



UT Neutral citation number: [2023] UKUT 00161 (IAC)

Rexhaj (extended family members: assumed dependency)

**Upper Tribunal
(Immigration and Asylum Chamber)**

Heard at **Field House**

THE IMMIGRATION ACTS

Heard on **23 March 2023**
Promulgated on **24 April 2023**

Before

**UPPER TRIBUNAL JUDGE STEPHEN SMITH
DEPUTY UPPER TRIBUNAL JUDGE SKINNER**

Between

**Have Rexhaj
(NO ANONYMITY DIRECTION MADE)**

Appellant

and

Secretary of State for the Home Department

Respondent

Representation:

For the Appellant: Ms S. Saifolah, Counsel instructed by Sterling Lawyers Ltd
For the Respondent: Mr T. Lindsay, Senior Home Office Presenting Officer

1. Where an applicant:

- a. has been granted entry clearance as a dependent parent under Appendix EU (Family Permit); and*
- b. is subsequently granted limited leave to enter at the border as a dependent parent,*

the operative basis upon which the individual was granted leave to enter at the border is to be found within Appendix EU.

2. *It follows that such an applicant will already have been granted leave as a dependent parent under Appendix EU (c.f. “under this Appendix”) and, pursuant to the definition of “dependent parent” in Annex 1 to Appendix EU at paragraph (c)(i), will not be subject to the requirement to establish dependency.*

DECISION AND REASONS

1. By a decision promulgated on 12 October 2022, First-tier Tribunal Judge C. H. Bennett (“the judge”) dismissed an appeal brought by the appellant, a citizen of Albania born in 1964, against a decision of the Secretary of State dated 12 April 2022 to refuse her application for leave to remain as a dependent parent under Appendix EU of the Immigration Rules. The appellant now appeals against the judge’s decision to the Upper Tribunal.

Factual background

2. On 21 June 2021, the appellant applied for an EU Family Permit under Appendix EU (Family Permit) (“Appendix EUFP”) of the Immigration Rules as the “dependent parent” of her Albanian son, Urim Raxhaj, and his Romanian wife, Laura Predincea (“the sponsors”). The sponsors each hold indefinite leave to remain under the EU Settlement Scheme (“the EUSS”). The appellant’s application was successful. She was granted entry clearance valid for six months from 15 November 2021 and was admitted to the UK on 25 December 2021. The appellant did not have to demonstrate dependency when making that application. Her application was submitted before 30 June 2021, so her claimed dependency was assumed.
3. The appellant applied from within the UK for leave to remain as a dependent parent of the sponsors on 2 January 2022, under Appendix EU. The application was refused on the basis that the appellant had not demonstrated dependency. The appellant appealed to the First-tier Tribunal under the Immigration (Citizens' Rights Appeals) (EU Exit) Regulations 2020 (“the 2020 Regulations”).

Decision of the judge

4. In his lengthy and detailed decision, the judge set out the factual background, the relevant legal framework and the applicable provisions of Appendix EU and Appendix EUFP of the Immigration Rules. At para. 15, the judge quoted from the definition of “dependent parent” in Annex 1 to Appendix EU. The relevant part of the definition is paragraph (c), concerning the requirement for dependency. It provides, where relevant, that an applicant does not have to meet a 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...”
(emphasis added)
5. At para. 16, the judge concluded that the appellant had not been granted leave to enter under *Appendix EU*, but rather had been granted leave to enter under Appendix EU (*Family Permit*). That being so, he found, the appellant’s claimed dependency could not be assumed, because she had not been granted leave to enter “*under this Appendix*”, namely Appendix EU. She had been granted leave under Appendix EUFP. Pursuant to the Immigration (Leave to Enter and Remain) Order 2000 (“the 2000 Order”), the appellant’s entry clearance under Appendix EUFP had effect as leave to enter under that appendix, and not Appendix EU.

6. The judge found that, in any event, the appellant was not dependent upon the sponsors. The sponsors had attended the remote hearing before the judge but had not been called to give evidence. The judge therefore focussed on the written evidence. He concluded (para. 20) that, at the date of the application to the Secretary of State, the appellant was not “dependent” upon the sponsors, by reference to the definition of the term in “dependent parent” in Appendix EU. There was minimal documentary evidence pertaining to the claimed cash transfers, the sponsors’ witness statements were light on detail, and the appellant had returned to Albania following the refusal of her application, undermining her claim to be dependent upon them in any event. The appellant had other children. The judge found that they could be providing for her. He found that there was “an obvious and inherent improbability” that certain key aspects of the appellant’s case had been omitted from the witness statements (para. 21(d)). He was not satisfied that he had been “told the truth” about the claimed provision of financial or other material support by the sponsors (para. 21(f)).
7. The judge dismissed the appeal.

Issues on appeal to the Upper Tribunal

8. Permission to appeal was granted by a judge of the First-tier Tribunal. There are two grounds of appeal:
- a. The first is that the judge fell into error by finding that the appellant had to demonstrate dependency.
 - b. The second is that the judge’s findings of fact were procedurally unfair. The hearing before the judge proceeded by way of submissions alone “without the express prior agreement of the parties” (grounds of appeal, para 3.3), despite the sponsors having attended the hearing (albeit remotely) and being in a position to give evidence. The judge did not indicate that he would have benefitted from the provision of oral evidence and did not indicate his concerns about the credibility of any of the evidence to the parties yet found that the witnesses had not been truthful.
9. In support of the second ground of appeal, the appellant relies on a witness statement by Nozima Rakhimjonova, the appellant’s Level 2 Caseworker under the Law Society Immigration and Asylum Accreditation Scheme, dated 21 October 2022. The statement summarises what took place at the hearing. Mr Lindsay did not object to the admission of the statement. We admit it under rule 15(2A) of the Tribunal Procedure (Upper Tribunal) Rules 2008.

Issue (1): judge erred concerning assumed dependency

10. In support of the grounds of appeal, Ms Saifolahi, who did not appear below, drew our attention to paragraphs FP1 and FP2 of Appendix EUFP, entitled “Purpose”. Those paragraphs provide:
- “FP1. This Appendix sets out the basis on which a person will, if they apply under it, be granted an entry clearance:
- (a) In the form of an EU Settlement Scheme Family Permit – to join a relevant EEA citizen or a qualifying British 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.”

11. Ms Saifolahi submitted that para. FP2 provides the necessary link between grants of entry clearance and leave to enter made under Appendix EUFP and Appendix EU. While she accepted that the appellant was granted leave under Appendix EUFP, she submitted that para. FP2 rendered her leave to enter effective “for the purposes of acquiring leave to enter or remain in the UK by virtue of Appendix EU”. That being so, the judge was wrong to distinguish between the two appendices in the way that he did.
12. Resisting the appeal, Mr Lindsay submitted that the definition of “dependent parent” in Annex 1 to Appendix EU was clear: unless the leave to enter was granted under Appendix EU, rather than Appendix EUFP, the requirement for dependency to be assumed continued to apply. A purposive interpretation was inappropriate in the face of the clear meaning of the rules.
13. In response to questions from the panel, Mr Lindsay submitted that, under the rules as drafted, a dependent parent would only be able to obtain entry clearance, and subsequent admission at the border, under Appendix EUFP, rather than under Appendix EU. We queried with him whether the logical conclusion of his submission was that it would be impossible for any dependent parent who held entry clearance issued under Appendix EUFP, to benefit from assumed dependency under the Annex 1 definition in Appendix EU, in light of the distinction that he submitted should be drawn between the two appendices. Mr Lindsay said that, having previously taken instructions from the relevant policy team in the Home Office, the references in the Annex 1 definition of “dependent parent” to an applicant having previously been granted leave to enter “under this Appendix” were present in order to cater for future possible amendments to Appendix EU, in the event that the Secretary of State chose to make direct provision for entry clearance to be granted to dependent parents under Appendix EU, rather than Appendix EUFP. By adopting that approach, the Secretary of State sought to avoid unnecessary textual changes to Appendix EU in the future. This was an example of good and effective drafting, he submitted.
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; [2010] Imm AR 203 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 Mr Lindsay 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 Mr Lindsay'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 Mr Lindsay'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.
21. We find that the judge made an error of law when concluding that the appellant had not previously been granted limited leave to remain “under this Appendix” (that is, Appendix EU). She had. That meant that the appellant did not need to establish dependency. It was an error for the judge to find that she did. We set the decision aside.

Issue (2): the judge’s findings of fact set aside

22. In our judgment, the judge should not have made any findings of fact concerning the issue of dependency as that was not a live issue before him. We therefore do not preserve any of the judge’s findings of fact and do not need to consider the second ground of appeal in any depth.
23. However, we pause briefly to observe that we harbour grave doubts about whether it was open to the judge to reach findings that the sponsors had been dishonest in circumstances when (i) neither the Secretary of State nor the judge had not raised dishonesty, and (ii) the judge had not heard oral evidence from the witnesses concerned. However, we do not need to reach a considered view as to whether the judge was procedurally unfair in reaching those findings, since we have set them aside in any event. For the avoidance of doubt, there are now no judicial findings that the sponsors or the appellant sought to give untruthful evidence.

Remaking the decision

24. We consider that it is appropriate to remake the decision in this tribunal, acting under section 12(2)(b)(ii) of the Tribunals, Courts and Enforcement Act 2007. There are no issues of fact to determine, and the outcome of the appeal turns on a point of law alone. Mr Lindsay encouraged us to list the matter for a further hearing if we decided to set the decision aside, but, in light of the extensive oral argument we have already heard concerning the construction of the definition of “dependent parent”, we do not consider that it is necessary to reconvene the hearing. Deciding the case justly and fairly for the purposes of the overriding objective of the Tribunal Procedure (Upper Tribunal) Rules 2008 includes avoiding delay, so far as is compatible with proper consideration of the issues.
25. The appeal was originally brought by the appellant on the basis that the decision of the Secretary of State breached her rights under the EU Withdrawal Agreement. By the time of the hearing before the judge, she had expanded her grounds of appeal (without any apparent objection from the Secretary of State) to include a ground that the decision breached her rights under the Immigration Rules: see para. 10(b) of the appellant’s skeleton argument before the First-tier Tribunal dated 16 September 2022. We therefore remake the decision by reference to the ground of appeal at regulation 8(3)(b) of the 2020 Regulations, namely that the decision is not in accordance with the “residence scheme Immigration Rules”, that is, Appendix EU.
26. In our judgment, the appellant meets the requirements of para. EU14A of Appendix EU, which we take in turn. The applicant is, we find, a “joining family

member of a relevant sponsor” (EU14A, para. (a)(i)). The definition of that term, at para. (d), includes the “dependent parent of a relevant sponsor”. The appellant was not resident in the UK as the family member of a relevant EEA citizen before the specified date. We have set out above how the appellant meets the requirement to be a “dependent parent”, on account of having previously been issued with limited leave to remain under Appendix EU in that capacity, by reference to para. (c) of the definition of “dependent parent”. There is no suggestion that she is eligible for indefinite leave to remain on either of the bases specified in para. EU14A(b). There has been no “supervening event”, as defined in Annex 1. The appellant therefore meets the requirements of Appendix EU for limited leave to remain as a dependent parent.

27. We therefore remake the decision by allowing the appeal.

Notice of Decision

The decision of Judge C. H. Bennett involved the making of an error of law and is set aside with no findings of fact preserved.

We remake the decision, allowing the appeal under the Immigration (Citizens’ Rights Appeals) (EU Exit) Regulations 2020.

As we have allowed the appeal and because a fee has been paid or is payable, we have considered making a fee award and have decided to make a whole fee award of any fee which has been paid or may be payable for the following reason: the appellant was successful in the appeal and established that her application was incorrectly refused by the Secretary of State.

Stephen H Smith

Judge of the Upper Tribunal
Immigration and Asylum Chamber

3 April 2023