IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2023-002161
First-tier Tribunal No: EA/075229/2022

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On the 23 November 2023

Before

UPPER TRIBUNAL JUDGE MANDALIA
and
DEPUTY UPPER TRIBUNAL JUDGE BOWLER

Between

Secretary of State for the Home Department

Appellant

and

Reda Madour
(NO ANONYMITY DIRECTION MADE)

Respondent

Representation:
For the Appellant: Mr M Parvar, Senior Home Office Presenting Officer
For the Respondent: Mr A Swain, counsel instructed by Ashfield Solicitors

Heard at Field House on 13 November 2023

DECISION AND REASONS

1. The appellant in the appeal before us is the Secretary of State for the Home Department ("SSHD") and the respondent to this appeal is Mr Reda Madour. However, for ease of reference, in the course of this decision we adopt the parties' status as it was before the FtT. We refer to Mr Madour as the appellant, and the Secretary of State as the respondent.

2. The appellant is a national of Algeria. On 28 June 2021 he made an application under the EU Settlement Scheme as a 'person with a Zambrano right to reside' in the United Kingdom. The application was refused by the respondent for reasons set out in a decision dated 8 August 2022. The respondent concluded the appellant does not meet the eligibility requirement for indefinite leave to remain as a person with a Zambrano right to reside as defined in Annex 1 to Appendix EU of the immigration rules.

3. The appellant's appeal against that decision was allowed by First-tier Tribunal Judge Mace for reasons set out in her decision promulgated on 21 March 2023.

4. The respondent claims the decision of Judge Mace is vitiated by material errors of law. It is said the judge failed to properly consider whether, as at the specified date, the appellant met the relevant requirements of Regulation 16 of the Immigration (European Economic Area) Regulations 2016 ("the 2016 Regulations"). The respondent claims the appellant was married to his partner, Ms Emma Shubotham on 25 May 2021 and that on any view, he was not her "primary carer" as defined in the 2016 Regulations. In summary he was not a 'direct relative' *(i.e. a spouse)* as at the specified date. The judge noted at paragraph [28] of her decision that prior to the specified date the appellant and the sponsor had entered into an Islamic marriage. She noted that is not a marriage which is recognised as a valid lawful marriage under UK law and therefore the appellant was not a direct relative of the sponsor at 31 December 2020. The respondent claims Judge Mace referred to guidance; "EU Settlement Scheme: person with a Zambrano right to reside, version 6.0, December 2022", and having taken into account the reasons for the delay in marrying, erroneously concluded that there were reasonable grounds for making the application after the specified date, and so the appellant met the requirements of Appendix EU. Alternatively, the respondent claims Judge Mace failed to properly consider whether Mrs Shubotham would be able to reside in the UK without the appellant. Judge Mace also referred to s55 Borders, Citizenship and Immigration Act 2009 ("the 2009 Act") and the children's bests interests, but fails to explain how the best interests of the children are relevant when the appellant does not have an entitlement to remain under the EU Settlement Scheme.

5. Permission to appeal was granted by First-tier Tribunal Judge Athwal on 15 May 2023. Judge Athwal said:

> "It is arguable that the Judge did not properly consider whether the eligibility requirement was met at and from the specified date, and that the reasons for the delay in the marriage could not be relevant, pursuant to Celik."

6. We are grateful to the parties' representatives for their focussed and succinct submissions.

7. Mr Parvar adopted the respondent's grounds of appeal. He submits the guidance referred to by Judge Mace does not assist the appellant in circumstances where, on any view, he was not a direct relative of Ms

Emma Shubotham as at 31 December 2020. The guidance did not in any way alter the eligibility requirements for indefinite leave to remain as a person with a Zambrano right to reside set out in Appendix EU. Mr Parvar submits the underlying requirements were not met by the appellant, and the appeal should have been dismissed.

8. Mr Swain adopted his rule 24 response dated 11 June 2023. He submits Judge Mace gave detailed, justified and considered reasons for determining that the appellant satisfied the eligibility requirements in Appendix EU, and it was open to her to find that the appellant satisfied the 'Zambrano requirements' given the inevitable delay in the appellant and his wife marrying prior to 31st December 2020 due to the Covid 19 Pandemic.

9. Mr Swain, quite properly in our judgment, acknowledged that the decision of the Court of Appeal in *Celik v SSHD* [2023] EWCA Civ 921 now poses the appellant significant difficulties, albeit the decision of the Court Appeal post-dates the decision of Judge Mace. He submits the appeal was bound to succeed in any event under section 55 Border, Citizenship and Immigration Act 2009, taking into account the best interests of Mrs Shubotham's children. That was not a 'new matter', and the Tribunal did not require the respondent's consent to consider s55. Mr Sain submits the evidence before the First-tier Tribunal established that Mrs Shubotham is in the most desperate physical and emotional condition and it is only the appellant who can offer her the physical and emotional support, care and treatment she requires.

10. When pressed, Mr Swain accepted that s55 of the 2009 Act is not a freestanding basis upon which an individual can establish an entitlement to enter or remain in the UK. He acknowledges that under the Immigration (Citizens' Rights Appeals) (EU Exit) Regulations 2020, the refusal of an application under the EU Settlement Scheme gives rise to a right of appeal on the grounds that the decision is not in accordance with the "residence scheme Immigration Rules" for an application under the EUSS. Mr Swain also acknowledged that it is now well established that absent a decision on a human rights claim, an appellant in an EEA appeal is not able to raise human rights as a basis for challenging the EEA refusal decision.

11. Mr Swain submits that it can be inferred from the respondent's decision of 8 August 2022 that the respondent had refused a human rights claim advanced by the appellant on the basis of the best interests of the children. The respondent said in the decision that the duty under s55 of the 2009 Act has been complied with and that the best interests of the children have been a primary consideration in assessing the application. That, Mr Sawin submits, is analogous to the requirement in GEN.3.3 of Appendix FM of the Immigration Rules which requires that in considering an application for leave to remain, the decision maker must take into account, as a primary consideration, the best interests of any relevant child. Mr Swain submits it was therefore open to Judge Mace to consider the best interests of the children in an Article 8 human rights context. Judge Mace said:

> "24. The duty under section 55 of the Borders, Citizenship and Immigration requires me to consider the best interests of any minor affected as a primary, though not paramount, consideration. The decision affects both of the sponsor's daughters. The appellant provides parental care for them and I find that their best interests are met by remaining in the care of their mother and the appellant."

12. Mr Swain submits that we should infer that Judge Mace allowed the appeal on Article 8 grounds on the basis that she was seized of an appeal where the respondent had decided to refuse a human rights claim made by the appellant.

DECISION

13. Despite the valiant attempt made by Mr Swain to persuade us otherwise, we are satisfied that Judge Mace made a material error of law in her decision such that it must be set aside.

14. The guidance that was referred to by Judge Mace was issued following the decision of the Court of Appeal in *Akinsanya v SSHD* [2022] EWCA Civ 37. The Court of Appeal held that the Home Office had erred in its understanding of regulation 16(7) of the 2016 Regulations in defining 'a person with a Zambrano right to reside' in the Immigration Rules for the EUSS in Appendix EU. The guidance operated so that until 25 July 2022 individuals were able to apply or re-apply to the EUSS as a 'person with a Zambrano right to reside' and be deemed to have reasonable grounds for having missed the deadline to apply, which was 30 June 2021. The guidance therefore extended the deadline for applications but not the cut-off date for meeting the eligibility requirements. The guidance did not alter the fact that, in summary, an applicant would only be eligible to make an application as a Zambrano carer where they, by the end of the transition period (on 31 December 2020) and throughout the relevant period, did not hold leave to enter or remain in the UK (unless this was under Appendix EU), and met the other relevant requirements of Regulation 16 of the 2016 Regulations.

15. The Court of Appeal held in *Celik v SSHD* that on the proper interpretation of Article 10 of the EU Withdrawal Agreement, a Turkish national who had married an EU national after the end of the post-EU exit transition period did not have any right to reside in the UK. The fact that their marriage had been delayed due to the COVID-19 pandemic did not alter the interpretation of the Withdrawal Agreement. By analogy here, the fact that the appellant was not a 'direct relative' *(i.e. a spouse)* as at the specified date, whether solely because of the Covid-19 pandemic or that together with other factors, does not alter the fact that he was unable to meet the eligibility requirements for leave to remain as a person with a Zambrano right to reside as set out in Appendix EU and defined in Annex 1.

16. We do not accept that the reference to the respondent's duty to have regard to the best interests of the children under s55 of the 2009 Act can be read, as Mr Swain submits, as a decision by the respondent to refuse a human rights claim made by the appellant. The duty under s55 to have regard to the need to safeguard and promote the welfare of children who

are in the United Kingdom applies whenever the respondent is carrying out her function in relation to immigration, asylum or nationality. It applies as much in the context of an EEA application, as it does in a human rights application.

17. There are a number of difficulties with the submission made by Mr Swain that the respondent's decision should be read as a decision to refuse a human rights claim. First, the application made by the appellant was not a human rights application but specifically an application under the EU Settlement Scheme as a 'person with a Zambrano right to reside'. The decision expressly states it is that application which is refused. Second, the application is based on the appellant's claim that he is the primary carer of Mrs Shubotham, and not on Article 8 grounds based upon the best interests of the children. Third, beyond the reference to s55 in the decision, there is nothing in the decision that even begins to suggest that the respondent had regard to the best interests of the children in a wider Article 8 context. Fourth, GEN.3.3 of Appendix FM is expressly concerned with applications for entry clearance or leave to enter or remain where paragraphs GEN.3.1 or GEN.3.2 apply. Unsurprisingly, given the nature of the application that was made by the appellant, the respondent had not considered whether appellant met the eligibility requirements for leave to remain as a partner, or whether there are exceptional circumstances which would render refusal of leave to remain a breach of Article 8.

18. Similarly, we do not accept that we can infer from the decision of Judge Mace that the appellant's appeal was also allowed on Article 8 grounds. Judge Mace made no reference whatsoever to Article 8 in her decision. At paragraph [32] she concluded the appellant meets the requirements of Appendix EU and allowed the appeal under the rules. Judge Mace, understandably, does not engage with the requirements to be met by those seeking leave to remain in the UK on the basis of their family life with a person who is a British citizen as set out in Appendix FM of the immigration rules. At its highest, she referred to the best interests of the children at paragraph [24] of her decision. It is now well established that the best interests of a child are "a primary consideration", which, is not the same as "the primary consideration", still less "the paramount consideration". Had she been addressing a human rights claim she would have been bound to have regard to the public interest considerations set out in section 117B of the Nationality, Immigration and Asylum Act 2002. She did not do so and was not required to do so for the purposes of the issues in the appeal before her.

19. It follows that the decision of First-tier Tribunal Judge Mace must be set aside.

20. As to disposal, we remake the decision in the Upper Tribunal. It is clear that the appellant cannot meet the eligibility requirements for leave to remain as a person with a Zambrano right to reside as set out n Appendix EU for the reasons we have already set out. The judgement of the Court of appeal in *Celik v SSHD* [2023] EWCA Civ 921, now makes that clear.

21. It follows that we dismiss the appellant's appeal against the respondent's decision to refuse his application under the EU Settlement Scheme as a 'person with a Zambrano right to reside'.

22. Finally, we were invited by Mr Swain to note in our decision that if this had been a human rights claim or a human rights appeal, the appellant has, for all intents and purposes, become the *de facto* father of Mrs Shubotham's children and that the overall merits of the human rights claim have some considerable strength. It would be wholly inappropriate for us to say anything about the strength or otherwise of a human rights claim that may be open to the appellant. In reaching our decision we have not had the need to delve into the evidence or to consider matters that may be relevant to a potential human rights claim. We therefore decline to make any observations about such a claim.

Notice of Decision

23. The decision of First-tier Tribunal Judge Mace promulgated on 21 March 2023 is set aside.

24. We remake the decision in the Upper Tribunal and dismiss the appellant's appeal.

V. Mandalia

Upper Tribunal Judge Mandalia

Judge of the Upper Tribunal
Immigration and Asylum Chamber

22 November 2023