



Neutral Citation Number: [2024] EWCA Civ 784

Case No: CA-2023-001547

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE UPPER TRIBUNAL
(IMMIGRATION AND ASYLUM CHAMBER)
Upper Tribunal Judge Stephen Smith
and Deputy Upper Tribunal Judge Skinner
[2023] UKUT 161 (IAC)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 11/07/2024

Before :

LORD JUSTICE UNDERHILL
(Vice-President of the Court of Appeal (Civil Division))
LORD JUSTICE POPPLEWELL
and
LORD JUSTICE LEWIS

Between :

THE SECRETARY OF STATE FOR THE HOME
DEPARTMENT **Appellant**
- and -
HAVE REXHAJ **Respondent**
- and -
THE AIRE CENTRE **Intervener**

Julia Smyth (instructed by **the Treasury Solicitor**) for the **Appellant**
Anthony Metzger KC, Sanaz Saifolahi and **Nozima Rakhimjonova** (instructed by **Sterling**
Lawyers Ltd) for the **Respondent**
Sonali Naik KC, Bojana Asanović and **Eva Doerr** (instructed by **Herbert Smith Freehills**
LLP) for the **Intervener**

Hearing dates: 10 & 11 April 2024

Approved Judgment

This judgment was handed down remotely at 10.30am on 11 July 2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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Lord Justice Underhill:

INTRODUCTION

1. This appeal concerns the relationship between the EU Settlement Scheme (“the EUSS”), which is contained in Appendix EU to the Immigration Rules (“Appendix EU”), and the provisions of the separate but related Appendix EU (Family Permit) (“Appendix EU (FP)”). The purpose of the EUSS is to give residence rights in the UK to EU, EEA and Swiss citizens (referred to together as “EEA citizens”) who had prior to the UK’s withdrawal from the EU (and from its associated treaties with the EEA and Switzerland) been living in the UK, and in some circumstances also to their family members. The rights in question take the form of either limited or indefinite leave to remain (“LLR” or “ILR”) – otherwise known as “pre-settled” or “settled” status – but where it is not necessary to distinguish I will refer to them compendiously as “settlement”.
2. The issue before us concerns the provisions of the EUSS which govern an application by a non-EEA citizen living outside the UK (“the applicant”) for settlement rights here by virtue of their relationship with an EEA-citizen son or daughter, or son- or daughter-in-law, (“the sponsor”) in the UK, and specifically whether it was, at the material time, a requirement that the parent show that they are dependent on the child. In most cases an application for settlement cannot be made from outside the UK, so the applicant first requires leave to enter. That means that they have to follow a two-stage process, the essentials of which are as follows:
 - (1) They must first apply under Appendix EU (FP) for entry clearance in the form of an “EU Settlement Scheme Family Permit” (“a family permit”).
 - (2) Once they have entered the UK pursuant to the entry clearance, they can apply under Appendix EU for, depending on their particular circumstances, either ILR or LLR.

I set out the particular rules underpinning that process later in this judgment.

3. The applicant in this case is Mrs Have Rexhaj, an Albanian citizen now aged 60 and a widow, and the sponsor is her daughter-in-law, Ms Laura-Marinela Prednicea, who is married to her son Urim. Ms Prednicea is a Romanian national who has acquired settlement rights under the EUSS. Mrs Rexhaj followed the two-stage process outlined above. Specifically:
 - (1) On 21 June 2021 she applied to the Entry Clearance Officer in Tirana for a family permit, using the prescribed form and identifying Ms Prednicea as her sponsor. In both the form itself and the covering letter from her immigration advisers she said that she relied on Ms Prednicea for financial support.
 - (2) On 15 November 2021 that application was granted. A vignette was inserted in her passport headed “Entry Clearance”, the “type” being identified as “EU Settlement Scheme Family Permit to join L M Prednicea”. The permit was valid for a period of six months and allowed multiple entries to the UK during that period.

- (3) On 25 December 2021 she arrived in the UK at Luton airport and the vignette was stamped to record her entry.
- (4) On 2 January 2022 she made an online application for leave to remain under the EUSS “based on [my] relationship to someone eligible for the EU Settlement Scheme”: Ms Prednicea was identified as the relative in question. The application did not specify whether she was seeking LLR or ILR, but it is common ground that her only potential eligibility was for LLR.

She went back to Albania after 2 January 2022 and has not returned since.

4. On 12 April 2022 Mrs Rexhaj’s application was refused by the Secretary of State. In short, the refusal was on the basis that she had failed to show that she was dependent on Ms Prednicea, which the Secretary of State believed was a requirement of the EUSS.
5. Mrs Rexhaj appealed to the First-tier Tribunal under regulation 8 of the Immigration (Citizens’ Rights Appeals) (EU Exit) Regulations 2020 (“the 2020 Regulations”). Her primary case was that she was not, on the true construction of the relevant provisions of Appendix EU, required to show that she was dependent on Ms Prednicea (“the issue of law”); but she also contended that if there was such a requirement she had satisfied it (“the factual issue”). By a decision dated 12 October 2022 FTTJ Bennett found against her on both issues and dismissed her appeal.
6. Mrs Rexhaj appealed to the Upper Tribunal. As regards the issue of law, she contended that she was not subject to any dependency requirement. As regards the factual issue, she contended that the First-tier Tribunal’s findings were procedurally unfair because no opportunity had been given for oral evidence. By a decision dated 24 April 2023 the Tribunal (UTJ Stephen Smith and DUTJ Skinner) allowed her appeal on the issue of law. It also set aside the FTTJ’s findings of fact on the factual issue, on the basis that that was not a relevant inquiry given its conclusion on the legal issue. That meant that it did not have to decide whether the findings were otherwise challengeable, but at para. 23 of its decision it said that it “harboured grave doubts” over whether they were in fact open to the Tribunal as a matter of procedural fairness.
7. The Secretary of State appeals against the decision of the Upper Tribunal with the permission of Elisabeth Laing LJ granted on 30 October 2023. She¹ has been represented before us by Ms Julia Smyth of counsel. Mrs Rexhaj has been represented by Mr Anthony Metzger KC, leading Ms Sanaz Saifolahi and Ms Nozima Rakhimjonova. In the Upper Tribunal the Secretary of State was represented by a Senior Home Office Presenting Officer and Mrs Rexhaj by Ms Saifolahi.
8. On 6 March 2024, barely a month before the hearing of the appeal, the AIRE Centre applied for permission to intervene. By order dated 8 March Elisabeth Laing LJ gave it permission to do so, both in writing and by short oral submissions. It has been represented by Ms Sonali Naik KC, Ms Bojana Asanovic and Ms Eva Doerr. As will appear, the issues sought to be raised by the AIRE Centre are quite different from those

¹ For convenience, I will throughout this judgment refer to the Secretary of State by the gender of the incumbent at the time of the impugned decision.

raised by the appeal. I will accordingly first address the latter and will return to the intervention at the end of the judgment.

9. In order to understand the issue on which the appeal depends it is necessary to identify the relevant UK legislation about leave to enter and entry clearance and to set out the relevant provisions of the two Appendices. I will also summarise the provisions of the Withdrawal Agreement between the EU and the UK which relate to the rights of persons in Mrs Rexhaj's position, though in truth they are no more than a background to the specific issue which we have to decide.

THE LEGISLATION

The Withdrawal Agreement

10. It is convenient to deal with the Withdrawal Agreement first, although its conclusion post-dates some of the domestic legislation with which we are concerned.
11. The Withdrawal Agreement was concluded on 17 October 2019. By section 7A of the European Union (Withdrawal) Act 2018, inserted by the European Union (Withdrawal Agreement) Act 2020 ("the 2020 Act"), the provisions of the Agreement relating to the settlement rights of EU citizens and their family members have direct effect in UK law.
12. The Agreement provided for a transition period, ending at 11 p.m. on 31 December 2020, under which EU law would continue to apply in the UK. Until that date the rights of non-EU citizen family members were governed by the relevant terms of Directive 2004/38/EC (generally known as the Citizens Rights Directive), implemented as a matter of domestic law by the Immigration (European Economic Area) Regulations 2016 ("the 2016 Regulations"): I will refer to that as the "pre-withdrawal regime".
13. Chapter 1 of Title II of Part 2 of the Withdrawal Agreement (which comprises articles 13-23) requires the parties, post-withdrawal, to confer rights of residence, including in some circumstances rights of permanent residence, on the categories of persons identified in (so far as relevant for our purposes) article 10.1.
14. Article 10.1 comprises six categories ("points" (a)-(f)). So far as the rights of EU citizens in the UK are concerned, the primary beneficiaries are identified at point (a) as "Union citizens who exercised their rights to reside in the United Kingdom in accordance with Union law before the end of the transition period and continued to reside there thereafter".
15. "Family members" of such EU citizens are covered by point (e) under article 10.1, provided they satisfy one of conditions (i)-(iii). The relevant condition for our purposes is (ii), namely that:

"they were directly related to a person referred to in points (a) to (d) and resided outside the host State before the end of the transition period, provided that they fulfil the conditions set out in point (2) of Article 2 of Directive 2004/38/EC at the time they seek residence under this Part in order to join the person referred to in points (a) to (d) of this paragraph".

Article 2 (2) of the Citizens Rights Directive (imported not only by the provision quoted above but also by article 9 (a) of the Agreement) defines the term “family member”. The part of the definition which covers parents-in-law is:

“(d) the *dependent* [my italics] direct relatives in the ascending line ... of the spouse or partner [of the relevant EU citizen]”.

(It is unnecessary for the purpose of this appeal to consider the meaning of “dependent”; but there is a convenient summary of the relevant law in *Lim v Entry Clearance Officer, Manila* [2015] EWCA Civ 1383.)

16. The upshot of all that is that the Withdrawal Agreement does not require the UK to make settlement available to parents, or parents-in-law, of EU citizens resident in the UK post-withdrawal unless they are dependent on their sponsors. That was also the position under the pre-withdrawal regime.

Leave to Enter and Entry Clearance

17. Section 3 (1) of the Immigration Act 1971 establishes the basic rule that a person who is not a British citizen may not enter the UK unless given leave to enter in accordance with the Act itself or provisions made under it. Section 3A empowers the Secretary of State to provide by order for a system of entry clearance. The term “entry clearance” is defined in section 33 of the Act as follows:

“‘entry clearance’ means a visa, entry certificate or other document which, in accordance with the immigration rules, is to be taken as evidence or the requisite evidence of a person’s eligibility, though not a British citizen, for entry into the United Kingdom (but does not include a work permit)”.

A family permit under Appendix EU (FP) is self-evidently an “other document”. (Although a visa is the most familiar form of document evidencing eligibility for entry, in the EU context the term “permit” has always been preferred.)

18. The Immigration (Leave to Enter and Remain) Order 2000 (“the 2000 Order”) is made under the power conferred by section 3A of the 1971 Act. Part II of the Order is entitled “Entry Clearance as Leave to Enter”. Article 2, which has the identical heading, reads:

“Subject to article 6(3), an entry clearance which complies with the requirements of article 3 shall have effect as leave to enter the United Kingdom to the extent specified in article 4, but subject to the conditions referred to in article 5.”

Article 6 (3) provides that that entry clearance will not have effect as leave to enter in the circumstances prescribed by article 7. I need not summarise those circumstances, but they are of their nature exceptional.

19. As appears from para. 3 above, the family permit granted to Mrs Rexhaj in November 2021 was a form of entry clearance. (Although at one point in his oral submissions Mr Metzger appeared to be questioning whether it complied with the requirements of article 3 of the Order and/or that its effect was qualified by article 5, he eventually confirmed that that was not his case.) Accordingly I need not set out any of the other articles referred to in article 2, though I should note that, consistently with the article itself, they

use the terminology of entry clearance “having effect as leave to enter” – see, e.g., article 4 (3) and article 5.

20. Entry clearance is also the subject of paragraphs 25-30C of the Immigration Rules. Paragraph 25A expressly identifies the requirements of the 2000 Order, but I need not reproduce it here or refer to any of the other paragraphs.

Appendix EU

21. The full title of Appendix EU is “Appendix EU: EU, other EEA and Swiss citizens and family members”. It was inserted into the Immigration Rules, with effect from 30 March 2019: the relevant Statement of Changes is HC 1919, dated 7 March 2019. Its purpose is, as I have said, to give effect to the UK’s obligations under the Withdrawal Agreement, although it was in some respects more generous. The Withdrawal Agreement had not of course been concluded at the date of its introduction, but the Government wanted to have a scheme in place well before the pre-withdrawal regime came to an end, so that those affected knew where they stood and there did not have to be a last-minute rush of applications: a draft of the Agreement already existed, and the shape of the likely deal as regards settlement rights for EU citizens and their family members was already well understood.
22. The original terms of the EUSS required revision to reflect the ending of the pre-withdrawal regime at the end of the transition period. That revision was effected by Statement of Changes HC 813, dated 22 October 2020, with effect from 11 p.m. on 31 December 2020. This was the version in force at the time that Mrs Rexhaj made her application. One of the changes required by the ending of the pre-withdrawal regime was the introduction of specific provision for non-EEA citizens outside the UK wishing to join EEA-citizen family members in the UK, described as “joining family members”. Under the previous regime persons in that category had been able to apply for a “family permit” under the 2016 Regulations, but that regime would of course cease to apply at the end of the transition period.
23. I should say that by Statement of Changes HC 1780, which took effect from 5 October 2023, the Secretary of State introduced amendments intended to reverse the effect of the decision of the Upper Tribunal in this case. Ms Smyth made it clear that that had been done out of abundance of caution, and I need not refer to the details of the changes here.
24. I set out below the provisions of Appendix EU specifically relating to joining family members applying for LLR, but I should first explain the structure of the Appendix. It is in six sections, headed respectively “Purpose” (paragraph EU1), “Requirements and procedure” (paragraphs EU2-EU8), “Valid application” (paragraphs EU9-EU10), “Eligibility for indefinite leave to enter or remain” (paragraphs EU11-EU13), “Eligibility for limited leave to enter or remain” (paragraphs EU14 and EU14A) and “Suitability” (paragraphs EU15-EU18), together with three Annexes, of which only the first, “Definitions”, is material for our purposes. The definitions are often extremely lengthy and difficult to navigate; where I have had to quote from them I have pared them to the minimum.

25. The first section, “Purpose”, has only a single paragraph, which reads as follows:

“EU1. This Appendix sets out the basis on which an EEA citizen and their family members ... will if they apply under it, be granted indefinite leave to enter or remain or limited leave to enter or remain.”

Indefinite leave to remain and limited leave to remain are the domestic equivalents of the rights of residence and permanent residence referred to in article 10 of the Withdrawal Agreement.

26. The second section has four substantive paragraphs – EU2, EU2A, EU3, and EU3A – which set out the requirements for (a) indefinite and (b) limited “leave to enter or remain” either (1) as a joining family member of a relevant sponsor or (2) otherwise than as such a family member. (The remaining paragraphs are supplementary or procedural in character.) The paragraphs dealing with joining family members (introduced by HC 813) are EU2A and EU3A. We are concerned with paragraph EU3A, which sets out the requirements for limited leave. It reads:

“The applicant will be granted five years’ limited leave to enter (where the application is made outside the UK) or five years’ limited leave to remain (where the application is made within the UK) as a joining family member of a relevant sponsor where:

- A valid application has been made in accordance with paragraph EU9;
- The applicant does not meet the eligibility requirements for indefinite leave to enter or remain in accordance with paragraph EU11A, but meets the eligibility requirements for limited leave to enter or remain in accordance with paragraph EU14A; and
- The application is not to be refused on grounds of suitability in accordance with paragraph EU15 or EU16.”

The aspect which is directly relevant for our purposes is the requirement in the second bullet that the applicant satisfy the eligibility requirements in paragraph EU14A.

27. The third and fourth sections set out the “eligibility requirements” for each of the four kinds of case identified at paragraphs EU2-EU3A. Paragraph EU14A is the relevant provision for cases falling under paragraph EU3A. It reads:

“The applicant meets the eligibility requirements for limited leave to enter or remain as a joining family member of a relevant sponsor where the Secretary of State is satisfied, including by the required evidence of family relationship, that, at the date of application and in an application made after the specified date and by the required date, the condition set out in the following table is met.”

The “following table” sets out a condition with three sub-paragraphs, (a)-(c). We are only concerned with sub-paragraph (a), which reads (so far as relevant):

“The applicant is:

- (i) a joining family member of a relevant sponsor; or
- (ii)”

The “specified date” is defined in Annex 1 as 11 p.m. on 31 December 2020. The “required date” has an elaborate definition but for our purposes is before 1 July 2021.

28. The phrase “joining family member of a relevant sponsor” is defined in Annex 1. The relevant part reads:

“a person who has satisfied the Secretary of State, including by the required evidence of family relationship, that they are ...:

- (a)-(d) ...
- (e) the ... dependent parent of the spouse or civil partner of a relevant sponsor, as described in sub-paragraph (a) above, and all the family relationships:
 - (i) existed before the specified date ...; and
 - (ii) continue to exist at the date of application ...”

29. The terms “relevant sponsor” and “dependent parent” are both themselves defined in Annex 1. It is common ground that Ms Prednicea satisfies the former definition. As to “dependent parent”, the definition in its present form was introduced by HC 813 and includes some changes from the original version. The relevant parts read:

“(a) the direct relative in the ascending line of a relevant EEA citizen ... or of their spouse or civil partner; and

(b) (unless sub-paragraph (c) immediately below applies) dependent on (as the case may be):

- (i) ...; or
- (ii) ...; or
- (iii) on the relevant sponsor (or on their spouse or civil partner) at the date of application *and ... that dependency is assumed where the date of application is before 1 July 2021* [my italics]; and
- (c) this sub-paragraph applies (and the applicant therefore has to meet no requirement as to dependency) where:
 - (i) the applicant was previously granted limited leave to enter or remain under this Appendix as a dependent parent, and that leave has not lapsed or been cancelled, curtailed or invalidated; or

- (ii) the spouse, civil partner or durable partner of the applicant (and with whom they reside) has been granted indefinite leave to enter or remain or limited leave to enter or remain under this Appendix as a dependent parent of the relevant EEA citizen ... or of their spouse or civil partner, and that indefinite or limited leave has not lapsed or been cancelled, curtailed, revoked or invalidated”

(The definition goes on to set out the meaning of “dependent”, but I need not reproduce that part.) I have included head (ii) for completeness, but for present purposes we are concerned with head (i).

30. The specific issue in this appeal is whether sub-paragraph (c) (i) applies in Mrs Rexhaj’s case, and, more particularly, whether she was “previously granted leave to enter ... *under this Appendix*”. I will come back to that question later. But I need to say something at this stage about sub-paragraph (b) (iii). Its primary effect is to impose (subject to sub-paragraph (c)) a requirement of dependency on the relevant sponsor (or their spouse or civil partner). However, that is qualified by the provision that dependency will be “assumed” if the application was made before 1 July 2021.² The background to this provision is as follows. In the original version of the definition, although there was a formal requirement that the parent be dependent on the sponsor, reflecting the position under the pre-withdrawal regime and the anticipated provisions of the Withdrawal Agreement, it was provided that dependency was to be “assumed”, with the result that the dependency requirement was in practice purely nominal. I will refer to this as “the dependency concession”. Ms Smyth explained that it reflected a decision by the Government that assessing evidence of dependency on a case-by-case basis would impose a disproportionate administrative burden on caseworkers. However, it was subsequently decided that the dependency concession should be withdrawn, and a substantive dependency requirement thus reinstated, following the end of the transition period, but that there would be a further six-month grace period, i.e. to the end of June 2021.
31. It will be necessary to refer to some other provisions of Appendix EU, but that is best done in the context of the specific points to which they are relevant.

Appendix EU (FP)

32. Appendix EU (FP) was inserted into the Immigration Rules at the same time as Appendix EU – that is, on 30 March 2019. It too was altered by HC 813 with effect from 11 p.m. on 31 December 2020. It has two sections – “Purpose” (paragraphs FP1-FP2) and “Requirements and procedure” (paragraphs FP3-FP11) – and three Annexes, of which the first contains a number of definitions.
33. The “Purpose” section reads as follows:

“FP1. This Appendix sets out the basis on which a person will, if they apply under it, be granted an entry clearance:

² The use of the linking word “and” is rather clumsy. The link “but”, or “save that”, would have been clearer, but that is evidently the intended effect.

- (a) In the form of an EU Settlement Scheme Family Permit – to join a relevant EEA citizen ... in the UK or to accompany them to the UK; or
- (b) In the form of an EU Settlement Scheme Travel Permit – to travel to the UK.

FP2. This Appendix has effect in connection with the granting of entry clearance for the purposes of acquiring leave to enter or remain in the UK by virtue of Appendix EU to these Rules.”

We are in this case concerned with the first of the kinds of permit referred to in paragraph FP1 – that is, an EU Settlement Scheme Family Permit, whose purpose is, as paragraph FP2 states, to give the applicant entry clearance so that they can make an application under Appendix EU.

34. The conditions of eligibility for such a permit are set out in paragraph FP6 (1), which reads (so far as material):

- “(a) The applicant is a specified EEA citizen or a non-EEA citizen;
- (b) The applicant is a family member of a relevant EEA citizen;
- (c)-(e) ...”

35. Mrs Rexhaj satisfied requirement (a) because she was a non-EEA citizen. As to requirement (b), “family member of a relevant EEA citizen” is defined in Annex 1. The definition includes the term “dependent parent”. The definition has three sub-paragraphs but I need not set them out. In summary:

- (1) Sub-paragraph (a) is identical to the definition in Appendix EU (see para. 29 above).
- (2) Sub-paragraph (b) (i) imposes a requirement that the applicant be dependent on the relevant EEA citizen. The date at which the requirement must be satisfied depends on which of three cases the applicant falls into: in Mrs Rexhaj’s case (case (cc)) the date is the date of application. However, as in the equivalent provision of the definition in Appendix EU, the definition contained a qualification to the effect that dependency was assumed where the date of application is before 1 July 2021.
- (3) I note for completeness that sub-paragraph (b) (i) is expressed as not applying where sub-paragraph (c) applies; but sub-paragraph (c) in this definition is quite different from sub-paragraph (c) of the definition in Appendix EU and has no application to Mrs Rexhaj’s case.

36. Where a family permit is issued paragraph FP3 provides that it will be valid for “the relevant period”, defined (so far as relevant for our purposes) as six months from the date of decision, which is in practice the date of issue.

37. Those are the provisions on the basis of which Mrs Rexhaj made her application for a family permit on 21 June 2021. Since the application was made prior to 1 July 2021

the qualification to sub-paragraph (b) (i) (cc) applied and her dependency on Ms Prednicea was assumed. (It follows that, although she did to some extent address the question of dependency in the form and her covering letter – see para. 3 (1) above – she need not have done so.)

THE APPEAL

38. In the light of the basis on which the Upper Tribunal decided the appeal to it, our concern in this Court is simply with the legal issue, i.e. whether Mrs Rexhaj’s eligibility for leave to remain was subject to a dependency requirement. We are not concerned with the factual issue of whether she satisfied that requirement.
39. The Secretary of State’s case is straightforward. Mrs Rexhaj had to satisfy the definition of “joining family member of a relevant sponsor” for the purpose of paragraph EU14A (a) (i). That definition in turn required her to satisfy the definition of “dependent parent” in Annex 1. Sub-paragraph (b) (iii) of that definition explicitly incorporated a requirement that she be dependent on her sponsor: see paras. 29-30 above.
40. In response to that case Mrs Rexhaj relies on the exception to sub-paragraph (b) set out in sub-paragraph (c) (i) of the definition: see para. 29 above. She submits that the grant to her of leave to enter on 25 December 2021, pursuant to the entry clearance embodied in her family permit, meant that as at 2 January 2022 she had been “previously granted limited leave to enter or remain under this Appendix as a dependent parent”.
41. The Secretary of State contends that sub-paragraph (c) (i) does not apply because Mrs Rexhaj’s leave to enter was the result of the grant of the family permit, which was not “under this Appendix” – that is, Appendix EU – but under Appendix EU (FP).
42. The First-tier Tribunal Judge accepted the Secretary of State’s submission. The relevant part of para. 16 of his decision reads as follows:

“... [T]he leave to enter which [the] family permit conferred was not ‘limited leave to enter or remain under this Appendix [i.e. Appendix EU] as a dependent parent’. It was limited leave conferred by the joint effect of Appendix EU (Family Permit) and the 2000 Order. In reaching that conclusion, I have not overlooked paragraph FP2 of Appendix EU (Family Permit), which provides as follows.

‘This appendix has effect in connection with the granting of entry clearance for the purposes of acquiring leave to enter or remain in the UK by virtue of Appendix EU to these Rules.’

I do not accept that that paragraph causes the grant of the family permit or entry clearance under Appendix EU (Family Permit) to take effect as a grant of leave to enter or remain under Appendix EU. The grant of the family permit or entry clearance under Appendix EU (Family Permit) simply enables the individual who has been granted the family permit or entry clearance to enter the United Kingdom and then to apply for leave to remain under Appendix EU after his arrival. I am therefore not

satisfied that paragraph (c) of the definition of ‘dependent parent’ in Appendix EU assists Mrs [Rexhaj].”

43. The Upper Tribunal allowed Mrs Rexhaj’s appeal because it held that leave to enter had indeed, on a proper analysis, been granted under Appendix EU. I should set out its careful reasoning in full:

“14. In our judgment, the essential question concerns the operative basis upon which the appellant was admitted at the border: her passport was stamped by an immigration officer at Luton Airport on 25 December 2021. If, as the judge found, the appellant’s prior entry clearance under Appendix EUFP converted into leave to enter under Appendix EUFP, then the judge was plainly right to conclude that she had not been granted leave to enter under Appendix EU, and she was subject to the requirement to demonstrate dependency. By contrast, if the operative basis for her grant of leave to enter was Appendix EU, it follows that she had previously been granted leave to enter ‘under this Appendix’ (i.e. Appendix EU), and dependency fell to be assumed under para. (c) of the definition of ‘dependent parent’.

15. The Immigration Rules are not to be construed with the strictness applicable to the construction of legislation. Rather they must sensibly be interpreted according to the natural and ordinary meaning of the words used, recognising that they are statements of the Secretary of State’s administrative policy: see *Mahad v Entry Clearance Officer* [2009] UKSC 16 at para. 10. Accordingly, we consider that the two appendices should be read together, considering the stated purpose and role of each. The chronology of decisions under the two appendices appears to us to be as follows. First, an applicant applies for an entry clearance as a dependent parent under Appendix EUFP. Secondly, in the event of the application succeeding and an applicant being granted entry clearance under Appendix EUFP, once an applicant presents at the border, if admitted the applicant will be granted leave to enter. The question then arises as to whether such leave to enter would have been granted under Appendix EUFP, upon the conversion of her entry clearance to leave to enter, or whether the operative part of the Immigration Rules under which leave to enter is granted was, in fact, Appendix EU.

16. We find that the operative part of the rules under which leave to enter is granted to the holder of an EUSS Family Permit granted under Appendix EUFP is Appendix EU. The focus of Appendix EUFP is the granting of entry clearance (see para. FP1 of Appendix EUFP). By contrast, Appendix EU makes detailed provision for leave to enter and remain to be granted to its beneficiaries (see para. EU1). To that end, para. EU14A expressly addresses leave to enter for dependent parents. Appendix EUFP, by contrast, makes no provision for the granting of leave to enter, and expressly states that its purpose is to operate in tandem with Appendix EU: see para. FP2.

17. In our judgment, the judge's conclusion that the appellant's leave to enter was granted under Appendix EUFP, rather than Appendix EU, had an air of unreality about it. It requires reading in to Appendix EUFP wording that is not there and ignoring the express provision contained in Appendix EU concerning grants of leave to enter: see para. EU14A.

18. It is nothing to the point that the 2000 Order makes provision for entry clearance to have effect as leave to enter. That is, of course, correct. But the 2000 Order does not specify the provisions of the Immigration Rules under which entry clearance shall have effect as leave to enter or otherwise descend into that level of detail. For such details, one must look to the terms of the rules themselves. As [the Presenting Officer] submitted, the judge's reliance on the 2000 Order was something of a red herring.

19. We observe that the construction we prefer avoids rendering para. (c) in the definition of 'dependent parent' otiose. If we accepted [the Presenting Officer's] submissions on this issue, the rules would have made provision to cater for a situation which would rarely, if ever, arise, for all grants of leave to enter to the holder of an EU Family Permit as a dependent parent would be under Appendix EUFP. That cannot have been the intention of the Secretary of State. We reject [the Presenting Officer's] submissions that the inclusion of para. (c) was a matter of good drafting, to cater for possible future changes to the rules. Appendices EU and EUFP do not appear to have been drafted with future (or even present) clarity in mind, still less do we accept that we can impute to the rules an intention to make provision that 'beats the air'. We prefer the construction we have set out above, which gives the rules their ordinary meaning, when examined by reference to the chronology of a putative dependent parent's engagement in the Secretary of State, commencing with an application for a family permit, followed by a grant of entry clearance, leave to enter, and an eventual in-country application for further limited leave to remain. We also observe that there is a coherence between the assumed dependency from which an applicant in this appellant's position would benefit and the assumed dependence from which she has already benefitted, having applied for the family permit by 30 June 2021.

20. Drawing this analysis together, we find that where an individual has been granted entry clearance as a dependent parent and subsequently granted limited leave to enter at the border in that capacity, the operative basis upon which the individual was granted leave to enter at the border is to be found within Appendix EU. It follows that such an applicant will already have been granted leave as a dependent parent under Appendix EU and will not be subject to the requirement to establish dependency."

In his written and oral submissions Mr Metzger essentially relied on that reasoning, though I note below one or two additional points which he made in support.

44. The issue revealed by the judgments below was described by both parties before us as one of “construction”. That description is potentially misleading. Both parties agree that “under this Appendix” means “under Appendix EU”. Rather, the key element in the Upper Tribunal’s reasoning, as it makes clear at the start of para. 14, is its analysis of the formal basis on which Mrs Rexhaj was granted leave to enter on 25 December 2021. That analysis does indeed involve interpreting the language of the two Appendices, but the real question is how they are to be understood in the context of the system of entry clearance laid down in the legislation reviewed above.
45. As to that, I agree with the Upper Tribunal’s succinct formulation of the central issue in para. 14 and with the “chronology of decisions” set out in para. 15. But I respectfully part company with its conclusion in paras. 16 and 17 that the basis of the grant of leave to enter on 25 December 2022 was not Appendix EU (FP) but Appendix EU. My reasons are as follows.
46. The starting-point is that it is common ground that Mrs Rexhaj’s entry clearance was granted under Appendix EU (FP): that is clear on the face of the permit itself (see para. 3 (2) above), and the grant of entry clearance is the avowed purpose of the Appendix. But, as Ms Smyth emphasised, the effect of article 2 of the 2000 Order is that such entry clearance as a matter of law also constitutes leave to enter (activated at the point that the grantee presents themselves at the border). That being so, it is on the face of it both natural and correct to describe Mrs Rexhaj’s leave to enter as having been granted “under” Appendix EU (FP). It may be right to say, as the First-tier Tribunal Judge did, that it was the result of “the joint effect of [Appendix EU (FP)] and the 2000 Order”; but the fact remains that the operative decision is the grant of entry clearance under Appendix EU (FP) and the 2000 Order takes effect as an automatic consequence of that decision. But in any case Appendix EU has nothing to do with it.
47. The reasoning of the Upper Tribunal in support of its contrary conclusion in paras. 16 and 17 has essentially three elements – (1) that the “focus” of Appendix EU (FP) is on the grant of entry clearance and that it makes no express provision for the grant of leave to enter; (2) that it is clear from paragraph FP2 that the purpose of the Appendix EU (FP) is “to operate in tandem with Appendix EU”; and (3) that Appendix EU does itself make express provision for the grant of leave to enter. I take those elements in turn.
48. As to (1), I do not believe that the fact that Appendix EU (FP) refers only to entry clearance is a matter of any significance given that it is a basic feature of UK immigration law, as explained above, that entry clearance and leave to enter go together like a horse and carriage. If you grant one the other follows as a matter of law. It would be bizarre for the Rules to provide for entry clearance to be granted under one Appendix and leave to enter under another. For the same reason, I do not think that the Secretary of State’s case can fairly be described as requiring words to be read into Appendix EU (FP), as suggested at para. 17 of the decision.
49. As to (2), the two Appendices are of course intended to work together, but they do so in a specific way and in accordance with their particular terms. As is clear from paragraph FP2, the purpose of Appendix EU (FP) is to enable would-be applicants for settlement rights under the EUSS to enter the UK in order to be able to make an application under Appendix EU; but that purpose does not require the kind of hybrid approach to the grants of entry clearance and leave to enter which the Tribunal’s approach involves.

50. As to (3), it is indeed the case that Appendix EU refers, not only in paragraph EU14A but also in paragraph EU1 and in relation to each of the four kinds of case identified at para. 26 above, both to the grant of leave to remain (which is the appropriate form of leave for persons already in the UK) and to the grant of leave to enter (which is the appropriate form of leave for those outside the UK). But it does not follow that the references to leave to enter are directed at the position of applicants who have received entry clearance under Appendix EU (FP): they are not the only kind of applicant who need leave to enter. In her helpful oral submissions Ms Smyth demonstrated that Appendix EU makes specific provision for the grant of leave to enter in certain very particular circumstances, which have nothing to do with Appendix EU (FP), and in no other circumstances. The explanation is rather complicated and I take it in stages.

(1) The starting-point is that the first bullet under each of paragraphs EU2- EU3A provides that a valid application must have been made under paragraph EU9. Paragraph EU9 reads:

“A valid application has been made under this Appendix where:

- (a) It has been made using the required application process;
- (b) The required proof of identity and nationality has been provided, where the application is made within the UK;
- (c) The required proof of entitlement to apply from outside the UK has been provided, where the application is made outside the UK; and
- (d) The required biometrics have been provided.”

(2) As appears from head (c), where the application is made from outside the UK, the applicant has to provide the “required proof of entitlement to apply from outside the UK”. The definition of that term in Annex 1 specifies different kinds of proof as between EEA citizens and non-EEA citizens. In the case of EEA citizens it is their passport or a national identity card (provided it contains a biometric identity chip). In the case of non-EEA citizens it is “their specified relevant document”.

(3) “Specified relevant document” is itself a defined term. The definition reads:

“(a) within the meaning of sub-paragraph (a)(i)(aa) of the entry for ‘relevant document’ in this table, a residence card, permanent residence card or derivative residence card issued by the UK under the EEA Regulations on the basis of an application made on or after 6 April 2015; or

(b) a biometric residence card as described in subparagraph (a)(iii) of the entry for ‘relevant document’ in this table”.

(4) As will be seen, that definition requires cross-reference to yet another definition in Annex 1 (confusingly referred to as an “entry” in “this table”), namely the definition of “relevant document”. That definition is extremely complicated, but

fortunately it is unnecessary to set out sub-paragraph (a)(i)(aa) (i.e. the provision referenced under head (a)): all that matters is that the documents identified are documents which establish that the applicant had a right of residence in the UK under the pre-withdrawal regime. As for head (b), I do need to set out sub-paragraph (a) (iii): this reads “a biometric residence card issued by virtue of having been granted *limited* [my italics] leave to enter or remain under this Appendix”.

- (5) In sum, the effect of the definition of “specified relevant document” is that the documents covered by it are those which evidence the grant of residence rights to the applicant either under the pre-withdrawal regime (head (a)) or under the EUSS itself as embodied in Appendix EU (head (b)). They do not include documents evidencing the grant of entry clearance under Appendix EU (FP).
 - (6) Thus a non-EEA citizen could apply under Appendix EU from abroad, and thus be granted leave to enter rather than leave to remain, where they (i) had previously qualified for and been granted residence rights by virtue of their relationship with an EEA citizen; but (ii) were currently living outside the UK; and (iii) wished to apply for settlement rights under the EUSS. It is easy to see how such a situation could arise where the applicant had acquired residence rights under the pre-withdrawal regime (head (a)); but it could also arise where they had acquired such rights under the EUSS itself if they had so far acquired only *limited* leave to enter or remain, which is the situation identified under head (b). It is understandable that the Secretary of State’s policy should be that because such a person has already qualified for residence rights they should be entitled, on production of the relevant documents, to apply from outside the UK.
 - (7) Such situations might not be common but they are certainly not fanciful, and part of the reason for the complexity of the EUSS and its definitions is, as Ms Smyth emphasised, that they had to cover a wide variety of possible situations. To adapt an example suggested by Lewis LJ in the course of argument, a non-EEA citizen with EEA-citizen children in both the UK and the Netherlands (a) might be granted either (under the pre-withdrawal regime) a UK residence card or (after the introduction of the EUSS in March 2019) residence rights in the form of limited leave to remain on the basis of their relationship with their child in the UK; (b) might, prior to 31 December 2020, go back to live in the Netherlands to live with their other child; but (c) might in mid-2021 wish, say because that child had died, to return to live with their child in England. The effect of the provisions reviewed above is that they could rely on their previous grant of residence rights in order to be granted leave to enter and would not have to apply under Appendix EU (FP)
51. It is rash to be completely confident when navigating such difficult waters, but Mr Metzger did not challenge Ms Smyth’s analysis, and so far as I can see it satisfactorily explains why, and the circumstances in which, Appendix EU provides for applications from outside the UK and thus for the grant of leave to enter as well as leave to remain. But even if there were some undetected problem about the explanation, the fact remains that Appendix EU only provides for leave to enter in limited and specific circumstances where the applicant can satisfy the requirements of the provisions which I have set out. What it certainly does not do is provide for the generality of non-EEA citizens outside the UK to be able to apply for leave to enter or, more particularly, for persons who have

obtained entry clearance under Appendix EU (FP) to be able to do so. That being so, I do not see how it can be regarded as the basis of the leave to enter which Mrs Rexhaj was granted – still less so where the grant of entry clearance under Appendix EU (FP) coupled with the effect of article 2 of the 2000 Order constitutes a much more straightforward and obvious basis.

52. That analysis is given some further support by the terms of paragraph FP11 of Appendix EU (FP), which reads:

“Annex 3 applies in respect of the revocation of an entry clearance that was granted under this Appendix, and of the cancellation and curtailment of leave to enter granted by virtue of having arrived in the UK with an entry clearance that was granted under this Appendix.”

I need not summarise the terms of Annex 3. What matters for our purposes is that it makes provision not only about the revocation of the entry clearance granted by a family permit but also about the cancellation and curtailment of any leave to enter granted by virtue of having arrived in the UK with such an entry clearance. If the Upper Tribunal were right that leave to enter in such a case were granted under Appendix EU, one would expect the provisions in question to appear there and not in Appendix EU (FP).

53. None of the foregoing directly accounts for why paragraph FP2 of Appendix EU (FP) refers to “entry clearance for the purposes of acquiring leave to *enter or* remain in the UK by virtue of Appendix EU”. That wording was not in fact specifically referred to by the Upper Tribunal, but Mr Metzger placed particular emphasis on it in his submissions, and I agree that it is problematic. Ms Smyth was unable to identify any circumstances in which a person who has received leave to enter consequent on the grant of leave to enter under Appendix EU (FP) would require leave to enter under Appendix EU; and she accepted that the reference to leave to enter was to that extent anomalous. In my view, however, this is no more than a piece of loose drafting. The purpose of Appendix EU as formally stated in paragraph EU1 is explicitly said to be to allow eligible applicants to obtain “leave to enter or remain” and that formula is, as we have seen, employed throughout its substantive provisions. In those circumstances it is not very surprising that the drafter of paragraph FP2 should simply have adopted it as a label when referring to Appendix EU, notwithstanding that the power to grant leave *to enter* would in fact have no application in the types of case with which Appendix EU (FP) was concerned. The same label is used elsewhere. For example, Ms Smyth referred us to section 17 (2) of Part 3 of the 2020 Act, which defines the term “relevant entry clearance immigration rules” as “any immigration rules which are identified in the immigration rules as *having effect in connection with the granting of entry clearance for the purposes of acquiring leave to enter or remain in the United Kingdom by virtue of residence scheme immigration rules*”: the definition of “residence scheme immigration rules” (in subsection (1)) includes Appendix EU. The fact that in the case of Appendix EU (FP) the label is wider than it need be cannot undermine what I believe to be the correct analysis by reference to the substantive provisions of the two Appendices in the context of the general law about the relationship between entry clearance and leave to enter.
54. For those reasons I cannot accept the reasoning at paras. 14-18 of the Upper Tribunal’s decision. For essentially the same reasons I do not agree with the Tribunal’s point at

para. 19 that its approach “avoids rendering para. (c) [strictly, I think the reference is to sub-paragraph (c) (i)] in the definition of ‘dependent parent’ otiose”. As we have seen, there are circumstances in which a non-EEA citizen claiming ILR as a dependent parent (or parent-in-law) might previously have been granted LLR under Appendix EU, and the effect of sub-paragraph (c) (i) is that in those circumstances the dependency requirement is disapplied.

55. At the end of para. 19 of its decision the Upper Tribunal makes the point that its approach leads to a “coherent” result, in that Mrs Rexhaj would get the benefit of an assumption of dependency in the context of both her application for entry clearance under Appendix EU (FP) and her application for settlement under Appendix EU – both of which use the same definition of “dependent parent”. As to that, I agree that it follows from the Secretary of State’s analysis that, where an applicant makes their application for a family permit before 1 July 2021 but makes their application for settlement only after that date, they will not have to show dependency for the purpose of the former application but will have to do so for the latter. I can see that, since typically³ the two applications are made as part of a single process, it may seem odd that different requirements should apply as regards the same criterion at different stages of that process.
56. I do not, however, believe that that oddity justifies disregarding the clear effect of the rules. It remains the case that the applications are made under different Appendices at different times (possibly many months apart⁴), and the application of different criteria is the result of the expiry of a time-limited concession (i.e. that dependency would be “assumed”) in the interval between the two applications. That does not involve any logical inconsistency such that the Secretary of State cannot have intended the rules to have that effect. It could perhaps be said that it would have been (to use the Upper Tribunal’s language) more “coherent” if she had made transitional provisions to the effect that, where dependency had been assumed for the purpose of the application for a family permit, it should be assumed also for the purpose of any application for settlement made during the currency of any consequent leave to enter; but that is not a sufficient reason for saying that the rules must be construed, contrary to their plain meaning, as if she had done so.
57. The Upper Tribunal did not suggest that the Secretary of State’s analysis produced unfairness, but during the course of the oral submissions there was some exploration of whether that was so. I am satisfied that it does not. The expiry of the concession, under both Appendices, on 30 June 2021 was explicit from the moment that they were introduced in October 2020. Applicants were able to make their choices on that basis. Specifically, they would know that applying for a family permit before 1 July 2021

³ I say “typically” because Ms Smyth submitted that in principle the grantee of a family permit could use it simply to visit their family, without ever making an application to settle. That may be so; but it is evident from paragraphs FP1 and FP2 that that is not the purpose contemplated by the Secretary of State when providing for the grant of family permits.

⁴ The application for leave to remain may be made at any time during the validity of the permit – that is, six months from the date of issue. And there will also be an interval between the date of application for the permit and the date of issue: in Mrs Rexhaj’s case it was almost five months.

without having to prove dependency would be of no real value unless they were also able to enter the UK and make their settlement application before that date. There might perhaps be cases where applicants who could not prove dependency applied for a family permit before 1 July, but too late for it to be issued in time for them to come to the UK until after that date, in the mistaken belief that all that mattered was the date of application for the permit. But the possibility that applicants might be prejudiced if they misunderstood the effect of the rules can have no bearing on how they are to be construed. (I would add that Mrs Rexhaj herself did not act in any such mistaken belief: when she made her entry clearance application she believed, albeit wrongly, that she did have to show dependency: see para. 3 (1) above.)

58. I am less reluctant than I otherwise would be to differ from the conclusions of the Upper Tribunal because it is clear that it did not have the benefit of the detailed analysis of the relevant provisions which we had from Ms Smyth, and at least two points in the submissions of the Presenting Officer were positively inconsistent with that analysis: see his acceptance, recorded at para. 18 of the decision, that “the judge’s reliance on the 2000 Order was something of a red herring” and the obviously unconvincing answer that he is recorded at para. 19 of the decision as having given to the “otiose” point. In her skeleton argument Ms Smyth frankly acknowledged these deficiencies in the presentation of the case below, referring to a probable “miscommunication between the Presenting Officer and the policy team”, but she submitted that the Secretary of State was not thereby precluded from advancing the correct analysis. That is in my view correct, and Mr Metzger did not seek to persuade us to the contrary. This is not, unfortunately, this Court’s only experience of poor liaison between those with policy responsibility for drafting and applying the Immigration Rules and the presenting officers and counsel who have to explain them in the tribunals or the courts. The potential for confusion and inconsistency is all the greater where, as in the case of the EUSS, the drafting of the Rules is particularly complex and difficult to understand.
59. I should address two further arguments advanced by Mr Metzger in support of Mrs Rexhaj’s case.
60. First, he relied on a copy of an email dated 19 May 2021 from the EU Settlement Scheme Resolution Centre to an applicant (not Mrs Rexhaj) which says:

“Therefore as an EUSS FP is classed as LTE [leave to enter], as long as the applicant entered the UK whilst that FP was still valid, even if this is after 1st July 2021 (and applied as a JFM [joining family member] within 90 days of arrival in the UK) they would not be required to then evidence dependency.”

We were not told the precise function of the Resolution Centre, but for present purposes it is enough that it is a Home Office entity. Mr Metzger submitted the statement quoted was clearly to the same effect as his submissions and contrary to those of the Secretary of State. That appears to be right, though it is not possible to be entirely sure without sight of the question to which the Centre was responding, which we do not have. But if the Secretary of State’s analysis is correct, as for the reasons given above I am satisfied that it is, the fact that her own officials have misunderstood the position cannot make any difference: this would not alas be the first time that that has happened. Of course the receipt of misleading advice from the Home Office in a particular case might affect an applicant’s rights; but that is not the issue before us.

61. Second, Mr Metzger referred us to para. 7.66 of the Explanatory Memorandum accompanying HC 1919, which is the Statement of Changes introducing Appendices EU and EU (FP) in their original form. The first bullet of the paragraph reads:

“Consistent with the draft Withdrawal Agreement with the EU, the new Appendix EU (Family Permit) provides for a non-EEA/Swiss citizen, who is the family member of an EEA/Swiss citizen with status granted under the EU Settlement Scheme, to apply for an entry clearance to join the EEA/Swiss citizen in the UK, or to accompany them here, whether for a short stay or to make an application under the scheme in the UK.”

I am bound to say that I am unable to see how that assists his argument. The passage says nothing about the means by which the entry clearance granted under Appendix EU (FP) is converted into leave to enter.

62. For completeness, I should mention that Ms Smyth drew our attention to a number of other provisions in Appendix EU which used the phrase “under this Appendix” in contexts where it could only be referring to Appendix EU; and likewise that where it intends to refer to Appendix EU (FP) it does so explicitly. That would be important if Mrs Rexhaj’s case were that the phrase “under this Appendix” in sub-paragraph (c) (i) means “under Appendix EU (FP)”. But, as we have seen, that was not the Upper Tribunal’s approach.
63. For those reasons, and subject to consideration of the intervention by the AIRE Centre, I would allow the Secretary of State’s appeal to this Court.

THE INTERVENTION

64. Para. 3 of Ms Naik’s written submissions on behalf of the AIRE Centre summarises the argument which it wished to advance before us as follows:

“The ... Secretary of State for the Home Department’s ... decision to create a scheme for joining family members from 30 June 2021 in which he resiled from the initial relaxation of the evidential requirements for joining dependent parents depending on the date on which they applied for pre settled status under Appendix EU, but permitted relaxed evidential provisions in relation to dependent parents already in the UK before 31 December 2020 to continue, offends against the fundamental principle of equality/non discrimination in EU law and requires that restrictive provisions of Appendix EU be disapplied.”

I will refer to that as “the discrimination argument”. It had been not raised by Mrs Rexhaj’s representatives either in the First-tier Tribunal or in the Upper Tribunal and is a wholly new point. At the conclusion of his oral submissions Mr Metzger said that he wished to adopt Ms Naik’s written submissions, but he made no substantive submissions on the point.

65. In her written submissions in response Ms Smyth advanced three arguments, which I summarise as follows:

- (1) The discrimination argument not only was outside the scope of the issues raised by the appeal but involved a challenge to the lawfulness of the relevant provisions of Appendix EU which the First-tier Tribunal had no jurisdiction to determine under the 2020 Regulations. As I understand it, the submission was that any such challenge could only be brought by way of judicial review.
 - (2) The argument could not be determined without the Secretary of State having the opportunity to advance evidence of justification, which she had not had because the argument was being sought to be raised for the first time on appeal.
 - (3) The argument was in any event misconceived – first, because the alleged victims of were parents who were not dependent and the Withdrawal Agreement only conferred rights on parents who were; and, secondly, because even if the differential treatment of parents applying for settlement after 30 June 2021 did in some way engage the EU principle of equal treatment that difference was plainly justified.
66. At the conclusion of the submissions from the primary parties we invited Ms Naik to address us on the issue of whether she should be permitted to advance the discrimination argument, i.e. essentially Ms Smyth’s first two points. She did so and in fact in the course of doing so also made some outline submissions on the substantive merits of the argument. At the conclusion of her submissions we decided that she should not be allowed to advance the discrimination argument, for the second of the two reasons advanced by Ms Smyth. This Court has of course a discretion to allow new points to be taken on appeal, even by an intervener (at least where, as here, it is adopted by one of the parties). But it is axiomatic that that discretion should not be exercised where the new point cannot be determined in the absence of evidence on a contentious factual issue which was not adduced below. The justification of any inequality of treatment of the kind alleged by the intervener is plainly such an issue.
67. Ms Naik initially took the point that when, on 19 February 2024, the AIRE Centre had notified the parties of its intention to apply for permission to intervene, making clear the argument which it was intending to advance, the Treasury Solicitor had replied the next day saying that the Secretary of State did not oppose the application, stipulating only that she should be given a proper opportunity to respond. It may be that she took that course in a co-operative spirit, and with a view to the imminence of the hearing, but I am bound to say that I find it surprising that more time was not taken to consider the implications of the submissions which the AIRE Centre wished to make. If that had occurred, it is likely that the objections raised by Ms Smyth before us would have been raised from the start, and I do not think it can be assumed that permission to intervene would have been given. However, I do not believe that the Treasury Solicitor’s initial response can be treated as definitively waiving any objection to the admissibility of the AIRE Centre’s argument, and in the end Ms Naik did not submit that it did.
68. In those circumstances we need not consider Ms Smyth’s other two objections, and I prefer not to do so. I should say that I see real force in both, but Ms Naik outlined potential answers to them, and it would be wrong to express a concluded view on the basis of the limited argument that we heard.
69. Ms Naik submitted by way of fallback that, even if we were not prepared to entertain the discrimination argument ourselves, we should, if the appeal were allowed,

encourage the Upper Tribunal on remittal to take a procedural route which would enable the argument to be considered in the context of the current proceedings. She did not suggest that we had any power to direct the Upper Tribunal to take such a step. She also accepted that it would be necessary for Mrs Rexhaj to seek permission to amend her grounds of appeal to the Upper Tribunal and/or to the First-tier Tribunal. I am not prepared to say anything by way of encouragement of such a course. The appeal is being remitted on a specific and distinct question about whether Mrs Rexhaj has proved dependency. The discrimination argument goes to the separate and prior question of whether there was a lawful requirement for her to do so. That is the question on which, on the hypothesis we are considering, she will have lost, and I cannot see how it would be right to allow her to revisit it simply because there has been a remittal on another issue.

DISPOSAL

70. As I have said, I would allow the Secretary of State's appeal against the Upper Tribunal's decision. That appeal relates only to what I have called the legal issue: see para. 5 above. It was common ground between counsel that if that were our decision the case should be remitted to the Upper Tribunal to determine Mrs Rexhaj's challenge to the fairness of the decision of the First-tier Tribunal on the factual issue. However, in an e-mail to the Court shortly after the end of the hearing the Treasury Solicitor confirmed an indication by Ms Smyth in her oral submissions that the Secretary of State accepted that that decision was indeed procedurally unfair. In the light of that concession, it will be for the Upper Tribunal to decide whether itself to hear evidence and remake the decision or to remit the case to the First-tier Tribunal.

Popplewell LJ:

71. I agree.

Lewis LJ:

72. I also agree.