



IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2023-002427

First-tier Tribunal No: EA/09670/2022

THE IMMIGRATION ACTS

Decision & Reasons Issued:

15th January 2024

Before

UPPER TRIBUNAL JUDGE PICKUP

Between

Zhino Abdalla Hussein Hussein
(NO ANONYMITY ORDER MADE)

Appellant

and

Secretary of State for the Home Department

Respondent

Representation:

For the Appellant: Mr Wilson, Refuge and Migrant Centre

For the Respondent: Mr N Wain, Senior Home Office Presenting Officer

Heard remotely at Field House on 10 January 2024

DECISION AND REASONS

1. By the decision of the Upper Tribunal (Judge Reeds) issued on 15.8.23, the appellant, a national of Iraq, has been granted permission to appeal to the Upper Tribunal against the decision of the First-tier Tribunal (Judge Mills) promulgated 13.4.23 dismissing her appeal against the respondent's decision of 15.9.22 refusing her EUSS application made on 30.7.21 for residence in the UK as the family member of a qualifying British Citizen, under Annex 1 of Appendix EU of the Immigration Rules.
2. In granting permission, Judge Reeds considered that: "The grounds raise arguable points concerning the construction and meaning of the phrase 'immediately before returning to the UK' as set out in the grounds of challenge. The FtTJ recorded in his decision that he found that this was a point that was not easy for him to decide, and reference has been made to the relevant guidance. In the circumstances the grounds of challenge set out arguable issues to be determined."

3. The Upper Tribunal has received the respondent's Rule 24 reply, dated 24.8.23, and the respondent's skeleton argument of 19.9.23. The appellant relies on the grounds of application for permission.
4. Following the helpful and patient submissions of both representatives, I indicated that I found no material error of law in the decision of the First-tier Tribunal but reserved my full decision and reasons to be given in writing, which I now do.
5. The relevant facts are not in dispute, and it is not necessary to rehearse them here in any detail. However, in summary, the Iraqi appellant was resident in Sweden with her British citizen husband exercising his EU Treaty rights, until she left for Iraq in February 2018, after obtaining an EU residence permit, leaving her husband behind in Sweden. He remained there alone until he returned alone to the UK in November 2019. The appellant remained in Iraq until joining her husband in the UK via Dublin and Belfast in January 2020, using her EU family permit. It follows that the appellant did not come to the UK from Sweden with or following her husband but instead spent almost two years in Iraq.
6. Unarguably, the respondent's Guidance, as cited at [23] of the decision requires the appellant to be resident in the EEA host country with the qualifying British citizen exercising his Treaty rights by the specified date of 31.12.20 and immediately before returning to the UK. The appellant submitted that this interpretation of the provisions was in error. The First-tier Tribunal accepted that the Guidance was not binding and went on to consider the detailed provisions before reaching its conclusion.
7. There was some initial confusion, at least on my part, as to the correct wording of the relevant definition provisions. The respondent's skeleton argument erroneously referenced the definitions in Appendix EU (Family Permit), which as Mr Wain explained does not apply to an in-country application; the correct definition provisions are in Appendix EU. It did not help either that the definitions as printed in the 11th edition of the Immigration Law Handbook are inaccurate, in that the key phrase "immediately before returning to the UK with (or following) the qualifying British citizen" does not include in the printed text the words 'or following'. That may be because the provisions have been amended since the handbook was published. Looking at the government's website, I saw that Appendix EU has been amended almost every month and it would be a mammoth task to determine when the particular change took place. For the purpose of this appeal, however, I proceed on the basis that the relevant definitions for a qualifying British citizen and a family member of a qualifying British citizen are as they currently appear, including the disputed interpretation of the requirement under (b)(ii): "immediately before returning to the UK with (or following) the qualifying British citizen (who is to be treated as the British citizen ("BC") to whom those provisions refer)," which is consistent with the wording relied on by the First-tier Tribunal and by both representatives before me.
8. The First-tier Tribunal concluded at [25] that paragraph (b)(ii) of the definition of family member of a qualifying British Citizen found at Annex 1 of Appendix EU required the family member to have been residing in the host EEA state immediately before the British citizen returned to the UK to qualify for status under the EUSS.
9. In summary, the appellant argues the First-tier Tribunal's interpretation of that part of the definition of a family member of a qualifying British citizen in Annex A of Appendix EU: "*b) they satisfied the conditions in regulation 9(2), (3) and (4)(a) of the EEA Regulations (as the family member ("F") to whom those provisions*

refer)... immediately before returning to the UK with (or following) the qualifying British citizen (who is to be treated as the British citizen (“BC”) to whom those provisions refer)” as meaning that the family member and the British citizen must have resided together in the EEA state immediately before returning to the United Kingdom is incorrect. It is argued that the construction can only make sense if different time references apply. Mr Wilson submitted that it made no sense if the “immediately before” requirement was imposed on all the requirements under Regulation 9(2) of the 2016 Regulations, some of which also refer to “immediately before”. His argument was that the interpretation of the Guidance and that of the First-tier Tribunal was wrong in law. He pointed to the provisions, asserting that they contemplate and allow separate entries into the UK. He submitted that because of the wording ‘or following’, the appellant can succeed even though she was not residing with him when he returned to the UK and did not accompany or follow him when he entered the UK but can do so despite living apart from him in Iraq for almost two years.

10. Having listened carefully to Mr Wilson’s submissions and studied the definition provisions, I find that he is mistaken as to the interpretation advanced before the Tribunal. I reject the assertion that Regulation 9(2) does not make sense if there is an ‘immediately before’ requirement. For a family member of a British citizen to qualify, Regulation 9(2) required the British citizen to be exercising Treaty rights and residing in an EEA state, or to have been so residing immediately before returning to the UK, or to have acquired a right of permanent residence (which the appellant’s husband did not). There are other requirements, such that the family member must have resided together with the British citizen and that their residence was genuine, but there is no dispute in relation to those other requirements on the facts of this case. The relevant requirement on the facts of this case is that the husband was residing in the EEA state immediately before returning to the UK, which he was. However, since the UK left the EU, the appellant family member can only qualify if the Regulation 9(2) requirements are satisfied on the terms set out in the Annex 1 definition.
11. The definition under Annex 1 of Appendix EU at (b)(ii) is not inconsistent with Regulation 9(2). It provides that those requirements must be satisfied before the specified date and immediately before returning to the UK with (or following) the qualifying British citizen. Clearly, the appellant does not have to enter the UK at the same precise moment as her British citizen husband, but I am satisfied that the ordinary and plain meaning of the wording requires her to be residing in the EEA state after the specified date and immediately before returning to the UK with or following her qualifying British citizen husband. On the plain facts of this case, she cannot meet that definition; she was not residing in the EEA state immediately before his return and therefore cannot meet the requirements for status under the EUSS.
12. It follows from the above that the First-tier Tribunal was correct in its interpretation and understanding of the definition and requirements. No material error of law is disclosed by the decision of the First-tier Tribunal.

Notice of Decision

The appellant’s appeal to the Upper Tribunal is dismissed.

The decision of the First-tier Tribunal stands, and the appellant’s appeal remains dismissed.

I make no order as to costs.

DMW Pickup

DMW Pickup

Judge of the Upper Tribunal
Immigration and Asylum Chamber

10 January 2024