IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2023-002474

First-tier Tribunal No: EA/01343/2023

THE IMMIGRATION ACTS

Decision & Reasons Issued:

24th January 2024

Before

UPPER TRIBUNAL JUDGE MANDALIA
DEPUTY UPPER TRIBUNAL JUDGE SHEPHERD

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

And

SIFAT KAUR
(NO ANONYMITY ORDER MADE)

Respondent

Representation:
For the Appellant: Mr Lawson, Senior Home Office Presenting Officer
For the Respondents: The Appellant's mother appeared without legal representation

Heard at Birmingham Civil Justice Centre on 16 January 2024

DECISION AND REASONS

Background

1. To avoid confusion, we shall refer to the parties as they were before the First-tier Tribunal i.e. to Sifat Kaur as the Appellant and the Secretary of State of the Home Department as the Respondent.

2. This matter concerns an appeal against the Respondent's decision letter of 2 February 2023, refusing the Appellant's application made under the EU settlement scheme (EUSS).

3. The Appellant is a national of India born on 7 December 2020. Her claim is made on the basis that she is a family member of an EEA national under the EUSS. Her mother and sister moved to the UK in June 2019 and obtained pre-

settled status as the dependent family members of her mother's brother-in-law, an Italian national. The Appellant's father is said to be Mr Dharminder Singh, an Indian national. The Appellant's mother claims that her relationship with the Appellant's father has ended. The mother works but still relies on her brother-in-law's financial support and also now receives benefits; the Appellant is therefore also supported by the mother's brother-in-law, her uncle.

4. The Respondent refused the Appellant's claim on the basis that she had not proved, pursuant to rules EU11 and EU14 of the EUSS, that she is a dependent relative of her sponsor or that she held a valid relevant document, required by the rules.

5. The appeal was determined by First-tier Tribunal Judge Groom ("the Judge") on the papers and she allowed the appeal in her decision promulgated on 23 May 2023.

6. The Respondent applied to the First-tier Tribunal for permission to appeal to this Tribunal on the grounds that the Judge had materially misdirected herself in law because:

(a) She has regard to irrelevant matters. The only available ground of appeal was that the decision was not in accordance with EUSS rules. A regulation 8(2) Extended Family Member, where there had been no facilitation under Article 3.2a of the 2004 Directive, was not in scope of the Withdrawal Agreement or the EUSS. This concept was well established in Batool and others (other family members: EU exit) [2022] UKUT 00219 (IAC) to which the Judge makes no reference.

(b) Questions of section 55 best interests and of other relatives having pre-settled status are legally irrelevant to the appeal; where those relatives were reliant on an extended family member relationship their stay had previously been facilitated by the issue of an EEA Family Permit; the Appellant's had not.

(c) Any policy suggesting that non-EEA national children born to a non-EEA national parent – even if such a policy existed – could not avail the Appellant unless it was contained within the rules.

7. Permission to appeal was refused by First-tier Tribunal Judge Moon on 20 June 2023, mistakenly referring to the sponsor as being the Appellant's mother, rather than her uncle.

8. The Respondent renewed the application for permission to appeal on the same grounds, adding that the Appellant does not qualify under the EUSS because she is the niece of an EEA national, and not a direct family member as required under Appendix EU; thus her presence in the UK needed to have been facilitated via a successful pre-31/12/20 application for a residence card.

9. Permission to appeal was granted by Upper Tribunal Judge Reeds on 8 August 2023, stating:

> "1. It is arguable that the FtTJ erred in law by failing to consider the status of the appellant under Appendix EU when allowing the appeal as the respondent's grounds set out. The appellant's sponsor's (mother) was a non-EEA citizen whose own pre-settled status was facilitated through a family permit and there was no evidence

> that the appellant had been facilitated through the issuance of a family permit. The matters set out in the FtTJ's decision may be human rights considerations but arguably were not relevant under Appendix EU."

10. The Appellant did not file a response to the appeal.

The Hearing

11. The matter came before us for hearing on 16 January 2024 in Birmingham to determine whether the decision of the Judge is infected by a material error of law, and if so, to remake the decision.

12. The Appellant was represented by her mother, Mandeep Kaur, who appeared alone. She was assisted by an interpreter Mr P. Singh speaking Punjabi, whom Mrs Kaur confirmed she understood.

13. As Mrs Kaur did not have the assistance of legal representation, we took great care to explain the nature of the hearing as one concerned with the question of error of law rather than being an opportunity for her to re-argue the Appellant's case as was before the First-tier Tribunal.

14. Mr Lawson explained in simple terms, why the Judge's decision should not stand. He said the Appellant does not qualify as a family member. She is the niece of the EEA national. Whilst her mother and elder sister were granted leave to enter the UK on a family permit, the Appellant was born in the UK and at no time had a family permit been issued to the Appellant. Under the EUSS, there is no facility for extended family members to be granted pre-settled status. There is also no ability to rely on human rights or children's best interests considerations in EUSS cases following recent case authorities. However, it was open to the Appellant to make a human rights application which would likely be the best route for her to follow.

15. Mrs Kaur responded to refer only to the Appellant's situation and did not make any submissions as to why the Judge's decision should stand.

16. We rose for a short while to consider the matter; on return Judge Mandalia gave a short extempore judgement to the effect that we are satisfied that there is a material error of law in the decision of the Judge so that it must be sat aside. He explained that we remake the decision, and dismiss the Appellant's appeal. In summary, the Appellant cannot meet the eligibility requirements for indefinite leave to enter or remain as the family member of a relevant EEA Citizen as defined in Appendix EU. Her application under the EU Settlement Scheme cannot therefore succeed.

17. We said we would provide full reasons for our decision in writing, which we now do.

Discussion and Findings

18. We remind ourselves of the important guidance handed down by the Court of Appeal that an appellate court must not interfere in a decision of a judge below without good reason. The power of the Upper Tribunal to set aside a decision of the First-tier Tribunal and to proceed to remake the decision only arises in law, if it is found that the tribunal below has made a genuine error of law that is material to the outcome of the appeal.

19. The Judge's decision is brief. Whilst brevity is often to be lauded, it must not be at the expense of sufficient explanation and reasoning (see, for example, the headnote of MK (duty to give reasons) Pakistan [2013] UKUT 00641 (IAC), including as to the origin of the point or evidence on which findings are based so as to avoid both confusion and further dispute in any onward appeal.

20. No challenge has been brought against the Judge's description of the background or burden and standard of proof applied. The Judge does not specifically refer to the relevant legislative provisions and only says in [6] that:

> "The Respondent has referred to the relevant regulations in the correspondence to the Appellant".

21. She repeats this at [14].

22. The Judge's findings are contained in [13]-[24] and appear to be as follows:

(a) The Respondent does not refer in the Refusal Letter to the Appellant being a 2-year-old child or to her mother and elder sister having pre settled status [15][16]; nor does he refer to carrying out a section 55 consideration regarding the best interests of the Appellant who is a child under the age of 18 in the UK [17] [18].

(b) The Respondent has not challenged the evidence that the Appellant has been living with her mother and sister in the UK since birth such that she was here prior to the specified date and was born to a parent who had subsisting pre-settled status [19][20].

(c) It is the government's policy that if a person has pre settled status, any children born in the UK will be eligible for pre settled status [21].

(d) It is in the Appellant's best interests to remain with her mother and elder sister in the UK, both of whom have pre-settled status [22].

(e) The Appellant has discharged the burden of proof and the reasons given by the Respondent do not justify the refusal in these circumstances [23].

23. As can be seen, there is no reference to which part(s) of the EUSS are applicable to the Appellant nor why she is found to meet them. There is no analysis of the relationship between the Appellant and her Sponsor. There is no analysis of whether the Appellant had a relevant document facilitating her presence in the UK as was required by the EUSS. The Judge does not state the government policy that she refers to, and we cannot see that any such policy was in evidence before her.

24. We agree with the grounds of appeal that the Judge errs in law in having regard to irrelevant matters.

25. Paragraph 93 of Batool and others (other family members: EU exit) [2022] UKUT 00219 (IAC) confirms that, since a refusal decision under the EUSS is not concerned with human rights issues, a human rights claim raised within an appeal concerning the EUSS cannot be dealt with unless the Respondent has given consent to it being raised. There is no evidence that any such consent has been granted here.

26. Paragraph 87 of Batool also states that

> "Article 24 of the EU Charter concerns the rights of the child. Article 24.1 is irrelevant in the present context. Article 24.2, which requires a child's best interests to be a primary consideration in all actions relating to children, broadly corresponds with section 55 of the Borders, Citizenship and Immigration Act 2009, insofar as the respondent is concerned. The appellants have, however, failed to explain how the respondent's decisions under EUSS (FP) could conceivably have been different, merely because the appellants were children; still less how section 55 can be a material factor in an appeal brought under the 2020 Appeal Regulations (leaving aside the issue of human rights, discussed above)".

27. On this basis, insofar as the Judge considers arguments concerning human rights or the best interests of the Appellant as a child in the UK, she erred by having regard to irrelevant matters.

28. Otherwise, the Judge has not addressed the issues in dispute at all which is a further error.

29. These are errors which are material given that, had the Judge properly addressed her mind to the issues and correct legislative provisions against the evidence before her, she would likely not have reached the same decision. It is for these reasons that we set the Judge's decision aside.

30. Given the narrowness of the issue under appeal, and the fact that in light of Batool (amongst other things which we discuss below), the Appellant's appeal could not succeed, we consider it appropriate to proceed to remake the decision without hearing any further evidence or submissions. This we now do.

31. There has been no challenge to the credibility of any of the witness evidence such that we accept its contents. The Appellant was born in the UK on 7 December 2022 to her mother, Mandeep Kaur who is an Indian national. The Appellant's father is Darminder Singh, an Indian national who is no longer present in Mrs Kaur or the Appellant's life. Mrs Kaur originally came to the UK with her daughter Keerat Kaur in June 2019 as family members dependent on Mrs Kaur's sister Sandeep Kaur, and brother-in-law, Harvinder Singh, both of whom are Italian nationals. Mrs Kaur and Keerat initially lived with, and were financially supported by, Sandeep and Harvinder, but moved out due to the number of people living in the house. After Mrs Kaur met and commenced a relationship with Darminder Singh, she and Keerat moved to Birmingham to be with him. Mrs Kaur fell pregnant and the Appellant was born. Mr Singh left shortly after the birth. Mrs Kaur and Keerat continue to have pre-settled status and continue to rely on the brother-in-law for financial support, although Mrs Kaur now also receives universal credit and has a part-time job.

32. We have already set out the relevant dates and contents of the Appellant's application made on 8 December 2022 and Refusal Letter of 2 February 2023.

33. The Appellant's application and Refusal Letter were both made after the end of the transitional period following Britain's exit from the European Union, which ended at 11pm on 31 December 2020.

34. The basis of the Appellant's appeal is under The Immigration (Citizens' Rights Appeals) (EU Exit) Regulations 2020. The right of appeal is provided for at Regulation 3, which provides:

> "3 –(1) A person ("P") may appeal against a decision made on or after exit day –
>
> …
>
> (c) not to grant any leave to enter or remain in the United Kingdom in response to P's relevant application, or
>
> (d) not to grant indefinite leave to enter or remain in the United Kingdom in response to P's relevant application (where limited leave to enter or remain is granted, or P had limited leave to enter or remain where P made the relevant application).
>
> (2) In this regulation, "relevant application" means an application for leave to enter or remain in the United Kingdom made under residence scheme immigration rules on or after exit day".

35. The grounds upon which the appeal may be brought are found at Regulation 8, which states:

> "8. – (1) An appeal under these Regulations must be brought on one or both of the following two grounds.
>
> (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
>
> ….
>
> (3) The second ground of appeal is that –
>
> (a) …
>
> (b) where the decision is mentioned in Regulation 3(1)(c) or (d), it is not in accordance with residence scheme Immigration Rules.
>
> …"

36. The term "residence scheme immigration rules" is not defined within the above regulations. It is defined at section 17 of the European Union (Withdrawal Agreement) Act 2020, which states:

> "Interpretation: Part 3
>
> (1) In this Part, "residence scheme immigration rules" means—
>
> (a) Appendix EU to the immigration rules except those rules, or changes to that Appendix, which are identified in the immigration rules as not having effect in connection with the residence scheme that operates in connection with the withdrawal of the United Kingdom from the EU, and
>
> (b) any other immigration rules which are identified in the immigration rules as having effect in connection with the withdrawal of the United Kingdom from the EU.
>
> (2) In this Part, "relevant entry clearance immigration rules" means any immigration rules which are identified in the immigration rules as having effect in connection

with the granting of entry clearance for the purposes of acquiring leave to enter or remain in the United Kingdom by virtue of residence scheme immigration rules.

(3) In this Part, reference to having leave to enter or remain in the United Kingdom granted by virtue of residence scheme immigration rules include references to having such leave granted by virtue of those rules before this section comes into force".

37. The relevant parts of Appendix EU are EU11 and EU14, which we do not propose to set out in full here. Suffice to say, for either rule, the Appellant needs to meet the definition of 'family member of a relevant EEA citizen' contained in Annex 1 of Appendix EU. This states that a "family member of a relevant EEA citizen" is:

> "a person who does not meet the definition of 'joining family member of a relevant sponsor' in this table, and who has satisfied the Secretary of State, including by the required evidence of family relationship, that they are …
>
> (a) the spouse or civil partner of a relevant EEA citizen, …
>
> (b) the durable partner of a relevant EEA citizen…
>
> (c) the child or dependent parent of a relevant EEA citizen…
>
> (d) the child or dependent parent of the spouse or civil partner of a relevant EEA citizen … or
>
> (e) the dependent relative, before the specified date, of a relevant EEA citizen (or of their spouse or civil partner …"

38. The Appellant, being the niece of the relevant EEA citizen, potentially falls within (e).

39. The definition of "dependent relative" requires the Appellant to be a person who is (our emphasis in bold):

> "(a)
>
> (i)
>
> (aa) is a relative (other than a spouse, civil partner, durable partner, child or dependent parent) of their sponsoring person; and
>
> (bb) is, or (as the case may be) for the relevant period was, a dependant of the sponsoring person, a member of their household or in strict need of their personal care on serious health grounds; or
>
> (ii) is a person who is subject to a non-adoptive legal guardianship order in favour (solely or jointly with another party) of their sponsoring person; or
>
> (iii) is a person under the age of 18 years … who:
>
> (aa) is the direct descendant of the durable partner of their sponsoring person; or
>
> (bb) has been adopted by the durable partner of their sponsoring person, in accordance with a relevant adoption decision; **and**

> (b) **holds a relevant document** as the dependent relative of their sponsoring person for the period of residence relied upon …

40. We do not propose to set out the definition of 'relevant document' here as it is lengthy. Suffice to say that, in agreement with the Refusal Letter, there is no evidence that the Appellant holds any document which would meet the definition.

41. It follows that the Appellant is not a 'family member of a relevant EEA citizen' and does not fall within the scope of Appendix EU.

42. In addition, the case of Batool (full citation set out above) confirms that:

> "(1) An extended (oka other) family member whose entry and residence was not being facilitated by the United Kingdom before 11pm GMT on 31 December 2020 and who had not applied for facilitation of entry and residence before that time, 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.
>
> (2) Such a person has no right to have any application they have made for settlement as a family member treated as an application for facilitation and residence as an extended/other family member".

43. There is no evidence that the Appellant had applied for facilitation of residence prior to 31 December 2020.

44. As already found, also based on Batool, there is no scope for us considering arguments concerning human rights or the best interests of the Appellant as a child in the UK under section 55 of the Borders, Citizenship and Immigration Act 2009.

45. There is therefore no basis on which the Appellant's application can succeed and her appeal must be dismissed.

Notice of Decision

1. The decision of the First-tier Tribunal involved the making of an error of law and we set it aside.

2. We remake the decision, dismissing the Appellant's appeal.

3. No anonymity order is made.

L. Shepherd
Deputy Judge of the Upper Tribunal
Immigration and Asylum Chamber
23 January 2024