IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2022-003643

First-tier Tribunal No:
EA/03162/2021

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On 21 July 2023

Before

UPPER TRIBUNAL JUDGE MANDALIA

Between

Secretary of State for the Home Department

Appellant

and

Mr Mohamed Djeghri
(NO ANONYMITY DIRECTION MADE)

Respondent

Representation:
For the Appellant: Mr P Lawson, Senior Home Office Presenting Officer
For the Respondent: Mr Ahmed Djeghri Kerchoud, Sponsor

Heard at Birmingham Civil Justice Centre on 11 July 2023

DECISION AND REASONS

1. The appellant in the appeal before me is the Secretary of State for the Home Department ("SSHD") and the respondent to this appeal is Mr Mohamed Djeghri. However, for ease of reference, in the course of this decision I adopt the parties' status as it was before the FtT. I refer to Mr Djeghri as the appellant, and the Secretary of State as the respondent.

2. The appellant is a national of Algeria. His application for an EUSS family permit on the basis that he is a 'family member' of a relevant EEA citizen

was refused by the respondent on 1 February 2021. The respondent said the appellant had not provided sufficient evidence to prove that he is a 'family member' of a relevant EEA or Swiss citizen. The respondent noted the relationship to the sponsor, his brother, Mr Ahmed Kerchoud does not come within the definition of 'family member of a relevant EEA citizen' as stated in Appendix EU (Family Permit) to the Immigration Rules.

3. The appellant's appeal against that decision was allowed by First-tier Tribunal Judge Hawden-Beal for reasons set out in a decision promulgated on 5 July 2022.

4. The respondent claims Judge Hawden-Beal accepted the appellant cannot succeed under Articles 9 and 10 of the Withdrawal Agreement and in any event the Withdrawal Agreement provides no applicable rights to a person in the appellant's circumstances. Article 10(1)(e) confirms that beneficiaries are those who were residing in the UK in accordance with EU law as at 31st December 2020. The appellant, on the findings set out, was not therefore within the personal scope of the Agreement and there was no entitlement to the full range of judicial redress including Articles 10 & 18. Second, the finding by Judge Hawden-Beale that the EUSS Rules are discriminatory had never formed part of any of the appellant's claim either before, or crucially during the hearing. The respondent was therefore denied an opportunity to make any submissions on this issue, and as such it was procedurally unfair to make such a finding without inviting submissions on this point.

5. Permission to appeal was granted by First-tier Tribunal Judge Lodato on 20 July 2022. Judge Lodato said:

> "… The appeal was decided on a novel interpretation of the discrimination provisions of the Withdrawal Agreement in that the judge decisively found that the rules discriminated against EEA nationals in favour of British citizens. It is argued that this issue was not raised by the parties and neither was an opportunity afforded to the advocates to deal with the point during the hearing. It is arguable that this amounts to a material error of law. All grounds may be argued."

6. Before me, Mr Lawson adopted the grounds of appeal. He submits the decision of Judge Haden-Beal stems from procedural unfairness and the respondent was given no opportunity to address the fundamental reason that the judge gave for allowing the appeal.

7. Mr Kerchoud re-iterated, as he had before the First-tier Tribunal previously, that the EUSS application made on behalf of the appellant was erroneously made by Nottingham Law Centre. They had subsequently requested that the application be considered as an application for a residence permit as an 'extended family member' under Regulation 8 of the 2016 Regulations, but the respondent had declined to do so.

Decision

8. The appellant's grounds of appeal before the First-tier Tribunal were set out in the Form IAFT-6. The appellant claimed the respondent's decision was not in accordance with the appellant's right to free movement under EU Directive 2004/38/EC and the Immigration (EEA) Regulations 2016 ("the

2016 Regulations"). The appellant claimed the application under EUSS had been submitted in error, and the application should have been treated as an application for an EEA family permit under the 2016 Regulations. The appellant had provided evidence that he is the brother of Mr Ahmed Kerchoud, and evidence that demonstrates the appellant "is partially dependent on the remittances provided by his brother". It was said that although the appellant is currently employed, he cannot meet his essential living needs.

9. The sponsor attended the hearing of the appeal before the First-tier Tribunal and gave oral evidence. Judge Hawden-Beal noted, at [6], that the appellant and his parents had made applications under the EUSS scheme. The appellant's parents' did not have to evidence dependency, and their applications were successful. It appears that rather than an application as an 'extended family member' under the Immigration (European Economic Area) Regulations 2016, the appellant made an application under the EUSS scheme.

10. Judge Hawden-Beal referred to Appendix EU and said at paragraph [14] of her decision, that there is nothing in the definition section of Appendix EU (Family Permit) which states that the brother of a relevant EEA national, is a family member of a relevant EEA citizen. She concluded that the appellant is not a family member under the new EUSS scheme. She concluded, at [17], that the appellant cannot succeed under Article 9 of the Withdrawal Agreement. At paragraph [18], she also concluded the appellant cannot succeed under Article 10.

11. At paragraph [20], Judge Hawden-Beal noted however that the Withdrawal Agreement does have a prohibition on discrimination under Article 12. At paragraphs [25] to [27] she said:

> "25. …. There is no dependent relative provision for EEA nationals. The applicant either falls within the definition of a family member of an EEA national or they do not. In this case if the appellant had been the brother of a British citizen or specified relevant person of Northern Ireland, he could have qualified as a dependent relative because he is specifically not the spouse, civil or durable partner, child or dependent parent of the sponsor of his spouse or civil partner.
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> 26. I am therefore satisfied that there is discrimination on the basis of nationality between the appellant's EEA national sponsor and a sponsor who was a British citizen or from Northern Ireland.
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> 27. In those circumstances, I am satisfied that, although the appellant cannot meet the requirements of EU FP6(1) in order to be granted settled or pre-settled status, I find that the decision breaches the Withdrawal Agreement because it discriminates against sponsor as an EEA national under Article 12."

12. It is clear that the question as to whether any discrimination arises on the basis of nationality was not a matter that was raised by or on behalf of the appellant in the grounds of appeal, prior to the hearing of the appeal, or an issue that was raised by Judge Hawden-Beal during the course of the hearing. It was a question of law that the respondent should have been given the opportunity to consider and address. The question for me is

simply whether it was unfair for Judge Hawden-Beal to decide an issue that formed no part of either party's case before the Tribunal without giving the respondent any opportunity to obtain address. In such a case the question is not whether it was reasonably open to Judge Hawden-Beal to reach the decision that she did, but whether it was procedurally unfair for her to decide that issue with no opportunity afforded to the parties to address it. I find the decision to allow the appeal for the reasons given is vitiated by procedural unfairness and for that reason alone the decision should be set aside.

13. In any event, the conclusion reached by Judge Hawden-Beal is wrong in law. She did not set out the relevant extracts from Article 12, which provides:

> "Non-discrimination
>
> Within the scope of this Part, and without prejudice to any special provisions contained therein, any discrimination on grounds of nationality within the meaning of the first subparagraph of Article 18 TFEU shall be prohibited in the host State and the State of work in respect of the persons referred to in Article 10 of this Agreement." *(my emphasis)*

14. Article 12 prohibits discrimination on the grounds of nationality *"in respect of the persons referred to in Article 10 of this Agreement"*. Judge Hawden-Beal found the appellant cannot succeed under Article 10 and as he is not a person within Article 10, and so Article 12 cannot assist him.

15. It is clear therefore that the decision of First-tier Tribunal Judge Hawden-Beal is vitiated by an error of law and must be set aside. There is no reason why the decision cannot be remade by me in the Upper Tribunal. Absent the conclusion reached by Judge Hawden-Beal as to discrimination, it is clear the appeal was bound to fail and it follows that I dismiss the appeal.

Notice of Decision

16. The decision of First-tier Tribunal Judge Hawden-Beal promulgated on 5 July 2022 is set aside.

17. I remake the decision and dismiss the appeal.

V. Mandalia

Upper Tribunal Judge Mandalia

Judge of the Upper Tribunal
Immigration and Asylum Chamber

11 July 2023