IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2022-004243

First-tier Tribunal No: EA/15217/2021

THE IMMIGRATION ACTS

Decision & Reasons Promulgated
On 23 February 2023

Before

UPPER TRIBUNAL JUDGE GRUBB
DEPUTY UPPER TRIBUNAL J F W PHILLIPS

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

LISE SOUSAN SHIDANI

Respondent

Representation:
For the Appellant: Ms S Rushforth, Senior Home Office Presenting Officer
For the Respondent: Mr A Joseph instructed by Immigration Advisory Service

Heard at Cardiff Civil Justice Centre on 9 February 2023

DECISION AND REASONS

Introduction

1. Although this is an appeal by the Secretary of State, for convenience we will refer to the parties as they appeared before the First-tier Tribunal.

2. The Secretary of State appeals against a decision of the First-tier Tribunal (Judge K Heaven) which allowed the appellant's appeal against the respondent's decision made on 30 September 2021 to refuse her application dated 15 May 2021 for a family permit under the EU Settlement Scheme ("EUSS") in Appendix EU(FP) of the Immigration Rules.

Background

3. The appellant is a citizen of France who was born on 12 November 1941. She left Iran in 1984 with her two sons. She was granted refugee status in France and in 2005 was granted French citizenship. Her son, Armand Arash Parandian ("AAP") is also a French citizen. He is married to a British citizen, Suzanne Louis Parandian ("SLP") who is, therefore, the appellant's daughter-in-law.

4. SLP and AAP lived in France where SLP had worked since 2015. They lived close to the appellant and, due to her health problems, provided her with care and also financial support. SLP and AAP decided to return to the UK in order that SLP cold provide support for her own mother. AAP applied under the EUSS for a family permit as the spouse of a qualifying British citizen. At the same time, the appellant also applied for a family permit under the EUSS as the "family member of a qualifying British citizen", i.e of SLP, her daughter-in-law. The judge summarised the situation at [3] of her decision which we do not understand to be in dispute:

> "The Appellant is age 81 was supported on a daily basis by her son and daughter in law ('the couple') in France since 2006 – they live[d] a few streets away. The Appellant has a number of complex medical issues which are extensively documented in the bundle. The couple assisted the Appellant to obtain medical treatment, they also shop for her and generally provide daily care. The couple delayed a move to Wales due to Covid 19 but moved on 7 November 2021. Prior to this they lived with the Appellant for one month. The couple are unable to support the Appellant and meet her needs whilst in Wales. The couple wish for the Appellant to reside with them in Wales given they are her remaining family and she is entirely dependent on them. The Appellant is currently residing with the couple in Wales."

5. As we understand it, AAP was successful in his EUSS application. The appellant was, however, refused a family permit on the basis that she had not established that she was a "family member of a qualifying British citizen" because she was not residing in an EEA country with a British citizen whilst that British citizen was exercising Treaty rights.

The Appeal to the First-tier Tribunal

6. The appellant appealed to the First-tier Tribunal under reg 3 of the Immigration (Citizens' Rights Appeals) (EU Exit) Regulations 2020 (SI 2020/61) (the "Appeals Regulations 2020") relying on the two grounds in reg 8(2)(a) and reg 8(3)(b) which provide as follows:

> "8.- (1) An appeal under these Regulations must be brought on one or both of the following two grounds.
>
> (2) The first ground of appeal is that the decision breaches any right which the appellant has by virtue of—
>
> (a) Chapter 1, or Article 24(2) or 25(2) of Chapter 2, of Title II of Part 2 of the withdrawal agreement,
>
> ....

> (3) The second ground of appeal is that—
>
> ….
>
> (b) where the decision is mentioned in regulation 3(1)(c) or (d), it is not in accordance with residence scheme immigration rules; ….””

7. The reference to the “residence scheme immigration rules” in reg 8(3)(b) includes the EUSS rules in Appendix EU(FP) (see EU (Withdrawal Agreement) Act 2020, s.17(1)).

8. Judge Heaven allowed the appeal on three bases.

9. First, the appellant succeeded under the EUSS. She did so on the basis that the appellant was a “family member of a qualifying EEA citizen” and a “dependent parent”. Her findings are at [6]-[8] as follows:

> “6. The Appellant is a specified EEA citizen and the family member of a relevant EEA citizen within the meaning of Appendix EU (Family Permit) and she joined her son in the UK within six months of the date of the application.
>
> 7. Further, for the avoidance of any doubt the Appellant is a family member of a relevant EEA citizen and a dependant parent within the meaning of Appendix EU. I heard evidence from the Appellant and her daughter in law explaining the history of the dependency which is extensive and the extent to which the Appellant was and still is dependent on the couple and the limited support structure in France. I note that some of the evidence includes: Shopping bills of the Appellant’s son (when in Wales) for his mother, the Appellant’s rent receipts 2020- 2021, paid for by her son (and son’s corresponding bank statements), the Appellant’s utility bills (Gas, electricity) 2017-2021, paid for by her son (and son’s corresponding bank statements). I accept that on all the evidence before the court the Appellant is an extremely vulnerable and elderly lady, who is entirely dependent upon her son and daughter-in-law for her essential living needs: be they practical, financial or emotional. She has no other immediate family in France. They are, all together, a deeply integrated family unit. I found the Appellant’s daughter in law to be credible and indeed dependency is accepted by the Respondent. I also accept the submissions that I have heard that this application would have been made at a much earlier time had it not been for the Covid 19 pandemic when the Appellant would have been clearly entitled to accompany the couple to the UK and reside with them in Wales.
>
> 8. I find that the Appellant meets the requirements of the Immigration Rules.”

10. Second, the judge reasoned that the decision was not proportionate and in breach of the Withdrawal Agreement. At [9], the judge said this:

> “9. In the alternative, I find that the Respondent’s decision is not proportionate and not in accordance with the Withdrawal Agreement. As noted above the Appellant would have applied much earlier had it

> not been for the Covid 19 pandemic which placed her health at significant risk given her age and vulnerability. I accept that this delayed the application. At the time and under the EEA Regulations 2016 the Appellant would clearly have been entitled to reside in the UK with the couple."

11. Finally, the judge found that the decision breached Art 8 of the ECHR (see [10]-[14]).

The Appeal to the Upper Tribunal

12. The respondent challenged the judge's decision to allow the appeal on three grounds.

13. First, the judge wrongly applied the requirements of Appendix EU(FP). The appellant could only satisfy the definition of ae "family member of a qualifying British citizen" in Annex 1 if she satisfied the requirements of regs 9(2), 9(3) and 9(4)(a) of the Immigration (EEA) Regulations 2016 (SI 2016/1052) ("the EEA Regulations") which, in summary, required the appellant to have resided together with her daughter-in-law (the British citizen) who was exercising Treaty rights in France.

14. Second, the judge had been wrong to consider Art 8 which was not a ground of appeal under the Appeals Regulations 2020.

15. Third, the judge's finding in respect of proportionality and breach of the Withdrawal Agreement was not adequately reasoned.

16. The First-tier Tribunal (Judge JM Dixon) initially refused permission on 29 June 2022. However, on 27 October 2022 the UT (UTJ Macleman) granted the Secretary of State permission to appeal.

17. The appeal was listed at the Cardiff CJC on 9 February 2023. The Secretary of State was represented by Ms Rushforth and the appellant by Mr Joseph. We heard submissions from both representatives.

Error of Law

18. At the hearing, the representatives helpfully took us through the relevant provisions in Appendix EU(FP).

19. The appellant's application under Appendix EU(FP) was made, on its face, as the "family member of a qualifying British citizen". That is the basis on which the ECO refused the family permit but, as we shall see, it may not have been the only basis on which the application under the EUSS should have been considered. It was not the basis on which the judge decided the appeal (see [6]).

20. Under para FP3, an applicant will be granted entry clearance if they (i) make a valid application under para FP4; (ii) meet the 'eligibility requirements' in para FP6(1), (2) or (3); and (iii) do not fall within the grounds of 'suitability' grounds of refusal in para FP7.

21. As regards (i), the appellant made a valid application on the web-based form as required by para FP4(a) and it is not suggested that she did not provide the

required identity and national documentation and biometrics as required by para FP4(b) and (c).

22. As regards (iii), there is no suggestion that the appellant falls within a ground of refusal.

23. The issue is requirement (ii). Paragraph FP6(2) sets out the relevant 'eligibility' requirements including that, at the date of application, the applicant is a "family member of a qualifying British citizen" (para FP(2)(b)).

24. A "family member of a qualified British citizen" is defined in Annex 1, so far as relevant, in para (a)(vi) in relation to a person (such as the appellant) who will be returning to the UK before 2300 GMT on 29 March 2022 to include "the… dependent parent of the spouse…of a qualifying British citizen". It is not, as this makes clear, limited to the 'parent' of the 'qualifying British citizen'. The appellant was accepted – and found by the judge at [7] - to be "dependent" upon her son and daughter-in-law and so is a "dependent parent" of the spouse of a British citizen.

25. Who is a "qualified British citizen" is defined in Annex 1 para (a)(i) and (b) which provides, so far as relevant, is a British citizen who satisfied:

> "regulation 9(2), (3) and (4)(a) of the EEA Regulations (as the British citizen ("BC") to whom those provisions refer, with the applicant being treated as the family member ("F")…)"

26. Regulation 9(2), (3) and (4)(a) of the EEA Regulations set out the requitements, following the Surrinder Singh (Case C-370/90) [1992] Imm AR 565 (ECJ), for the free movement of a "family member" of a British citizen returning to the UK pre-Brexit after the British citizen has been exercising Treaty rights in another EU country:

> "(2) The conditions are that-
>
> (a) BC-
>
> (i) is residing in an EEA State as a worker, self-employed person, self-sufficient person or a student, or so resided immediately before returning to the United Kingdom; or
>
> (ii) has acquired the right of permanent residence in an EEA State;
>
> (b) *F* or EFM *and BC resided together in the EEA State*;
>
> (c) *F* or EFM *and BC's residence in the EEA State was genuine*;
>
> (d) either –
>
> (i) F was a family member of BC during all or part of their residence in the EEA Sate;
>
> (ii) [concerned with EFMs]; or
>
> (iii) [concerned with EFMs];

(e) genuine family life was created or strengthened during F or EFM and BC's joint residence in the EEA State and;

(f) the conditions in sub-paragraphs (a), (b) and (c) have been met concurrently.

(3) Factors relevant to whether residence in the EEA State is or was genuine include-

(a) whether the centre of BC's life transferred to the EEA State;

(b) the length of F or EFM and BC's joint residence in the EEA State;

(c) the nature and quality of the F or EFM and BC's accommodation in the EEA State, and whether it is or was BC's principal residence;

(d) the degree of F or EFM and BC's integration in the EEA State;

(e) whether F's or EFM's first lawful residence in the EU with BC was in the EEA State.

(4) This regulation does not apply-

(a) where the purpose of the residence in the EEA State was as a means for circumventing any immigration laws applying to non-EEA nationals to which F or EFM would otherwise be subject (such as any applicable requirement under the 1971 Act to have leave to enter or remain in the United Kingdom); or….." (our emphasis)

27. These requirements, in principle, were applicable to the appellant in order for SLP to be a "qualified British citizen" under Appendix EU(FP). For our purposes the reference to "F" is a reference to the appellant in this appeal and the reference to "BC" is to SLP, her daughter-in-law.

28. Mr Joseph accepted that, in considering the application on this basis, the judge had erred in law by not considering this issue and whether the requirements in the EEA Regulations were met. He accepted, to that extent, that the respondent's grounds were made out.

29. We agree. The judge, in particular, failed to consider whether the appellant met the requirement in reg 9(2)(b), namely that she and SLP (her daughter-in-law) had "resided together" in France. For that reason, as we indicated at the hearing, the decision of the FtT judge cannot stand.

30. Further, in the absence of a s.120 statement, the judge had no jurisdiction to determine whether the decision breached Art 8. That was not a ground of appeal under the Appeals Regulations 2020 (see regs 9 and 10). That decision also cannot stand.

31. The decision must be re-made in respect of the appellant's EUSS application under Appendix EU(FP).

Re-Making the Decision

32. We indicated at the hearing that, it being accepted there was an error of law, we proposed to re-make the decision. We raised with the representatives the potential bases on which we should do so. We identified two.

33. Both representatives agreed that we should re-make the decision on the basis of the appellant claiming to be a "family member of a qualified British citizen". In that regard, Ms Rushforth made a single point in relation to Appendix EU(FP) and the incorporated provisions of reg 9 of the EEA Regulations. She submitted that the appellant could not establish that the appellant and SLP "resided together" in France. The evidence was that they lived separately but close to one another in Paris. SLP and AAP only stayed with the appellant for a month prior to returning to the UK because they gave up the tenancy of their own home. That was not, Ms Rushforth submitted, sufficient to show they "resided together" in France. Mr Joseph invited us to reach the opposite conclusion.

34. It is undoubtedly the case, on the evidence, that the residence of SLP and AAP in France was "genuine". The EEA Regulations offer no definition of "resided together" other than it must be part of residence in the EU state that is genuine, i.e. not contrived to circumvent immigration laws (see reg 9(4)). The length of joint residence may be relevant to its "genuineness" (reg 9(3)(b)) but it is not determinative of the latter, nor is any specific length of "residence" required to meet the relevant provision in the EEA Regulations and so the requirement in Appendix EU(FP). The judge made clear findings as to the 'dependency' of the appellant on both SLP and AAP in France. Ultimately, albeit for reasons relating to the practical arrangements before return to the UK, they all did 'live together' in the appellant's home. We do not consider that this time spent 'living together' should not equate to "resided together". For that pre-return period – albeit for the relatively short period of one month – the appellant, her son and daughter-in-law lived together in their family unit. In ordinary language they "resided together" in France.

35. However, it is not sufficient that the appellant met the substance of the eligibility requirements in October/November 2021. The eligibility requirement in FP6(b) must be met, as the rule states on its face, "at the date of application" and that was 15 May 2021. At that time, the sponsor and son lived separately; they only moved in with the appellant about a month before they came to the UK which was in November 2021. So, they were not residing together at the date of application. For that reason, the appellant cannot succeed on this basis under Appendix EU(FP)

36. There is, however, another basis upon which the appellant's appeal succeeds under Appendix EU(FP), namely as a "family member of a relevant EEA citizen".

37. Ms Rushforth accepted that the appellant met the 'eligibility' requirement in para FP6((1)b) as the "family member of a relevant EEA citizen", namely her son, who is a French citizen. She accepted that the appellant met the definitional requirements of a "family member of a relevant EEA citizen" in Annex 1, para (a)(iii). First, Ms Rushforth accepted the appellant's son was an EEA citizen and the application was before 1 July 2021. Second, the appellant was his "dependent parent" at all relevant times and so a "family member". Third, although AAP did not have indefinite leave to enter or remain, or limited leave to enter of remain, Mr Rushforth accepted he was a person who would be granted limited leave under para EU3 (read with para EU14) of Appendix EU if he had made an

application before 1 July 2021. He was a "family member of a qualifying British citizen", i.e. of his spouse, SLP and, therefore, fell within EU14, Condition 2. Added together, those matters fulfilled the definition of "relevant EEA citizen" in Annex 1 at para (a)(iii) at all relevant times, including the date of application.

38. Ms Rushforth did not, however, accept that we should consider the appeal on this basis as the appellant had only made an application as a "family member of a qualified British citizen" and not on this further basis relying upon her son, rather than daughter-in-law. We do not agree.

39. First, in making her application the appellant used the form (web-based) for her EUSS application. In the relevant section "Application category", the appellant used a 'drop-down box' that the application was as a "Family member of a qualifying British citizen (Surinder Singh) route". However, there does not appear to be any facility to make an application on more than one basis under the EUSS on the particular form. Nevertheless, the substance of the application may suggest that the drop-down box entry is not the real basis of the application or, as in this case, that there is an additional basis for the application under the EUSS. We do not consider that the drop-down box entry is conclusive of the basis of an application which has to be considered by the respondent or, on appeal, by the FtT or (potentially) the UT. Here, the "Extra information" section of the form pointed out that the application was made both through reliance on SLP and through her son:

> "I am applying for the EUSS Family Permit based on the BREXIT withdrawal agreement for UK citizens to return to UK with their EU spouse *or close family member* by the 29 March 2022. This is because *my son Armand Arash Parandian* and British daughter-in-law Suzanne Louis Parandian are *planning to return to UK* on the 1st of [O]ctober 2021 and I am completely dependant on them. They care for my needs (shopping, errands, doctor appointments, etc.) as I am unable to go out alone. They also assist me financially. My daughter-in-law needs to return to care for her aging and infirm parents living in Wales and also take care of me. Please consider my application along with that of my son Armand Arash Parandian [UKVI_3EX0026016111] as we will be travelling together."

40. Added to which, of course, the appellant's son made his application for a family permit at the same time and that was, of course, granted. The ECO should, therefore, have been well-aware that the appellant was making a claim to enter the UK under Appendix EU(FP) not only as a "family member of a qualifying British citizen" but also as a "family member of a relevant EEA citizen".

41. Second, the application was a valid one under the EUSS scheme whether or not the drop-down box disclosed correctly or, as in this case, fully the basis of the application. It was on either basis a "valid application" made in accordance with para FP4 of Appendix EU(FP) (see para FP3(a)). The required process was used and it is not suggested that the applications did not, at least together, provide the required identification and nationality documents and the required biometrics (para FP4).

42. Third, in determining the appeal the ground of appeal was that the FtT (and now UT re-making the decision) has to decide whether the decision is "not in accordance with residence scheme immigration rules" (see Appeals Regulations 2020, reg 8(3)(b)). That means all of the EUSS rules, at least to the extent that it

can be said there is an application on that basis. Indeed, reading [7] of the judge's decision, she appears to have decided the appeal on this alternate basis under Appendix EU(FP).

43. This is not a case where the individual claims the application should be considered under a different legal regime, for example should be considered under the EEA Regulations when, on its face, the application was made under the EUSS (see Siddiqa (other family members: EU exit) [2023] UKUT 47 (IAC)). In this appeal, the application, on either basis, was always one made under the EUSS.

44. Given the two-pronged basis of the substance of the appellant's application under the EUSS, the decision is not in accordance with those Rules, because the appellant met the requirements of those Rules (Appendix EU(FP)) as a "family member of a relevant EEA citizen".

45. We are satisfied, therefore, that the appellant meets the requirements of Appendix EU(FP) for a family permit to enter the UK.

Decision

46. For the above reasons, the decision of the First-tier Tribunal to allow the appellant's appeal involved the making of an error of law. That decision cannot stand and we set it aside.

47. We re-make the decision allowing the appeal on the ground in reg 8(3(b). The appellant satisfies the requirements for a family permit under Appendix EU(FP).

Andrew Grubb

Judge of the Upper Tribunal
Immigration and Asylum Chamber

21 February 2023