



IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM
CHAMBER

Case No: UI-2024-000875
First-tier Tribunal No:
[EU/50173/2022]
LE/00813/2023

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On the 25 July 2024

Before

UPPER TRIBUNAL JUDGE KOPIECZEK
DEPUTY UPPER TRIBUNAL JUDGE COTTON

Between

BRUNO MIGUEL FURTADO
(ANONYMITY ORDER NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms S. Saifolahi, Counsel instructed by Arona St James, Solicitors

For the Respondent: Mr E. Terrell, Senior Home Office Presenting Officer

Heard at Field House on 29 May 2024

DECISION AND REASONS

Introduction

1. The appellant is a citizen of Portugal, born in July 1994. He appealed to the First-tier Tribunal ("FtT") against the respondent's decision dated 9

December 2022 to refuse his application for settlement under the EU Settlement Scheme ("EUSS"). That decision was made in the context of the appellant having been convicted on 18 June 2020 of possession with intent to supply a controlled drug, for which he received a sentence of 20 months' imprisonment.

2. A deportation order was made on 21 January 2021 under the Immigration (European Economic Area) Regulations 2016 ("the EEA Regulations"). The appellant appealed that decision but his appeal was dismissed by the FtT on 7 February 2022. His appeal to the Upper Tribunal ("UT") was unsuccessful.
3. His appeal against the EUSS decision came before First-tier Tribunal Judge Shand on 27 November 2023, which resulted in his appeal being dismissed. Permission to appeal having been granted by a judge of the FtT, the appeal came before us.

Judge Shand's decision

4. By way of background, Judge Shand referred to the appellant having a son, a Portuguese citizen, born in the UK on 14 October 2022. The child's mother is also Portuguese citizen who came to the UK in 2019 and who has pre-settled status. She and the appellant and their son live together in the UK.
5. Judge Shand referred to the facts advanced on behalf of the appellant that his son was born prematurely and has sickle cell disease, and that he has significant health problems, including the need for oxygen support at home.
6. Judge Shand gave a detailed summary of the appellant's arguments and the representations made to the respondent, as well as the respondent's responses. She summarised the evidence given by the appellant, his partner, the appellant's mother, and a cousin of the appellant. She gave a detailed summary of the parties submissions.
7. In her findings, Judge Shand dealt with the question of whether the facts relied on in terms of Article 8 were a 'new matter' for which the respondent would need to give consent to be considered. The issue was not clear cut but she resolved it in favour of the appellant.
8. Most significantly, Judge Shand said the following at [43]-[46]:
 - "43. However I have no power [to] allow the appeal based on article 8 considerations given that a deportation order has been made and remains in place. The terms of rule EU15 are binding on me and I do not therefore have the power to allow the appellant's appeal against the refusal of his application under the EU Settlement Scheme.
 44. Accordingly the appeal falls to be dismissed.

45. In these circumstances no proportionality assessment falls to be made in this appeal or can meaningfully be made.
46. For completeness I accept the unchallenged evidence that the appellant and Ms De Melo Mendes are in a relationship and Ms De Melo Mendes' baby is the appellant's son."

The grounds of appeal

9. The grounds of appeal boil down to the single issue of whether Judge Shand was correct to find that she had no jurisdiction to consider Article 8 because of the terms of paragraph EU15 of the Immigration Rules ("the Rules").
10. The grounds point out that Judge Shand referred to the respondent's review dated 4 July 2023 in which the respondent had considered the Article 8 representations made prior to the hearing. The supplementary decision letter dated 9 December 2022 had also considered Article 8. The supplementary decision letter said that the appellant's case now reverted to the FtT.
11. The grounds rely on *Batool and others (other family members: EU exit)* [2022] UKUT 00219 (IAC), in particular at [80] in support of the contention that the FtT was wrong to find that it had no jurisdiction to consider Article 8. The grounds also rely on *Dani (non-removal human rights submissions)* [2023] UKUT 00293 (IAC) at [7] to the same effect, albeit that that decision post-dated the appeal before the FtT.

Submissions

12. We summarise the parties' oral submissions. At the outset, Mr Terrell accepted that it was difficult to suggest that consent was not given by the respondent to Article 8 being considered as a new matter.
13. In her submissions, Ms Saifolahi relied on her skeleton argument. She suggested that this appellant's case was unusual in that two sets of submissions were made by the appellant to the respondent, firstly prior to the decision taken under the EUSS, and secondly, on 11 May 2023 raising Article 8. The reasons for that were that the appeal against the deportation decision had been dismissed in an earlier appeal. The Article 8 case related to his son's birth. Ms Saifolahi referred to the positive findings of fact made by Judge Shand in relation to the appellant's relationship with his wife and son.
14. After further reference to the representations made to the respondent Ms Saifolahi said that the appellant's understanding was that consideration of Article 8 had reverted to the FtT.
15. As in the grounds of appeal and skeleton argument, Ms Saifolahi relied on *Batool*. In the context of reg 9(4) of the Immigration (Citizens' Rights Appeals) (EU Exit) Regulations 2020 ("the Appeal Regulations") it was

submitted that Article 8 in this case was “relevant to the substance of the decision” under reg 9(4) and, therefore, did need to be considered. It appeared that the respondent certainly thought so, it was argued.

16. As regards *Dani*, Ms Saifolahi pointed out a number of differences between that case and the case of this appellant as set out in her skeleton argument, including the lack of Article 8 representations made to the Secretary of State in that case, no acceptance by the Secretary of State that Article 8 was an issue for the FtT, and no removal decision or prospect of removal. Ms Saifolahi also referred to the more recent case of *Ayoola (previously considered matters) Nigeria* [2024] UKUT 143 (IAC) to support the contention that the Secretary of State had considered the Article 8 issue in advance of the hearing.
17. For his part, Mr Terrell also relied on his skeleton argument. He referred to reg 9 of the Appeal Regulations and said that reg 9(4) is the only bar to jurisdiction, subject to the ‘new matter’ provisions.
18. Mr Terrell accepted that the guidance in *Dani* refers to ‘non-removal’ cases, but submitted that this was because of the context of that appeal. The decision under appeal in this appellant’s case was simply a refusal pursuant to paragraph EU15 of the Rules. He submitted that it was fundamentally a decision under the Withdrawal Agreement and not in terms of human rights. Mr Terrell also relied on *Amirteymour v Secretary of State for the Home Department* [2017] EWCA Civ 353 at [47]-[48] to like effect. He pointed out that the UT in *Munday (EEA decision: grounds of appeal)* [2019] UKUT 00091(IAC) decided that *Amirteymour* still applied.
19. In answer to my enquiry as to whether any of the supplementary decision letters informed the appellant that he had a right of appeal against the refusal of a human rights claim, Ms Saifolahi said that the first supplementary decision later dated 9 December 2022 states at paragraph 28 that there would be no removal action taken and that he had an appeal against the EUSS refusal.
20. Mr Terrell referred to *Johnson v Secretary of State for the Home Department* [2024] EWCA Civ 182, in particular at [62], to the effect that the views of civil servants in individual cases are not an aid to the interpretation of the law.
21. Finally, as set out in his skeleton argument, Mr Terrell submitted that on this issue *Celik (EU exit; marriage; human rights)* [2022] UKUT 00220 (IAC) has been overtaken by the approach in *Dani*. In his skeleton argument it is pointed out that the court in *Celik* was not referred to *Amirteymour*.
22. In reply, Ms Saifolahi argued that the respondent’s case revolves around [35] of *Dani* but the guidance in the headnote at [5], taken together with [32]-[33] clearly indicates that the approach to an appeal in this respect has to be fact-specific. She submitted that *Dani* specifically refers to non-removal cases.

23. Ms Saifolahi submitted that reg 9(6), and s.84 of the Nationality, Immigration and Asylum Act 2002 (“the 2002 Act”), which allows for an appeal on human rights grounds, means that there is scope for an appeal on Article 8 grounds. She submitted that the respondent’s argument makes reg 9(6) redundant.

Assessment and Conclusions

24. The issue, easy to state, but more difficult to decide, is whether the FtT was right to conclude that it had no jurisdiction to consider Article 8 of the ECHR. We are grateful to the parties for their very helpful skeleton arguments and the quality of their oral submissions.
25. There are two decisions dated 9 December 2022, the first is a decision to refuse to reconsider the deportation decision under the EEA Regulations. The second is a decision to refuse settlement under the EUSS on the basis that the appellant is subject to a deportation order, leading to refusal on suitability grounds under paragraph EU15 of the Rules. It is the EUSS decision which is the decision that is the subject of these proceedings.
26. The right of appeal against that decision is provided for by the Appeal Regulations. It is agreed that the grounds of appeal are to be found in reg 8(2)(a) and 8(3)(b), that the decision breaches any right under the Withdrawal Agreement, and that the decision is not in accordance with residence scheme immigration rules, respectively.
27. Reg 9 of the Appeal Regulations provides as follows:

“Matters to be considered by the relevant authority

9.—(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 Act.

(2) In this regulation, “section 120 statement” means a statement made under section 120 of the 2002 Act 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.”

28. S.84 of the 2002 Act is as follows:

“Grounds of appeal

(1) An appeal under section 82(1)(a) (refusal of protection claim) must be brought on one or more of the following grounds—

(a) that removal of the appellant from the United Kingdom would breach the United Kingdom's obligations under the Refugee Convention;

(b) that removal of the appellant from the United Kingdom would breach the United Kingdom's obligations in relation to persons eligible for a grant of humanitarian protection;

(c) that removal of the appellant from the United Kingdom would be unlawful under section 6 of the Human Rights Act 1998 (public authority not to act contrary to Human Rights Convention).

(2) An appeal under section 82(1)(b) (refusal of human rights claim) must be brought on the ground that the decision is unlawful under section 6 of the Human Rights Act 1998.

(3) An appeal under section 82(1)(c) (revocation of protection status) must be brought on one or more of the following grounds—

(a) that the decision to revoke the appellant's protection status breaches the United Kingdom's obligations under the Refugee Convention;

(b) that the decision to revoke the appellant's protection status breaches the United Kingdom's obligations in relation to persons eligible for a grant of humanitarian protection.”

29. Paragraph EU15 of the Rules, so far as relevant states that:

“EU15. (1) An application made under this Appendix will be refused on grounds of suitability where any of the following apply at the date of decision:

(a) The applicant is subject to a deportation order or to a decision to make a deportation order...”

30. The area of dispute is in terms of whether human rights, specifically Article 8 in this case, is a matter that is “relevant to the substance of the decision”.
31. It is accepted on behalf of the respondent that, realistically, consent was given for the FtT to consider Article 8 as a new matter. However, submits Mr Terrell, that is not the issue in this appeal.
32. Mr Terrell’s position rests substantially on the decision of the UT in *Dani* which, he submits, alters the approach taken by the UT in *Celik*. The guidance in *Celik* in its headnote includes the following:
- “(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.”
33. That guidance, as it always would be in a reported case from the UT, reflects the reasoning in the decision itself. The relevant paragraphs are the following:
- “92. The first question is to decide whether the First-tier Tribunal has jurisdiction, in an appeal of this kind, to consider human rights. The question arises because decision-making under residence scheme immigration rules (Appendix EU) does not involve a consideration of the applicant’s (or any other person’s) rights under Article 8 of the ECHR.
93. In order for regulation 9(4) to come into play, two requirements must be satisfied. There must be a “matter”, in the sense of being the factual substance of a claim: Mahmud (s.85 NIAA 2002 - ‘new matters’) [2017] UKUT 00488 (IAC) at paragraph 29. Second, the matter must be “relevant to the substance of the decision appealed against”. The interpretation of the words “relevant to the substance of the decision”, as found in section 85(4) of the 2002 Act, was considered by the Supreme Court in *Patel & Others v SSHD* [2013] UKSC 72; [2014] Imm AR 456. Giving the lead judgment, Lord Carnwath (with whom Lord Kerr, Lord Reed and Lord Hughes agreed) upheld the “wide” construction of the words, which had been taken by the majority of the Court of Appeal in AS (Afghanistan) v SSHD [2011] EWCA Civ 833; [2011] Imm AR 832. Under this approach, the substance of the decision appealed against is no more than the decision to refuse to grant or vary leave to enter or remain (or entry clearance) as opposed to, for example, a “decision to refuse to vary leave to remain under rule x” (Sullivan LJ at paragraph 113).
94. Transposed to regulation 9 of the 2020 Regulations, the “decision appealed against”, is, in the present case, the decision to refuse to grant the appellant leave to enter or remain generally, as opposed to a decision to refuse him leave to enter or remain under the EUSS rules specifically.

95. This means that regulation 9(4) confers a power on the First-tier Tribunal to consider a human rights ground, subject to the prohibition imposed by regulation 9(5) upon the Tribunal considering a new matter without the consent of the respondent.”
34. Those paragraphs come under a section whose subheading is “Article 8 ECHR” which was one of the grounds of appeal before the UT. Mr Terrell’s characterisation of this part of the UT’s decision as “obiter comments” is, with respect, wrong. It is part of the *ratio* of the decision by the Presidential panel and is part of its guidance. In any event, *obiter* comments that form part of guidance in a reported decision of the UT is guidance nonetheless. It is binding on the FtT, and the principal of judicial comity means that another constitution of the UT should follow it unless there is good reason not to.
35. Does *Dani* alter the guidance in *Celik*? We are not satisfied that it does. Mr Terrell fairly recognises in his skeleton argument, as he did in oral submissions, that *Dani* was not a case about removal. The guidance in *Dani* is the following:
- “1) The mere refusal of leave to remain under the EUSS is not, without more, a "human rights claim" under section 113(1) of the 2002 Act.
 - 2) Consequently, the "new matter" regime does not regulate the Tribunal's consideration of non-removal human rights submissions.
 - 3) But the Tribunal may only consider matters which it thinks are "relevant to the substance of the decision appealed against".
 - 4) Whether Article 8 is engaged by a decision to refuse an EUSS application is not "relevant to the substance of the decision appealed against"; the Tribunal cannot not consider it (sic). The Tribunal does not enjoy a broad, unencumbered jurisdiction to consider non-removal human rights submissions at large.
 - 5) In any event, Article 8 will not, without more, be engaged by a decision to refuse leave to remain under the EUSS.
 - 6) Section 7(1)(b) of the Human Rights Act 1998 does not permit an appellant to advance a free-standing Article 8 claim in proceedings before the First-tier Tribunal.”
36. Some preliminary observations may be made in relation to the above guidance. First, the UT refers to the “mere refusal” of leave to remain under the EUSS, and Article 8 will not “without more” be engaged. Second, the type of decisions it has in mind are plainly “non-removal decisions”.
37. That the UT’s focus in *Dani* was on non-removal decisions is plain from the very paragraphs that the respondent relies on. At [33]-[37] the UT said this:

- “33. In the case of an EUSS appeal, whether Article 8 is engaged by the Secretary of State’s underlying refusal decision is not a matter which is relevant to the substance of the decision, for the following reasons.
34. First, it was not the appellant’s case in his application to the Secretary of State that he was entitled to leave to remain on Article 8 grounds.
35. Secondly, even if the appellant had maintained or implied to the Secretary of State that he was entitled to Article 8-based leave in the course of making an EUSS application, his primary application to the Secretary of State was for leave under the EUSS. His EUSS application would have been framed by reference to EUSS criteria, which are based on the EU Withdrawal Agreement, not the ECHR. Neither the EUSS nor the EU Withdrawal Agreement feature criteria commensurate with the general Article 8-based submissions the appellant sought to rely upon before the judge. Appendix EU of the Immigration Rules, which establishes the EUSS, has not been framed to give effect to the UK’s ECHR obligations. The ECHR is, of course, an entirely different international treaty from the EU Withdrawal Agreement. The Secretary of State has made quite separate provision under the Immigration Rules, for example in Appendix FM, to give effect to the UK’s Article 8 ECHR obligations. Mr Toal’s attempt to achieve cross-pollination between two entirely separate regimes is misconceived.
36. Thirdly, nothing in the Secretary of State’s EUSS decision purported to engage with any matters relating to Article 8 ECHR, or the Immigration Rules which seek to give effect to the UK’s Article 8 ECHR obligations.
37. Fourthly, since the appellant’s case is expressly premised on the footing that he did not make an Article 8 claim based on his prospective removal, there was no sense in which the Secretary of State’s decision to refuse EUSS leave engaged his rights under Article 8(1) ECHR.”
38. Of the UT’s reasons for its conclusions in relation to Article 8 rights one can immediately see from the above paragraphs that this appellant’s case is different. It is this appellant’s case that he is entitled to leave to remain on Article 8 grounds. The Secretary of State’s decision did engage with the appellant’s Article 8 submissions. The appellant’s case is premised on the footing of a prospective removal because of the deportation order.
39. We respectfully agree with the UT’s reasoning in *Dani* in terms of the facts of the appeal before it, but we do not consider that it is authority for the proposition that the appellant in the appeal before us is not entitled to have Article 8 considered as part of his appeal. We would also observe that in *Dani* the UT does not appear to have considered the guidance in *Celik*.
40. We also note that in *Batool and others* (cited above), another Presidential panel, the UT at [80] reiterated what it had said in *Celik* in relation to Article 8. Although Mr Terrell rightly points out that *Celik* did not consider *Amirteymour*, in *Batool* it did. In any event if it is suggested that we should

come to a different conclusion from that in *Celik* on the basis that it did not consider *Amirteymour*, we decline to do so.

41. Having considered the parties' respective positions with care, we are satisfied that the FtT erred in law in concluding that it did not have jurisdiction to consider Article 8. Its decision is, accordingly, set aside.
42. We have considered whether the appropriate course is for the appeal to be retained in the UT or remitted to the FtT for a fresh hearing. We have regard to paragraph 7.2 of the Senior President of Tribunals Practice Statement, and have concluded that the appeal should be remitted to the First-tier Tribunal for a further hearing before a judge other than Judge Shand.
43. We would not normally consider it appropriate to remit an appeal where there are any facts that can be preserved. However, in this case there are findings of fact that are clear and self-contained and which are plainly not infected by the error of law. There will thus be no difficulty in the FtT understanding what findings of fact are preserved and what further findings are required. For the avoidance of doubt we reproduce the relevant paragraph as follows:

"46. For completeness I accept the unchallenged evidence that the appellant and Ms De Melo Mendes are in a relationship and Ms De Melo Mendes' baby is the appellant's son."

Decision

44. The decision of the First-tier Tribunal involved the making of an error on a point of law. Its decision is set aside and the appeal is remitted to the First-tier Tribunal for a hearing *de novo* with the only findings of fact preserved those to be found at [46] of its decision, as set out above. The appeal is to be heard by a judge or a panel of judges other than First-tier Tribunal Judge Shand.

A.M. Kopieczek
Judge of the Upper Tribunal
Immigration and Asylum Chamber

20/07/2024