IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM
CHAMBER

Case No: UI-2023-001633
UI-2023-001632
UI-2023-001634

First-Tier Tribunal No:
EA/06370/2022
EA/06371/2022
EA/06372/2022

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On 25th March 2024

Before

UPPER TRIBUNAL JUDGE MANDALIA

Between

Secretary of State for the Home Department

Appellant

and

Mohammad Bilal Rustamkhail & Others
(NO ANONYMITY DIRECTION MADE)

Respondent

REPRESENTATION

For the Appellant: Mr P Lawson, Senior Home Office Presenting Officer
For the Respondent: Mr S Vokes, instructed by Axis Solicitors Ltd

Heard at Birmingham Civil Justice Centre on 23 November 2023

DECISION AND REASONS

INTRODUCTION

1. The appellant in the appeal before me is the Secretary of State for the Home Department ("SSHD") and the respondents to this appeal are Mr Mohammad Bilal Rustamkhail and his two siblings. However, for ease of reference, in the course of this decision I adopt the parties' status as it was

before the FtT. I refer to Mr Rustamkhail and his siblings as the appellants, and the Secretary of State as the respondent.

2. The appeal before me arises from the decision of First-tier Tribunal Judge Joshi ("the judge") promulgated on 6 March 2023 to allow the appellants appeals against the respondent's decisions of 6 May 2022 to refuse their applications for an EU Settlement Scheme Family Permit. Before I turn to the decision of the judge it is helpful to say a little more about the background to the appeal.

BACKGROUND

3. The appellants are nationals of Afghanistan now aged 23, 20 and 14. On 15 December 2020 each of the appellant's made an application for an EU Settlement Scheme (EUSS) Family Permit on the basis that they are a 'family member' of a relevant EEA citizen. Their sponsor is their sister-in-law, Ms Pamela Rusu, a Romanian national who has lived in the UK since August 2008. Ms Rasu is the spouse of the appellants' brother, Mr Abdul Halim Rustamkhail. At the same time the appellant's made their applications, applications were also made by their parents. The applications made by the appellants' mother, Mrs Najeba Rustamkhail and the appellants were all refused by the respondent for reasons set out in decisions dated 30 January 2021. I have been provided with copies of those decisions. In each case the respondent concluded the applicant does not meet the requirements for a EUSS Family Permit. In each case the respondent said:

> "Your application has been refused because you have not provided sufficient evidence to prove that you are a 'family member' - (a spouse; civil partner; child, grandchild, great-grandchild under 21; dependent child, grandchild, great-grandchild over 21; or dependent parent, grandparent, great-grandparent)- of a relevant EEA or Swiss citizen or of their spouse or civil partner as claimed.
>
> As your relationship to the sponsor does not come within the definition of 'family member of a relevant EEA citizen' as stated in Appendix EU (Family Permit) to the Immigration Rules, you do not meet the eligibility requirements."

4. The appellants each lodged an appeal with the First-tier Tribunal ("FtT"). In their grounds of appeal dated 19 February 2021 settled by Axis Solicitors, the appellants (including the appellants' mother) claimed the respondent's decision is not in accordance with the EUSS Family Permit Rules. The grounds of appeal noted the application made by the appellants mother had been refused because "no birth certificate was provided" to prove her relationship with her son, and in turn her daughter-in-law (the sponsor). As far as the appellants are concerned, the grounds of appeal said:

> "18. The Respondent also failed to take a common-sense approach when assessing the applications for the 2nd 3rd and 4th Appellants. They are the siblings of the Sponsor and the children of the 1st Appellant and Mr

> Rustamkhail. Naturally if the mother and father wish to travel to the UK to *(sic)* the children have no choice but to accompany their parents. How can one expect the children to remain behind, it is again an unnecessary reason for refusal.
>
> 19. The Appellants reside together with Mr Rustamkhail in their country of origin as complete family unit and as reflected in their applications they wish to travel to the UK as that same family unit, therefore their applications should be considered jointly as opposed to individually."

5. The appellants appeal was listed for hearing before the FtT on 4 November 2021. Under cover of a letter dated 3 November 2021, the respondent wrote to the FtT referring to the appellants (including their mother) and said:

> "Having reviewed the further documents provided by the Appellants and taken further advice from a Senior Case Worker, I am instructed that the Respondent wishes to withdraw the original immigration decisions with a view to grant leave *(sic)*, subject to usual security checks.
>
> A copy of this letter has also been provided to the Appellants representatives."

6. The 'further documents' referred to in that letter appear to be birth certificate that had not been provided by the appellants mother to support her application and to establish her relationship with her daughter-in-law.

7. The Tribunal Procedure (First-tier Tribunal) (Immigration and Asylum Chamber) Rules 2014 provide as follows:

> "17. (2) The Tribunal must (save for good reason) treat an appeal as withdrawn if the respondent notifies the Tribunal and each other party that the decision (or, where the appeal relates to more than one decision, all of the decisions) to which the appeal relates has been withdrawn and specifies the reasons for withdrawal of the decision."

8. It is not clear from the information before me whether the FtT notified each party that a withdrawal had taken effect and that the proceedings are no longer regarded by the Tribunal as pending. I have however been provided with copies of the 'Judge's Minute' relating to each of the appellants signed by FtT Judge Williams and dated 17 February 2022. She noted the decisions against which the appeals were brought had been withdrawn by the respondent.

9. The decisions were remade by the respondent. It seems the appellants' mother was granted an EUSS Family Permit. The decisions sent to each of the appellants are dated 6 May 2022 and are in the same terms. The respondent said:

> "I have reviewed your application, I note on your application form you state you are related as the brother in law of your sponsor, You do not qualify for an EUSS family permit because you have not provided adequate evidence to prove that you are a 'family member' as defined by Appendix EU - (a spouse; civil partner; durable partner; child, grandchild, great-

grandchild under 21; dependent child, grandchild, great-grandchild over 21; or dependent parent, grandparent, great-grandparent)- of a relevant EEA or Swiss citizen or of their spouse or civil partner.

As your relationship to the sponsor does not come within the definition of 'family member of a relevant EEA citizen' as stated in Appendix EU (Family Permit) to the Immigration Rules, you do not meet the eligibility requirements."

10. The appellants grounds of appeal to the FtT are set out in the Grounds of Appeal dated 1 July 2022 again settled by Axis Solicitors. They state:

> "14. The decision to withdraw the childrens grant the second time is unduly harsh and unfair.
>
> 15. The Appellants have provided clear reasoning and evidence of their relationship which has already been established by the Home Office Presenting Officer present at the hearing on 4 November 2022.
>
> 16. For the Respondent to then reconsider their decision quite randomly again a second time, is not only unprofessional but also negligent of the impact it is having on the Appellants and Sponsor. It is completely unacceptable.
>
> 17. It seems unreasonable and unfair that the mother is expected to join the father in the UK whilst the children are expected to live in Pakistan.
>
> 18. It is further submitted that the appeal is considered under Article 8 ECHR, the ECO should recpect *(sic)* the Appellants right to a family life. The Appellants father is already in the UK and their mother has submitted her passport and will be entering the UK shortly. The refusal is leading them to being kept unjustifiably and unreasonably apart. The entire family unit is being torn apart."

11. The appellants' appeal against those decisions were allowed by First-tier Tribunal Judge Joshi for reasons set out in his decision promulgated on 6 March 2023.

THE GROUNDS OF APPEAL

12. The respondent claims Judge Joshi erred by straying from the jurisdiction of the FtT in relation to an appeal against the respondent's decisions under the Immigration (Citizens' Rights Appeals) (EU Exit) Regulations 2020 ("the 2020 Appeal Regulations") and embarked on a quasi-judicial review of the appropriateness of permitting the respondent to withdraw an earlier concession. The respondent claims the only question to be decided was whether or not the relevant requirements of Appendix EU (Family Permit) were met. They could not be met given the relationship between the appellants and their sister-in-law, is not one that falls within the definition of a 'family member'. The respondent claims that whilst it is unfortunate that the respondent had erroneously believed that the appellants' appeals fell inevitably to be treated in line with their parents, who were direct relatives of the sponsor, that did not alter the fact that the scope of the appeals was limited, and the appellant's are in fact, not family members of the sponsor.

13. Permission to appeal was granted by First-tier Tribunal Judge Lawrence on 10 May 2023. Judge Lawrence said:

> "It is arguable that the Judge materially erred in law by allowing the appeals on grounds that were not available to the Appellants under the Immigration (Citizens' Rights Appeals) (EU Exit) Regulations 2020."

THE HEARING OF THE APPEAL BEFORE ME

14. Mr Lawson adopts the grounds of appeal and submits that on any view, the appellants are not family members of their sponsor as defined in the Immigration (European Economic Area) Regulations 2016 and their applications could not succeed on appeal.

15. In reply, Mr Vokes submits there was a promise made by the respondent on 3 November 2021. The respondent did not simply say that the decisions would be reconsidered, but said that the original decisions were being withdrawn with a view to leave being granted subject to the usual security checks. He accepts there was no concession made at a hearing, but the letter of 3 November 2021 had been provided following advice from a Senior Case Worker. The subsequent decisions to refuse the applications made by the appellant were made upon the same premise and not because of anything revealed as a result of security checks.

16. Mr Vokes submits the over-riding objective requires the Tribunal to consider cases fairly and justly. He refers to Regulation 8(3)(a) of the 2020 Appeal Regulations that provides that an appeal under the Regulations can be brought on the ground that a decision mentioned in Regulation 3(1)(a) or (b) or 5, is not in accordance with the provision of the immigration rules by virtue of which it was made. Furthermore, Regulation 9(4) of the 2020 Appeal Regulations provides that the relevant authority may also consider any matter which it thinks relevant to the substance of the decision appealed against, including a matter arising after the date of the decision. Mr Vokes submits that the judge was entitled to have regard to issues of 'procedural fairness' by reference to the over-riding objective set out in the Tribunal rules.

17. Mr Vokes submits that if the conduct of the respondent to withdraw a decision and reach the same decision again is permitted, appellants and their representatives will be reluctant to agree that the respondent should be permitted to withdraw decisions because the appellant would be left with some considerable uncertainty, with no assurance that the respondent will actually do what is said. He submits the respondent's conduct here has been manifestly unfair and unjust, and it was open to the judge to have regard to what had been said by the respondent previously. The effect of the respondent's decision is that three children of the family are left in Afghanistan, in circumstances where they understood that they would be joining the rest of the family in the UK.

DECISION

18. The entire focus of the judge's findings and conclusions at paragraphs [34] to [47] of his decision is upon the unfortunate background to the appeal and the withdrawal of the respondent's previous decisions dated 30 January 2021. In summary, the judge said at paragraph [33] of his decision that the appellants "withdrew their appeals" against the respondent's decision of January 2021 because of what was said by the respondent in the letter dated 3 November 2021. I pause to note that the appellants had not withdrawn their previous appeals but the appeals were treated by the Tribunal as withdrawn because the respondent had notified the Tribunal that the decisions have been withdrawn "with a view to grant *(sic)* leave, subject to usual security checks". Nothing turns on that.

19. The judge found that the respondent's decision created a 'legitimate expectation' that the appellants would be granted leave and that the respondent had made that decision having considered all the evidence before the respondent, and following consideration by more than one person. AT paragraph [37] the judge said:

> "I find that it is not clear from the Respondent's letter what the basis was for their decision to grant the Appellants leave. It is clear that the Appellant's father was accepted as a family member under EUSS and subsequently their mother was too. It is also not disputed that the Appellants would not fall within the definition of a family member under EUSS, and this was the Respondent's position at that time as well [highlighted]."

20. At paragraph [38] of his decision the judge speculated that it is likely that either both individuals who made the decision had made a mistake as submitted by the Presenting Officer, with respect to the appellants, who are not family members under EUSS, or that discretion was exercised to grant the appellants leave, and there are several reasons why the respondent may have chosen to do this. The judge noted the respondent has not provided any explanation for the apparent change in position. At paragraphs [44] and [45], the judge said:

> "44. For the avoidance of doubt, this appeal has not been allowed under Article 8 of the ECHR – it is clear that consent has not been provided and that in light of Batool and others (other family members: EU exit) [2022] UKUT 00219 the Appellants cannot rely upon the Withdrawal Agreement or the Immigration Rules in order to succeed in an appeal under the Immigration (Citizens' Rights Appeals) (EU Exit) Regulations 2020.
>
> 45. Instead, I find that for the reasons as set out above the Respondent's concession to grant leave should not have been withdrawn because they have failed to address the underlying issue."

21. The judge recites a number of authorities in which the Courts have considered the principles that apply when the respondent seeks to withdraw a concession that is made either in a decision or in the course of an appeal. The authorities that are referred to by the judge demonstrate

the approach taken in different cases, but what is clear is that much will turn on the particular facts and circumstances and there are no all embracing principles.

22. I can see the force in the submissions made by Mr Vokes that appellants may be reluctant to withdraw appeals if the respondent cannot be trusted to act in accordance with any concession made. I accept that where a Presenting Officer makes a concession during the course of the hearing before the FtT or at any prior stage in the appeal before it, it should not normally be open to the Secretary of State at the second appeal stage to seek to withdraw it with no explanation for its having been made.

23. However here, respondent had neither made any concession in the decisions nor during the course of the appeals before the Tribunal. The appeals before the Tribunal were not appeals against the respondent's decision made in January 2021. There is no escaping the fact that those previous decisions had been withdrawn by the respondent and the decisions that were the subject of the appeal before the FtT were the respondent's decisions dated 6 May 2022.

24. The respondent's reasons for refusing the applications on 6 May 2022 were clear. As the judge noted at paragraph [42] of the decision, the appeals were previously adjourned to allow the respondent an opportunity to explain the position. In a response dated 20 January 2023 the respondent maintained the applications were refused on the basis that the appellants' relationship to the sponsor does not come within the definition of 'family member of a relevant EEA citizen'. That was the position maintained by the Presenting Officer throughout the course of the hearing. The appellants have been aware of the case they have to answer throughout, and whilst the previous chronology is unfortunate, the judge was not entitled to entirely disregard the legal framework under which the appeal was to be determined. The question of whether the respondent should be permitted to resile from a concession made, did not therefore arise. In any event, I accept the submission made by Mr Lawson that the use of the words "*with a view to*" granting leave subject to security checks, did not give rise to any legitimate expectation that the appellants were bound to be granted leave to remain. I do not need to enter into a discussion about the law of 'legitimate expectation' in this decision. It is sufficient to say that the appellants are unable to point to any unequivocal promise of a particular outcome.

25. As far as the jurisdiction of the Tribunal is concerned, the EUSS was established pursuant to the EU Withdrawal Agreement to make provision for the continued residence rights of EU citizens and their family members resident in the UK before 11PM on 31 December 2020. The 2020 Regulations were made by the Secretary of State under section 11 of the European Union (Withdrawal Agreement) Act 2020 ("the 2020 Act") to provide for rights of appeal against decisions taken under the EUSS.

26. The 2020 Appeal Regulations provide that appeals against EUSS decisions lie to the First-tier Tribunal. Regulations 8 provides:

> "**8.**—(1) An appeal under these Regulations must be brought on one or both of the following two grounds. *(my emphasis)*
>
> (2) The first ground of appeal is that the decision breaches any right which the appellant has by virtue of—
>
> (a) Chapter 1, or Article 24(2) or 25(2) of Chapter 2, of Title II of Part 2 of the withdrawal agreement,
>
> (b) Chapter 1, or Article 23(2) or 24(2) of Chapter 2, of Title II of Part 2 of the EEA EFTA separation agreement, or
>
> (c) Part 2 of the Swiss citizens' rights agreement(**1**).
>
> (3) The second ground of appeal is that—
>
> (a) where the decision is mentioned in regulation 3(1)(a) or (b) or 5, it is not in accordance with the provision of the immigration rules by virtue of which it was made;
>
> (b) where the decision is mentioned in regulation 3(1)(c) or (d), it is not in accordance with residence scheme immigration rules;
>
> (c)where the decision is mentioned in regulation 4, it is not in accordance with section 76(1) or (2) of the 2002 Act (as the case may be);
>
> (d)where the decision is mentioned in regulation 6, it is not in accordance with section 3(5) or (6) of the 1971 Act (as the case may be).
>
> (4) But this is subject to regulation 9."

27. An appeal to the FtT therefore lies on the basis of one (or both) of two grounds of appeal specified in Regulation 8(2) and (3) of the 2020 Appeal Regulations. There is no free-standing provision for an appellant to rely on human rights-based grounds of appeal but instead permit an appellant to rely on a ground of appeal of a kind listed in section 84 of the 2002 Act, in the circumstances specified by Regulation 9:

> "Matters to be considered by the relevant authority
>
> 9.— (1) If an appellant makes a section 120 statement, the relevant authority must consider any matter raised in that statement which constitutes a specified ground of appeal against the decision appealed against.
>
> For the purposes of this paragraph, a "specified ground of appeal" is a ground of appeal of a kind listed in regulation 8 or section 84 of the 2002 Act.
>
> (2) In this regulation, "section 120 statement" means a statement made under section 120 of the 2002 Act and includes any statement made under that section, as applied by Schedule 1 or 2 to these Regulations.
>
> (3) For the purposes of this regulation, it does not matter whether a section 120 statement is made before or after the appeal under these Regulations is commenced.

(4) The relevant authority may also consider any matter which it thinks relevant to the substance of the decision appealed against, including a matter arising after the date of the decision.

(5) But the relevant authority must not consider a new matter without the consent of the Secretary of State.

(6) A matter is a "new matter" if—

(a) it constitutes a ground of appeal of a kind listed in regulation 8 or section 84 of the 2002 Act, and

(b) the Secretary of State has not previously considered the matter in the context of—

(i) the decision appealed against under these Regulations, or

(ii) a section 120 statement made by the appellant."

28. In summary therefore, Regulation 8(3) of the 2020 Appeal regulations enable an appellant to contend that the decision breaches the rights enjoyed by the appellant under, in the case of paragraph (2), the EU Withdrawal Agreement (or the EFTA or Swiss agreements, as the case may be), and in the case of paragraph (3), the EUSS and other specified domestic primary and secondary legislation. The permitted grounds of appeal under the 2020 Appeal Regulations define and thereby limit the Tribunal's jurisdiction. Regulation 9(4) provides that the tribunal "may also consider any matter which it thinks relevant to the substance of the decision appealed against…". The effect of regulation 9(4) is to anchor the matters which may legitimately be considered by the Tribunal in an appeal to those which are "relevant to the substance of the decision appealed against". Here, the decision to withdraw the previous decision was not 'relevant to the substance of the decision appealed against. The 'substance of the decision' is the criteria by which the requirements of the EUSS are met. To the extent that an EUSS decision does not provide an applicant with their 'hoped-for outcome', as set out in the appellant's grounds of appeal to the FtT, following the withdrawal of a previous decision, that, at best, is an indirect consequence of the EUSS decision. It is not a matter relating to the "substance" of the decision.

29. It follows that in my judgement, the judge had no jurisdiction to allow the appeal for the reasons that he gave. The decision is vitiated by material errors of law and must be set aside.

REMAKING THE DECISION

30. As to disposal, having found that the decision of the FtT involved the making of an error on a point of law, I have set it aside pursuant to section 12(2)(a) of the Tribunals, Courts and Enforcement Act 2007 ('the Act'). I can re-make the decision pursuant to section 12(2)(b)(ii) of the Act. By virtue of section 12(4) of the Act, I may make any decision which the FtT could make if it were re-making the decision and may make such findings of fact I consider appropriate.

31. I am conscious of the Court of Appeal's decision in *AEB v SSHD* [2022] EWCA Civ 1512, *Begum (Remaking or remittal) Bangladesh* [2023] UKUT 00046 (IAC) and §7.2 of the Senior President's Practice Statements. Sub-paragraph (a) deals with where the effect of the error has been to deprive a party before the Tribunal of a fair hearing or other opportunity for that party's case to be put to and considered by the FtT, whereas sub-paragraph (b) directs me to consider whether I am satisfied that the nature or extent of any judicial fact finding which is necessary in order for the decision in the appeal to be re-made.

32. There is no reason why the decision cannot be remade in the Upper Tribunal. The factual background to this appeal is uncontroversial, as is the fact that the appellants are not 'family members' of their sponsor. On a proper application of the law, the outcome of the appeal is therefore inevitable. The appellants are not 'family members' of their sponsor and therefore they do not meet the requirements for an EU Settlement Scheme Family Permit.

33. It follows their appeals are dismissed.

34. As Mr Lawson acknowledged, it remains open to the appellants to make a human rights claim to the Secretary of State based on the particular facts and circumstances of their case. That is a matter for them and their representatives, but as the judge quire properly noted at paragraph [44] of his decision, that was not a matter before the Tribunal.

NOTICE OF DECISION

35. The decision of First-Tier Tribunal Judge Joshi is set aside.

36. The decision is remade in the Upper Tribunal and I dismiss the appellants' appeals.

V. Mandalia
Upper Tribunal Judge Mandalia

Judge of the Upper Tribunal
Immigration and Asylum Chamber

22 February 2024