



IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2022-006183

First-tier Tribunal No: EA/01435/2022

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On 12 August 2024

Before

UPPER TRIBUNAL JUDGE PERKINS
DEPUTY UPPER TRIBUNAL JUDGE FARRELLY

Between

The Secretary of State for the Home Department

Appellant

and

Jashandeep Kaur
(no anonymity order made)

Respondent

Representation:

For the Appellant: Mr M Diwnycz, Senior Home Office Presenting Officer
For the Respondent: Mr A Alam, Counsel, instructed by Syed's Solicitors

Heard at Field House on 7 September 2023

DECISION AND REASONS

1. This is an appeal by the Secretary of State against the decision of the First-tier Tribunal allowing the appeal of the appellant, hereinafter "the claimant", against the decision of the Secretary of State refusing her application for settled or pre-settled status pursuant to the EU Settlement Scheme in accordance with Appendix EU of the Immigration Rules. The appeal was allowed because of evidence supporting the contention that relevant events occurred after the Secretary of State had decided the application.
2. The essence of the Secretary of State's appeal (we consider this in more detail below) is that the judge should not have entertained the arguments relating to the new event because it was a "new matter" within the meaning of Section 85(5) of the Nationality, Immigration and Asylum Act 2002. It was Mr Alam's contention the new material was not within the definition of "new matter" under Section 85 but, much more importantly, it was his contention that Section 85 has no application in an appeal under the EU Regulations.

3. Having reflected on the matter, we agree with Mr Alam and we dismiss the Secretary of State's appeal.
4. We now endeavour to explain this decision.
5. The Secretary of State's decision is dated 14 January 2022. It acknowledges an application made by the claimant under the EU Settlement Scheme and explained why the claimant, in the Secretary of State's opinion, did not satisfy the requirements of the Rules. The letter then showed that the claimant had a right of appeal to the First-tier Tribunal under the "Immigration (Citizens' Rights Appeals) (EU Exit) Regulations 2020". This prompted the claimant to appeal and she relied on grounds settled by her then solicitors (not Syed's Solicitors). Some of the things described as "grounds of appeal" are probably not permissible grounds but they explain the nature of the complaint and refer in different places to the EU Settlement Scheme Rules, rights under the Withdrawal Agreement, being not in accordance with Immigration Rules EU Regulations, being "not in accordance with the law" and also raising points that had not been considered before the decision which, it was said, put the claimant within the scope of the Rules. Inasmuch as the grounds identified permissible legal ground, they all related to the EU Settlement Scheme. The application is not and never was cast as a human rights appeal.
6. The First-tier Tribunal Judge's Decision and Reasons shows that she was purporting to determine an appeal brought "on the appropriate statutory ground under the Immigration (Citizens' Rights Appeals) (EU Exit) Regulations 2020". The claimant made it plain that she wanted to rely on a fresh incident in her private life in support of her claim and the Presenting Officer before the First-tier Tribunal, having indicated that he had no objection, took advice and said that it was a "new matter which had not been considered by the [Secretary of State] in the Reasons for Refusal Letter" and asked for time. The application was opposed and the judge continued with the hearing and admitted the evidence relating to recent events and found in the claimant's favour. The judge said that if the material had not been considered then it should have been considered. It was plain from the grounds of appeal that the claimant wanted to rely on the "new" material and the Secretary of State did not take the point at least before the hearing.
7. It is important to see how the Decision and Reasons was criticised by the Secretary of State in the application for permission to appeal. Only one ground is raised. It is said the First-tier Tribunal erred by "making a material misdirection of law on any relevant matter". The criticism then is that the judge allowed the appeal because of the "new matter" even though consent had not been given by the Secretary of State to consider the new matter and this was contrary to the requirements of Section 85(5) of the 2002 Act. The Grounds of Appeal to the Upper Tribunal recognised that the point was raised in the grounds of appeal to the First-tier Tribunal and said that was no answer. The grounds drew attention to Section 85(6) of the 2002 Act which deals with the definition of a new matter. It must constitute a "ground of appeal of a kind listed in Section 84" and must not have been considered previously in a particular context, particularly the decision mentioned in Section 82(1) or in a "statement made by the appellant under Section 120". (Section 85(6)(b)(ii)). It was said that the judge erred by entertaining the argument and relied on the decision of the Upper Tribunal in **Quaidoo (new matter: procedure/process) [2018] UKUT 00087 (IAC)**.

8. In short, the point taken is that Section 85(5) applied, the consent had not been given and the judge was wrong. No other points were raised. Section 85 of the 2002 Act does not apply to all appeals before the Upper Tribunal. It applies to “An appeal under Section 82(1) against the decision ...”. The vast majority of appeals before the Upper Tribunal are brought under Section 82(1) but not all.
9. The Immigration (Citizens’ Rights Appeals) (EU Exit) Regulations 2020 provide for decisions and appeals against those decisions in respect of “Citizens’ rights immigration decisions”. Under the heading “Chapter 2” Regulation 11 provides that “Schedule 2 makes provision for the application of the 2002 Act to appeals to the Tribunal”.
10. Schedule 2 begins with a list of “application of provisions of the 2002 Act in connection with appeals to the Tribunal” and lists a series of sections of the 2002 Act which are said to apply in connection with an appeal to the Tribunal under these Regulations, as they apply in connection with an appeal under Section 82(1). Subject to a possible qualification we note below, there are seven sections or groups of sections noted and Section 85 is not amongst them. There are provisions in later parts of the schedule for “general modifications” and “specific modifications” but again, there is no mention of Section 85.
11. The plain conclusion is that Section 85 does not apply and the Home Office’s appeal is completely misconceived.
12. Without in any way suggesting that the attack would have been justified, still less successful, it might have been possible to criticise the judge for finding that the requirements of the exit provisions were met or for procedural unfairness in continuing with a point that the Secretary of State had not anticipated. These points were not relied upon in the grounds and, sensibly, there was no application to amend them at this late stage.
13. It follows that we agree with Mr Alam that Section 85 does not apply and it follows that the grounds make out no material or any error of law.
14. We decline to determine Mr Alam’s subsidiary submission that even if wrong about this, the matters relied upon would not be a “new matter” within the meaning of the Act. This is a potentially very complex area and we see no point considering it as we are satisfied it just does not arise.

Notice of Decision

15. I find the First-tier Tribunal did not err in law and we dismiss the Secretary of State’s appeal.

Jonathan Perkins

Judge of the Upper Tribunal
Immigration and Asylum Chamber

Date 2 August 2024