Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: UI-2022-003334**
EA/14155/2021

THE IMMIGRATION ACTS

Heard at Field House
On the 11th November 2022

Decision & Reasons Promulgated
On the 23 January 2023

Before

UPPER TRIBUNAL JUDGE RIMINGTON

Between

MS ALIYA KOUSAR
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

ENTRY CLEARANCE OFFICER

Respondent

Representation:
For the Appellant: Mr S Walker, Home Office Presenting Officer
For the Respondent: Mr R Dar instructed by Trojan Solicitors

DECISION AND REASONS

1. The application for permission to appeal was made by the Secretary of State on behalf of the Entry Clearance Officer ("the respondent") but nonetheless I shall refer to the parties as they were described before the First-tier Tribunal, that is Ms Kousar as the appellant.

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2. The Secretary of State appealed the decision of First-tier Tribunal Judge Hawden-Beal ("the judge"), promulgated on 19th April 2022, which allowed the appellant's appeal against the respondent's decision dated 20th September 2021 refusing the appellant's application under the EU Settlement Scheme for a family permit.

3. The appellant, a Pakistan national, applied to join her father-in-law, an Italian citizen in the UK. The judge identified that by the date of the hearing both the sponsor's son (the appellant's husband and the son of the EEA national) and their child (born in 2017), were in the United Kingdom but the appellant had been refused because she was not a 'family member' under Appendix EU (Family Permit). It was submitted at the hearing before the First-tier Tribunal, on behalf of the appellant that Article 10 of the Withdrawal Agreement should be applied as should the best interests of the child.

4. The judge found at [13] – [15] with reference to Appendix EU Annex 1 that the appellant did not fall within the definition of 'family member' because she was not the child or dependent parent of the EEA national or the spouse or civil partner of a relevant EEA citizen and with reference to Appendix EU (Family Permit) it was clear that the relationship is defined by blood to the sponsor or his/her spouse or civil partner [15]. As the judge stated there was nothing in Appendix EU (Family Permit) which included the *spouse of the child* of the EEA national to be included as a family member. Nor did the appellant fall within the definition of family member under Article 9 of the Withdrawal Agreement [16].

5. (For clarity, the definition of family member is set out at Annex 1 of Appendix EU (Family Permit)).

6. The judge proceeded to find at [16] that the appellant could not succeed therefore under Appendix EU (Family Permit). She was not a family member within article 2 of the Directive 2004/38/EC and her presence was not required by her sponsor in order for the sponsor not to be deprived of his right to reside in the UK. Nor did the appellant fall under the remaining categories referenced by Article 10 of the Withdrawal Agreement. The judge proceeded, however, to state that the Withdrawal Agreement had a prohibition under Article 12 against discrimination and proceeded to allow the appeal on that ground and that if the appellant had been the spouse of the son of a *British citizen* she *would have* qualified as a dependent relative [26]. As a result the judge allowed the appeal.

7. The respondent's grounds of appeal asserted that the judge had made a material misdirection in law on a material matter by failing properly to consider and apply the Withdrawal Agreement which provides no applicable right to a person in the appellant's position. There was no entitlement to the full range of judicial redress including the Article 18(1) requirement that the decision was proportionate. To allow the appeal on the basis of discrimination was an incorrect approach because this was not a permissible ground under regulation 8(2) of The (Immigration Citizens'

Rights Appeals) (EU Exit) Regulations 2020 which set out the grounds of appeal as follows:

> "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) or 25(2) of Chapter 2, of Title II of Part 2 of the withdrawal agreement,
>
> (b) Chapter 1, or Article 23(2) or 24(2) of Chapter 2, of Title II of Part 2 of the EEA EFTA separation agreement, or
>
> (c) Part 2 of the Swiss citizens' rights agreement(1)."

8. At the hearing before me Mr Walker relied on the grounds of appeal.

9. Mr Dar submitted that there should be consideration afforded to section 55 of the Borders Citizenship and Immigration Act 2009 and the best interests of the child who was born on 27th September 2017 and came to the UK on a visa granted on 3rd November 2021 valid to 3rd May 2022. I invited Mr Dar to make any further submissions in addition to those already made, in the event that I should find an error of law, set aside the decision of the First-tier Tribunal and remake the decision; he pointed to the interests of the child

Analysis

10. There had been no rule 24 response from Ms Kousar's representatives and thus no challenge to the findings by the judge that the appellant could neither fulfil the provisions under Appendix EU (Family Permit) nor under the Withdrawal Agreement remained unchallenged. Those findings stand.

11. I find that the judge proceeded to allow the appeal on a basis on which the appellant could not fulfil. Even if the judge were right about a family member of a British citizen that is not the position of the appellant. She did not fall under the definition of 'family member' for either the Appendix EU (Family Permit) Regulations nor the Withdrawal Agreement. As she did not fall within the definition of article 9 of the Withdrawal Agreement, any protection under the Withdrawal Agreement falls away as the appellant does not fall within the personal scope of Article 10, for reasons explained in **Batool and others (other family members: EU exit)** [2022] UKUT 219 (IAC) at [56]-[58]. The appellant cannot therefore engage any provision in relation to discrimination under the Withdrawal Agreement including any discrimination provisions. The appellant cannot show her rights were breached by the respondent's decision. The ground of appeal available to her, (given above), makes clear that the right of appeal relates to any breach of a right the appellant has *personally*. Discrimination to the sponsor will not assist.

12. I was not taken to any section 120 response raising human rights on behalf of the appellant and thus this would be a 'new matter' which had not been afforded consent by the Secretary of State.

13. In relation to section 55 of the Borders Citizenship and Immigration Act 2009, **Amirteymour v SSHD** [2017] EWCA Civ 353 did not address the matter of the best interests of the child. I note that the best interests of the child is a primary consideration but the parents have decided to bring the child to the United Kingdom, he resides with his father and thus at least one parent and there was nothing to suggest, albeit he is parted from his mother, that the status quo cannot be continued for the time being. The child's interests are not a paramount consideration and in the light of the findings above that the appellant cannot meet the relevant requirements those interests do not outweigh immigration provisions cited herein and her appeal must be dismissed.

14. The Judge erred materially for the reasons identified. I set aside the decision pursuant to Section 12(2)(a) of the Tribunals Courts and Enforcement Act 2007 (TCE 2007) and remake the decision under section 12(2) (b) (ii) of the TCE 2007 and on the reasoning given above the appellant's appeal falls to be dismissed.

Notice of Decision

The appeal of Ms Kousar is dismissed.

No anonymity direction is made.

Signed Helen Rimington Date 11th November 2022

Upper Tribunal Judge Rimington

Fee order

I make no fee order as the appeal has been dismissed.

Signed Helen Rimington Date 11th November 2022

Upper Tribunal Judge Rimington