IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2023-004952

First-tier Tribunal No: EU/50093/2022

THE IMMIGRATION ACTS

Decision & Reasons Issued:

On 3rd of July 2024

Before

UPPER TRIBUNAL JUDGE HANSON
UPPER TRIBUNAL JUDGE MANDALIA

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

NADIR ALI
(NO ANONYMITY ORDER MADE)

Respondent

Representation:
For the Appellant: Mr Bates, a Senior Home Office Presenting Officer.
For the Respondent: Ms Batool, the sponsor.

Heard at Birmingham Civil Justice Centre on 11 March 2024

DECISION AND REASONS

1. The Secretary of State appeals with permission a decision of First-tier Tribunal Judge Greer ('the Judge'), promulgated following a hearing at Nottingham on 25 August 2023, in which the Judge allowed Mr Ali's appeal against the refusal of his application for leave to enter the United Kingdom under the EU Settlement Scheme (EUSS), Appendix EU (Family Permit).
2. Mr Ali is a Portuguese national born on 21 October 1990 who applied for entry clearance under Appendix EU (Family Permit) in order to join his wife, Syeda Batool ('the Sponsor') who has pre-settled status under the EUSS.
3. The application was refused as the decision maker was not satisfied the Sponsor was an EEA national and therefore could not be considered as a 'relevant EEA citizen' as stated in Appendix EU (Family Permit) to the Immigration Rules, meaning Mr Ali was not eligible to apply for the EUSS Family Permit.
4. Between [5] – [7] of the decision under challenge the Judge writes:

5. The matter came before me for a face-to-face hearing at the Nottingham Hearing Centre. The Appellant did not have a legal representative, but his sponsor Ms Batool attended. Ms Batool was assisted by the Tribunal appointed interpreter in the Urdu language.
6. After the hearing was called on, Ms Bibi asked for additional time to take instructions from a senior caseworker as to whether the Respondent wished to contest the Appeal. After a short break, Ms Bibi returned to the hearing room and told me that the decision under appeal was not sustainable considering the evidence now before the Tribunal. She told me that the Respondent is now satisfied that the Appellant qualifies for Entry Clearance under Appendix EU (Family Permit) to the Immigration Rules. Because the Tribunal was seized of the appeal, Ms Bibi did not propose to withdraw the decision under appeal, and she invited me to allow the Appeal.
7. After hearing Ms Bibi's submissions, I informed the parties that I would be allowing the Appeal. I now give written reasons for my decision.

5. At [9] the Judge writes:

> 9. I have kept in mind the guidance at Carcabuk & Bla v Secretary of State for the Home Department (00/TH/01426). I have had regard to the guidance at [12(5)]. I am obliged to accept Ms Bibi's concession. This is determinative of the Appeal in the Appellant's favour.

6. The Secretary of State sought permission to appeal on the basis the concession made by the Presenting Officer was misconceived and that although not recorded in the determination it was based on a misapprehension of a document in the Secretary of State's bundle which was taken to show the Sponsor held Portuguese citizenship, when in fact the document was a Residency Card issued by the Portuguese authorities to a citizen of Pakistan.
7. The grounds assert that the issue in this appeal is how acceptance of an apparently manifestly incorrect concession can constitute an error of law and what parameters govern the subsequent withdrawal of that concession. Reference is made in the grounds to the decision of the Court of Appeal in Lopes v Secretary of State for the Home Department [2019] EWCA Civ 199.
8. Permission to appeal was initially refused by another judge of the First-tier Tribunal but granted by Upper Tribunal Judge Gill on 15 December 2023, the operative part of the grant being in the following terms:

> It is arguable that, if it is allowed to stand, the decision of Judge of the First-tier Tribunal Greer proceeds upon unfairness arising from the fact that the Presenting Officer's concession was arguably based on a misconception of the appellant's evidence, in that, the Presenting Officer was mistaken in thinking that the appellant's wife was an EEA national whereas she was in fact a national of Pakistan.
>
> Arguably, Judge Greer misdirected himself in thinking that he was obliged to accept the Presenting Officer's concession.
>
> The respondent's minutes of the hearing before Judge Greer (attached to the application for permission to appeal) arguably show that the Presenting Officer explained the basis of her concession. Accordingly, the sponsor (who attended the hearing) arguably ought to have raised with Judge Greer that the Presenting Officer was mistaken in thinking that she was an EEA national whereas she was in fact a citizen of Pakistan. The fact that she may not have been legally unqualified is arguably not an answer.
>
> However, whether or not the sponsor understood what was going on at the hearing, it is arguable that the appellant ought not to benefit from what is arguably a material mistake on the part of the respondent.

Discussion and analysis

9. The Sponsor attended the hearing, and we are grateful for her input and further explanation of the matters raised at the hearing before the Judge, and her own personal and family circumstances.
10. The sponsor claims that when the Presenting Officer indicated the concession was being made the Judge asked the Presenting Officer whether she was aware the Sponsor was not a Portuguese national but was told that the concession still stands. The Sponsor has never claimed to be an EU national and confirmed before us that she is and remains a citizen of Pakistan. Although the Sponsor has made an application for Portuguese citizenship that had not been granted at the date of decision under appeal and is still a pending application.
11. The Sponsor confirmed her husband, who is a Portuguese citizen, remains in Portugal.
12. The Sponsor became somewhat distressed during the course of the hearing while speaking about her daughter who clearly has medical needs which are being looked after by the NHS in the UK. Our attention was drawn to a letter from the Derby Medical Centre dated 10 August 2023, confirming the child's diagnosis and treatment. The letter confirms the child had entered the UK before the hearing of the appeal that occurred on 25 August 2023. The relevance of this is that the child has not entered the UK as a result of a positive decision on her father's application. She did not enter the UK in reliance upon the positive outcome of her father's appeal before the FtT, and there is therefore no prejudice caused to her by the withdrawal of the concession.
13. In relation to the Secretary of State's challenge, Mr Bates has provided a very useful skeleton argument.
14. In relation to the case specifically referred to by the Judge, Carcabuk & Bla v Secretary of State for the Home Department (00/TH/01426), the Tribunal at [7] stated *"the adjudicator is entitled to satisfy himself that the particular concession was made and was intended to be made. The adjudicator may express his reservations and ask the HOP to reconsider if the adjudicator believes that the concession ought not in all the circumstances to have been made"*. It appears this was precisely what the Judge did according to the information provided by the Sponsor, although that particular fact is not recorded in the determination.
15. If what we are told by the Sponsor as to the hearing before the FtT is correct, it now appears that the point raised by Mr Bates at [9] of his skeleton argument, that there was no suggestion that the concession was clarified as to the basis upon which it was made by the Judge, may be incorrect. If what the Sponsor told us is correct, the Judge clearly queried with the Presenting Officer whether she was aware that the Sponsor was not an EU national but was told the concession was still being made.
16. The finding of the Judge that he considered himself bound by a concession which was clearly wrong on both the facts and in law, and accordingly allowed the appeal, especially without considering other available authorities, is what gives rise to this challenge.
17. The case of Carcabuk was considered by the Court of Appeal in NR (Jamaica) v Secretary of State for the Home Department [2009] EWCA Civ 856. In relation to an appeal against a decision made having placed reliance upon a concession the Court found:

> 11. In Secretary of State for the Home Department v Akram Davoodipanah [2004] EWCA Civ 106, Kennedy LJ, with whose judgment Clarke LJ and Jacob J (as they then were) agreed, set out the principle in the following way [22]: "It is clear from the authorities that where a concession has been made before an adjudicator by either

> party the Tribunal can allow the concession to be withdrawn if it considers that there is good reason in all the circumstances to take that course…Obviously if there will be prejudice to one of the parties if the withdrawal is allowed that will be relevant and matters such as the nature of the concession and the timing may also be relevant, but it is not essential to demonstrate prejudice before an application to withdraw a concession can be refused. What the Tribunal must do is to try to obtain a fair and just result. In the absence of prejudice, if a presenting officer has made a concession which appears in retrospect to be a concession which he should not have made, then justice will require that the Secretary of State be allowed to withdraw that concession before the Tribunal. But, as I have said, everything depends on the circumstances, and each case must be considered on its own merits."

The underlined section is our emphasis.

18. There are a number of other authorities referred to by Mr Bates but it is an inescapable fact in relation to this appeal that the concession made before the Judge is contrary to the law in that to succeed, Mr Ali had to demonstrate the Sponsor was an EEA national, which he could not do because she is a citizen of Pakistan. We find the interests of justice require the Secretary of State to be permitted to withdraw the concession.
19. We accept the Judge appears to have faced a dilemma in that he clearly had in his mind that the Sponsor is a citizen of Pakistan and that the concession being offered by the Presenting Officer was wrong in relation to both the facts and law, but appeared to have been maintained even after the Judge indicated the nationality of the Sponsor to the Presenting Officer. A Judge has a wide discretion in relation to which aspects of the evidence he or she accepts or does not, and providing a decision is supported by adequate reasons the weight to be given to the evidence will be a matter for the Judge. Had the Judge refused to accept the concession on the basis it should not have been made in light of the nationality issue, in absence of any alternative explanation for why such was appropriate, which would have led to the appeal being dismissed, the decision would have been unimpeachable.
20. We accept the Secretary of State has a wide discretionary power to grant an individual leave to remain even if they cannot satisfy any provision of the Immigration Rules or otherwise. If a concession has been made on the basis of an exercise of such discretionary powers it is important for a judge to specifically record in the determination not only the concession being made in clear unequivocal terms, but also the nature of any discussion that may have taken place in relation to the concession, any factual basis on which it is being made, and specifically record that if it is as a result of an exercise discretion outside the Rules or other relevant legal provision that this is the basis on which it is being made. A party insisting upon a judge accepting a concession which the judge knows to be wrong in fact and law, and which is bound to be the subject of an appeal, which is likely to result in a finding that the interests of justice require the concession to be withdrawn and subject to the requirements of fairness for the appeal to be reheard, is not in accordance with the overriding objective or efficient use both judicial and estate resources available to a court or tribunal.
21. As found by the House of Lords in Bahamas International Trust Co Ltd v Theadgold [1974] 1 WLR 1514 at page 1525:

> “It is for the judge to decide for himself what the law is, not to accept it from any or even all of the parties to the suit; having so decided it is his duty to apply it to the facts of the case. He would be acting contrary to his judicial oath if he were to determine the case by applying what the parties conceived to be the law, if in his own opinion it was erroneous.”

We find the same equally applicable to a concession a judge knows to be wrong.

22. We find in the circumstances of this appeal, where such an obvious and fundamental legal error has been made by the Presenting Officer, it not being established there was any scope for exercise of discretion under Appendix EU or the Withdraw Agreement that would entitle Mr Ali to succeed on the facts, the Secretary of State must be permitted to withdraw the concession.
23. We therefore find the Judge has erred in law in a manner material to the decision to allow the appeal.
24. In relation to the question of fairness, if there was an issue that required further consideration and discussion, we would have remitted the matter to the First-tier Tribunal or adjourned for a further hearing before the Upper Tribunal. This is an appeal, however, where in our opinion there is only one outcome.
25. The core issue in the appeal is whether Mr Ali met the requirements of the EU Settlement Scheme under Appendix EU (Family Permit) to the Immigration Rules on the basis he is a 'family member of a relevant EEA citizen'.
26. It is unarguable that as the Sponsor is a citizen of Pakistan she is not a relevant EEA citizen. On that basis the appeal must be dismissed.
27. As a matter of comment, but no more, it is clear that a number of the matters that were raised in support of the appeal, which the Sponsor spoke about during the course of the hearing before us, may be relevant to an application made pursuant to Article 8 ECHR or under another provision of the Immigration Rules. We are unable to develop any argument on an alternative basis as Article 8 ECHR was not a matter before us and the Secretary of State's consent had not been sought or granted for us considering this as a new matter.

Notice of Decision

28. The First-tier Tribunal materially erred in law. We set the decision aside.
29. We substitute a decision to dismiss the appeal.

C J Hanson

Judge of the Upper Tribunal
Immigration and Asylum Chamber

1 July 2024