IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2023-002211
First-tier Tribunal No:
EA/12605/2022

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On the 07 August 2024

Before

UPPER TRIBUNAL JUDGE KEBEDE

Between

HAMZA ASIM KHAN

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr A Alam, instructed by Solicitors Inn
For the Respondent: Mr T Melvin, Senior Home Office Presenting Officer

Heard at Field House on 30 July 2024

DECISION AND REASONS

1. The appellant is a citizen of Pakistan born on 9 October 2001. He appeals, with permission, against the decision of the First-tier Tribunal dismissing his appeal against the respondent's decision to refuse his application for an EU Settlement Scheme (EUSS) Family Permit.

2. The appellant made his application for an EUSS Family Permit on 2 September 2022 on the basis of being a family member of a relevant EEA citizen, namely his uncle, a German national with pre-settled status in the UK. His application was refused on 1 December 2022 on the grounds that he had not provided adequate evidence to prove that he was a family member of a relevant EEA national since his relationship to the sponsor did not come within the definition of 'family member of a relevant EEA citizen' as stated in Appendix EU (Family Permit) to the Immigration Rules.

3. The appellant appealed against that decision. His appeal was heard by First-tier Tribunal Judge Malcolm on 29 March 2023 and was dismissed in a decision promulgated on 25 April 2023. The respondent was not represented before the judge but Mr Alam attended for the appellant. The judge heard from the appellant's sponsor, his uncle, and from his mother. The appellant's evidence before the judge, in a statement provided in his appeal bundle, was that he had previously submitted an application for an EEA family permit on 4 December 2020 but that he had been unable to provide his biometrics because of the visa application centre in Cyprus, where he was living and studying, having closed due to covid. His application was therefore not processed and he was advised by the Home Office, he claimed, that he could make another application with the reference of the earlier application. The appellant stated that he was dependent upon his uncle, his father having passed away. The sponsor confirmed that the appellant was the son of his brother and was financially dependent upon him, and stated that the appellant's mother and sister had been granted family permits and were residing with him in the UK and were also dependent upon him.

4. On behalf of the appellant it was argued that the application of September 2022 should be treated as though made on 4 December 2020 or alternatively treated as a variation of the December 2020 application and that, since it was expressly made as an extended family member, the Withdrawal Agreement was directly relevant, with specific reference to Article 18(e) and 18(r). It was also argued that Article 8 had been raised in the cover letter to the appellant's application and that Article 8 was therefore not a new matter and could be considered on the basis of the appellant's family life with his mother and sister and with his uncle who had stepped into the role of his father.

5. Judge Malcolm did not accept the argument made on behalf of the appellant that the December 2020 had not been officially invalidated and did not accept that the September 2022 should be treated as having been lodged in December 2020 or as being a variation of the December 2020 application. The judge considered, therefore, that the application had been made in September 2022, after the end of the transition period and that the appellant could not succeed under the immigration rules. With regard to Article 8, the judge did not consider that the family ties were anything other than those normally expected between adult children and a parent or uncle and that Article 8 was therefore not engaged on family life grounds The judge accordingly dismissed the appeal under the immigration rules and on human rights grounds.

6. The appellant sought permission to appeal to the Upper Tribunal on two grounds: firstly, that the judge had failed to consider whether Article 18(d) was applicable and that she had failed to make clear findings with respect to Article 18(e) and (d) of the Withdrawal Agreement; and secondly, that the judge had failed to make adequate findings with respect to Article 8.

7. Permission was granted on all grounds, but with particular reference to ground one.

8. The respondent filed and served a rule 24 response opposing the appeal and relying upon Celik (EU exit, marriage, human rights) [2022] UKUT 220.

9. The appeal was stayed awaiting the judgement of the Court of appeal in Celik v Secretary of State for the Home Department [2023] EWCA Civ 921. Judgement was given in Celik on 31 July 2023.

10.On 7 February 2024 directions were issued by Upper Tribunal Judge Macleman in the appellant's case, as follows:

"DIRECTIONS

1. FtT Judge Galloway granted permission on 5 June 2023. The SSHD responded on 12 July 2023.

2. On 31 July 2023, the Court of Appeal gave its judgement in Celik [2023] EWCA Civ 921.

3. Parties are required to reconsider, in light of that judgment.

4. If the appellant elects to withdraw, he is invited to send the UT written notice under rule 17 of the TP (UT) Rules 2008 within 21 days of the date these directions are sent.

5. If he elects to continue, he must provide the UT and the respondent with amended grounds, within the same time.

6. If there is no response to directions, or of the UT otherwise considers it appropriate, the appeal will be listed for disposal on notice to the parties after the expiry of that time."

11.In the absence of a response by the appellant to the directions within the time limit stated, the matter was listed for disposal.

12.The appellant subsequently, and outside the time limits stated in the directions, on 26 July 2024, filed and served an appeal bundle containing amended grounds. The amended grounds were in the same terms as the initial grounds.

13.The matter then came before me. Both parties made submissions.

14.Mr Alam said that he was not pursuing the first ground, although he was not conceding the ground. His submissions therefore focussed on the second ground in relation to Article 8. He submitted that the judge was entitled to consider Article 8 because it had been specifically mentioned in the covering letter to the application and the respondent had not sought to challenge the fact that consent was considered to have been given. He submitted that there was a complex factual matrix which included the fact that the appellant was dependant upon his uncle, that his father had passed away, that his mother and sister were already in the UK as dependants of the sponsor following a successful application for a family permit under the EEA Regulations, that the appellant had applied under the 2016 Regulations but had been unable to register his biometrics due to covid and had been invited by the Home Office to make another application, that the appellant's mother was from Bangladesh and had previously been living in Kuwait with the appellant until he went to Cyprus to study, that the appellant's family were all in the UK, and that the appellant's studies had been financed by the sponsor. Mr Alam submitted that the judge had failed to grapple with that set of facts and had failed to consider that if the appellant had been able to comply with the biometrics he would have succeeded in his application as a dependent of his uncle. The judge's findings on Article 8 failed to take account of those circumstances and were inadequate. Mr Alam submitted that this was similar to the 'historic injustice' cases in that family life could not be considered to be extinguished merely by the fact that the appellant had been away from his family for two years. Mr Alam asked that the judge's decision be set aside and that the matter be re-made at a resumed hearing with further evidence to be submitted.

15.Mr Melvin submitted that Article 8 was a new matter for which consent was required but had not been given. The judge was therefore not entitled to look at Article 8. Alternatively, the findings made were adequate. The appellant can make an Article 8 application rather than seeking to argue Article 8 through the back door.

16.Mr Alam, in response, reiterated the points previously made.

Analysis

17.Although Mr Alam did not concede the first ground, he made it clear that he was not pursuing the arguments made with reference to the Withdrawal Agreement. He

was right not to do so. The appellant clearly cannot succeed in his case relying upon the Withdrawal Agreement in light of the findings in Celik and Batool & Ors (other family members: EU exit) [2022] UKUT 219. The appellant's application was properly found by Judge Malcolm to have been made on 2 September 2022, after the specified date of 31 December 2020, and he therefore could not rely upon the EEA Regulations 2016 which no longer existed. He clearly was not a 'family member of a relevant EEA citizen', his relationship with his uncle not falling within the definition of 'family member' for the purposes of Appendix EU (Family Permit), and he could not succeed under the EUSS. Celik and Batool made it clear that Article 18 of the Withdrawal Agreement did not change that position nor provide for an argument on proportionality in circumstances such as the appellant's. Judge Malcolm was accordingly perfectly entitled to conclude that the appellant could not meet the requirements of the immigration rules in Appendix EU (Family Permit).

18. Mr Alam's focus was on the second ground of appeal which relied upon Article 8 and challenged the judge's findings in that regard. It is of note that, whilst not specifically excluded, permission was not granted on that basis. That is because there is clearly no arguable merit in that ground. Although Article 8 was referred to in the covering letter to the appellant's application for a family permit, it was only in the context of the EEA Regulations 2016 which, in any event, did not apply. There was no application made on the basis of the appellant's family life. The application made by the appellant was for an EUSS family permit. That was the application considered and refused by the respondent. The refusal decision did not refer to Article 8. It did not accept, either directly or by implication, that an Article 8 claim had been made. The appellant's appeal against the respondent's decision was made under the Immigration (Citizens Rights Appeals) (EU Exit) Regulations 2020 which did not include a ground of appeal on Article 8 grounds. There was therefore no Article 8 claim or appeal before the judge and neither was any consent given for such a matter to be considered. That was made clear by the Upper Tribunal at [87] to [97] of the decision in Celik, with reference to Regulation 9 of the 2020 Regulations. The fact that the respondent was not represented at the hearing did not provide any implied consent to the matter being considered. Accordingly the judge ought not to have even entertained any arguments under Article 8 and the challenge to the findings that she did make are therefore of no relevance or materiality.

19. In the circumstances the judge was entitled to make the decision that she did and properly dismissed the appeal. That was the correct decision as a matter of law and on the basis of the evidence available. Her decision to dismiss the appellant's appeal on all grounds is therefore upheld.

Notice of Decision

20. The making of the decision of the First-tier Tribunal did not involve a material error on a point of law requiring it to be set aside. The decision to dismiss the appeal stands.

Signed: S Kebede
Upper Tribunal Judge Kebede

Judge of the Upper Tribunal
Immigration and Asylum Chamber

Dated: 31 July 2024