IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER
Extempore

Case No: UI-2023-001062

First-tier Tribunal No: EA/11714/2021

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On 21st May 2024

Before

UPPER TRIBUNAL JUDGE RINTOUL
DEPUTY UPPER TRIBUNAL JUDGE CHANA

Between

MOHAMMAD ALI
(NO ANONYMITY ORDER MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: No appearance
For the Respondent: Mr M Parvar

Heard at Field House on 10 May 2024

DECISION AND REASONS

1. The appellant appeals with permission against a decision of First-tier Tribunal Judge Davey promulgated on 10 January 2023 although the decision records that it was prepared on 13 July 2022.

2. The appellant did not attend the hearing. We are satisfied from the court file that the appellant was given due notice of the time, date and venue of the hearing but he did not attend nor has anybody attended on his behalf, nor have we been given any explanation for his failure to attend.

3. We note that in this case directions were issued first by Judge Mandalia and most recently by Judge Lindsley on 12 March 2024 requiring the appellant to indicate whether, in the light of the Court of Appeal's decision in Celik v SSHD [2023] EWCA Civ 921, he wished to proceed and on what basis. There has been no compliance with those directions. Indeed, there has been no correspondence from the appellant or those still on record as representing him.

4. In all the circumstances of this case and given the specific directions made and the issues at play we are satisfied that it is in the interests of justice to proceed to determine this appeal in the appellant's absence.

5. This was an appeal to the First-tier Tribunal under the Immigration (Citizens' Rights Appeals) (EU Exit) Regulations 2020 ("the Appeals Regulations")against a decision of an Entry Clearance Officer made on 8 July 2021 to refuse to issue the appellant with a family permit pursuant to Appendix EU (FP). It was accepted that he had not chosen to apply earlier under the Immigration (European Economic Area) Regulations 2016 ("the EEA Regulations") for a family permit under those regulations.

6. In this case the decision under appeal was a decision to refuse entry clearance on the basis that the appellant had not provided evidence that he was a family member as defined within Appendix EU (FP) which required him to demonstrate that he was a family member of a relevant EEA citizen. That notice also informed him that he had a right of appeal.

7. The appeal before the First-tier Tribunal was heard on 11 July 2023. At that time the appellant was represented by Ms Asanovic of Counsel. The Entry Clearance Officer was not represented. The judge had before him a skeleton argument in which (as he records at [3]) it was accepted that the appellant had not made an application under the EEA Regulations but had decided not to do so notwithstanding the practical difficulties understanding the exercise to use the EUSS approach. The judge noted that guidance had been provided as to which schemes were accessible and said succinctly at [7], "I did not find that the Respondent had failed to properly apply the relevant scheme requirements nor did the evidence in support of Article 8 ECHR in the circumstances become engaged simply through the circumstances complained of in the skeleton argument". He found that there had been no error of law either in relation to the EUSS Scheme or indeed the import of the withdrawal agreement in terms of eligibility under the scheme.

8. The appellant then sought permission to appeal on the grounds that the judge had erred in a number of respects. First, in failing to give proper reasons for his decision, it being averred that the respondent should have treated the appellant's application under the EUSS as an application under the EEA Regulations, that the decision was impossible to understand the reasons being inadequate, and that the decision was contrary to the withdrawal agreement. Reference is also made to the decision of the Upper Tribunal in Batool and others (other family members: EU exit)

[2022] UKUT 219 and also to the decision in Celik EU exit; marriage; human rights) [2022] UKUT 00220 and to the then ongoing case of Emambux v Secretary of State.

9. Permission was granted by Upper Tribunal Judge Norton-Taylor on 27 April 2023 given the reference to the decision of Celik (UT) directing also that it would be stayed pending the outcome of the appeal to the Court of Appeal in Celik; and Emambux. It is to be noted that since then, the Upper Tribunal has handed down its decision in Emambux [2023] UKAITUR EA005452021 and the Court of Appeal has handed down its decision in Celik entitled Celik v Secretary of State for the Home Department [2023] EWCA Civ 921. Permission to appeal in Batool was refused. We note also that the decision of the Upper Tribunal was to dismiss Mr Emambux's appeal and whilst he was granted permission to appeal to the Court of Appeal by the Court of Appeal, that was in effect pending a decision in Siddiqa v ECO [2024] EWCA Civ 248 which was handed down on 14 March 2024.

10. We note also that there were in this case directions issued by Judge Lindsley on 12 March directing the appellant to consider whether he should withdraw his appeal in the light of the decision in Celik and that if he considered there are other arguable grounds which he could succeed that these should be provided within 21 days of the issue of the hearings which was not done and he was advised that if he did not respond to this, this matter would be listed for disposal.

11. At the outset we do note that in this case the decision of the First-tier Tribunal is lacking in detail. Brevity is to be commended, but it is a problem when it is simply not possible to discern what the judge had decided or why. He does not appear to have made any decision regarding the application under EUSS versus EEA which at the time may have been relevant, nor does it explain what the relevant provisions were or why the appellant could not succeed, nor for that matter does he deal with how or why Article 8 could be raised as a ground of appeal in this case. These defects would, ordinarily, militate in favour of a finding that the decision involve the making of an error of law. But, for the reasons to which we now give, the appeal was bound to fail. It is therefore necessary to set out in detail why it is that the appellant could not succeed.

12. Under Appendix EU (FP) the appellant could only obtain a family permit to enter if he was the "family member of a relevant EEA citizen" as defined within Appendix EU(FP). While, as a relative he appears he comes within the parameters of subparagraph (f) of that definition, he can only succeed if he would have succeeded if he could have made valid application under Appendix EU as a dependent relative which would have been granted. Turning then to Appendix EU of the Immigration Rules we note the definition which would have applied to "dependent relative". To qualify as a "dependant relative", an applicant had to produce a "relevant document", which in this case was a document showing that he had been granted the right to reside or to enter pursuant to the EEA Regulations.

He did not do so and indeed it is not in dispute that he did not have such a document.

13. In line with the decision in Siddiqa and in the decision in Batool it cannot be argued that anything flowed from the fact that he chose to use one route rather than another, nor can it be argued that he falls within the scope of the withdrawal agreement as he is simply not within the categories set out in Article 10 of that instrument. In the circumstances there is only one answer that could have been reached in this case, which is that the appellant simply does not meet the requirements of Appendix EU (FP) or any other provisions of the relevant rules, nor could he come within the scope of the Withdrawal Agreement and the appeal was bound as a matter of law to be dismissed.

14. Finally, we remind ourselves of the permissible grounds of appeal in this case. These are set out in the Appeals Regulations and do not include an argument that the decision was contrary to someone's rights pursuant to the Human Rights Convention.

15. Accordingly, given that the appellant simply could not on any view lawfully have succeeded in this appeal we consider that the decision did not involve the making of an error of law capable of affecting the outcome and we therefore uphold it and dismiss the appeal.

Notice of Decision

(1) The decision of the First-tier Tribunal did not involve the making of an error of law and we uphold it.

Signed Date: 13 May 2024

Jeremy K H Rintoul
Judge of the Upper Tribunal