



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

Appeal Number: UI-2022-002097
EA/11834/2021

THE IMMIGRATION ACTS

**Heard at Field House
On 25 November 2022**

**Decision & Reasons Promulgated
On 5 January 2023**

Before

**UPPER TRIBUNAL JUDGE RINTOUL
DEPUTY UPPER TRIBUNAL JUDGE CHANA**

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

**EUNICE MOJISOLA AKINLABI
(ANONYMITY DIRECTION NOT MADE)**

Respondent

Representation:

For the Appellant: Ms S Cunha, Senior Home Office Presenting Officer

For the Respondent: Mr L Youssefian instructed by Sabz Solicitors

DECISION AND REASONS

1. The Secretary of State appeals with permission against the decision of First-tier Tribunal Judge Dean, promulgated on 4 January 2022, allowing the respondent's appeal against a decision by the Secretary of State to refuse to issue her with a family permit under Appendix EU (Family Permit) ("Appendix EU (FP)").

Background

2. The respondent is a citizen of Nigeria. on 27 February 2021 she made an application on 27 February 2021 for an EU Settlement Scheme Family Permit as a 'family member of a relevant EEA citizen', namely her daughter-in-law, Blessing Adenike Omoniyi, who is a German citizen. The relationship between the respondent's son and Ms Omoniyi had previously been accepted as a 'durable relationship akin to marriage and the relevant document issued prior to 31 December 2020, but the couple were not married until 24 May 2021.
3. The Secretary of State refused the respondent's application on 29 July 2021 because she was of the view that the respondent had not provided sufficient evidence to demonstrate that she is the 'family member' of a relevant EEA Citizen because she had provided no evidence that her son is the spouse or civil partner of her sponsor (Ms Omoniyi) and therefore she did not come within the definition of a 'family member of a relevant EEA citizen' under Appendix EU (FP).
4. The appeal was considered on the papers alone without an oral hearing. The judge found:
 9. Looking at the evidence of the birth certificates and the Mortgage Transaction Summary, I find that the Sponsor and the Appellant's son were clearly living together as a family with their children in what can be described as a civil partnership, although I accept that they have not submitted documents to demonstrate that they formally entered into a civil partnership.
 10. However, a marriage certificate was submitted which shows that the Sponsor and the Appellant's son were married in a civil ceremony on 24 May 2021. Amongst other things, this names the Appellant as the mother of the groom, Mr Bamidele Isaac Akinlabi. I therefore find that the Appellant's son is the spouse of the Appellant's Sponsor.
 11. Accordingly, looking at the totality of the evidence before me, I find that the Appellant has demonstrated to the required standard that she is a family member of a relevant EEA citizen and I therefore allow her appeal.

Grounds of appeal

5. The Secretary of State sought permission to appeal on the grounds that the judge had erred in law as she:
 - (i) failed to take into account the requirement of paragraph FP6. (1) of Appendix EU (FP) that an applicant must meet the requirement to be the family member of an EEA national as at the date of application, but the marriage had taken place after the date of application.
 - (ii) made no findings as to the respondent's dependency on the EEA national which is a necessary requirement of Appendix EU (FP).

Submissions

6. Ms Cunha submitted that rule FP 6 of Appendix EU(FP) required an applicant to meet the requirement to be a family member of a relevant EEA national at the date of application. She submitted that as the respondent's son had not married until after that date, she did not meet the eligibility requirements of the Appendix EU (FP). She submitted in the alternative that, on a proper construction of the relevant rules, the respondent could not meet the definition of "family member of a relevant EEA national".
7. Mr Youssefian relied on his skeleton argument, submitting that on a proper construction of the rules, the respondent was a family member of a relevant EEA national, and that issue before the First-tier Tribunal was whether the requirements of Appendix EU(FP) were met at the date of hearing.

The law

8. The Immigration (Citizens Rights Appeals) (EU Exit) Regulations 2020 (SI 2020/61) grant a right of appeal to those refused a permit under Appendix EU (FP). The permissible grounds of appeal are set out in reg. 8.
9. The relevant immigration rules are set out in Appendix EU(FP) which provides, materially:
 - FP6. (1) The applicant meets the eligibility requirements for an entry clearance to be granted under this Appendix in the form of an EU Settlement Scheme Family Permit, where the entry clearance officer is satisfied that *at the date of application* [our emphasis]:
 - (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* [our emphasis];
 - (c) The relevant EEA citizen is resident in the UK or will be travelling to the UK with the applicant within six months of the date of application;
10. In Schedule 1 to Appendix EU(FP), family member of a relevant EEA citizen is defined as:
 - a person who has satisfied the entry clearance officer, including by the required evidence of family relationship, that they are:
 - a) the spouse or civil partner of a relevant EEA citizen, and:
 - (i) (aa) the marriage was contracted or the civil partnership was formed before the specified date; or
 - (bb) the applicant was the durable partner of the relevant EEA citizen before the specified date (the definition of 'durable partner' in this table being met before that date rather than at the date of application) and the partnership remained durable at the specified date; and

(ii) the marriage or civil partnership continues to exist at the date of application;

or

...

(e) the child or *dependent parent* [our emphasis] of the spouse or civil partner of a relevant EEA citizen, as described in sub-paragraph (a) above, and:

(i) the family relationship of the child or dependent parent to the spouse or civil partner existed before the specified date (unless, in the case of a child, the person was born after that date, was adopted after that date in accordance with a relevant adoption decision or after that date became a child within the meaning of that entry in this table on the basis of one of sub-paragraphs (a)(iii) to (a)(xi) of that entry); and

(ii) all the family relationships continue to exist at the date of application; or...

11. “Dependant parent” is defined as:

(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) ...; 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; or

(ii) ...; and

‘dependent’ means here that:

(a) having regard to their financial and social conditions, or health, the applicant cannot meet their essential living needs (in whole or in part) without the financial or other material support of the relevant EEA citizen (or, as the case may be, of the qualifying British citizen) or of their spouse or civil partner; and

(b) such support is being provided to the applicant by the relevant EEA citizen (or, as the case may be, by the qualifying British citizen) or by their spouse or civil partner; and

(c) there is no need to determine the reasons for that dependence or for the recourse to that support

[...]"

Discussion

12. There are three issues before us: (i) does the respondent come within the definition of “family member of a relevant EEA National”; (ii) was the judge entitled to take into account the post-application marriage; (iii) was the respondent a dependent, so far as it was necessary for her to show that.
13. Issues (i) and (ii) are linked. That is because, if the respondent is correct and the definition of family member of a relevant EEA National in this case does not require the marriage of the respondent’s son and daughter in law to have taken place prior to 31 December 2020, she also needs to show that the judge was entitled to take the post-application marriage into account when determining that the Immigration Rules were met.
14. We turn first to the definition of “family member of a relevant EEA National”. Appendix EU(FP) sets out who is a “family member of a relevant EEA citizen” by reference to a closed list of categories of people. We are here concerned with sub-paragraph (e) of that list, that is, dependent parents of the spouse or civil partner of a relevant EEA citizen.
15. Mr Youssefian accepts that a dependent parent can only rely on their child’s relationship to an EEA national if they are married or in a civil partnership and that being the parent of a person in a recognised durable relationship with an EEA national (as here) will not satisfy the definition of ‘family member of a relevant EEA citizen’. That was, he accepted, not the position here at the date of application. He submits, however, that Appendix EU (FP) does not specify *when* the marriage to the EEA national had to have taken place. He concedes that the family relationship had to exist before the specified date but submits that “family relationship” is not defined in Appendix EU(FP)I – a deliberate omission – the rules instead prescribing what the required evidence of a family relationship is. He submits that in this case, the only evidence required is evidence of birth of the son. Mr Youssefian submits that “family relationship” should be construed wider, beyond the legal relationship of spouse, to include a situation, as here, where a durable relationship had been recognised; it is the same relationship, which is relevant, the only difference being the formalisation of it through marriage.
16. We accept that “family relationship” is not expressly defined in Appendix EU (FP). The phrase occurs within schedule 1 within the definitions of “family member of a qualifying British citizen”, “family member of a relevant EEA national” and “required evidence of family relationship”. We note in passing that in all three, as within much of Appendix EU (FP), the issue arises of whether a specific legal relationship existed as at the specified date.
17. In sub-paragraph (e) the phrase “family relationship” is preceded by “the” which refers back to two possible relationships: a child (with which we are

not concerned here) and “dependent parent of the spouse or civil partner of a relevant EEA citizen, *as described in sub-paragraph (a)* [our emphasis]”. The phrase in italics applies to the spouse or civil partner in question; it is qualification to “spouse” as defined in Schedule 1, narrowing its definition for the purposes of this paragraph so that it applies only where the marriage creating the spousal relationship was contracted before the specified date.

18. We accept that construction depends on “described” being understood as “defined” and thus importing the requirement in (a)(i) (aa) that a spouse is a spouse for these purposes only if the marriage pre-dates the specified date. It may be argued that adopting that qualification of spouse would make the requirement in sub-paragraph (3) (i) that the family relationship with the spouse had to exist before the specified date redundant.
19. The difficulty, however, in omitting the qualification in paragraph (a)(i)(aa) is that it would result in an anomaly whereby the spouse of a relevant EEA national who had married after the specified date could not meet the definition of family member of a relevant EEA national, but that spouse’s parents would. That, in our view, counts against such an omission.
20. Drawing these strands together, we conclude that in order to come within the definition of family member of a relevant EEA national in Schedule 1 to Appendix EU (FP) (e) es the marriage (or civil partnership) of the dependent’s son or daughter to an EEA national must have been contracted (or formed) before 31 December 2020.
21. In the alternative, we have considered Mr Youssefian’s submission that “family relationship” is undefined and should be construed to cover the factual matrix in this appeal.
22. We have considered whether “family relationship” in sub-paragraph (e)(i) extends beyond the legal definition of spouse. As a preliminary observation we do not think it contentious to find that on the facts of this case a family life for the purposes of article 8 of the Human Rights Convention exists here. But the same could be said in many cases of a child prior to adoption, in which case the exceptions for adopted children and so on are necessary in sub-paragraph (e) (i). Further, adopting a broader, human rights focussed approach would introduce a significant degree of uncertainty and would not reflect the Withdrawal Agreement; it would also involve a departure from the legal relationships between individuals (rather than the existence of family life) which is a characteristic of Appendix EU (FP) and, importantly the free movement rights under EU law under Directive 2004/38/EC and the Treaties.
23. We consider that even although “family relationship is not expressly defined, the use of “the” before it when used indicates that it is a specific family relationship which is meant. Had it been “a” family relationship, then there would have been some force in the submission that family relationship requires an evaluation of a relationship rather than asking

whether the specific legal relationship existed at a point in time. It would, in circumstances other than these, be difficult if not impossible to ascertain, both in determining a start point and an end point of a “family relationship”.

24. The fact that it is not defined expressly militates against the expansive interpretation put forward by Mr Youssefian. We find that the phrase “family relationship” in paragraph must be interpreted as referring to the legal relationship between in question. In this appeal, that relationship is the marriage between the respondent’s son and daughter in law.
25. Again, drawing these strands together, we conclude that “family relationship” in paragraph (e) (i) refers to the legal relationship between the parties be that a marriage or civil partnership. For that reason, and for the reasons set out above, the judge erred in concluding that the respondent is a family member of a relevant EEA national.
26. We do not, however, find that the judge erred in taking into account the evidence of the marriage; that was a fact occurring prior to the date of decision. But, what that evidence could not do, is meet a requirement of the immigration rules which had to be met at the date of application. That is however a moot point, on the light of our view of the correct construction of “family member of a relevant EEA national” as it applies to dependent parents of the non-EEA national spouses/civil partners of relevant EEA nationals
27. Having reached these conclusions, it is unnecessary for us to consider whether ground 2 is made out. Had it been necessary for us to reach a decision on it, we observed that at no stage was the issue raised by the Secretary of State either in the refusal letter or otherwise; and, she chose not to attend the hearing. It is not an error of law for a judge not to consider an issue not put before her.
28. For these reasons we set aside the decision of the First-tier Tribunal. Applying the correct interpretation of family member of a relevant EEA national to the facts of this case, we find that the respondent is not such a person and so cannot on any view meet the requirements of paragraph FP 6 of Appendix EU (FP). It is not argued that the respondent has any rights under the Withdrawal Agreement, and for these reasons, we dismiss the appeal on all grounds.

Notice of Decision

1. The decision of the First-tier Tribunal involved the making of an error of law and we set it aside.
2. We remake the decision by dismissing it on all grounds.

Signed

Date: 29 December 2022

Jeremy K H Rintoul
Upper Tribunal Judge Rintoul