Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number:** UI-2022-000292 (EA/06397/2020)

THE IMMIGRATION ACTS

Heard at Field House
on 21 December 2022

Decision & Reasons Promulgated
On 8 March 2023

Before

UPPER TRIBUNAL JUDGE NORTON-TAYLOR

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

OLANRENWAIU ATANDA FALETI
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:
For the appellant: Ms S Lecointe, Senior Home Office Presenting Officer
For the respondent: Ms E Harris, Counsel, instructed by Rashid and Rashid Solicitor

DECISION AND REASONS

Introduction

1. This appeal concerns the interpretation of one element of a definition contained within Annex 1 to Appendix EU of the Immigration Rules ("Appendix EU"), as it stood at the date of the respondent's decision which

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was the subject of the appeal to the First-tier Tribunal. The particular phrase in question is “family relationship”, which was a constituent part of the definition of “family member of a relevant EEA citizen”.

2. For ease of reference, I shall refer to the parties as they were before the First-tier Tribunal. Thus, the Secretary of State is once more “the respondent” and Mr Faleti is “the appellant”.

3. This is an appeal by the respondent against the decision of First-tier Tribunal Judge Ferguson (“the judge”), promulgated on 7 January 2022 following a hearing on 27 September 2021. By that decision, the judge allowed the appellant’s appeal against the respondent’s decision, dated 12 November 2020, refusing his application under the EU Settlement Scheme (“the EUSS”). The appeal against that decision was brought under the Immigration (Citizens' Rights Appeals)(EU Exit) Regulations 2020 (“the 2020 Regulations”), relying solely on the ground of appeal specified under regulation 8(3)(b), namely that the respondent’s decision was not in accordance with residence scheme Rules (i.e. the EUSS).

Relevant factual background

4. The appellant is a citizen of Nigeria, born in April 1975. He arrived in the United Kingdom as a visitor in November 2006 and then overstayed. In 2008, he applied under the Immigration (European Economic Area) Regulations 2006 ("the 2006 Regulations") for a residence card as an extended family member (“EFM”) of a claimed cousin, a Swedish national residing in this country. The application was refused, but the subsequent appeal allowed, with the claimed relationship being accepted, together with the relevant dependency required under EU law and the 2006 Regulations (IA/05552/2010). The appellant was issued with a residence card, valid from 20 July 2010 until 20 July 2015. That residence card was never revoked.

5. In July 2016, the appellant applied for a permanent residence card. This application was refused and subsequent appeal dismissed by the First-tier Tribunal in June 2018 (EA/02420/2017), with an onward appeal to the Upper Tribunal being rejected thereafter. The First-tier Tribunal found that the appellant has ceased to be dependent on his cousin or a member of the cousin’s household at some point prior to the date of that hearing. In July 2019, the appellant made another application for a permanent residence card. This too was refused and a subsequent appeal dismissed in April 2020 (EA/06141/2019). Again, it was found that the appellant was neither dependent on the cousin, nor was he a member of the household.

6. The application leading to the current proceedings was made on 21 October 2020. That application was for limited leave to remain under Appendix EU. As with the previous applications, it was based on a claimed dependency on the cousin.

The decision of the First-tier Tribunal

7. Before turning to the judge's analysis and conclusions, it is important to note the way in which the appellant's case was put to him. At [4], the judge recorded Counsel's reliance on a skeleton argument (dated 26 in September 2021 and which has been provided in this appeal). In summary, the submission was that: (a) as at the date of the EUSS application in October 2020, the appellant was a family member of the EEA citizen because he was a "dependent relative" of his cousin prior to 1 January 2021, relying on the residence card issued in 2010; (b) at the date of application, the "family relationship" with the cousin had continued to exist and that relationship did not require the element of dependency; (c) the combination of (a) and (b) or sufficient for the appellant to succeed in his appeal under the 2020 Regulations. The particulars of this argument will need to be analysed in due course. At this stage, suffice it to say that the appellant's case was predicated on the version of Appendix EU which existed as at the date of the EUSS application and the respondent's decision thereon. Appendix EU had materially changed by the time of the hearing before the judge and the promulgation of his decision.

8. Although the appellant's argument related to a previous version of Appendix EU, the judge appears to have reached his conclusions based on its provisions as they stood on the date of the hearing before him in September 2021 (or the date his decision was signed off in December 2021). Having recounted the history of appeals and the on/off dependency of the appellant on his cousin over the course of time, the judge found that the appellant had in fact once again been dependent at the time of the EUSS application in October 2020. At [20], he concluded that "Appendix EU requires the dependency of the relative to continue to exist "at the date of the application" and that this had been demonstrated. As result, the appeal was allowed under the 2020 Regulations.

The grounds of appeal and grant of permission

9. The respondent's concise grounds of appeal asserted that the judge was wrong to have concluded that the (unchallenged) resumption of dependency by the appellant on his cousin was sufficient for the requirements of Appendix EU to have been met. The appellant's residence card had expired in July 2015 and he had never been issued with another. As the appellant had not held a residence card as at the specified date of 31 December 2020, the appellant could not have succeeded in his appeal.

10. Permission to appeal was granted by the First-tier Tribunal on 8 March 2022.

11. Following the grant of permission, Counsel (Mr M Allison, who had appeared before the judge) drafted a further skeleton argument, dated 27 May 2022. In essence, this reiterated the submissions made in the original skeleton argument. It is not entirely clear when this was sent into the Upper Tribunal and/or the respondent. On balance, I am however satisfied that it was in fact provided. That skeleton argument was, to all intents and purposes, a rule 24 response. It asserted that the judge had been right to have allowed the appeal by an erroneous route.

The hearing

12. The hearing was delayed for a time in order for Ms Lecointe to read and consider the two skeleton arguments. On resumption of the hearing, she confirmed that she was content to proceed.

13. I asked Ms Harris to provide an outline of her case before hearing from Ms Lecointe. Ms Harris relied on the two skeleton arguments. The essence of the appellant's case in resistance to the respondent's appeal was that:

    (a) the relevant provisions of Appendix EU were those in place as at the date of the EUSS application and the respondent's decision. Reliance was placed on Odelola v SSHD [2009] UKHL 25; [2009] WLR 1230;

    (b) these provisions had been more generous than those in place at the time of the hearing before the judge and his decision;

    (c) the appellant could demonstrate that he had been a "dependent relative" before 1 January 2021 by relying on the residence card. That document had never been revoked, nor had it been invalidated;

    (d) the definition of "family member of a relevant EEA citizen " (which included a person who was a "dependent relative") contained in Annex 1 to Appendix EU had required the appellant to show that his "family relationship" with his cousin had continue to exist as at the date of the EUSS application;

    (e) that the term "family relationship" did not then include an element of dependency;

    (f) the appellant had continued to be the cousin of the EEA citizen at the date of the EUSS application;

    (g) it followed that the appellant had been able to satisfy requirements of Appendix EU as they stood at the date of the EUSS application and the respondent's decision;

(h) whilst the judge had seemingly pursued the wrong route (by applying the provisions of Appendix EU in place as at the date of hearing and his decision), the outcome decision, namely allowing the appellant's appeal, was correct;

(i) although the judge had erred, I should exercise my discretion and not set aside his decision, or I should set it aside and re-make it by allowing the appellant's appeal under the 2020 Regulations.

14. Ms Lecointe submitted that the term "family relationship" within the definition of "family member of a relevant EEA citizen" in Annex 1 had, as at the date of decision, implicitly included a requirement of dependency. In other words, the term should be read as either "dependent family relationship" or "a family relationship of dependency".

15. Although Ms Harris firmly maintained her primary argument, she put forward an alternative argument to the effect that even if dependency had been a requirement of the term "family relationship", the judge had found that the appellant had once again become dependent on his cousin by the time of the EUSS application in October 2020.

16. At the end of the hearing I reserved my decision.

Discussion and conclusions

17. Before turning to my analysis of this case I remind myself of the need to show appropriate restraint before interfering with a decision of the First-tier Tribunal, having regard to numerous exhortations to this effect emanating from the Court of Appeal in recent years: see, for example, Lowe [2021] EWCA Civ 62, at paragraphs 29-31, AA (Nigeria) [2020] EWCA Civ 1296; [2020] 4 WLR 145, at paragraph 41, and UT (Sri Lanka) [2019] EWCA Civ 1095, at paragraph 19.

18. At the outset I make an observation about appeals to the Upper Tribunal concerning the EUSS. It is unfortunately not uncommon for the respondent to be unable to provide a clear exposition of what she asserts is the correct interpretation of its contents. This is particularly highlighted when it is the respondent who brings an appeal against the decision of the First-tier Tribunal. In the present case, it seems as though no consideration has been given to the appellant's specific argument, as put to the judge and then reasserted through the skeleton argument of May 2022, following the grant of permission and throughout the intervening months leading up to the hearing before me.

19. In saying this, I mean no criticism of Ms Lecointe. I appreciate that Senior Presenting Officers have limited time and resources when preparing appeal lists.

20. What I must of course do is decide this appeal. I have sought to undertake this task on the basis of the submissions made on the materials to which I have been specifically referred. I have not been provided with any guidance published by the respondent.

Which version of the Rules to consider?

21. It is a statement of the obvious to say that the Immigration Rules undergo a large number of changes over the course of time. This applies to the EUSS as much as to many other provisions. The first issue to consider is whether the appellant is correct in her submission that the judge should have looked at the version of Appendix EU in force as at the date of the respondent's decision on 12 November 2020.

22. The suggestion that the appropriate version was that in place as at the date of the EUSS application is misconceived. The appellant's reliance on Odelola provides the reason for this. The Opinions set out therein make it abundantly clear that decisions are made in light of the Immigration Rules as they stand at that date, not when an individual makes an application (subject to any transitional provisions): see Lord Hoffman, at paragraph 7, and Lord Brown of Eaton-under-Heywood, at paragraphs 38 and 39.

23. The case of Odelola does, however, assist the appellant in respect of his assertion that his appeal before the judge should have been considered in light of Appendix EU as it stood at the date of the respondent's decision. This approach is also consistent with the grounds of appeal on which the appellant relied before the judge, namely that the respondent's decision "was not in accordance with residence scheme immigration rules": regulation 8(3)(b) of the 2020 Regulations.

24. In light of the above, I am satisfied that the judge should have considered the appellant's case on the basis of Appendix EU as it stood on 12 November 2020.

The relevant provisions of Appendix EU

25. I have gleaned the relevant provisions from the Immigration Rules archive available through the gov.uk website. The relevant archive period is 5 October 2020 to 30 November 2020.

26. When setting out the relevant provisions, I have underlined the specific criteria/terms which bear on this appeal.

27. The first relevant provision is EU14; the basic eligibility criteria for limited leave to enter or remain:

> "Eligibility for limited leave to enter or remain

EU14. The applicant meets the eligibility requirements for limited leave to enter or remain where the Secretary of State is satisfied, including (where applicable) by the required evidence of family relationship, that, at the date of application, condition 1 or 2 set out in the following table is met:

Condition 1 is met where:

(a) The applicant is:

(i) a relevant EEA citizen; or

(ii) a family member of a relevant EEA citizen; or

(iii) a family member who has retained the right of residence by virtue 520 of a relationship with a relevant EEA citizen; or

(iv) a person with a derivative right to reside; or

(v) a person with a Zambrano right to reside; and

(b) The applicant is not eligible for indefinite leave to enter or remain under this Appendix solely because they have completed a continuous qualifying period of less than five years"

28. "Family member of a relevant EEA citizen" was defined under Annex 1 as follows:

"family member of a relevant EEA citizen

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:

(a) the spouse or civil partner of a relevant EEA citizen, and:

(i) the marriage was contracted or the civil partnership was formed before the specified date; or

(ii) 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; or

(b) the durable partner of a relevant EEA citizen, and:

(i) the partnership was formed and was durable before the specified date; and

(ii) the partnership remains durable at the date of application (or it did so for the relevant period or immediately before the death of the relevant EEA citizen); or

(c) the child or dependent parent of a relevant EEA citizen; or

(d) the child or dependent parent of the spouse or civil partner of a relevant EEA citizen, as described in sub paragraph (a) above; or

(e) the dependent relative, before 1 January 2021, of a relevant EEA citizen (or of their spouse or civil partner, as described in sub-paragraph (a) above) and the family relationship continues to exist at the date of application"

29. The term "dependent relative" was defined as:

"dependent relative

the person:

(a) (i) (aa) is a relative (other than a spouse, civil partner, durable partner, child or dependent parent) of their sponsor; and

(bb) is, or (as the case may be) for the relevant period was, a dependant of the sponsor, a member of their household or in strict need of their personal care on serious health grounds; or

(ii) is a person who is subject to a non-adoptive legal guardianship order in favour (solely or jointly with another party) of their sponsor; or

(iii) is a person under the age of 18 years who:

(aa) is the direct descendant of the durable partner of their sponsor; or

(bb) has been adopted by the durable partner of their sponsor, in accordance with a relevant adoption decision; and

(b) holds a relevant document (as described in sub paragraph (a)(i) or (a)(ii) of that entry in this table) as the dependent relative of their sponsor for the period of residence relied upon"

30. As to "relevant document", the definition read as follows:

"relevant document

(a) (i) (aa) a family permit, registration certificate, residence card, document certifying permanent residence, permanent residence card or derivative residence card issued by the UK

> under the EEA Regulations on the basis of an application made under the EEA Regulations before (in the case of a family permit) 1 July 2021 and otherwise before 1 January 2021 and
>
> **...**
>
> (b) it was not subsequently revoked, or fell to be so, because the relationship or dependency had never existed or the relationship or (where relevant) dependency had ceased; and
>
> (c) (subject to sub-paragraph (d) below) it has not expired or otherwise ceased to be effective, or it remained valid for the period of residence relied upon"

31. Finally, "required evidence of family relationship" was, in respect of dependent relatives, defined as follows:

> "required evidence of family relationship
>
> in the case of:
>
> …
>
> (f) a dependent relative – a relevant document (as described in sub-paragraph (a)(i) or (a)(ii) of that entry in this table) as the dependent relative of their sponsor (in the entry for 'dependent relative' in this table) and, unless this confirms the right of permanent residence in the UK under regulation 15 of the EEA Regulations (or the right of permanent residence in the Islands through the application there of section 7(1) of the Immigration Act 1988 or under the Immigration (European Economic Area) Regulations of the Isle of Man), evidence which satisfies the Secretary of State that the relationship continues to subsist (or did so for the period of residence relied upon)"

Analysis

32. The following essential facts are not in dispute. The appellant was issued with a residence card as the dependent relative of his cousin. The residence card was valid from July 2010 until July 2015. It was never revoked, although the respondent had the power to do so (regulation 20(2) of the 2006 Regulations). In addition, the residence card did not cease to be valid as result of the appellant no longer being dependent on his cousin at some point prior to July 2018. This is because the 2006 Regulations did not contain a provision equivalent to regulation 18(7)(b) of the Immigration (European Economic Area) Regulations 2016.

33. The appellant once again became dependent on his cousin at a date prior to the making of the EUSS application in October 2020.

34. The appellant remained the cousin of the EEA citizen as at the date of the respondent's decision on 12 November 2020.

35. I apply these facts to the requirements of Appendix EU, as they stood in November 2020.

36. The essential question is whether the appellant was a "family member of a relevant EEA citizen".

37. To be so, he had to the definition of "dependent relative". This involved two limbs: see the definition at (e) set out in paragraph 28, above.

38. First, he had to have been such a relative of a relevant EEA citizen before 1 January 2021. I accept the appellant's submission that there was no temporal limitation to this requirement. The definition did not state that the status had had to be for a particular period of time, or that it must have been extant as at 1 January 2021.

39. In this case, the appellant had held a residence card as a dependent relative between 2010 and 2015. That residence card had not been revoked, nor did it cease to be valid. As to whether it "fell to be" revoked, there has as far as I can see been no judicial finding that the appellant's dependency on his cousin ceased prior to July 2015. Ms Lecointe did not argue the contrary.

40. The appellant was entitled to rely on the residence card as demonstrating that he had been a "dependent relative" for a period "before 1 January 2021", namely the currency of that document between 2010 and 2015. The respondent has not alleged that the appellant was not dependent during that time and there are no previous judicial findings indicating that he was not.

41. The second limb involved the "family relationship" continuing to exist at the date of application. It is this phrase which featured as the central point of dispute in the appeal.

42. Ms Lecointe has urged me to interpret it so as to include, by implication, a requirement of dependency. Against that, Ms Harris relies on the fact that dependency was not included in the definition and that its subsequent introduction into Annex 1 is indicative of a substantive change.

43. The cardinal principle when interpreting the Rules stated by Lord Brown in Mahad v ECO [2009] UKSC 16; [2010] Imm AR 203, at paragraph 10:

> "10. …Essentially it comes to this. The Rules are not to be construed with all the strictness applicable to the construction of a statute or a statutory instrument but, instead, sensibly according to the natural and ordinary meaning of the words used, recognising that they are statements of the Secretary of State's administrative policy…True, as I observed in *Odelola* (para 33): "the question is what the Secretary of State intended. The rules

> are her rules." But that intention is to be discerned objectively from the language used, not divined by reference to supposed policy considerations.”

44. Applying this principle, I conclude that the term “family relationship” is to be interpreted as relating to the familial connection between the applicant and the relevant EEA citizen sponsor and not to a relationship of dependency in the sense contended for by the respondent. I have reached this conclusion for the following reasons.

45. First, the natural and ordinary meaning of the words contained in the phrase “family relationship” points strongly towards the fact of the familial connection in question, rather than whether there was, for example, financial dependency or membership of a particular household. Such familial connections would include those by blood, those established through marriage (i.e. an in-law), or emotional and/or other commitment, such as durable relationships.

46. Second, there is no necessary implication of dependency within the phrase. A requirement for a “family relationship” of the type described in the previous paragraph to have continued was sensible, when seen in context. Such relationships may well change, or indeed cease, over the course of time and it was no doubt prudent for Appendix EU and its definition section to have provided for such eventualities.

47. Third, it was open to the respondent to have expressly included a dependency requirement in the phrase “family relationship”. In other words, the phrases “dependent relationship”, “relationship of dependency”, or “dependent family relationship” could have been used, but were not.

48. Fourth, at a point in time between November 2020 and the judge’s decision in late December 2021[1], a Statement of Changes amended the definition of the term “family member of a relevant EEA citizen” so as to read:

> “(e) the dependent relative, before the specified date, of a relevant EEA citizen (or of their spouse or civil partner, as described in sub-paragraph (a) above) and the dependency (or, as the case may be, their membership of the household or their strict need for personal care on serious health grounds) continues to exist at the date of application (or did so for the period of residence relied upon)”
>
> [Emphasis added]

49. The fact that an express dependency requirement was introduced into the definition of “dependent relative” within Annex 1 is indicative of an intention on the respondent’s part to have materially changed that

[1] Neither party has been able to direct me to the particular Statement of Changes which amended the definition and frankly it is not a proportionate use of the Tribunal’s time to search through the numerous changes which have occurred during the period in question

definition. It is, in my judgment, reasonable to infer that the change was made for a purpose. Such a purpose may have been to tighten the relevant requirements (although the respondent has not referred me to any Explanatory Statement or other materials to that effect). In any event, what might have been considered by the respondent to have been too generous a definition is not a knockout blow to the appellant's argument in this case. It had always been open to the respondent to adopt a more generous approach within the EUSS than that required by existing EU law or the Withdrawal Agreement.

50. Fifth, it is apparent that an element of the definition of "relevant document" within Annex 1, current at the date of decision, had drawn a distinction between a relationship and dependency:

> "…
>
> (b) it was not subsequently revoked, or fell to be so, because the relationship <u>or</u> dependency had never existed or the relationship <u>or</u> (where relevant) dependency had ceased;
>
> …"
>
> [Emphasis added]

51. Whilst this clearly dealt with a different definition, it is in my judgment of some relevance to the interpretation of the phrase with which I am presently concerned.

52. Sixth, I can see no absurdity in the interpretation which I have favoured. Certainly, Ms Lecointe did not point to any such outcome.

53. Applying this interpretation, the appellant's "family relationship" with the sponsor had continued as at the date of his EUSS application in October 2020. He thus satisfied the second limb of the definition of "dependent relative"(in respect of the first, see paragraphs 38-40, above).

54. Turning back to the judge's decision and the version of Appendix EU in force at that point in time, it is apparent that the appellant could not have shown that a relationship of dependency (in the sense mandated by EU law principles) had continued at the date of the application because it had previously ceased and there had been no further application for, or issuance of, a residence card under the Immigration (European Economic Area) Regulations 2016 prior to their revocation: see, for example, <u>Chowdhury (Extended family members: dependency)</u> [2020] UKUT 188 (IAC).

Conclusions

55. In light of the analysis set out above, I conclude that the appellant satisfied the requirements of Appendix EU, as it stood at the date of the respondent's decision, on the basis that the was a "family member of a relevant EEA citizen".

56. Having said that, on the version of Appendix EU as it stood at the date of the hearing before the judge and the promulgation of his decision, the appellant could not have satisfied its requirements.

57. Thus, the judge was right to have allowed the appeal, but the method by which he reached that outcome involved an error of law, namely a failure to have applied the correct version of Appendix EU and, in turn, to have impermissibly concluded that the appellant continued to be dependent on the sponsor in so far as was required by definition of "family member of a relevant EEA citizen".

58. I have considered whether to exercise my discretion and set the judge's decision aside for error of law. I have concluded that I should not take that course of action. As stated above, the outcome decision was correct. On my analysis, no further findings of fact are required and there is really no point in setting the decision aside only for me to re-make it by once again allowing the appeal.

Anonymity

59. The First-tier Tribunal made no direction and there is no reason for me to do so.

Notice of Decision

60. **The making of the decision of the First-tier Tribunal did involve the making of an error on a point of law.**

61. **In the exercise of my discretion under section 12(2)(a) of the Tribunals, Courts and Enforcement Act 2007, I do not set aside the decision of the First-tier Tribunal.**

62. **The respondent's appeal to the Upper Tribunal is accordingly dismissed and the decision of the First-tier Tribunal shall stand.**

Signed: H Norton-Taylor Date: 10 January 2023

Upper Tribunal Judge Norton-Taylor