



IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2024-000126

First-tier Tribunal No:
EU/52851/2023

THE IMMIGRATION ACTS

Decision & Reasons Issued:

On 14th of March 2024

Before

UPPER TRIBUNAL JUDGE MACLEMAN

Between

MYKHAILO TSIURAK

(no anonymity order requested or made)

Appellant (in the FtT)

and

Secretary of State for the Home Department

Respondent (in the FtT)

For the Appellant: Mr J Collins of counsel, instructed by LS Legal, Solicitors
For the Respondent: Mr P Deller, Senior Home Office Presenting Officer

Heard at Field House, London on 26 February 2024

DECISION AND REASONS

1. This decision refers to parties as they were in the FtT.
2. By a decision dated 5 December 2023, FtT Judge Pinder allowed the appellant's appeal against refusal of his application "for pre-settled status / limited leave to remain under appendix EU" of the immigration rules ("the EUSS").
3. On 11 January 2024, FtT Judge Mills granted permission to appeal to the UT.

4. The issues are encapsulated in the grant of permission: ...

2. The appellant is a Ukrainian national who, along with his wife and daughter, was granted a family permit under the EU Settlement Scheme, to join his mother-in-law in the UK, who is a relevant EEA citizen with settled status. Having entered the UK on 18/01/2023, the family sought pre-settled status under the EUSS. While his wife and daughter were granted, the appellant was refused on the basis that his relationship with the sponsor was too far distant to qualify under the EUSS rules.

3. On appeal the Judge has allowed the appeal, despite agreeing that the appellant could not meet the requirements of the EUSS rules, on the basis that he should be treated as if he did given the respondent's decision to admit him to the UK under those same rules. The Judge also found that the appellant was entitled to rely on the Withdrawal Agreement, as someone who had been granted a family permit, and that [to refuse him] status was disproportionate under Article 18(1)(r), given the history of the case, and the fact that the rest of the family had been granted status.

4. The respondent has sought permission to appeal against the Judge's decision, arguing in the grounds for permission that the Judge has erred through going beyond the statutory grounds available to the appellant, as it was accepted that the appellant could not meet the EUSS rules on their specific terms, and there is no discretion available to the Tribunal to find that the respondent must be fixed with the consequences of an earlier mistaken concession that he could.

5. The grounds also argue that the Judge has erred in finding that the appellant is [within the] scope of the Withdrawal Agreement as, even if the mistaken grant of a family permit were treated as facilitation of his residence in the UK, the issue of the permit followed an application made after the relevant date of 31/12/2020, and so the Withdrawal Agreement could not apply.

6. I find that the challenge does make out arguable errors of law in the Judge's decision, for the reasons already summarised above. While it is entirely understandable that the judge will have had sympathy for the appellant's situation, it is arguable that she was not entitled to find that the appeal could succeed on either of the statutory grounds available to him.

5. The appellant has leave until 2025 under the "Ukraine Scheme". At [42] of its decision, the FtT noted that such leave was discretionary, with no guarantees of extension, and thought that it "did not displace" the respondent's obligations under the Withdrawal Agreement ("WA").
6. The FtT allowed the appeal at [43] because the respondent's decision was "not in accordance with the immigration rules" and was "in breach of the appellant's rights under the WA".
7. Mr Deller submitted further on both issues raised in the grounds, and argued that the FtT's decision should be reversed.
8. Mr Collins accepted that if the SSHD was right on both points, the logical outcome could only be reversal.
9. Mr Collins acknowledged that it was not possible to sustain the outcome by reference to "the second ground of appeal" specified in regulation 8 (3) of The Immigration (Citizens' Rights Appeals) (EU Exit) Regulations 2020, in terms of the immigration rules.

10. However, Mr Collins eloquently sought to justify the outcome in terms of the “first ground of appeal” specified in regulation 8 (2) - breach of a right which the appellant has by virtue of the WA. He contended that the grounds showed no error by the FtT in holding that proportionality justified an outcome in the appellant’s favour.
11. I reserved my decision.
12. As the Judge granting permission said, the FtT understandably sympathised with the appellant’s position, following the error by the SSHD when finding him to qualify for a family permit. The convolutions in its decision, however, identify nothing which entitled it to treat him as if he qualified for any status under the EUSS.
13. The decision of the respondent plainly is “in accordance with the provision of the immigration rules by which it was made”.
14. The concession for the appellant on the second ground of appeal in the regulations was correctly made.
15. On proportionality, Mr Collins eloquently put the case that if the FtT was entitled to embark on that exercise, no error has been shown (or even asserted, as an alternative) in coming down on the side it did.
16. The question is whether the appellant qualified for such an exercise to be carried out.
17. The point as put in the SSHD’s grounds is that “the Judge had no secondary function to hold that the Secretary of State was fixed with a *prima facie* error where the rules were not met by the present application and no Withdrawal Agreement rights existed to have been breached.”
18. The difficulty here for the appellant is that he simply did not fall within the scope of the WA.
19. The decision of the FtT cannot be sustained by reference to either of the grounds of appeal provided by the regulations. It is set aside. The following decision is substituted. The appeal, as originally brought to the FtT, is dismissed.

Hugh Macleman

Judge of the Upper Tribunal
Immigration and Asylum Chamber
8 March 2024