IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2023-004441

First-tier Tribunal No: EA/11655/2022

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On 7th of March 2024

Before

UPPER TRIBUNAL JUDGE KAMARA
UPPER TRIBUNAL JUDGE RIMINGTON

Between

NM
(ANONYMITY ORDER MADE)

Appellant

and

ENTRY CLEARANCE OFFICER

Respondent

Representation:
For the Appellant: Mr G. Ó Ceallaigh, counsel instructed by Ata & Co Solicitors
For the Respondent: Mr E Tufan, Senior Home Office Presenting Officer

Heard at Field House on 9 February 2024

Order Regarding Anonymity

Pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008, the appellant and/or any member of their family is granted anonymity. No-one shall publish or reveal any information, including the name or address of the appellant, likely to lead members of the public to identify the appellant and/or their family member. Failure to comply with this order could amount to a contempt of court.

DECISION AND REASONS

Introduction

1. The Secretary of State has been granted permission to appeal the decision of a panel of the First-tier Tribunal which was promulgated on 31 July 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 Upper Tribunal Judge Kebede on 10 November 2023.

Anonymity

4. An anonymity direction was made previously and is maintained because the appellant could be put at risk in her current location were she to be identified.

Factual Background

5. The appellant is a national of Afghanistan who was a journalist until she was evacuated to Pakistan during September 2021 where she was granted a temporary visa of 60 days duration. The appellant's parents left Afghanistan in 2019 and ultimately entered the United Kingdom under the European Union Settlement Scheme (EUSS) in 2021. The appellant's sister is an EEA national residing in the United Kingdom with Settled Status and has been supporting the appellant financially.

6. On 22 June 2022, the appellant made an application under the EUSS to join her family in the United Kingdom. That family consists of her sponsoring sister, her mother and two other siblings. The appellant's father sadly died in 2022. Representations made on the appellant's behalf in a letter dated 6 July 2022 acknowledged that she could not meet the requirements of the EUSS but requested that she be granted leave to enter based on exceptional circumstances. Those circumstances being that the appellant had always been dependent upon her family, that she was alone in Pakistan and that she was eligible for the Afghan Citizens Resettlement Scheme under categories A (woman) and B (journalist). Reference was also made to the Adult Dependent Relative Rules, Appendix FM-SE and to the appellant's rights under Article 8 ECHR

7. The respondent's decision dated 15 November 2022, refusing the application of 6 July 2022 made no reference to human rights and provided the following reasons.

> Your application has been refused because you have not provided adequate evidence to prove that you are a 'family member' - (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 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.

The decision of the First-tier Tribunal

8. The appellant appealed to the First-tier Tribunal on the basis that the respondent's decision was unlawful on Article 8 ECHR grounds. The appeal was allowed on the said basis, the First-tier Tribunal accepting the submission that it had jurisdiction to consider human rights grounds notwithstanding the respondent declining to consent to Article 8 being raised as a new matter. The

panel distinguished appellant's case from that of the claimant in *MY* (Pakistan) [2021] EWCA Civ 1500.

The grounds of appeal

9. The Secretary of State's grounds of appeal are set out in full below.

GROUND ONE: FAILURE TO FOLLOW BINDING AUTHORITY – MY PAKISTAN The Tribunal erred in holding that the making of a human rights claim rather than the explicit refusal of one (and notification of a right of appeal) served to provide the Tribunal with jurisdiction to bypass the new matter provisions. As is plain from the Court of Appeal decision in MY (Pakistan), it is the action of refusing a human rights claim which generates an appealable decision. It is perverse to suggest that complete silence on the issue, a complete failure to give reasons or to notify the relevant appeal right under section 82(1)(b) of the 2002 Act could possibly have constituted making a decision en passant. Nor did the Tribunal explain how its analysis supported its jurisdiction to consider a human rights ground in a Citizens' Right appeal given the ratio of Batool et al. At its very highest, the Tribunal had discovered an outstanding human rights claim which awaited a decision.

GROUND TWO: PROCEDURAL UNFAIRNESS: CONSTITUTION WITHOUT NOTICE OF A SECTION 82(1)(b) APPEAL By analogy, the Tribunal also acted procedurally unfairly insofar as it purported to deal with human rights in respect of a ground in a non-existent section 82(1)(b) appeal which had neither been filed or listed for hearing. The preliminary ruling was incorrect insofar as it claimed that the issue was at large by way either of a decision by inaction or of a manoeuvring into place of a "jurisdiction" to consider the issue without consent.

GROUND THREE: IMPROPER CONSIDERATION WITHOUT CONSENT OF A PRIMA FACIE NEW MATTER For completeness, it is repeated that the Tribunal had no locus to consider human rights as a ground brought in respect of the EUSS Family Permit refusal. It was manifestly a "new matter" and not a ground available under regulation 8 of the 2020 Regulations.

10. On 10 November 2023, permission to appeal was granted on the basis sought, with the judge making the following remarks.

> It is arguable, given that this was an appeal under the Citizens' Rights Appeals (EU Exit) Regulations 2020, with the only rights of appeal being that the decision was not in accordance with the EUSS Family Permit Rules or that it breached any rights under the Withdrawal Agreement, that the Tribunal did not have jurisdiction to consider Article 8 without the consent of the Secretary of State. Arguably the judge erred by assuming jurisdiction to consider Article 8 when no such jurisdiction existed.

11. The appellant made an application for an expedited hearing which was supported by Steve Reed MP owing to the appellant' declining mental state and insecure circumstances in Pakistan.

12. The Upper Tribunal made directions for the Secretary of State, as the party granted permission to appeal, to provide a composite electronic bundle ten working days before 9 February 2024 which was compliant with the Guidance on the Format of Electronic Bundles in the Upper Tribunal (IAC). A compliant bundle was not provided until 7 February 2024.

13. A skeleton argument was filed on behalf of the appellant on 6 February 2024 which raised broadly the same issues which were successfully argued before the First-tier Tribunal.

14. On 7 February 2024, the respondent filed a skeleton argument which included an application for an extension of time. We set out the arguments in support of the appeal in full here.

> The Secretary of State's position had been that such an appeal could not be argued on a human rights ground without consent as explained by this Tribunal in Celik.
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> The panel sought to circumvent this restriction by finding that the application had incorporated a human rights claim and that the refusal decision was a refusal of that claim, carrying a right of appeal under section 82(1)(b) and removing any need for consent as a new matter under regulation 9(4) and (5) as it was a live ground – indeed the only available ground – in the section 82 appeal.
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> The grounds to this Tribunal protest that the panel's approach offended against binding authority of the Court of Appeal on when a human rights decision had been made; was procedurally unfair in constituting a section 82(1)(b) appeal and listing it without notice; and that as per the Secretary of State's adopted line human rights were not arguable without consent.
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> The binding authority in question is MY (Pakistan) v Secretary of State for the Home Department [2021] EWCA Civ 1500, which although it concerned an application for leave to remain under the Domestic Violence provisions was squarely on point as to when a section 82(1)(b) appeal existed. This was not if an application could have been considered to be a human rights claim, but whether the decision-maker had treated as such a claim and refused it as such. See paragraph 44.
>
> This did not happen here. It was entirely clear that the ECO considered only the requirements of Appendix EU. It cannot be said that an application under Appendix EU (Family Permit) inherently involved an assertion of a breach of protected human rights.
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> Absent a refusal of a human rights claim, there could have been no section 82(1)(b) appeal. It is, moreover, apparent that the Tribunal did not admit a section 82(1)(b) appeal in that no "HU" reference was created or notified. It was thus procedurally unfair to proceed with a section 82(1)(b) appeal even if one existed. The proper course on identifying that a human rights claim had been made would have been to return it to the ECO for decision, properly generating an appealable refusal of a human rights claim in the event of a negative decision.

The error of law hearing

15. When this matter came before us, Mr Ó Ceallaigh submitted an amended skeleton argument, an authorities' bundle, as well as a copy of the letter dated 6 July 2022 which accompanied the appellant's application for leave to enter the United Kingdom.

16. Thereafter, we heard succinct submissions from the representatives which were in line with their written arguments.

17. At the end of the hearing, we reserved our decision.

Decision on error of law

18. Overarching the three grounds is the issue of whether the First-tier Tribunal was correct in considering that it had jurisdiction to consider the appellant's human rights claim.

19. The first point made in the Secretary of State's grounds is that the First-tier Tribunal failed to follow the binding authority of *MY* in its decision and reasons dated 31 July 2023.

20. The decision on jurisdiction was issued on 19 June 2023, following a hearing which took place on 13 June 2023. In response to an application to adjourn the substantive hearing of the appeal, the panel revisited the issue at [10-18]. We find that the panel carefully considered *MY* and provided sound reasons for concluding that the appellant's circumstances could be distinguished from that of the claimant in *MY*.

21. We find that the panel rightly took into consideration at [15] that the claimant in *MY* was an in-country applicant seeking leave to remain as a victim of domestic violence under DVILR of Appendix FM and who was also seeking to rely on human rights. At [16] the panel correctly noted that an application under DVILR did not involve an inherent human rights claim, that the refusal of that claim did not amount to a refusal of a human rights claim and that the remedy for such an applicant was to make a human rights claim using a specified form.

22. Indeed paragraphs 16 and 17 of *MY* explain precisely why there is no human rights claim in a DVILR application as follows:

> 16. However, the essential point underlying the Appellant's claim is that the Secretary of State does not regard applications by victims of domestic violence (or bereaved partners) as "human rights applications" in the sense explained in the previous paragraph: that is, she does not regard them as inherently involving a human rights claim in the same way as an application on the other bases covered by Appendix FM. That is apparent from the Appeals Guidance, but it is also explicitly reflected in Appendix FM itself. The relevant provision is paragraph GEN.3.2. Sub-paragraphs (1)-(3) provide (in summary) that in the case of applications under most of the sections of Appendix FM leave will be granted even if the applicant does not satisfy the prescribed requirements if refusal would give rise to a breach of article 8: that is because the Secretary of State recognises that there will be exceptional cases where an applicant who should be granted leave to remain under article 8 (as it relates to family life) will slip through the net of the specific provisions of Appendix FM. However sub-paragraph (4) provides that those sub-paragraphs should not apply to applications from bereaved partners and victims of domestic violence.[3] (The same approach is reflected in the administrative review provisions: see para. 18 below.)
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> 17. I should also mention section 120 of the 2002 Act. This gives the Secretary of State the option in specified circumstances to give notice requiring a person seeking leave to remain to state in a single document all the grounds on which they wish to rely – in the jargon, a "one-stop notice". The effect of the service of such a statement is that where there is an appeal pending any further grounds for leave to remain specified in it are to be treated as grounds in the appeal: see section 85 (2). (There are also other consequences, as specified in section 96, but I need not refer to them here.) But in the absence of a pending appeal the making of such a statement does not relieve an applicant who wishes to raise a particular ground for entitlement to leave to remain of the obligation under paragraph 34 of the Rules to make the appropriate application using the prescribed form: see the judgment of this Court in R (Shrestha) v Secretary of State for the Home Department [2018] EWCA Civ 2810.[4] Section 120 is not therefore at odds with the one-application-at-a-time policy.'

23. Mr Tufan could not point us to any provision which, like DVILR applications, specifically precluded the making of a human rights claim within an EUSS application from overseas nor any guidance which precluded the same. Nor did there appear to be a 'one application-at-a-time' policy in relation to such applications. There would appear to be no prescribed form for a human rights application in these circumstances. The appellant merely selected which form she considered most closely matched her circumstances. Although she had previously been refused entry clearance under the EUSS there was no indication that she had been advised not to make any further application under the same scheme.

24. The panel gave sound reasons for concluding that the appellant did not have the option of using a specific form for making a human rights application and referred to Home Office guidance which directed an applicant for leave to remain outside the Rules (LOTR) to apply via the route which most closely matches their circumstances and to raise any compelling compassionate factors to be considered within the application for entry clearance. The guidance in question was Version 2.0 of the Leave outside the Immigration Rules guidance, updated on 29 August 2023 which included the following.

> Applying overseas for LOTR
>
> Applicants overseas must apply on the application form for the route which most closely matches their circumstances and pay the relevant fees and charges. Any compelling compassionate factors they wish to be considered, including any documentary evidence, must be raised within the application for entry clearance on their chosen route. Any dependants of the main applicant seeking a grant of LOTR at the same time, must be included on the form and pay the relevant fees and charges.

25. Mr Tufan raised a new point during his submissions, that the applicant ought to have selected a different form to match her circumstances, such as the form for Adult Dependant Relatives, owing to the reference to these Rules in the covering letter of 6 July 2022. He was unable to identify which specific form applied to such an application. The implication of this submission was that the appellant had never raised a human rights claim at all. We note that this is a point which was not taken by the respondent in refusing the application, that it had not been raised before the First-tier Tribunal nor in the grounds of appeal to the Upper Tribunal. Furthermore, Mr Tufan did not rely on any authority to support his point that the appellant ought to have used a different form. We conclude that his submissions lacked substance and did not undermine the findings made by the First-tier Tribunal at [18] of the decision.

26. The second point raised by the respondent in the grounds is that there was procedural unfairness in the First-tier Tribunal dealing with issue of human rights in the absence of a human rights appeal. Therefore, we now consider whether the panel erred in finding that there had been a decision to refuse a human rights claim and thus generate a human rights appeal notwithstanding the respondent's failure to engage with that claim in the decision letter.

27. From the outset we take into account that the respondent was given ample opportunity to set out his position regarding the appellant's human rights claim following the jurisdictional decision and declined to do so, as can be seen from [7-9] of the substantive decision. Furthermore, the respondent failed to participate in the hearing of the appeal after being refused an adjournment to take instructions from the Policy Team.

28. Given the respondent's lack of compliance with the previous directions and the vulnerable position the appellant was in, we find that the panel were undoubtedly correct to proceed with the appeal. At this juncture we emphasise that the grounds of challenge raise no issue as to the findings of the First-tier Tribunal regarding the substance of the appellant's human rights claim.

29. Mr Tufan argued that as the decision refused the appellant entry under the EUSS, the only appeal available to the appellant was one under the "EU Regs." To that end, we take into consideration the 'Next Steps' spelt out in the decision letter in question which we reproduce below.

> You can also appeal this decision to the First Tier Tribunal under the Immigration Citizens' Rights Appeals (EU Exit) Regulations 2020. You have 28 days from the date since you received this decision to appeal.
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> You can appeal on the basis that the decision is not in accordance with the EUSS Family Permit Rules, or that it breaches any rights you have under the Withdrawal Agreement, the EEA EFTA Separation Agreement, or the Swiss Citizens' Rights Agreement. You may bring or continue an appeal from inside or outside the UK.

30. We do not accept that this standard information has the effect of limiting the grounds which can be argued by the appellant in view of the fact that she used the EUSS Family Permit form to raise compassionate factors in support of her claim under Article 8 ECHR. We hesitate to accept that the respondent's mere assertion as to a right of appeal should limit the appellant's rights of appeal. Furthermore, it is not the Regulations which confer a right of appeal in this case but the statutory provisions set out in section 82 (1)(b) of the Nationality, Immigration and Asylum Act 2002. The 2002 Act requires a right of appeal where a human rights claim has been refused.

31. On the question of the respondent's failure to address the appellant's representations, we take into consideration what was said at [51] of *MY*, where Underhill LJ made the following obiter remark.

> I should say that the question, raised by the second sentence of ground 1, whether it was necessary for the Secretary of State to "engage with" the Appellant's human rights claim is for these purposes a red herring. If his case were otherwise well-founded, the decision to refuse the application would necessarily be a decision to refuse the human rights claim even if she had purported not to have considered it as a separate claim.

32. It follows from the above comment that the First-tier Tribunal did not err in finding at [6] that the respondent's failure to engage with the human rights claim 'constituted a refusal' of it. Mr Tufan's submissions did not fully engage with this point and he has not persuaded us that the respondent had not implicitly refused the appellant's claim. We conclude that the First-tier Tribunal properly accepted jurisdiction.

33. Neither party cited *Amirteymour [*2017] EWCA Civ 353, nonetheless we have considered whether we can derive any assistance from this judgment. The Court of Appeal were considering whether an appellant was entitled to introduce a 'distinct' human rights claim in an appeal under the Immigration (European Economic Area) Regulations 2006. The short answer is what is said by Sales LJ in paragraph 1,' If the individual wishes to make a claim for leave to remain based on human rights, he needs to make a relevant application to the Secretary of State to rely on those rights.'

34. Again, the circumstances of the appellant differ from that of the claimant in *Amirteymour* in that the latter made an in-country application under the Regulations, was not threatened with removal from the United Kingdom and it was open to them to make a human rights application.

35. That the appellant's case can be distinguished is reflected in the following passages from *Amirteymour*:

> 22. The starting point for analysis is that the juristic basis for an application for a derivative residence card is distinct from that for an application for leave to enter or leave to remain based upon the Immigration Rules and/or upon Article 8. In the former case, the entitlement is based upon directly effective rights under EU law, as explained in *Ruiz Zambrano*. Those rights are reflected in regulations 15A and 18A of the EEA Regulations. An application for a derivative residence card is an application made under regulation 18A(1), and the relevant EEA decision is the decision made on that application.
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> 23. In the latter case, the application is made to the Secretary of State to ask her to apply her own immigration policy as set out in the Immigration Rules made pursuant to section 1(4) and section 3(2) of the Immigration Act 1971 (see *MM (Lebanon) v Secretary of State for the Home Department* [2017] UKSC 10; [2017] 1 WLR 771, [49]-[50]) or to exercise her residual discretion under the 1971 Act to grant leave to enter or leave to remain outside the Rules (see *R (Munir) v Secretary of State for the Home Department* [2012] UKSC 32; [2012] 1 WLR 2192, at [44]). The Secretary of State may come under an obligation under section 6(1) of the Human Rights Act 1998 ("the HRA") to grant leave to enter or leave to remain in exercise of her discretion outside the Rules where that is necessary to satisfy a Convention right of the applicant, for example under Article 8. An application for leave to enter or leave to remain under the Immigration Rules or in reliance on Article 8 (or any other Convention right) outside the Rules is different from an application under regulation 18A(1) of the EEA Regulations. It is made on a different form and under different legislative provisions. A decision made in respect of it is an "immigration decision" falling within the scope of section 82(1) of the 2002 Act

36. As we have discussed above, in the appellant's application for entry clearance, she was seeking a consideration of her human rights outside the provisions of the Immigration Rules with reference to Article 8. *Amirteymour* establishes that this is different from an application made under the Regulations. Indeed, the appellant did not make an application under Appendix EU but merely used the EUSS form as a conduit for her human rights claim.

37. Lastly, the grounds contend that the First-tier Tribunal erred in considering a new matter without the consent of the Secretary of State. Mr Tufan pursued this point, relying on *Celik* (EU exit; marriage; human rights) [2022] UKUT 00220 (IAC) and *Batool and others* (other family members: EU exit) [2022] UKUT 00219. We find that these authorities are of no assistance in this case. This is not a situation where Article 8 was raised at the appeal stage without having being raised in the underlying application.

38. *Batool* at paragraphs 79-82 states as follows:

> 79. Regulation 9(4) provides that the first-tier Tribunal has power to consider any matter which it thinks relevant to the substance of the decision. Here, however, the First-tier Tribunal can do so only with the consent of the Secretary of State, if the matter is a "new matter" as defined in regulation 9(6). This provides that the matter will be a "new matter" if it constitutes a ground of appeal of a kind listed in regulation 8 or section 84 and the Secretary of State has not previously considered the matter in the context of the decision appealed against under the Regulations or in the context of a section 120 statement from the appellant.
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> 80. The "jurisdiction" issue under regulation 9(4) in the context of Article 8 ECHR was addressed by the Upper Tribunal in Celik (EU exit; marriage; human rights) [2022] UKUT 220 (IAC). In essence, the Upper Tribunal found that the First-tier Tribunal has jurisdiction under regulation 9(4) to consider a human rights ground on an appeal against refusal of an application under the EUSS, provided that, if it is a "new matter", the Secretary of State consents. Unless the Secretary of State has previously considered the Article 8 ECHR issue in the context of the decision appealed against or in a section 120 statement, we agree with Ms Smyth that the Secretary of State's consent will be necessary in order for the First-tier Tribunal to consider the Article 8 issue. In order to succeed in an application for entry clearance under Appendix EU(FP), an applicant must meet the specific requirements of those rules. Since neither Appendix EU nor Appendix EU(FP) is intended to, and does not, give effect to this country's obligations under Article 8 ECHR, consideration of Article 8 forms no part of the decision-making process in relation to such an application. Regardless of the strength of any Article 8 claim, leave could not be granted under those provisions unless the requirements of the relevant rules were satisfied.
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> 81.This is amply demonstrated in the context of the present appeals by the application materials, to which we have made reference. These do not refer to human rights matters. They are, in no sense, a human rights claim within the meaning of section 113(1) of the 2002 Act. The decisions refusing the appellants' applications make no reference to human rights. The decisions can in no way be regarded as refusals of human rights claims within the meaning of section 82(1)(b) of that Act.
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> 82. The appellants contend that the First-tier Tribunal Judge had a duty to consider their human rights and that this was not capable of being a "new matter" requiring the Secretary of State's consent.

39. It is plainly obvious from the representations sent with the appellant's entry clearance application, that human rights were at the heart of the matter. Identical matters were relied upon before the Tribunal as were raised in the representations sent to the respondent. Consequently, on these particular facts, there is no basis to the argument that the Article 8 claim was a new matter and we conclude that the First-tier Tribunal committed no error in considering it. By contrast, there is no indication in *Batool* that the 'representations' were ever anything other than an Appendix EU(FP) application.

40. The decision of the First-tier Tribunal contained no material error of law.

Decision

The Secretary of State's appeal is dismissed.

The making of the decision of the First-tier Tribunal did not involve the making of an error on a point of law.

The decision of the First-tier Tribunal is upheld.

T Kamara

Judge of the Upper Tribunal
Immigration and Asylum Chamber

29 February 2024

NOTIFICATION OF APPEAL RIGHTS

1. A person seeking permission to appeal against this decision must make a written application to the Upper Tribunal. Any such application must be **received** by the Upper Tribunal within the **appropriate period** after this decision was **sent** to the person making the application. The appropriate period varies, as follows, according to the location of the individual and the way in which the Upper Tribunal's decision was sent:

2. Where the person who appealed to the First-tier Tribunal is **in the United Kingdom** at the time that the application for permission to appeal is made, and is not in detention under the Immigration Acts, the appropriate period is **12 working days (10 working days, if the notice of decision is sent electronically).**

3. Where the person making the application is in detention under the Immigration Acts**, the appropriate period is 7 working days (5 working days, if the notice of decision is sent electronically)**.

4. Where the person who appealed to the First-tier Tribunal is **outside the United Kingdom** at the time that the application for permission to appeal is made, the appropriate period is **38 days (10 working days, if the notice of decision is sent electronically).**

5. A "working day" means any day except a Saturday or a Sunday, Christmas Day, Good Friday or a bank holiday.

6. The date when the decision is "sent' is that appearing on the covering letter or covering email.