IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2023-001992
UI-2023-001993
First-tier Tribunal No: EA/11289/2022
EA/11290/2022

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On 2 July 2024

Before

UPPER TRIBUNAL JUDGE KAMARA

Between

MASTER MOHAMMAD SAAD SOHAIL
MISS MINHA SOHAIL
(NO ANONYMITY ORDER MADE**)**

Appellant

and

The Entry Clearance Officer

Respondent

Representation:
For the Appellant: Mr Ahmed, counsel
For the Respondent: Ms Newton, Senior Home Office Presenting Officer

Heard at Manchester Civil Justice Centre on 21 June 2024

DECISION AND REASONS

Introduction

1. The Secretary of State has been granted permission to appeal the decision of First-tier Tribunal Judge Chowdhury which was promulgated on 30 March 2023.

2. However, for ease of reference hereafter the parties will be referred to as they were before the First-tier Tribunal.

3. Permission to appeal was granted by First-tier Tribunal Judge Brewer on 18 May 2023.

Anonymity

4. No anonymity direction was made previously, and there is no reason for one now.

Factual Background

5. The appellants are nationals of Pakistan and are minor siblings. They applied under the European Union Settlement Scheme (EUSS) to join their parents who are the extended family members of an EEA national residing in the United Kingdom. That application was refused by way of a decision dated 31 October 2022. Briefly, the reason for refusal was that the appellants had not provided adequate evidence that they were the family members of an EEA national, their spouse or civil partner.

The decision of the First-tier Tribunal

6. The First-tier Tribunal judge heard evidence from the EEA national sponsor, Mr Amar Mohammad Khan who is also the maternal uncle of the appellants as well as from Mr Sohail Ahmed, the appellants' father. The judge allowed the appeals, finding that the appellants had substantive rights under the Withdrawal Agreement, that they could invoke the concept of proportionality and that the decisions made no mention of Section 55 of the Borders, Citizenship and Immigration Act 2009.

The appeal to the Upper Tribunal

7. The two succinct grounds of appeal are set out below.

GROUND ONE: ALLOWING THE APPEAL CONTRARY TO THE RESTRICTIONS ON AVAILABLE GROUNDS AS THE RELEVANT RULES WERE NOT MET AND NO WITHDRAWAL AGREEMENT RIGHTS EXISTED TO BE BREACHED

As an appeal under the Citizens' Rights Appeals regulations 2020 only two grounds were available – that the decision was not in accordance with Scheme rules or that it breached rights under the Withdrawal Agreements. Neither had any application here: there was simply no provision for a nephew or niece of the relevant EEA national whose admission had not been facilitated under Article 3.2 of the 2004 Directive by way of an application before 11pm 31 December 2020. It does not matter that such an application could not have been made by the second appellant who was not yet born.

For similar reasons, and as explained in the reported Tribunal decision of Batool & Ors (other family members: EU exit) [2022] UKUT 219 (IAC), the appellants could not claim any rights under the Withdrawal Agreements as they simply were not in scope under Article 10. They could not derive such rights from the fact that their parents had successfully had their entry facilitated.

GROUND TWO: REGARD TO IRRELEVANT MATTERS REGARDING THE APPELLANTS' PARENTS APPLICATIONS AND SECTION 55 OF THE 2009 ACT.

Even were Withdrawal Agreement rights in place (contrary to what is said above) Judge Chowdhury has had regard to irrelevant matters in a purported proportionality assessment at paragraphs 15 and 16. It could not have availed the second appellant in any event had the parents' applications been granted earlier and it is speculation that an application by the first appellant would have been made and have succeeded. Moreover section 55 of the 2009 Act has no lease in this situation as it could not change the legal requirements for a successful application by the children.

The ECO seeks an oral hearing if permission is granted and the setting aside of Judge Chowdhury's decision in favour of a remaking recognising that the appeals had no prospect of success on either statutory ground.

8. Permission to appeal was granted on the basis sought, with the judge granting permission making the following remarks.

The grounds of challenge do disclose arguable errors of law. The judge engaged and determined the appeal without considering the ratio in Batool and Ors (other family members: EU exit) [2022] UKUT 219 (IAC), viz extended family members being outside the scope of the Withdrawal agreement.

9. On 22 June 2023, the parties were informed that this appeal was stayed pending the decision of the Court of Appeal in *Celik* [2023] EWCA Civ 921. Following the judgment in *Celik*, Upper Tribunal Judge Macleman issued directions, which expressed his provisional view that the respondent's grounds were bound to succeed and invited the parties to reconsider their positions. The Secretary of State sent a detailed response dated 27 August 2023 in which it was contended that the respondent's appeal should be allowed, and the appellant's appeal dismissed. At no stage has there been any communication from the appellants' representatives in response to directions, albeit the sponsor and the appellants' mother enquired about the progress of the case. In directions issued on 8 December 2023, the parties were invited to agree a consent order pursuant to rule 39 of the Tribunal Procedure (Upper Tribunal) Rules 2008 disposing of the proceedings. On 20 December 2023, KM Solicitors requested a hearing as soon as possible.

The error of law hearing

10. The matter comes before the Upper Tribunal to determine whether the decision contains an error of law and, if it is so concluded, to either re-make the decision or remit the appeal to the First-tier Tribunal to do so. The hearing was attended by both representatives who made submissions and the conclusions below reflect those arguments and submissions where necessary. A bundle of documents was assembled by the Upper Tribunal containing, inter alia, the core documents in the appeal, including the appellant's and respondent's bundles before the First-tier Tribunal.

Discussion

11. Mr Ahmed, with sensitivity to the parents of the appellants who were present at the hearing, stated that he was instructed to do his best and acknowledged that he was in difficulty in defending the decision of the First-tier Tribunal. He made reference to the circumstances of the family and that were it not for the respondent's refusal of the parents' entry clearance applications, the appellants would have been born in the United Kingdom instead of Pakistan.

12. There was no dispute that the judge materially erred in allowing the appellants' appeals. They sought entry clearance as the family member of a relevant citizen despite being the niece and nephew and as such extended family members of the EEA sponsor.

13. The First-tier Tribunal judge acknowledged that the EUSS rules were not met at [4] but nonetheless allowed the appeal, finding that the appellants had substantive rights under the Withdrawal Agreement [14]. No reasoning was

provided for this finding nor the subsequent finding that the decision to refuse entry was disproportionate and did not take account of section 55 of the Borders, Citizenship and Immigration Act 2009.

14. The judge's conclusion that there was 'no reason' why entry should not be granted is unreasoned and does not explain under what provision entry should be granted. To be fair, Mr Ahmed did not attempt to defend any of these findings.

15. The judge materially erred in finding that the appellants met the scheme rules where no provision was made in the Rules for extended family members whose admission had not been facilitated under Article 3.2 of the 2004 Directive before the relevant date.

16. Applying *Batool & Ors* (other family members: EU exit) [2022] UKUT 219 (IAC), the appellants have no rights under the Withdrawal Agreements as they simply were not in scope under Article 10.

17. While it is devastating for the parents to be separated from their young children, the appellants' interests would have been better served by way of a human rights application. It follows that there was no basis for allowing this appeal under the Scheme Rules and therefore the decision is set aside with no preserved findings.

18. In terms of remaking the decision, both representatives were content for this to be undertaken immediately at the Upper Tribunal. In response to Mr Ahmed's query, Ms Newton stated that the Secertary of State did not consent to Article 8 being raised. Thereafter the parties invited me to arrive at a decision on the basis of the submissions already made.

19. I heard no submissions as to why these appeals ought to be allowed. Therefore, for the reasons rehearsed above, given the appellants were unable to satisfy the Scheme Rules, I have no option but to dismiss their appeals.

Notice of Decision

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

I set aside the decision to be re-made.

I substitute a decision dismissing the appeal on the basis that the Secretary of State's decision was in accordance with the EUSS Rules.

T Kamara

Judge of the Upper Tribunal
Immigration and Asylum Chamber

26 June 2024