



IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2022-003775
First-tier Tribunal No:
EA/01673/2022

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On the 01 May 2023

Before

UPPER TRIBUNAL JUDGE SHERIDAN

Between

The Secretary of State for the Home Department

Appellant

and

Fari Pjetri
(NO ANONYMITY ORDER MADE)

Respondent

Representation:

For the Appellant: Ms Leconite, Senior Home Office Presenting Officer
For the Respondent: Mr Mavrantonis, Counsel instructed by Vanguard Solicitors

Heard at Field House on 14 April 2023

DECISION AND REASONS

1. This is an appeal by the Secretary of State. However, for convenience, I will refer to the parties as they were designated in the First-tier Tribunal.
2. The appellant is a citizen of Albania born in 1973. His daughter (“the sponsor”) is a Greek citizen born in 2001 living in the UK.
3. On 26 September 2021 the appellant applied for a family permit under the EU Settlement Scheme in order to join his daughter in the UK.
4. On 10 January 2022 the application was refused on the basis that the appellant had not provided evidence to show that he was dependent on the sponsor. The appellant appealed to the First-tier Tribunal where his appeal came before Judge of the First-tier Tribunal Khan (“the judge”). In a decision promulgated on 18 July 2022 the judge allowed the appeal. The respondent is now appealing against that decision.

Decision of the First-tier Tribunal

5. The judge stated that the only issue in dispute was whether the appellant was dependent on the sponsor. The judge allowed the appeal on the basis that there was no need for the appellant to prove dependency on the sponsor because under the definition of “dependent parent” in Annex 1 to Appendix EU(FP) of the Immigration Rules dependency is assumed. In reaching this decision, the judge relied both on her understanding of the wording used in the definition of “dependent parent” in Annex 1 to Appendix EU(FP) and the respondent’s guidance EUSS: EU, other EEA Regulations and Swiss citizens and their family members (“the EUSS Guidance”).

Grounds of Appeal

6. The respondent argues that the judge misunderstood and misapplied the definition of dependent parent in Annex 1 of Appendix EU(FP) as there is no assumption of dependency for a person in the appellant’s position. The respondent also argued that the EUSS Guidance was not applicable and that the relevant guidance was the EU Settlement Scheme family permit guidance (“the EUSS (FP) Guidance”).

Rule 24 Response

7. In the appellant’s Rule 24 response it is submitted that the definition of dependent parent in Annex 1 to Appendix EU(FP) is ambiguous and unclear. It is submitted that the categorisation in the definition is such that the appellant could, on at least one interpretation of the definition, fall within and benefit from either category (b)(i)(bb) or (b)(i)(aa) where dependency would be assumed. It is submitted that such an interpretation would be consistent with the EUSS Guidance. It is also argued that the EUSS (FP) Guidance postdates the hearing and therefore the judge cannot be faulted for not considering it.

Submissions

8. Ms Leconite stated that she was relying on the grounds as drafted and did not advance any further arguments.
9. Mr Mavrantonis noted that the appellant’s mother had been successful in her application for a family permit. I asked Mr Mavrantonis to confirm the date of the application made by the appellant’s mother and he stated that it was made on 22 April 2021.
10. Mr Mavrantonis reiterated the arguments in his Rule 24 response. In particular, he emphasised the submission that the definition of dependent parent is unclear and difficult to follow; and could reasonably be interpreted as meaning that dependency is to be assumed in the appellant’s case.

Relevant Law

11. The relevant part of definition of dependent parent in Annex 1 to Appendix EU(FP) is as follows:
 - (a) the direct relative in the ascending line of a relevant EEA citizen (or, as the case may be, of a qualifying British citizen) or of their spouse or civil partner; and

- (b) (unless sub-paragraph (c) immediately below applies):
- (i) dependent on the relevant EEA citizen or on their spouse or civil partner:
- (aa) (where sub-paragraph (b)(i)(bb) or (b)(i)(cc) below does not apply) at the date of application and (unless the relevant EEA citizen is under the age of 18 years at the date of application) that dependency is assumed; or
- (bb) (where the date of application is after the specified date and where the applicant is not a joining family member) at the specified date, and (unless the relevant EEA citizen was under the age of 18 years at the specified date) that dependency is assumed; or
- (cc) (where the date of application is after the specified date and where the applicant is a joining family member) at the date of application and (unless the relevant EEA citizen is under the age of 18 years at the date of application) that dependency is assumed where the date of application is before 1 July 2021

Analysis

12. The definition of “dependent parent” in Annex 1 to Appendix EU(FP) includes three alternative categories of dependent person. These are set out in sub-paragraphs (aa), (bb) and (cc). Which category an applicant falls into depends on the date of application and whether the applicant is a “joining family member”. “Joining family member” is a defined term in Annex 1 to Appendix EU(FP). It was not in dispute that the appellant falls within the definition of a joining family member.
- (a) Sub-paragraph (cc) is the relevant category for an applicant who applied after the specified date (31 December 2020) and who falls within the definition of a “joining family member”.
- (b) Sub-paragraph (bb) is the relevant category for an applicant who applied after the specified date who does not fall within the definition of a “joining family member”.
- (c) Sub-paragraph (aa) is the relevant category for an applicant who does not fall within the other two sub-paragraphs.
13. The requirements, in respect of establishing dependency, differ depending on which category an applicant falls in.
14. The appellant applied after the specified date and is a “joining family member”. Consequently, he falls within sub-paragraph (cc). He does not fall within sub-paragraph (bb) because this category is only applicable to applicants who are not a joining family member. He does not fall within sub-paragraph (cc) because this category is only applicable to applicants who do not fall within either of the other categories and the applicant falls within sub-paragraph (cc).
15. It is therefore necessary to look at what is required, in terms of establishing dependency, of an applicant falling within sub-paragraph (cc). The wording is

clear: where the EEA citizen is over 18 at the date of application, which is the case here, there must be dependency at the date of application and the dependency will be assumed where the date of the application is before 1 July 2021. In other words, a distinction is drawn between applications made before and after 1 July 2021. Where an application is made prior to 1 July 2021 dependency will be assumed whereas for applications made after 1 July 2021 dependency will not be assumed and an applicant will need to be establish that there is dependency.

16. The difference in how the appellant and his wife were treated is consistent with this. The appellant's wife's application was made on 22 April 2021, which is before 1 July 2021; whereas the appellant's application was made on 26 September 2021, which is after 1 July 2021. Accordingly, in the case of the appellant's wife sub-paragraph (cc) required that dependency be assumed whereas in the case of the appellant it did not.
17. Mr Mavrantonis submitted that the judge was entitled to follow the EUSS Guidance, which was before him. I disagree. The EUSS Guidance relates to a different Appendix to the Immigration Rules to the Immigration Rules and therefore was irrelevant.
18. In conclusion: had the appellant applied before 1 July 2021 (as his wife did), it would have been assumed that he was dependent on the sponsor and he would not have needed to submit evidence to establish dependency. However, as he applied after 1 July 2021, dependency is not assumed and he therefore needs to prove dependency. The judge therefore erred by finding that dependency was to be assumed.
19. Although I reserved my decision, I asked the parties to express a view on whether, in the event that I found there to be an error, the matter should be remitted to the First-tier Tribunal or remain in the Upper Tribunal for remaking. Ms Leconite expressed no view. Mr Mavrantonis argued that, if I were to find that dependency is not assumed, the case should be remitted to the First-tier Tribunal on the basis that the issue of whether or not the appellant is dependent on the sponsor has not yet been considered in the First-tier Tribunal. I agree with Mr Mavrantonis. As there has not been any judicial consideration of dependency, I consider that the loss of the two-tier decision making process that would occur if the case is retained in the Upper Tribunal makes it appropriate for the matter to be remitted. In reaching this view, I have had regard to *AEB v SSHD* [2022] EWCA Civ 1512 and *Begum (Remaking or remittal) Bangladesh* [2023] UKUT 00046 IAC.

Notice of Decision

20. The decision of the First-tier Tribunal involved the making of a material error of law and is set aside. The appeal is remitted to the First-tier Tribunal to be made afresh by a different judge.

D. Sheridan

Judge of the Upper Tribunal
Immigration and Asylum Chamber

29.4.2023