IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2024-002419
First tier number: EU/54922/2023

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On 26th of September 2024

Before

UPPER TRIBUNAL JUDGE BRUCE
DEPUTY UPPER TRIBUNAL JUDGE SYMES

Between

ABDULLAH ABBAS BARAHOW
(no anonymity order made)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms D. Revill, Counsel
For the Respondent: Mr P. Deller, Senior Home Office Presenting Officer

Heard at Field House on 2 August 2024

DECISION AND REASONS

1. This is the appeal of Abdullah Abbas Barahow, a citizen of Sweden born 4 December 1994, against the decision of the First-tier Tribunal signed on 10 April 2024, dismissing his appeal, itself brought against the Respondent's refusal (on 8 August 2023) of his application under the EU settled status scheme (of 2 April 2023). For convenience we will use some abbreviations in our decision: EUSSch for EU settled status scheme, EUSS for EU settled status, and EUPSS for EU pre-settled status.

2. The application was made on the basis that the Appellant was the dependent of his mother Madina Hussein Ali; he had lived with her since entering the UK on 21 June 2022.

3. The application was refused because no evidence had been supplied of the Appellant's continuous residence UK residence prior to 31 December 2020, nor of his asserted dependency on his mother. Additionally it was thought that the application was made late, as it post-dated the end of the grace period (30 June 2021) for those who had not regularised their position prior to 31 December 2020. A point was originally taken also about the absence of a national insurance number, though that was subsequently explained by the Appellant never having applied for one.

4. The evidence given by witness statement and orally to the First-tier Tribunal was that the Appellant had lived in Sweden with his mother and siblings before they departed for the UK in 2019, whereas he remained there whilst he completed his studies. His mother worked as a cleaner, her earnings supplemented by Universal Credit, from which she sent him £300 monthly, which was his only regular source of support; his father occasionally gave him money.

5. The First-tier Tribunal accepted the evidence that it received, and found that the Appellant was indeed dependent on his mother at the date of the hearing before it. However he had provided no evidence whatsoever of pre-end transition period continuous residence, which the Judge believed was essential to the success of an Appendix EU application; absent such continuous residence, the appeal was dismissed.

6. Grounds of appeal contended that whilst the First-tier Tribunal was correct to find the Appellant had acquired no pre-end transition period continuous residence, which excluded him from the Appendix EU route styled “family member of a relevant EEA citizen”, he could nevertheless satisfy the criteria for “joining family member”. This alternative route had been ignored by the First-tier Tribunal, fatally flawing its decision.

7. The First-tier Tribunal granted permission to appeal on 21 May 2024 on the basis that this ground was arguable. If it had not been raised at the substantive hearing before the First-tier Tribunal, it was nevertheless arguably Robinson-obvious.

8. A Respondent’s response of 31 May 2024 contends that this argument had not been advanced before the First-tier Tribunal, and that the ground did not meet the criteria of being an obvious point of Convention law. Further, the First-tier Tribunal had not clearly accepted that dependency was established at the specified date, having referred to the Appellant receiving money for rent from his mother but also mentioning revenue streams.

9. Ms Revill made submissions in line with the grounds of appeal and her useful skeleton argument. For the Respondent Mr Deller argued that the decision maker had been entitled to treat the application as one made by reference to the “relevant EEA citizen” route rather than as an application to join a “relevant Sponsor”.

Decision and reasons

10. These are relevant provisions of Appendix EU.

"**EU11**. The applicant meets the eligibility requirements for indefinite leave to enter or remain as a relevant EEA citizen or their family member

Condition 3

(a) The applicant:

(i) is a relevant EEA citizen; or

(ii) is (or, as the case may be, for the relevant period was) a family member of a relevant EEA citizen …

(b) The applicant has completed a continuous qualifying period of five years in any (or any combination) of those categories;

EU11A. The applicant meets the eligibility requirements for indefinite leave to enter or remain as a joining family member of a relevant sponsor where the Secretary of State is satisfied, including by the required evidence of family relationship, that, at the date of application and in an application made after the specified date and by the required date, one of conditions 1 to 4 set out in the following table is met:

Condition 1

(a) The applicant: (i) is (or, as the case may be, for the relevant period was) a joining family member of a relevant sponsor;

(b) The applicant has completed a continuous qualifying period of five years which began after the specified date, in either (or any combination) of those categories;"

11. Each of those routes then contains a proviso that EUPSS rather than EUSS will be granted where the applicant is ineligible for indefinite leave to enter or remain solely because they have not completed a continuous qualifying period of less than five years (in the criteria for EUPSS for family members of relevant EEA citizens at EU14 and for relevant sponsors at EU14A).

12. Relevant terms within those criteria are defined in Annex 1. There "continuous qualifying period" is defined as a period of residence in the UK which began before the specified date and is unbroken by excess absence since it began.

13. A "relevant sponsor" is defined thus:

> "(b) where the date of application by a joining family member of a relevant sponsor is on or after 1 July 2021:
> (i) an EEA citizen (in accordance with sub - paragraph (a) of that entry in this table) who, having been resident in the UK and Islands for a continuous qualifying period which began before the specified date, has been granted: …
> (bb) limited leave to enter or remain under paragraph EU3 of this Appendix (or under its equivalent in the Islands), which has not lapsed or been cancelled, curtailed or invalidated;"

14. And "joining family member of a relevant sponsor" is defined as

> "a person who has satisfied the Secretary of State, including by the required evidence of family relationship, that they are (and for the relevant period have been), or (as the case may be) for the relevant period (or at the relevant time) they were: …
> (d) the child or dependent parent of a relevant sponsor, and the family relationship:
> (i) existed before the specified date … and

(ii) continues to exist at the date of application
in addition, the person meets one of the following requirements:
(a) … they were not resident in the UK and Islands on a basis which met the definition of 'family member of a relevant EEA citizen' in this table (where that relevant EEA citizen is their relevant sponsor) at any time before the specified date;"

15. "Child" for our purposes is defined as

"(b)(i) the direct descendant aged 21 years or over of a relevant EEA citizen … and
(ii) … dependent on …
(aa) the relevant EEA citizen (or on their spouse or civil partner) at the date of application or, where the date of application is after the specified date, at the specified date"

Error of law

16. The Appellant's solicitors provided a skeleton argument in February 2024 for the hearing below though its contents would not have assisted in the appeal's determination. It appears that some paragraphs may have been omitted when it was uploaded on the HMCTs system but there is nothing to suggest that the argument now pursued was clearly raised below, though there is passing reference to the route by which the family member of a relevant Sponsor could acquire EUSS.

17. We accept that the Robinson-obvious doctrine should apply to applications in relation to Appendix EU given that the EU settled status scheme was created as a means of preserving the fundamental rights of EEA nationals resident in the UK post-Brexit based both on the free movement rights under EU law and the family life consequences that inevitably ensued from exercising those rights. We bear in mind that the provisions of Appendix EU were described by Underhill LJ in Akinsanya v Secretary of State for the Home Department [2022] EWCA Civ 37 as "elaborate to the point of impenetrability" and in Secretary of State for the Home Department v Rexhaj [2024] EWCA Civ 784 as "particularly complex and difficult to understand." We accept that the Appellant's argument is of a nature that has a strong prospect of success once articulated and understood, albeit that to identify and understand it requires careful engagement with Appendix EU.

18. Indeed, tellingly the Respondent's review does not seek to defend the First-tier Tribunal's decision as a matter of principle; the Secretary of State's submission is essentially that this argument was not clearly raised below and that there are insufficient findings as to historic dependency as at the specified date to carry the appeal home in any event.

19. The version of the Appellant's application form supplied in the Respondent's bundle before the First-tier Tribunal is unenlightening. The application does not identify itself as having been made under any particular route within Appendix EU; the form asks questions such as whether the applicant was in the UK before 31 December 2020, whether they had previously applied for an EEA family permit, their relationship with their sponsor and whether that sponsor had applied to the EUSSch. None of

this appears to signify an election by the Appellant to pursue only one route of those available within Appendix EU.

20. The refusal letter does not acknowledge the two routes provided for (ie relevant EEA citizen and family member of relevant Sponsor) found within Appendix EU. It only refers to EU11 and EU14, the routes for EUSS and EUPSS for relevant EEA citizens. It also states that “We have also considered whether you meet any of the other eligibility requirements under Appendix EU. However, from the information and evidence provided, or otherwise available, you do not meet any of the other eligibility requirements.”

21. The Respondent having expressly stated that all routes had been considered and that the Appellant qualified under none of them, we accept that it was incumbent on the First-tier Tribunal to consider whether any route under Appendix EU was satisfied. It was a material error of law for it to fail to do so.

Remaking the decision

22. The parties before us did not suggest that any further hearing would be required to finally resolve this appeal and we therefore proceed to do so.

23. The Appellant did not possess a continuing qualifying period of UK residence before the date of decision and so the Appendix EU route for family members of relevant EEA citizens under EU14 read with EU11 was foreclosed to him. Nor did his application suggest that he did so. However, he did potentially meet the criteria for EU14A read with EU11A, ie the route for family members of relevant Sponsors. His mother was just such a Sponsor given that she held EUPSS based on pre-specified date residence. The Appellant was non UK resident before 31 December 2020 and his family relationship with the Sponsor pre-dated the specified date.

24. The only reasonable point of contention arises in relation to the Appellant's asserted dependency.

25. Under Appendix EU's Annex 1 definition of “dependent” for a child, “dependent” means that “having regard to their financial and social conditions, or health, the applicant cannot or (as the case may be) for the relevant period could not, meet their essential living needs (in whole or in part) without the financial or other material support of the [Sponsor].” That definition is intended to reflect, rather than alter, the pre-existing position under EU law whereby dependency is a question of fact: the Tribunal in Reyes [2013] UKUT 314 stated §19 that “First, the test of dependency is a purely factual test. Second, the Court general envisages that questions of dependency must not be reduced to a bare calculation of financial dependency but should be construed broadly to involve a holistic examination of a number of factors, including financial, physical and social conditions, so as to establish whether there is dependence that is genuine. The essential focus has to be on the nature of the relationship concerned and on whether it is one characterised by a situation of dependence based on an examination of all the factual circumstances, bearing in mind the underlying objective of maintaining the unity of the family. [There is a] need for a wide-ranging fact-specific approach …”

26. The evidence recorded and accepted by the First-tier Tribunal was that his mother was his main source of support: she was the only person who sent him money "regularly" when he lived in Sweden, which paid for the cost of his accommodation and he earned no money himself. He sometimes received contributions to the cost of meals from his brother when they went out to eat together, and his father occasionally gave him money. We accept, reasonably and sensibly construing this evidence, that the Appellant's mother has been his prevalent source of support at all material times, including at the specified date. Without her support he would not have been able to pay for his own accommodation which represents a very significant part of his physical and social conditions.

27. Although the Respondent raised delay in making the application post-the Grace Period's expiry in the refusal letter, this was not pursued by the Home Office Presenting Officer before the First-tier Tribunal nor by Mr Deller before us. We therefore leave that matter aside.

28. The Appellant's appeal under the residence scheme rules is therefore allowed.

29. The Appellant has not advanced any argument that the decision is in breach of the Withdrawal Agreement.

Decisions

The decision of the First-tier Tribunal is set aside to the extent identified above.

The decision in the appeal is remade: the appeal is allowed.

There is no order for anonymity.

M A Symes

Deputy Upper Tribunal Judge Symes
Immigration and Asylum Chamber
23 September 2024