IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2022-003191
First-tier Tribunal No: EA/00911/2022

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On the 23 March 2023

Before

UPPER TRIBUNAL JUDGE CANAVAN

Between

ENTRY CLEARANCE OFFICER

Appellant

and

S S
(ANONYMITY ORDER MADE)

Respondent

Representation:
For the Appellant: Mr E. Tufan, Senior Home Office Presenting Officer
For the Respondent: Mr G. Dingley, instructed by Chancery Solicitors

Heard at Field House on 14 November 2022

Order Regarding Anonymity

Pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008, the original appellant is granted anonymity because he is a child. 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 preparation of the decision in this case has been delayed, in part, due to a period of illness. For this I apologise because I know that the original appellant and his family will have been awaiting the outcome.

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2. For the sake of continuity, I shall refer to the parties as they were before the First-tier Tribunal although technically the Entry Clearance Officer, represented by the Secretary of State, is the appellant in the appeal before the Upper Tribunal.

3. On 16 June 2021 S and his mother applied for entry clearance under the immigration rules relating to the EU Settlement Scheme (Appendix EU (Family Permit)). S's mother was granted entry clearance to join her daughter-in-law, who was an EEA national residing in the UK i.e. a dependent parent of the EEA national sponsor's spouse. S's application was refused in a decision date 23 November 2021 because his relationship with the EEA national sponsor did not come within the definition of 'family member' contained in the relevant part of the rules i.e. a dependent brother-in-law. At the date of the decision S was 16 years old.

4. The appeal is brought under The Immigration (Citizens' Rights Appeals) (EU Exit) Regulations 2020 ('the CRA Regulations 2020'). The available grounds of appeal are:

   (i) that the decision breaches any right which the appellant has by virtue of the Withdrawal Agreement ('WA'), EEA EFTA Separation Agreement or the Swiss Citizens' Rights Agreement;

   (ii) the decision is not in accordance with the provision of the immigration rules by virtue of which it was made, is not in accordance with the residence scheme immigration rules, is not in accordance with section 76(1) or (2) of the 2002 Act (revocation of ILR) or is not in accordance with section 3(5) or (6) of the 1971 Act (deportation).

5. First-tier Tribunal Judge S. Taylor ('the judge') allowed the appeal in a decision sent on 12 May 2022. The judge heard evidence from the EEA national sponsor. The judge's findings were confined to the following two paragraphs:

> '9. … Having considered the EUSS regulations and guidance I can find no authority for the proposition that the appellant should be admitted as a dependant of a family member. His mother has now been admitted as a family member, and if he was granted entry clearance as her dependant, that would render the appellant a dependant of a dependant for the purposes of the EUSS Regulations, and I find no provision for the grant of entry clearance on this basis.
>
> 10. I accept that the appellant's mother was granted entry clearance as a family member of the sponsor but I find no provision within the Rules for the appellant to be granted entry clearance as the dependant of a family member. However, the appellant is currently aged 16 and his father has passed away. His mother has been granted entry clearance as a family member, with the intention that she was to join the sponsor in the UK together with the appellant. I am satisfied that the person named on the Residence Card is the appellant's mother, her details are included in the appellant's submitted passport and identity card. It was submitted that the application was for the appellant and his mother to travel to the UK as part of a family unit, and the refusal was not consistent with the permissive approach of EUSS and disproportionate to the need for immigration control under article 8 ECHR. I refer to the section concerning the best interest of the

> child which is at page 12 of the Home Office guidance application of the EUSS (sic). The guidance refers to S55 of the 2009 Act and that decisions under the Scheme should have regard to the safeguarding and welfare of children under the age of 18. The guidance notes that S55 only applies to children in the UK but the statutory guidance Every Child Matters – Change of Children, provides guidance on the extent that the spirit of S55 applies overseas. Applying the guidance I am satisfied that it would not be in the best interest of the appellant for his mother to travel to the UK alone, leaving him behind in Bangladesh, his father having passed away and he having the expectation of travelling to the UK with his mother. Applying the Home Office Guidance, I am satisfied that accepting the appellant's mother's application and refusing the appellant is not in his best interest and that the appeal should be allowed.'

6. The Secretary of State applied for permission to appeal to the Upper Tribunal on the ground that the First-tier Tribunal erred in apparently allowed the appeal with reference to Article 8 of the European Convention. This was not a permissible ground of appeal under the CRA Regulations 2020. The only grounds upon which the appeal could be brought were that the decision breached rights under the WA or was not in accordance with the relevant immigration rules.

7. First-tier Tribunal Judge Moon granted permission to appeal to the Upper Tribunal on the ground that it was arguable that the judge 'muddled the reference to proportionality contained within Article 18(1)(r) of the WA with a proportionality assessment in relation to Article 8 of the European Convention of Human Rights.'

8. I heard oral submissions from both parties at the hearing. It is not necessary to set out the arguments in full. They are a matter of record.

Decision and reasons

Error of law

9. By the date of the hearing the Upper Tribunal had published the reported decisions in *Batool and others (other family members: EU exit)* [2022] UKUT 219 (IAC) and *Celik (EU Exit; marriage; human rights)* [2002] UKUT 220 (IAC).

10. Mr Dingley accepted that the application for entry clearance in this case was made after the Implementation Period Completion Date of 31 December 2020 and that the general principles relating to EU law and the EU Settlement Scheme outlined in *Batool* were likely to apply.

11. Mr Dingley drew my attention to the fact that the original appeal form appeared to raise human rights grounds and suggested that it could have been treated as a 'new matter' with reference to section 85 of the Nationality, Immigration and Asylum Act 2002 ('NIAA 2002').

12. On closer inspection the form purported to appeal a decision made under The Immigration (European Economic Area) Regulations 2016 ('the EEA Regulations 2016'), when no such decision had been made. This was not an appeal brought under those regulations against a decision to refuse a family permit under EU law. Similarly, the assertion in the form that the appellant was seeking to appeal a decision to refuse a human rights claim was also incorrect when no such decision had been made. This was not appeal brought under section 82 NIAA 2002 against

a decision to refuse a human rights claim with reference to section 6 of the Human Rights Act 1998 ('HRA 1998').

13. The application for entry clearance was made after the EEA Regulations 2016 had been repealed. The decision was made under domestic immigration law with reference to the immigration rules relating to the EU Settlement Scheme. It was not an application for a family permit under EU law. The appeal could only be brought on the ground that the decision breached rights under the WA or was not in accordance with the immigration rules relating to the EU Settlement Scheme.

14. There is no evidence to suggest that an application was made to the Secretary of State for consent to be given for human rights issues to be raised in this appeal. Mr Dingley did not suggest that consent was given. If an application had been made, it is reasonable to infer that the judge would have referred to it in his decision.

15. Although the judge confused the terminology by referring to 'The Regulations' relating to the EU Settlement Scheme, the judge then made clear that he was aware that the appeal related to a decision made under the immigration rules [5]. It is clear that the judge concluded that there was no provision in the immigration rules for the dependent of a dependent relative to be granted entry clearance under the immigration rules relating to the EU Settlement Scheme [10]. Nevertheless, the judge had concerns about the best interests of the child in circumstances where his mother had been granted entry clearance and he had not.

16. What is less clear is the legal basis upon which the judge purported to allow the appeal. The judge referred in a general and unparticularised way to submissions that were made with reference to 'Home Office guidance' on the application of the EU Settlement Scheme. He also referred to submissions asserting that the decision was 'disproportionate to the need for immigration control under article 8 ECHR.'

17. It is unclear from the last line of the judge's findings on what basis he purported to allow the appeal. In my assessment, the lack of clarity alone amounts to an error of law. The judge seems to base his finding on the Home Office guidance. First, the specific section of the guidance is not outlined. Second, even if the guidance referred to the need to apply the spirit of the statutory duty regarding the welfare of children contained in section 55 of the Borders, Citizenship and Immigration Act 2009 ('the BCIA 2009') (applicable to children in the UK) it does not compel the respondent into a particular course of action and was not a lawful basis upon which to allow the appeal. Third, it is not even clear from this finding whether the judge was purporting to allow the appeal with reference to Article 8 of the ECHR. Fourth, there is nothing in the findings to suggest that the judge considered the case within the context of EU law proportionality. Even if the appellant's situation engaged the operation of the WA, which it did not following the decisions in *Batool* and *Celik*, the judge made no findings with reference to the WA.

18. For the reasons given above, I conclude that the First-tier Tribunal decision involved the making of an error of law.

Remaking

19. The parties agreed that the decision could be remade without a further hearing and made brief further submissions relating to remaking.

20. In addition to the submissions he had already made, Mr Dingley argued that the appeal should be allowed with reference to Article 18(r) (proportionality) of the WA and Article 24 (rights of the child) of the Charter of Fundamental Rights of the European Union. He sought to distinguish this case from what was said in *Batool* at [87].

21. It is unclear from the evidence how long the Italian national sponsor has lived in the UK. She was granted status under the EUSS in April 2020, indicating that she was likely to have been exercising her rights of free movement under EU law before the United Kingdom left the EU on 31 December 2020. It is unclear from the evidence how long S and his mother have been dependent upon the EEA national sponsor. There is no evidence to suggest that they had applied at an earlier stage for a family permit under EU law before the United Kingdom left the EU. The fact that S is the brother in law of the EEA sponsor might have been a sufficient relationship under regulation 8 of the EEA Regulations 2016 if he was found to be dependent upon the EEA sponsor for all his essential needs. However, an application under EU law would need to have been made before the United Kingdom left the EU on 31 December 2020.

22. Instead of making an application under EU law before the United Kingdom left the EU, S and his mother applied for a family permit under the domestic immigration rules relating to the EU Settlement Scheme after the United Kingdom left the EU. The 'grace period' set out in The Citizens' Rights (Application Deadline and Temporary Protection) Regulations 2020 was an extension of the period in which those who had established rights under EU law on or before 31 December 2020 could apply for leave to remain under the EU Settlement Scheme. It was an extension of the time to make an application and not an extension of time to establish rights of residence under EU law.

23. The EU Settlement Scheme was designed as a mechanism to grant leave to remain under domestic law to those who could establish that they were residing in the United Kingdom under EU law at the end of the transition period when their rights of residence came to an end. Because it is a mechanism of domestic law, it was open to respondent to define and narrow the type of relationships that would satisfy the requirement to be a 'family member' for the purpose of the immigration rules. S's mother qualified as a 'family member' but S did not.

24. Appendix EU of the immigration rules and Articles 10(2) and (3) of the WA gave effect to the general principles of EU law relating to 'other family members' by requiring a person who was not a family member within the meaning of Article 2(2) of the Citizen's Rights Directive (2004/38/EC) to have applied for or to have been facilitated entry or residence as an other family member by way of the issuing of a relevant document before the end of the transition period.

25. In *Batool and others (other family members: EU exit)* [2022] UKUT 219 (IAC) the Upper Tribunal analysed the relevant legal framework and highlighted the distinction between the rights of family members and the need for other family members to be facilitated entry under EU law. The Upper Tribunal also considered the terms of Appendix EU, which required other family members to have been issued with a 'residence document' (as defined) before the end of the transition period. The Upper Tribunal concluded that other family members who had not applied for facilitation of entry and residence before 23.00hrs on 31 December 2020 could not rely on the immigration rules or the WA to succeed in an appeal under the CRA Regulations 2020. Such a person did not have a right to have an application made for leave to remain under the immigration rules (domestic law)

to be treated as an application for facilitation of entry or residence as an other family member (EU law).

26. In *Celik (EU Exit; marriage; human rights)* [2002] UKUT 220 (IAC) the Upper Tribunal considered the position of those who were in a durable relationship with an EEA national before 31 December 2020. Again, the Upper Tribunal concluded that those persons did not have any substantive rights under the Withdrawal Agreement if they had not applied for facilitation of entry of residence before the end of the transition period. Where a person had not established a substantive right, they could not invoke the concept of proportionality in Article 18(1)(r) WA or the principle of fairness to succeed in an appeal under the CRA Regulations 2020.

27. Mr Dingley's attempts to distinguish *Batool* is not persuasive. The facts in *Batool* were similar in that they involved entry having been granted to the children's grandparents (dependent parents in the ascending line of the EEA sponsor) but the appellant children had not been facilitated entry as other family members under EU law before the United Kingdom left the EU. The children applied for family permits under the EU Settlement Scheme rules after the United Kingdom left the EU. The Upper Tribunal made clear that in such circumstances no EU rights had been established that would engage the operation of the WA or the provisions of the Charter of Fundamental Rights relating to the rights of children.

28. When the application for entry clearance was made on 16 June 2021 S did not meet the required definition to qualify as a 'family member' under the relevant immigration rules relating to the EU Settlement Scheme. Despite the fact that he could not qualify, there is no evidence to indicate that any representations were made to the respondent based on the best interests of the child or with reference to human rights issues. As a result, the decision that is the subject of this appeal is one made with strict reference to Appendix EU (family permit) and can only be appealed on the ground that the decision is not in accordance with that part of the immigration rules or it breaches rights under the WA.

29. For the reasons given above, S had not established any rights as an other family member before the United Kingdom left the EU on 31 December 2020. S did not meet the definition of a 'family member' for the purpose of Appendix EU (family permit). If S did not meet the requirement, representations should have been made human rights grounds asking the respondent to exercise discretion to consider human rights issues. No representations were made. No application was to ask the respondent to consent to human rights grounds being considered in this appeal. For the purpose of the application that was made, and in the confines of the appeal currently before the Upper Tribunal, the appeal cannot succeed.

30. I conclude that the decision did not breach any rights under the WA because the appellant had not established any rights under EU law before the end of the transition period. The appellant did not meet the requirements of Appendix EU (family permit) to qualify as a 'family member'. The decision was in accordance with the residence scheme immigration rules.

Notice of Decision

The First-tier Tribunal decision involved the making of an error on a point of law

The appeal is DISMISSED under the CRA Regulations 2020

M.Canavan
Judge of the Upper Tribunal
Immigration and Asylum Chamber

23 March 2023