mr Broachwalla in oral submissions, and his submissions were fully detailed in para [9] of the Decision. If Mr Sharma believed that there was merit in the other arguments put forward by Mr Broachwalla at the hearing - as recorded in the Decision - and that they had been wrongly rejected by the Judge, it was incumbent upon him to raise this in the Rule 24 Response and/or for the appellant to apply for permission to cross-appeal.

33. We also consider that Mr Sharma's stance on remaking is inconsistent with the stance that he took on the error of law question. As he did not seek to defend the Judge's decision by reference to *Celik*, it is difficult to see how he can maintain that there is arguable merit in the first argument sought to be raised at a remitted hearing. It is clear both from the ASA and also from the oral submissions recorded at para [9] of the Decision, that this argument relies on the principle of proportionality and on distinguishing the facts of the present case from the facts of *Celik*.

34. In any event, we have no doubt that the argument is hopeless. The appellant does not come within the scope of the Withdrawal Agreement, and therefore she cannot invoke the principle of proportionality. The fact that she is a child is nothing to the point. The guidance given by the Court of Appeal in *Celik* still applies.

35. As to the second argument which is now sought to be advanced, Judge Adio rightly did not entertain a claim under Article 8 ECHR. Firstly, such a claim was not advanced either in the ASA or in oral submissions, and secondly, even if it had been advanced, he would not have had jurisdiction to entertain such a claim: see *Dani (Non-removal human rights submissions)* [2023] UKUT 00293 (IAC). There is no reason to suppose that the appellant would now be permitted to raise an Article 8 claim for the purposes of a remitted appeal against the refusal of her EUSS application, and we do not consider that it is in accordance with the overriding objective to delay the disposal of the appellant's EUSS appeal in order to enable her parents to advance a claim under Article 8 ECHR on her behalf, which they can equally well do by means of a fresh application.

36. Applying *Celik* [2023] EWCA Civ 921, the appellant cannot succeed in her EUSS appeal, and so her appeal must be dismissed.

Notice of Decision

The decision of the First-tier Tribunal contained an error of law, and accordingly the decision is set aside and the following decision is substituted:

The appellant's appeal under the EUSS is dismissed.

Anonymity

The First-tier Tribunal made an anonymity order in favour of the appellant because she is a minor, and we consider that it is appropriate to preserved her anonymity for the purposes of these proceedings in the Upper Tribunal.

Andrew Monson
Deputy Judge of the Upper Tribunal
Immigration and Asylum Chamber
14 June 2024