



**Upper Tribunal  
(Immigration and Asylum Chamber)    Appeal Number: UI-2021-001209  
EA/01456/2021**

**THE IMMIGRATION ACTS**

**Heard at Field House  
On the 04 May 2022**

**Decision & Reasons Promulgated  
On the 07 September 2022**

**Before**

**UPPER TRIBUNAL JUDGE CANAVAN**

**Between**

**THE SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Appellant

**and**

**SOHAIL AHMAD**

Respondent

**Representation:**

For the appellant:    Mr D. Clarke, Senior Home Office Presenting Officer

For the respondent:    Mr K. Khan of Kings Law Solicitors

**DECISION AND REASONS**

1. For the sake of continuity, I shall refer to the parties as they were before the First-tier Tribunal although technically the Secretary of State is the appellant in the appeal before the Upper Tribunal.
2. The original appellant (Mr Ahmad) is a citizen of Pakistan who says that he entered the UK on 27 July 2011 with entry clearance as a Tier 4 (General) Student that was valid until 08 October 2012. The exact dates of various applications are not entirely clear from the evidence, but the following can be drawn from the appellant's witness statement. The appellant says that

he had problems preparing the evidence to support an application to extend his leave to remain as a student. Instead, he applied for further leave to remain outside the rules asking for further time to prepare. The application was refused in December 2012.

3. The appellant says that by 2013 he was in a relationship with a Romanian national called Ana-Georgiana Stoica. He applied for a residence card recognising a right of residence under EU law on 10 May 2013. Information provided to me at the hearing indicated that the application was refused on 05 July 2013. In January 2014 the couple married under Islamic law. The appellant says that they lived together from August 2014. On 20 May 2015 their daughter was born. She is also an EEA national. The appellant says that he made a further application for a residence card, which he withdrew in October 2015 due to problems in his relationship with his wife and her family. The marriage subsequently broke down.
4. The appellant says that he lodged proceedings in the family courts to obtain contact with his daughter. The Family Court issued Child Arrangements Orders on 10 November 2016 and 07 November 2017. Although the appellant's bundle contained an order from the District Judge dated 21 March 2018 giving permission to disclose those orders to the Home Office, it is not clear whether the Family Court has given permission for those orders to be disclosed in these proceedings. For this reason, I shall not give any details of those orders save to say that arrangements were made for the appellant to continue to have regular contact with his child.
5. The appellant says that he applied for leave to remain as the parent of a child in the UK although it is not clear when the application was made. He says that the human rights claim was refused on 21 November 2015. The appellant's appeal was dismissed by First-tier Tribunal Judge Young-Harry in a decision promulgated on 23 May 2018. The decision indicates that the application for leave to remain as a parent was refused under Appendix FM of the immigration rules on 'Suitability' grounds because it was alleged that the appellant had used a proxy test taker in a TOEIC English language test taken at Colwell College on 18 July 2012. The judge concluded that the respondent had discharged the overall burden of proof and that the appellant had failed to provide an innocent explanation to rebut the allegation. Although the judge noted that the appellant did not use the test result, he had planned to make a further application for leave to remain as a student. The test was taken for that purpose.
6. The judge considered the best interests of the appellant's child but did not come to any conclusion as to where those interests lay. The judge did not consider whether it was in the best interest of the child to be brought up in the UK by both parents. The judge simply concluded that the appellant could 'maintain regular contact with his daughter via modern communication and visits.' I note that the judge referred to section 117B of the Nationality, Immigration and Asylum Act 2002 ('NIAA') in general terms and considered what weight could be given to the appellant's

private life in the balancing exercise under Article 8. However, the judge did not make any findings in relation to section 117B(6). On the face of it the child was not a British citizen and had not yet been resident in the UK for a continuous period of seven years at the date of that hearing.

7. The respondent's current decision letter states that another application for an EU residence card was refused on 17 February 2020, but there is no information about the basis of the application.
8. On 27 February 2020 the appellant applied for leave to remain under the EU Settlement Scheme. At the hearing the appellant told me that he made the application without the assistance of a legal representative based on his relationship with his daughter, who is an EEA national child. Unhelpfully, the Home Office bundle before the First-tier Tribunal did not include a copy of the original application form. The bundle contains an undated letter that the appellant appears to have sent in response to a request from the Home Office for further evidence. Because it is undated, it is not clear whether this was sent to the Home Office before the decision or with the application for review. The letter made clear that his relationship with the child's mother broke down in December 2016. He explained that there was a contact order from the Family Court and outlined the contact he had with his daughter. The application included a copy of his ex-partner's Romanian passport, his daughter's birth certificate, a letter from the nursery his daughter attends, and a partial DNA test report.
9. The respondent's refused to grant leave to remain under the EU Settlement Scheme in a decision dated 09 January 2021. The respondent refused the application on the sole ground that there was insufficient evidence to show that the appellant was the durable partner of an EEA national. The appellant says that he did not apply on that basis.
10. The respondent reviewed the application and maintained the decision on 04 June 2021. It is not clear from the evidence currently before the Upper Tribunal when the appellant's undated letter and further evidence was sent to the respondent. It seems more likely that it may have been sent after the initial decision because the EUSS Review engages with the information provided in the letter.
11. The EUSS Review decision noted that the appellant's relationship with his partner had broken down. He did not meet the requirements of paragraph EU11 or EU14 of Appendix EU of the immigration rules. She considered the evidence relating to the appellant's relationship with his EEA national child. She did not place weight on the DNA evidence because it did not identify the 'service provider' for the test. Having taken the claimed relationship at its highest the respondent concluded that there was insufficient evidence to show that he was a dependent parent or that he had a '*Zambrano* derivative right to reside'. He had failed to show that his departure from the UK would compel the EEA national child to have to leave the EEA territory. The child lived with her mother and could continue

to do so. The respondent noted that if the appellant had a genuine and subsisting relationship with a child that is settled in the UK or has limited leave under Appendix EU he 'may be eligible for a grant of leave under alternative provisions under the Immigration Rules'.

12. The appellant appealed the decision. The appeal was brought under The Immigration Citizens' Rights Appeals (EU Exit) Regulations 2020 ('the Appeals Regulations 2020'). The grounds upon which the decision could be appealed were that the decision is not in accordance with the EU Settlement Scheme rules, or that it breaches any rights under the Withdrawal Agreement, the EEA EFTA Separation Agreement or the Swiss Citizens' Rights Agreement.
13. First-tier Tribunal Judge Ford ('the judge') allowed the appeal in a decision promulgated on 24 November 2021. The judge expressed concern that the respondent had not considered the welfare of the child under section 55 of the Borders, Citizenship and Immigration Act 2009 ('BCIA 2009'). Nor had the respondent considered the terms of the orders made by the Family Court [15]. She found that the appellant could not show that he met the requirements of paragraphs EU11 or EU14 of Appendix EU. She noted that at the date of the application the appellant could have applied for a residence card under The Immigration (European Economic Area) Regulations 2016 but did not. She concluded that 'it is arguable that the decision maker should have considered the application under the 2016 Regulations' [16].
14. The judge noted that one of the grounds of appeal under the Appeals Regulations 2020 was that the decision breached rights under the Withdrawal Agreement. The judge concluded:
  - '18. I find that he succeeds on this ground because;-
    - (a) The decision maker did not consider whether the Appellant should be viewed as qualifying for a Family permit
    - (b) The decision maker did not consider if the Appellant qualified for residence as at date of decision on the basis of his ongoing contact with his daughter, contact that was ordered by the Family court and supported by a Prohibited steps order
    - (c) There was no consideration of the impact of the decision on the best interests of A. I find that the decision to refuse to recognise the Appellant's right to reside in the UK in order to continue direct contact with his daughter is a potential breach of the withdrawal agreement and on that basis I allow the appeal.
  19. Allowing the appeal on this ground will allow further consideration of the Appellant's position by the Secretary of State. The contact order and the best interests of the child must be considered, as must the immigration status of A and her mother. There is an obligation under Article 18 of the Withdrawal agreement for host states to help the applicants to prove their eligibility and to avoid any errors or omissions in their applications. The withdrawal agreement states that the host state shall give the applicants the opportunity to furnish

supplementary evidence and to correct any deficiencies, errors, or omissions. If an applicant has made the wrong application he should be informed of this prior to refusal.

20. Should the Respondent be seized of information not available to the Appellant relevant to the outcome of the application, for example information as to the immigration status of A and her mother then that information should be accessed in making the decision. It is no answer to this obligation to say that the Appellant can make an alternative application under the Rules should he so wish.'
15. The Secretary of State appealed the First-tier Tribunal decision on the following grounds:
- (i) The judge failed to identify a proper legal basis and/or failed to give adequate reasons for allowing the appeal with reference to the Withdrawal Agreement.
  - (ii) Given that this was an application for leave to remain under the immigration rules, there was no basis upon which the Secretary of State should have considered the EEA Regulations 2016. Nor was there any basis for the appellant to be issued with a 'family permit' given that he applied from within the UK.
  - (iii) The judge failed to identify any basis upon which the Withdrawal Agreement might provide a right to contact with an EEA national child outside the provisions of the immigration rules relating to the EUSS Settlement Scheme.
  - (iv) The best interests of the child could not found a separate ground of appeal when no right under the Withdrawal Agreement had been identified. The fact that the Withdrawal Agreement states that there is an obligation to assist a person with the application does not extend beyond the scope of rights identified in the Withdrawal Agreement.
16. The rule 24 response filed on behalf of the appellant made general and unparticularised submissions asserting that the First-tier Tribunal had given sufficient reasons to explain why the appeal was allowed and had correctly identified a number of areas which had not been given adequate consideration by the Secretary of State.

### **Decision and reasons**

17. Having considered the First-tier Tribunal decision, the grounds of appeal, and the oral submissions I find that there is force in the Secretary of State's submission that the judge failed to give adequate reasons to particularise the legal basis upon which the appeal was allowed.
18. As acknowledged in the Secretary of State's grounds of appeal, the provisions introduced in the EU Settlement Scheme and the Withdrawal Agreement are complex. It would of course assist all involved in making applications and decisions if the immigration rules were simplified to achieve greater clarity and consistency in decision making.

19. I do not consider that an in-depth analysis of the EU Settlement Scheme and the Withdrawal Agreement is necessary when the main thrust of the Secretary of State's appeal is that the judge failed to give adequate reasons to explain how the reasons given for allowing the appeal were underpinned in law. However, it is necessary to consider the legal framework to some extent to answer that question.
20. The first point to note is that applications for leave to enter or remain under domestic law have always been separate to applications to recognise a right of residence under EU law. There have always been separate appeals in relation to decisions made under domestic law (largely brought under the NIAA 2002) and decisions made with reference to EU law (brought under the EEA Regulations 2016). The Secretary of State also requires applicants to make applications for leave to enter or remain and documentation under EU law on separate specified forms.
21. On 20 February 2020 the appellant made an application for leave to remain under the immigration rules put in place to give effect to the EU Settlement Scheme. An application under Appendix EU of the immigration rules is an application for leave to enter or remain under domestic law. The purpose of the scheme was to provide a transition for those remaining in the UK under EU law after the United Kingdom exited from the EU. The scheme ran parallel to the EEA Regulations 2016 for a period of time. The application for leave to remain was made before the EEA Regulations were revoked at the end of the Implementation Period ('IP') on 30 December 2020. In February 2020, it would have been possible for the appellant to make an application for a residence card recognising a right of residence under EU law. However, he chose to make an application under the EU Settlement Scheme instead.
22. The evidence before the First-tier Tribunal was incomplete. There was no copy of the original application in the Home Office bundle. Nor is it clear when the appellant wrote the undated letter and sent the further evidence to the respondent. The content of the letter indicates that the appellant was responding to a request for further evidence from the respondent. The letter stated:

'Many thanks for your email, the contents of which have been noted. Your email stated to provide additional evidence to help you consider my application for Settled Status or Pre Settled Status.'
23. The evidence given in the appellant's witness statement suggests that the undated letter might have been written after the refusal decision, but before the EUSS Review although the exact course of events is still rather unclear:

'I will say that I made an application to the Home Office under the EU Settlement Scheme again on the basis of my relationship with my daughter, the application was on the 09 January 2021 refused, I was given a right of appeal which I have exercised. My application was based not on my durable relationship with the former wife as noted by the Home Office in the refusal notice but on the basis of my relationship with my daughter. I am separated

from my former wife. I will say that I did contact the Home Office following their contact with me and explained in a letter which I enclose within the appeal to confirm that my application is based on my child and not on a durable relationship with my former wife, I had separated from my former wife.'

24. In any event, it seems that by the time the EUSS Review took place the respondent had invited the appellant to produce further supporting evidence and the question of whether the appellant met the requirements of the EU Settlement Scheme rules as the parent of an EEA national child was considered.
25. The judge stated that the appellant could not meet the requirements of paragraphs EU11 (indefinite leave) or EU14 (limited leave). She gave no reasons to explain why. Those paragraphs relate to applications by persons eligible for leave to enter or remain as a relevant EEA citizen or their family member, or as a person with a derivative right to reside 'or with a *Zambrano* right to reside'. Given her later findings, it was necessary for the judge to engage with the immigration rules relating to *Zambrano* right to reside if she was going to conclude that the appellant did not meet the requirements of Appendix EU. The *Zambrano* principle relates to a derivative right to reside in the UK as the parent of an EEA national child if removal of the parent would compel the child to leave the area of the EU.
26. When the judge moved on to consider the Withdrawal Agreement she failed to identify clearly what 'right' the appellant had by virtue of the Withdrawal Agreement that had been breached. This was at the heart of the remaining ground of appeal under regulation 8(2)(b) of the Appeals Regulations 2020.
27. Part Two of the Withdrawal Agreement relates to 'Citizens' Rights'. Article 9 of the defines 'family members' in the same terms outlined in the Citizens' Directive (2004/38/EC). However, the term 'family members' appears to be used in a broader sense to include both 'family members' and 'other family members' under the Directive.
28. Article 10 sets out the scope of the rights and identifies the people to whom they shall apply. The only provisions might apply to someone in the appellant's circumstances appear to be Article 10(1)(e)(i) and Article 10(2). Article 10(1)(e)(i) states:
  - '(e) family members of the persons referred to in points (a) to (d), provided that they fulfil one of the following conditions:
    - (i) they resided in the host State in accordance with Union law before the end of the transition period and continue to reside there thereafter;....'
29. Article 10(2) states:
  - '(2) Persons falling under points (a) and (b) of Article 3(2) of Directive 2004/38/EC whose residence was facilitated by the host State in accordance with its national legislation before the end of the transition

period in accordance with Article 3(2) of that Directive shall retain their right of residence in the host State in accordance with this Part, provided that they continue to reside in the host State thereafter.’

30. At the date of the application the appellant was remaining in the UK without leave. He had not had valid leave to remain under domestic law since 2012. Two applications for a residence card recognising a right of residence under EU law had been refused. In the absence of any evidence to show that the appellant had been recognised as having a right of residence under EU law both Article 10(1)(e)(i) and Article 10(2) would require an examination of the case to ascertain whether the appellant was a person to whom the Citizens’ Rights contained in Part Two of the Withdrawal Agreement applied. The judge conducted no assessment to establish whether the rights contained in the Withdrawal Agreement did in fact apply to the appellant.
31. Even if the judge had considered the question of whether the rights contained in the Withdrawal Agreement applied to the appellant, the three reasons she gave for concluding that rights under the Withdrawal Agreement were breached are somewhat confusing and the terminology used is unclear.
32. In law, words usually have a technical meaning. The judge found that the respondent failed to consider whether the appellant should be viewed as qualifying for a ‘family permit’. That is a legal term used in the EEA Regulations 2016 to refer to applications made from abroad for entry to the UK under EU law. Somewhat confusingly it is also used as a term in Appendix EU (family permit), which also relates to applications made from abroad in the context of the EU Settlement Scheme. Given that this was an application made in country for leave to remain under the EU Settlement scheme, and she had previously expressed the view that the respondent should have also considered the application under the EEA Regulations 2016, it is unclear what form of consideration the judge thought the respondent should have undertaken.
33. The second reason given by the judge for finding a breach of the Withdrawal Agreement refers to the respondent’s failure to consider if the appellant ‘qualified for residence’. Again, the term ‘residence’ is usually used to refer to a right of residence under EU law but is also used in the Withdrawal Agreement.
34. Although an assessment of the best interests of a child is always an important factor in any decision that might impact on a child in the UK, in my assessment the judge failed to give adequate reasons to explain why she thought this factor breached the appellant’s rights under the Withdrawal Agreement with proper reference to the relevant rights.
35. The final reason seemingly given by the judge for concluding that the decision breached the appellant’s rights under the Withdrawal Agreement was that the respondent had failed to comply with the procedural



obligation under Article 18(1)(o) of the Withdrawal Agreement. That part states that the competent authorities of the host State shall help applicants to prove their eligibility and to avoid any errors or omissions in their applications; they shall give the applicant the opportunity to furnish supplementary evidence and to correct any deficiencies, errors or omissions. The judge failed to consider the evidence that indicated that the appellant might have been invited to produce further evidence in support of the application although the timeline is unclear. Nor did she consider the EUSS Review, which did engage with the evidence produced by the appellant.

36. Whilst it is arguable that the breach of a procedural obligation is not necessarily the same as a breach of a 'right' identified in the Withdrawal Agreement for the purpose of the relevant ground of appeal under the Appeals Regulations 2020 it is not necessary for me to delve into that issue. The purpose of the appeal was to consider whether the respondent's decision was not in accordance with the immigration rules relating to the EU Residence Scheme or in the alternative whether it breached a right that the appellant might have had by virtue of the Withdrawal Agreement.
37. The judge had concerns that the best interests of the child and the relationship between her and her father had not been considered adequately. However, for the reasons explained above, whether the assessment was under the immigration rules or the Withdrawal Agreement it required the First-tier Tribunal to consider the substantive issues. The decision fails to assess whether the evidence before the First-tier Tribunal showed that the appellant met the requirements of the immigration rules. There is no assessment of whether the appellant met the requirements for leave to remain as a person with a *Zambrano* right to reside. The same substantive issues were relevant to the question of whether the rights contained in the Withdrawal Agreement even applied to the appellant with reference to Article 10. Even if a breach of a procedural obligation was capable of amounting to a breach of a 'right' under the Withdrawal Agreement, the judge failed to consider evidence that was material to a proper assessment of the issue.
38. For the reasons given above I conclude that the First-tier Tribunal decision involved the making of an error of law. The decision is set aside.
39. The usual course of action is for the Upper Tribunal to remake the decision even if it involves making further findings. Ultimately, it is a matter for the Upper Tribunal to decide what course is appropriate in each case. Mr Clarke urged me to remake the decision and to dismiss the appeal based on the submissions already made, but Mr Khan urged me to remit the case for a fresh hearing if an error of law was found.
40. I note that the First-tier Tribunal in 2018 appeared to accept that the appellant had a genuine and subsisting parental relationship with an EEA national child. At the time his daughter was not a 'qualifying child' because she is not a British citizen and had not been continuously resident

in the UK for a period of seven years. At the date this decision is prepared it is possible that the circumstances have changed because the child is now seven years old. The EUSS Review recognised that the appellant might be eligible for a grant of leave to remain under other provisions of the immigration rules. It is not yet clear to what extent, if any, human rights issues can be argued in appeals brought under the Appeals Regulations 2020. It is possible that guidance might soon be issued by the Upper Tribunal in relation to some of the relevant issues in this appeal.

41. Although the appellant is likely to have an uphill battle to show that he might have (or had before the end of the transition period) a *Zambrano* right to reside given that the child's mother is the primary carer, I do not consider it appropriate to determine the appeal in the way urged by Mr Clarke. No consideration has yet been given to the substantive legal issues applicable to this appeal. The appellant is entitled to considered findings on those issues.
42. Given the wholesale nature of the findings that will need to be made I find that it is appropriate on this occasion to remit the case to the First-tier Tribunal for a fresh hearing. This will give time for the parties to clarify the procedural history of the application, which would assist the Tribunal. It would also give time for the respondent to consider whether a pragmatic approach might be appropriate given the fact that the appellant's child is now likely to have been resident in the UK for a continuous period of seven years. As an EEA national child who is the subject of a Family Court order, it is at least arguable that it might be unreasonable to expect her to leave the UK. It is open to the respondent to exercise discretion in relation to other areas of the immigration rules, but that is entirely a matter for the respondent.
43. For the reasons given above, the case will be remitted to the First-tier Tribunal for a fresh hearing.

## DECISION

The First-tier Tribunal decision involved the making of an error on a point of law

Signed M. Canavan                      Date 14 July 2022  
Upper Tribunal Judge Canavan

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### **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**