



IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM
CHAMBER

Case No.: UI-2024-002837
First-tier Tribunal No:
EU/55179/2023
LE/00459/2024

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On the 07 October 2024

Before

DEPUTY UPPER TRIBUNAL JUDGE MONSON

Between

KATERZYNA MAGDALENA KEMPCZYNSKA
(ANONYMITY ORDER NOT MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr Z Raza, Counsel instructed by Marks & Marks Solicitors
For the Respondent: Mrs Amrika Nolan, Senior Home Office Presenting Officer

Heard at Field House on 16 September 2024

DECISION AND REASONS

1. The appellant appeals to the Upper Tribunal from the decision of First-tier Tribunal Judge Smyth promulgated on 22 April 2024 (“the Decision”). By the Decision, Judge Smyth dismissed the appellant’s appeal against the decision of the respondent to refuse to grant her settled or pre-settled status under the EU Settlement Scheme in the capacity of a dependant of her relevant EEA citizen sponsor, who was her daughter.

Relevant Background

2. The appellant is a national of Poland, whose date of birth is 9 November 1972. In April 2023 she arrived in the UK to visit her daughter. On 14 May 2023 she applied for a grant of status under Appendix EU as her daughter's dependant.
3. The application was supported by a letter from the sponsor who said that she was attaching her mortgage deed to prove that she was owner of the flat where her mum was staying with her. Her mum had previously attached a bank statement as a proof of address. Unfortunately, she did not have any more proof. Her mum was living with her, but she was not paying any bills, as she was not allowed to work in the UK. So, she was the main person who was paying for food, shopping and all the necessary supplies, which is why she had attached her bank statements as well.
4. On 24 August 2023 the respondent gave reasons for refusing the application. As she had applied on or after 1 July 2021, evidence of dependency upon her relevant sponsor had provided. For these purposes, dependency meant that having regard to her financial and social conditions, or health, she could not meet her essential living needs - in whole or in part - without the financial or other material support of the relevant sponsor; and the relevant sponsor was providing her with such support.

The Hearing Before, and the Decision of, the First-Tier Tribunal

5. The appellant's appeal came before Judge Smyth sitting at Hatton Cross on 17 April 2024. Both parties were legally represented, with Mr Raza of Counsel appearing on behalf of the appellant. The Judge received oral evidence from both the appellant and the sponsor.
6. In her appeal statement dated 6 February 2024 which the appellant adopted as her evidence in chief, the appellant said that her daughter, Polina, was her only child. She had divorced Polina's father in 2009. Polina had come to the UK in 2013 and had made the UK her home. She had frequently visited her since 2013, staying with her on each occasion. In 2012 she entered into a relationship with Andrzej in Poland, and they started living together in her home, which was a rented flat. In 2017 she and Andrzej decided to lease a property together. There was a total deposit to pay of approximately 47,000 PLN (roughly £9,000). Of this sum, her daughter sent her 15,000 PLN (£3,200) for her contribution towards the deposit. The remainder of the deposit was paid by Andrzej. He took out a loan of 25,000 PLN, and his mother took out a loan of 15,000 PLN. Andrzej was repaying both loans. They started living together in this property after acquiring the lease. She and Andrzej got married in September 2022.
7. She had worked throughout the majority of her adult life in Poland. In November 2018 she found work as a receptionist at a private GP practice. She gave notice to leave this job in January 2023, and her job formally came to an end on 31 March 2023. This was because the job had become

extremely overwhelming and mentally distressing - particularly during pandemic. She was burnt out. She wanted a short career gap, and to go back to work in a different sector. She had come to the UK on 7 April 2023 to visit her daughter and to spend some time with her in the UK and to get some rest. She planned on staying for around 4 months. But while she was in the UK, she found out that her husband had been having an affair. Although he initially denied it, he eventually confirmed that he was having an affair, and she was devastated. This was the reason why she decided to remain in the UK and submit an application for leave to remain under the EUSS. Had it not been for this, she would have returned to Poland. She had now filed for a divorce from her husband.

8. Since Polina had been in the UK, Polina had regularly supported her financially. Without her contribution, she and Andrzej would not have been able to acquire the property in 2017. Her annual income in Poland had varied. She was attaching her bank statements to show her yearly income in the calendar years of 2019, 2020, 2021 and 2022. They showed that her annual income had fluctuated between just under 20,000 PLN and just over 38,000 PLN. In 2022, her income increased, as she was required to work longer shifts. That was the reason why she was so burnt out and decided to resign in 2023.
9. Andrzej worked as a Construction Worker. His income was around 2,500 PLN per month (approximately £500). They were never able to save. Their expenses were too high. They always struggled at the end of the month. It was because of this that her daughter had regularly provided her with additional support from the UK. The appellant went on to detail the expenses that she had had in Poland.
10. As evidence of Polina's support to her in Poland, she had provided money-transfer slips from 2020, which was when Polina started transferring money to her via Western Union. Even when she was working, she had to rely upon Polina for financial assistance. She was not working now, and did not have any income of her own.
11. In her witness statement dated 6 February 2024, the sponsor gave evidence to the same effect as her mother.
12. In the Decision, the Judge's findings of fact began at para [8]. At para [10] he noted the sponsor's oral evidence that the appellant was not 100% dependent upon her while she was living in Poland. However, now that she was living in the UK with her, she was 100% dependent upon her. The sponsor confirmed that the appellant owned a flat in Poland with a 30-year lease, but she did not know what would happen to the appellant's rights to the flat when the divorce was finalised.
13. At para [11] the Judge found that the appellant owned a flat in Poland with a 30-year lease. In the absence of any evidence, such as a contract, he did not accept that the ownership of the flat was transferred to the appellant's husband by virtue of their separation.

14. At para [12] he found that the appellant would be able to find work in Poland. It was clear from her witness statement that she intended her visit to the UK to be short career gap before returning to work in a different sector. When she left Poland to visit the sponsor in the UK, she intended to return to Poland and find work. There was no reason why she could not do this, notwithstanding the separation from her husband.
15. At para [14] the Judge said that, in terms of the appellant's circumstances before she arrived in the UK, he accepted the sponsor's oral evidence and found that, although the sponsor had provided the appellant with financial support, the appellant was not dependent upon the sponsor while living in Poland to meet her essential living needs.
16. At para [15] the Judge said that, in terms of the appellant's current circumstances, he did not accept that she was dependent upon the sponsor. Firstly, the appellant owned the leasehold of the flat in Poland. She could generate income from the flat if she and her ex-husband decided to rent it out; or if they decided to sell it, the appellant would receive funds which she would be able to use to rent or buy a property elsewhere. Secondly, the appellant could find employment upon return, which was precisely what she intended to do when embarking upon a visit to the UK. There was no reason why, upon obtaining employment, the appellant would not be able to meet her essential living needs.

The Grounds of Appeal to the Upper Tribunal

17. Mr Raza settled the grounds of appeal to the Upper Tribunal. Ground 1 was that the Judge had erred in law in his approach to determining whether the appellant was dependent upon her EEA sponsor. The Judge was required to consider whether the appellant was presently dependent upon her sponsor. Whether she could return to work in Poland was irrelevant to the question of present dependency. Similarly, the Judge had erred in considering whether the appellant could generate income from the flat in Poland. The Judge had wrongly narrowed the scope of the evaluation. His reasoning was focused upon what the appellant might be able to do upon return to Poland, as opposed to evaluating the facts relating to her present situation, as well as at the time of her application.
18. Ground 2 was that the finding of fact at para [14] of the Decision was inadequately reasoned, or it was irrational. Having accepted the sponsor's evidence, it was established that the appellant was partially dependent upon the sponsor while she was living in Poland. So, the Judge's conclusion to the contrary was irrational.

The Reasons for the Grant of Permission to Appeal

19. On 2 July 2024 Upper Tribunal Judge Norton-Taylor granted permission to appeal on both grounds. Whether a person is dependent upon another in the context of EU Law and (one would assume) Appendix EU, was a question of fact. This much appeared to be recognised by the Judge at [13]. Notwithstanding that recognition, it was arguable that the

conclusions and reasons set out at [15] were wrong, because they appeared to be based upon alternative means of securing income as opposed to the factual circumstances pertaining at the material time. In addition, on the findings made in combination with what appeared to have been unchallenged evidence, it was arguable that the Judge's overall conclusion on dependency was irrational.

The Hearing in the Upper Tribunal

20. At the hearing before me to determine whether an error of law was made out, Mr Raza developed the grounds of appeal. He emphasised the fact that there was no requirement for the appellant to establish prior dependency. In reply, Mrs Nolan adopted the Rule 24 response opposing the appeal, dated 18 August 2024. She submitted that the Judge had rightly considered the appellant's overall circumstances. The Judge had not impermissibly looked at the future position, but had looked at the case holistically. It was open to the Judge to find that, while the sponsor had provided financial support to the appellant in Poland, this support was not needed to meet the appellant's essential living needs. In reply, Mr Raza submitted that the dependency can be a matter of choice, rather than necessity. At para [14] the Judge had not given adequate reasons as to why the appellant was not dependent upon the sponsor in Poland. At the very least, the evidence arguably established that she was dependent on the sponsor in Poland.

Discussion and Conclusions

21. As the error of law challenge is primarily a challenge to the adequacy of the Judge's reasons, I bear in mind the observations of Lord Brown in *South Bucks County Council -v- Porter* [2004] UKHL 33; 2004 1 WLR 1953. The guidance is cited with approval by the Presidential Panel in *TC (PS compliance - "Issues-based reasoning") Zimbabwe* [2023] UKUT 00164 (IAC). Lord Brown's observations were as follows:

"36. The reasons for a decision must be intelligible and they must be adequate. They must enable the reader to understand why the matter was decided as it was and what conclusions were reached on the "principal controversial issues", disclosing how any issue of law or fact was resolved. Reasons can be briefly stated, the degree of particularity required depending entirely on the nature of the issues falling for decision. The reasoning must not give rise to a substantial doubt as to whether the decision-maker erred in law, for example by misunderstanding some relevant policy or some other important matter or by failing to reach a rational decision on relevant grounds. But such adverse inference will not readily be drawn. The reasons need refer only to the main issues in dispute, not to every material consideration...Decision letters must be read in a straightforward manner, recognising that they are addressed to parties well aware of the issues involved and the arguments advanced. A reasons challenge will only succeed if the party aggrieved can satisfy the court that he has genuinely been substantially prejudiced by the failure to provide an adequately reasoned decision."

22. In the appeal skeleton argument (“ASA”) for the First-tier Tribunal, the appellant’s solicitors cited *Jia -v- Migrations Verket* [2007] INLR 336 for guidance given by the European Court of Justice on the meaning of dependency within the context of an application made by a dependent direct family member in the ascending line of the EEA national spouse. The findings cited include the following finding at [37]: *“In order to determine whether relatives in the ascending line of a spouse of a community national are dependent on the latter, the host member state must assess whether, having regard to their financial and social conditions, they are not in a position to support themselves. The need for material support must exist in the state of origin of those relatives or the state whence they came at the time when they applied to join the community national.”*
23. Accordingly, the appeal in the First-tier Tribunal proceeded on the premise that the appellant needed to establish that she had been dependent upon the sponsor before she entered the UK in April 2023, and it was not enough for her to establish that she had been dependent on the sponsor at the date of application and beyond, simply because she was staying in the sponsor’s household, and the sponsor was covering her living costs in the UK.
24. I do not consider that the Judge was clearly wrong to find that the financial support that the sponsor had been providing to the appellant in Poland was not shown to be such as to mean that the appellant had been dependent upon the sponsor in Poland. While the Judge did not purport to conduct an overt analysis of the detailed information given by the appellant in her witness statement about her income, her partner’s income and their joint living expenses, equally the appellant had not provided a schedule of the amounts remitted by the sponsor in the period 2020 to 2023, and there was no attempt to provide an arithmetical calculation of the extent of the sponsor’s contribution to the couple’s total income in these years in percentage terms. Moreover, reading between the lines, the appellant’s acknowledgement that her income had significantly increased in 2022 tended to indicate that her case on dependency was particularly weak in respect of the period immediately before she arrived in the UK.
25. Much is made of the fact that the Judge did not grapple with the implications of the accepted contribution by the sponsor to the purchase of a lease in 2017. But the couple were already living somewhere else, and the funding provided by the sponsor was objectively more consistent with funding to support a particular lifestyle, rather than being funding towards meeting an essential living need. Furthermore, on the appellant’s case, this funding was historic, whereas (as set out in the ASA) the appellant was seeking to prove that she had been dependent upon the sponsor in the period immediately before she arrived in the UK a visitor in April 2023.
26. I accept that the Judge’s finding on dependency prior to the appellant’s arrival in the UK could have been better expressed, but it is tolerably clear

that the reason why he found that dependency in Poland was not made out was because - notwithstanding the sponsor's subjective belief that her mother had been partially dependent upon her in Poland - objectively it was not established that the support that she had provided was required to meet the appellant's essential living needs in Poland.

27. For the above reasons, Ground 2 is not made out.
28. As to Ground 2, I consider it was open to the Judge to approach the question of present dependency on the basis that he needed to assess the appellant's overall circumstances. It is beyond argument that the appellant was currently being fully funded by the sponsor in the UK, as she was living in her household, she did not have a right to work in the UK and she was not being funded from Poland. The Judge was right not to treat these indisputable facts as being determinative of the question of whether the appellant should be treated as being a dependant of her daughter.
29. However, he was wrong to resolve the issue on the basis that the appellant's current state of dependency on the sponsor was one of choice, and she could choose not to be dependent upon the sponsor in Poland. As the Judge had himself acknowledged in the course of his findings, the appellant did not need to prove that her dependency was one of necessity. The Judge did not engage with - and hence make findings on - the appellant's evidence that the breakdown of her marriage due to her husband's infidelity had been a devastating life event which meant that no longer saw a good future for herself in Poland, where she would be living on her own, and that she had become - both now and for the foreseeable future - much more dependent on her daughter to meet her essential living needs, and also much more dependent on her daughter for emotional support and companionship. In short, the ultimate question which the Judge should have addressed, but did not, was whether the appellant was in a current state of dependency upon the sponsor that was genuine, as opposed to being artificial or contrived or merely temporary.
30. In conclusion, Ground 1 is made out as the Judge did not give adequate reasons for finding that the appellant was not presently dependent on her daughter.
31. As Ground 1 is made out, the Decision is unsafe and it must be set aside in its entirety.
32. I have carefully considered the venue of any rehearing, taking into account the submissions of the representatives. Applying *AEB* [2022] EWCA Civ 1512 and *Begum* (Remaking or remittal) Bangladesh [2023] UKUT 00046 (IAC), I have considered whether to retain the matter for remaking in the Upper Tribunal, in line with the general principle set out in statement 7 of the Senior President's Practice Statement.
33. I consider that it would be unfair for either party to be unable to avail themselves of the two-tier decision-making process and I therefore remit the appeal to the First-tier Tribunal.

Notice of Decision

The decision of the First-tier Tribunal contains an error of law, and accordingly the decision is set aside in its entirety, with none of the findings of fact being preserved.

This appeal is remitted to the First-tier Tribunal at Hatton Cross for a fresh hearing before any Judge apart from Judge Smyth.

Andrew Monson
Deputy Judge of the Upper Tribunal
Immigration and Asylum Chamber
2 October 2024