Upper Tribunal (Immigration and Asylum Chamber) Appeal Number: EA/07916/2021
UI-2022-001996

THE IMMIGRATION ACTS

Heard at Manchester
On 22 November 2022

Decision and Reasons Promulgated
On 12 February 2023

Before

Upper Tribunal Judge Kebede
Deputy Upper Tribunal Judge Sills

Between

Hafsa Nawaz
(Anonymity Direction Not Made)

Appellant

and

ENTRY CLEARANCE OFFICER

Respondent

ERROR OF LAW DECISION

Representation:
For the Appellant: Mr Hussein
For the Respondent: Mr McVeety

Introduction

1. The Respondent (R) appeals against the decision (the Decision) of Judge Beg (the Judge) dated 12 April 2022, allowing the Appellant (A)'s appeal against the refusal to grant her entry clearance under Appendix EU (Family Permit) of the Immigration Rules.

Factual Background

2. A applied for an EU Family Permit on 1 February 2021 to join her brother, a Portuguese national, in the UK. The application was refused on 8 April 2021 on the basis that R was not satisfied that A was a family member of an EEA national as claimed. A appealed. The appeal was heard on 6 April 2022. R was not represented at the appeal hearing. In the Decision, the Judge accepted that A and the relevant EEA national were siblings as claimed. The Judge found that as A had applied for entry clearance after 31 December 2020, she could not succeed in her application under Appendix EU (Family Permit). A had also sought to appeal on human rights grounds. The Judge was referred to s85(4) of the Nationality Immigration and Asylum Act 2002 (the 2002 Act), Regulation 9 of the Immigration (Citizens' Rights Appeals)(EU Exit) Regulations 2020 (the 2020 Regs), and s7 of the Human Rights Act 1998. She also referred to there being a s120 notice under the 2002 Act. She noted that R had not attended the hearing or raised any objections, that the s120 notice related to the same factual matrix, and decided to consider the human rights ground of appeal (Article 8 ECHR). The Judge accepted that as A's mother had been granted entry clearance, A would be left to live alone in Pakistan as a single woman which was culturally unacceptable. The Judge allowed the appeal on human rights grounds.

3. R appealed on the basis that the Judge was not entitled to allow the appeal on human rights grounds. The only grounds of appeal were contained in Reg 8 of the 2020 Regs. Permission to appeal was granted by Judge Athwal.

Legal Framework

4. Regs 8 and 9 of the 2020 Regs states:

> *8.— Grounds of appeal*
>
> *(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), 24(3), 25(2) or 25(3) of Chapter 2, of Title II, or Article 32(1)(b) of Title III, of Part 2 of the withdrawal agreement,…*
> *(3) The second ground of appeal is that—*
> *(b) where the decision is mentioned in regulation 3(1)(c) or (d), it is not in accordance with residence scheme immigration rules;*
> *…*
> *(4) But this is subject to regulation 9.*
>
> *9.— Matters to be considered by the relevant authority*

(1) If an appellant makes a section 120 statement, the relevant authority must consider any matter raised in that statement which constitutes a specified ground of appeal against the decision appealed against. For the purposes of this paragraph, a "specified ground of appeal" is a ground of appeal of a kind listed in regulation 8 or section 84 of the 2002 Act1.
(2) In this regulation, "section 120 statement" means a statement made under section 120 of the 2002 Act2 and includes any statement made under that section, as applied by Schedule 1 or 2 to these Regulations.
(3) For the purposes of this regulation, it does not matter whether a section 120 statement is made before or after the appeal under these Regulations is commenced.
(4) The relevant authority may also consider any matter which it thinks relevant to the substance of the decision appealed against, including a matter arising after the date of the decision.
(5) But the relevant authority must not consider a new matter without the consent of the Secretary of State.
(6) A matter is a "new matter" if—
(a) it constitutes a ground of appeal of a kind listed in regulation 8 or section 84 of the 2002 Act, and
(b) the Secretary of State has not previously considered the matter in the context of—
(i) the decision appealed against under these Regulations, or
(ii) a section 120 statement made by the appellant.

5. S120 of the 2002 Act states:

120 Requirement to state additional grounds for application etc

(1) Subsection (2) applies to a person ("P") if—
(a) P has made a protection claim or a human rights claim,
(b) P has made an application to enter or remain in the United Kingdom, or
(c) a decision to deport or remove P has been or may be taken.
(2) The Secretary of State or an immigration officer may serve a notice on P requiring P to provide a statement setting out—
(a) P's reasons for wishing to enter or remain in the United Kingdom,
(b) any grounds on which P should be permitted to enter or remain in the United Kingdom, and
(c) any grounds on which P should not be removed from or required to leave the United Kingdom.
(3) A statement under subsection (2) need not repeat reasons or grounds set out in—
(a) P's protection or human rights claim,
(b) the application mentioned in subsection (1)(b), or
(c) an application to which the decision mentioned in subsection (1)(c) relates.

> *(4) Subsection (5) applies to a person ("P") if P has previously been served with a notice under subsection (2) and—*
> *(a) P requires leave to enter or remain in the United Kingdom but does not have it, or*
> *(b) P has leave to enter or remain in the United Kingdom only by virtue of [section 3C of the Immigration Act 1971]2 (continuation of leave pending decision or appeal).*
> *(5) Where P's circumstances have changed since the Secretary of State or an immigration officer was last made aware of them (whether in the application or claim mentioned in subsection (1) or in a statement under subsection (2) or this subsection) so that P has—*
> *(a) additional reasons for wishing to enter or remain in the United Kingdom,*
> *(b) additional grounds on which P should be permitted to enter or remain in the United Kingdom, or*
> *(c) additional grounds on which P should not be removed from or required to leave the United Kingdom,*
> *P must, as soon as reasonably practicable, provide a supplementary statement to the Secretary of State or an immigration officer setting out the new circumstances and the additional reasons or grounds.*
> *(6) In this section—*
> *"human rights claim" and "protection claim" have the same meanings as in Part 5;*
> *references to "grounds" are to grounds on which an appeal under Part 5 may be brought (see section 84).*

6. After the grant of permission in this appeal, the UT gave relevant guidance in the case of Celik (EU exit; marriage; human rights) [2022] UKUT 00220 (IAC). The headnote of Celik states as follows:

> *(3) Regulation 9(4) of the 2020 Regulations confers a power on the First-tier Tribunal to consider a human rights ground of appeal, subject to the prohibition imposed by regulation 9(5) upon the Tribunal considering a new matter without the consent of the Secretary of State.*

7. Para 96 states:

> *96. Given what we have said about the nature of the respondent's decision-making under Appendix EU, the raising of a human rights claim will always be a" new matter", except where, for some reason, the respondent has already considered it.*

The Hearing

8. At the hearing, Mr McVeety modified R's case in the light of Celik. Mr McVeety argued that as R had not consented to the Tribunal considering

the new matter of the human rights claim, the Tribunal had no jurisdiction to consider this ground of appeal. His initial position was that R had not provided consent, having not attended the hearing. We raised with Mr McVeety whether R had ever served a s120 notice upon A and as a result he took time to examine R's file for this appeal. Mr McVeety then drew to our attention that on 1 February 2022 R had provided a response to directions from the First-Tier Tribunal. He filed and served this document. The response stated as follows: There was no record of R ever having served a s120 notice upon A, and so A's representations should not be treated as a statement under s120 of the 2002 Act. R relied on the case of Jaff (s.120 notice; statement of "additional grounds") [2012] UKUT 00396 (IAC). A could not appeal on human rights grounds against this decision. If the Tribunal accepted that the human rights claim was a new matter, R refused consent. As a result, Mr McVeety argued that R had explicitly refused consent for the Tribunal to consider any appeal on human rights grounds. Mr Hussain on A's behalf relied on the skeleton argument drafted by his instructing solicitor dated 15 July 2022, and argued that the human rights claim did not amount to a new matter and so consent was not required. We reserved our decision. _

Findings

9. We allow R's appeal for the following reasons. First, we are satisfied that A did not make a s120 statement as claimed. Having considered s120 of the 2002 Act itself, and the case of Jaff (s.120 notice; statement of "additional grounds") [2012] UKUT 00396(IAC) (see e.g., para 13) it is clear that a s120 statement can only be made in response to a s120 notice. An individual cannot unilaterally make a s120 statement. A's skeleton argument relies on s120(5), but as per s120(4) that only applies where the R has previously served a s120 notice on the person. The skeleton argument appears to acknowledge this at para 24. So far as A's skeleton argument claims that a s120(5) statement can be made without prior service of a notice by R under s120(2), we are satisfied that that claim is wrong in law.

10. We are satisfied that R has not serve a s120 notice upon A for the following reasons. There is no s120 notice in the papers before us. In response to directions issue by the First Tier Tribunal, R denied serving a s120 notice upon A. What is described as A's 'section 120 Statement' at p17 of A's bundle, makes no reference to A ever being served with such a notice. Finally, A's skeleton argument argues that A could serve a s120 statement without prior service of a notice. While we have rejected this argument, it is likely A was making this argument as there was no such notice. There is thus no s120 statement and Regs 9(1)-(3) of the 2020 Regs do not apply.

11. We are satisfied that the raising of human rights as a new ground of appeal did constitute a new matter and so Regs 9(4) and (5) apply. We find this to be the case because Celik explicitly states this to be the

case at para 96 as set out above. The circumstances of Celik and the present appeal are materially the same, namely an appellant seeking to raise a human rights grounds of appeal against a decision to refuse an application made under the Immigration Rules dealing with the EUSS. There was no consideration of, or decision on, any human rights claim in the decision under appeal.

12. As the human rights ground of appeal constitutes a new matter, the Tribunal could only consider this with R's consent. R explicitly refused to give consent. Therefore, the Tribunal had no jurisdiction to consider the appeal on this ground.

13. Finally, so far as it is suggested by A that a decision or provision which excludes a human rights claim itself must breach A's ECHR rights, that is plainly unarguable. If A wishes to have her human rights considered without relying on R's consent, she simply needs to make a human rights application.

14. We find that the Tribunal had no jurisdiction to consider and allow the appeal on human rights grounds and the Judge erred in law in doing so. We therefore set aside the Decision.

15. The Judge dismissed A's appeal on the grounds of appeal that were available to A. A did not seek to challenge the Judge's findings on this issue. We therefore remake the decision dismissing A's appeal.

Notice of Decision

The decision of the First-tier Tribunal contains a material error of law and is set aside.

We remake the decision and dismiss the appeal.

Signed Date 7

December 2022

Deputy Upper Tribunal Judge Sills