



IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2023-003992

First-tier Tribunal No:
EA/51363/2022

THE IMMIGRATION ACTS

Decision & Reasons Issued:

12th February 2024

Before

UPPER TRIBUNAL JUDGE MACLEMAN

Between

NIKOLAOS CHATZIMAVROUDIS

(no anonymity order requested or made)

Appellant (in the FtT)

and

Entry Clearance Officer

Respondent (in the FtT)

For the Appellant: Mr S Winter, Advocate, instructed by Peter G Farrell,
Solicitors

For the Respondent: Mr A Mullen, Senior Home Office Presenting Officer

Heard at Edinburgh on 7 February 2024

DECISION AND REASONS

1. This is the ECO's appeal to the UT, but parties are referred to as they were in the FtT.
2. The appellant is a Greek citizen. His application for a family permit under the EU Settlement Scheme ("EUSS") was refused by a decision dated 30 August 2022. The decision points out that his wife, the "qualifying British citizen" on whom the application was based, is both a British and a Greek citizen. It holds that she could not exercise free movement rights in a country of which she was a national, and so the requirements for an EUSS family permit were not met.

3. FtT Judge Agnew allowed the appeal by a decision dated 19 August 2023. At [17] she declined, due to the laborious and intricate nature of the exercise, to set out the EUSS definitions of “qualifying British citizen” and “family member” of such a citizen. At [10 - 15] she visits the case of *McCarthy* (C-434/09), although to no clear ultimate effect. At [18 - 20] she finds that the dual nationality of the appellant’s wife “does not preclude” the appellant from “applying to join her in the UK” under The Immigration (EEA) Regulations 2016 (SI 2016/1052). At [21] she appears to place some weight on the best interests of the child. She ends by allowing the appeal under The Immigration Citizens’ Rights Appeals (EU Exit) Regulations 2020.

4. The respondent sought permission to appeal, on these grounds:

The First-tier Tribunal erred in law in (1) failing properly to apply the definition of Qualifying British Citizen in Appendix EU Family permit (this being an appeal against refusal of an EUSS Family Permit made prior to arrival in the UK); (2) misapplying the case of *McCarthy* as it related to subjects who had never exercised Treaty rights in a State other than one of their own nationality; and (3) giving any weight to a view of the best interests of the child where this offered no statutory basis for allowing the appeal.

GROUND ONE: MISAPPREHENSION OF STATUTE AND CASE LAW

1. Judge Agnew has failed to appreciate that the definition of Qualifying British Citizen is closely linked with the avenue to exercising a *Surinder Singh* right as transposed by Regulation 9 of the 2016 Regulations. This required that the British citizen had exercised free movement rights in a country of which she was not a national. Thus, any suggestion that Ms Vazaiou was residing in Greece as a worker is unsustainable. She had no need for her free movement rights as a British citizen as she was in Greece as of right, whatever she was doing. The CJEU case of *McCarthy* assists the ECO rather than the appellant as there as here there had been no exercise of Treaty rights. In *McCarthy’s* case that meant that a dual British/ Irish National had never even travelled outside those two countries, but here there is no suggestion that Ms Vazaiou had ever resided outside Greece or the United Kingdom.

GROUND TWO: INAPPROPRIATE REFERENCE TO SECTION 55 WHERE THIS HAD NO STATUTORY BEARING ON THE APPEAL

2. At [21] Judge Agnew refers to the lack of mention of section 55 of the 2009 Act and gives a cursory view on the effect of the child’s best interests of a speculative understanding of future ability to visit. In fact section 55 could have no bearing whatsoever on the decision on the appeal. It formed no part of any available statutory ground and gave the Tribunal no authority to reinterpret the relevant rules or go behind an inability to meet them.

5. On 15 September 2023 FtT Judge Austin granted permission on ground 1, and opined that ground 2 was without merit, as the findings “are not said to have had any bearing on the decision made.”

6. In a rule 24 response the appellant says on ground 1 that there is no error because the Judge interpreted EU12 of appendix EU “in the correct manner”; the refusal letter did not dispute that the appellant’s partner was

a worker; and *McCarthy* was not relevant. It is conceded that ground 2 discloses an error.

7. Representatives in the UT agreed that ground 2 is correct, but irrelevant. They also agreed the case turns entirely on whether the appellant's wife was a "qualifying British citizen" in terms of the EUSS.
8. The argument for the appellant is that the relevant part of the definition in the Immigration Rules, Appendix EU (Family Permit), shows that it was enough for his wife to have "satisfied regulation 9 (2), (3) and (4) (a) of the EEA Regulations"; which, in turn, merely required her to be "residing in an EEA state as a worker" [or in other capacities, which do not matter]; and she was so residing and working.
9. That depends on "residing" and "worker" being taken in their ordinary dictionary sense, but they have to be given their meanings within the terms of the Treaty on the Functioning of the European Union (TFEU), the EEA Regulations, and the EUSS.
10. Regulation 4 (1) (a) of the EEA regulations states that "worker" means a worker within the meaning of article 45 of the (TFEU).
11. The TFEU, article 45, provides at (1) that "Freedom of movement for workers shall be secured within the Union", and at 43 (a) (b) entails the right "to move freely within the territory of Member States for this purpose".
12. The appellant's wife, as a Greek citizen, did not need an EEA right to reside and work in Greece; did not do so in exercise of a right under article 45 TFEU; did not satisfy regulation 9 of the EEA Regulations; and did not meet the definition in appendix EU (Family Permit) of the Immigration Rules.
13. Accordingly, the decision of the FtT is set aside, and the appeal, as originally brought to the FtT, is dismissed.

Hugh Macleman

Judge of the Upper Tribunal
Immigration and Asylum Chamber
8 February 2024