IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2024-000174
First-tier Tribunal No:
EU/52514/2023
LE/01918/2023

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On the 08 October 2024

Before

UPPER TRIBUNAL JUDGE SMITH

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

AMINA SHAMI MUHUMUD
[ANONYMITY DIRECTION NOT MADE]

Respondent

Representation:
For the Appellant: Mrs A Nolan, Senior Home Office Presenting Officer
For the Respondent: Ms A Jones, Counsel instructed by Terence Ray Solicitors

Heard at Field House on Tuesday 8 October 2024

DECISION AND REASONS

BACKGROUND

1. This is an appeal brought by the Secretary of State. For ease of reference, I refer to the parties as they were in the First-tier Tribunal. The Respondent appeals against the decision of First-tier Tribunal Judge Anthony promulgated on 8 December 2023 ("the Decision") allowing the Appellant's appeal against the Respondent's decision dated 11 March 2023 refusing her pre-settled status under the EU Settlement Scheme ("EUSS").

2. The Appellant is a national of Somalia. She applied for status under the EUSS as a family member of her son, Idris Ahmed Mohamud, who is a Norwegian citizen living in the UK ("the Sponsor").

3. The basis of the Respondent's decision refusing pre-settled status is that the Appellant has not provided evidence of her dependency on the Sponsor. The Appellant had previously been granted a family permit valid from 31 August 2022 until 28 February 2023. She entered the UK under that family permit on 26 January 2023.

4. The Appellant relied on the definition of a "dependent parent" under the Immigration Rules relating to EUSS (Appendix EU). That definition in Annex 1 provides that an applicant does not have to meet a requirement as to dependency where "the applicant was previously granted limited leave to enter or remain under paragraph EU3 or EU3A of this Appendix as a dependent parent, and that leave has not lapsed or been cancelled, curtailed or invalidated". The Appellant therefore contends that she is not required to provide evidence of dependency on the Sponsor.

5. The Tribunal in the case of Rexhaj (extended family members: assumed dependency) [2023] UKUT 00161 (IAC) ("Rexhaj") provided guidance which supported the Appellant's case. The Judge relied on the definition in Annex 1 and the decision in Rexhaj. She concluded that the Appellant met the definition in Appendix EU. Accordingly, the Respondent's decision was not in accordance with Appendix EU, and she allowed the appeal for that reason.

6. The Judge had also earlier refused a request for an adjournment made by the Respondent. The Respondent sought an adjournment because the Presenting Officer was ill. The Judge dealt with this at [7] and [8] of the Decision. She concluded that it was not appropriate to adjourn because the issue was a narrow one of law and it would make no difference if the Respondent were not represented.

7. The Respondent appeals on two grounds as follows:

   Ground one: The hearing was procedurally unfair. The refusal to adjourn denied the Respondent the opportunity to put forward her case on Rexhaj. The Respondent argues that Rexhaj is wrongly decided and submits that the Presenting Officer ought to have been afforded the opportunity to explain why that was so.

   Ground two: The Respondent argues that leave to enter granted pursuant to an EUSS family permit is not leave granted under Appendix EU and accordingly that the Judge was wrong to find that the Appellant met the definition of a "dependent parent" under Appendix EU and did not have to show dependency. This ground is in effect the Respondent's position taken in Rexhaj. She also relied on a change to Appendix EU made with effect from 5 October 2023 to clarify her

position (following Rexhaj). There is therefore a significant overlap between the grounds.

8. Permission to appeal was refused by First-tier Tribunal Judge Khurram on 12 January 2024 in the following terms so far as relevant:

> "…3. With respect to the first ground in failing to grant an adjournment and proceeding in the absence of the Respondent's representative. In a well reasoned decision the Judge provided adequate reasons for proceeding at §7-8, which are interlinked with the second ground, criticizing the Judge's reliance on the case of Rexhaj.
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> 4. Considering the underlying facts are not in dispute, the legal issue was narrow and on all fours with Rexhaj, the Judge cannot arguably be criticized for following a precedent case they were bound by. Notwithstanding that said case has been challenged to the Court of Appeal. This remains binding on the First-tier unless and until overturned by the Superior Court.
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> 5. Whilst there is some substance to the respondent's position with respect to fairness and ability to participate in the hearing. The Judge takes this into account and applies the overriding objective, in the context of further delay. The respondent cannot arguably demonstrate how participation at the hearing alone, would materially affect the outcome, considering my observations at §4 above."

9. The Respondent renewed her application for permission to appeal to this Tribunal. She expanded on her ground one, arguing that, whilst the issue of delay in the context of the overriding objective was clearly relevant, that also required consideration of the disadvantage caused to a party to the proceedings if an adjournment were refused. She relied on the denial of the opportunity to cross-examine (if her interpretation of Appendix EU were accepted) and/or to make submissions on the law The Respondent otherwise repeated her original grounds.

10. Permission to appeal was granted by Upper Tribunal Judge Macleman on 31 January 2024 in the following terms so far as relevant:

> "…2. The grounds at [4] say that a change in the rules on 5 October 2023 should have led to a different outcome. That calls for debate.
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> 3. The grant of permission is not restricted.
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> 4. The SSHD must advise the UT and the appellant, not less than 7 days after this decision is issued, of the current position on the application for permission to appeal *Rexhaj* [2023] UKUT 161 to the Court of Appeal."

11. Judge Macleman's decision was issued on 2 February 2024. On 21 February 2024, the Respondent filed a response to the directions seeking an extension of time and indicating that the Court of Appeal had granted permission to appeal the Tribunal's decision in Rexhaj and the case was listed to be heard on 10-11 April 2024. The Respondent

asked that the error of law hearing not be listed until after judgment in that case.

12. Following that response, Upper Tribunal Judge Blum issued directions inviting the parties' views as to whether the case should be stayed pending the Court of Appeal's judgment in Rexhaj. Both parties agreed that this would be appropriate.

13. By a judgment dated 11 July 2024, the Court of Appeal allowed the Respondent's appeal against the Tribunal's decision in Rexhaj (under neutral citation [2024] EWCA Civ 784). I come to the detail of that judgment below. The judgment was filed with the Tribunal on 18 July 2024. The Respondent asked that the error of law hearing now be listed.

14. So it is that the appeal comes before me in order to decide whether there is an error of law. If I determine that the Decision does contain an error of law, I then need to decide whether to set aside the Decision in consequence. If I set the Decision aside, I must then either re-make the decision or remit the appeal to the First-tier Tribunal to do so.

15. There has been no Rule 24 Reply from the Appellant either before or after the Court of Appeal's judgment. There is no application to adduce further evidence under rule 15(2A) of the Tribunal Procedure (Upper Tribunal) Rules 2008.

16. I have before me a bundle running to 133 pages (pdf) ([B/xx]) containing the documents relevant to the appeal before me, and the Appellant's and Respondent's bundles before the First-tier Tribunal.

17. Having heard submissions from Ms Jones and Mrs Nolan and in accordance with Ms Jones's concession, I indicated that I found an error of law in the Decision based on the Court of Appeal's judgment in Rexhaj which supported the Respondent's second ground. In light of that finding, I did not need to deal with the first ground which was no longer material. Ms Jones submitted that the appeal should be returned to the First-tier Tribunal for re-hearing on the issue of dependency. Mrs Nolan concurred with that view. It was agreed by both parties that the Decision fell to be set aside in its entirety and accordingly a full de novo hearing was required. I therefore agreed that it was appropriate to remit the appeal.

18. I indicated that I would provide the reasons for my decision in writing which I now turn to do.

DISCUSSION

19. Ms Jones pointed out that the Respondent's grounds as originally pleaded might have been unsustainable since it was suggested that the Judge could have ignored a binding decision of this Tribunal which she could not do unless this case were distinguishable or the law had

moved on (which it had not at that stage). However, she conceded that, following the Court of Appeal's judgment in Rexhaj which held the Tribunal's decision in that case to be wrongly decided, the Decision could not be upheld. There had been no finding by the Judge as to dependency and it could not therefore be argued that the error made in following the Tribunal's guidance in Rexhaj was immaterial. The Decision therefore fell to be set aside in its totality.

20. For the benefit of the Appellant, I set out below how the Judge fell into error and why therefore the Decision cannot be maintained.

21. The Tribunal in Rexhaj had concluded as follows:

> "20. Drawing this analysis together, we find that where an individual has been granted entry clearance as a dependent parent and subsequently granted limited leave to enter at the border in that capacity, the operative basis upon which the individual was granted leave to enter at the border is to be found within Appendix EU. It follows that such an applicant will already have been granted leave as a dependent parent under Appendix EU and will not be subject to the requirement to establish dependency."

22. The Court of Appeal in its judgment set out the provisions of Appendix EU relevant to its consideration which I do not therefore need to repeat. Those include at [29] the definition of a "dependent parent" on which this case turns.

23. The Court of Appeal also made reference to the provisions of the agreement between the UK and the EU on the UK's departure from the EU ("the Withdrawal Agreement"). However, as it stated at [9] of the judgment, the Withdrawal Agreement was merely a background to the issue under consideration.

24. The Court of Appeal also made clear at [23] of the judgment that it was not concerned with the changes to Appendix EU which had been made following the Tribunal's decision in Rexhaj "out of an abundance of caution".

25. Having set out the relevant passages from the Tribunal's decision, the facts of the case and the parties' competing submissions, the Court held that the Tribunal's reasoning at [14] to [18] of its decision was wrong and that its decision required to be overturned in consequence.

26. The Court's analysis is set out in some detail at [50] of its judgment. It is unnecessary to set that out in full. In essence, the Court accepted the Respondent's submission that "Appendix EU makes specific provision for the grant of leave to enter in certain very particular circumstances, which have nothing to do with Appendix EU (FP), and in no other circumstances".

27. In this case, the Judge's reasons for finding that the Appellant met the requirements of Appendix EU as a "dependent parent" are as follows:

> "11. The appellant had previously applied for a EUSS Family Permit and was granted a family permit valid from 31 August 2022 until 28 February 2023. The appellant entered the UK on 26 January 2023 (page 34). She then applied for EUSS pre settled status and the application was received by the respondent on 4 February 2023 (page 109). I find the appellant was previously granted limited leave to enter under paragraph EU3 of Appendix EU as a dependent parent, and that leave had not lapsed or been cancelled, curtailed or invalidated before her application for pre settled status reached the respondent on 4 February 2023.
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> 12. Accordingly, pursuant to paragraph (c) (i) of the definition of 'dependent parent' in Annex 1, the appellant is not required to demonstrate dependency as dependency is assumed. I find the respondent's refusal letter and the review subsequently carried out on 24 October 2023 is wholly misplaced as it fails to deal with the relevancy of paragraph (c) (i) of the definition of 'dependent parent' in Appendix EU."

28. The Judge then set out [20] of the Tribunal's decision in Rexhaj which she said supported her interpretation and application of the law to the facts of this case. However, that analysis has now been overturned.

29. The Judge appears to have thought that the Appellant met paragraph EU3 of Appendix EU. That refers to a person granted limited leave to enter other than as a joining family member of a relevant sponsor. The paragraph requires the individual to meet paragraph EU14 of Appendix EU. In turn, that requires the applicant to satisfy either condition 1 or 2 in that paragraph. The only relevant definition which the Appellant here could meet is as "a family member of a relevant EEA citizen".

30. However, reference to the definition of a "family member of a relevant EEA citizen" in Annex 1 to Appendix EU begins with the words "a person who does not meet the definition of 'joining family member of a relevant sponsor' in this table". Moving then to the definition of a "joining family member of a relevant sponsor" that is (so far as relevant) "a person who has satisfied the Secretary of State, including by the required evidence of family relationship that 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 … dependent parent of a relevant sponsor, and (i) the family relationship existed before the specified date …; and (ii) continues to exist at the date of application (or did so for the period of residence relied upon)…". In addition, that definition requires that the applicant must not have been residing in the UK as the family member of a relevant sponsor at the specified date (31 December 2020). Here, the Appellant was not residing in the UK until well after the specified date.

31. Accordingly, it appears that the Judge should have found that the Appellant fell within paragraph EU3 rather than EU3A (insofar as either could apply). However, little turns on that save that Rexhaj was concerned with an argument that paragraph EU3A and not EU3 applied. The facts of Rexhaj are in any event on all fours with the facts of this case: entry clearance as sought as a dependent parent (albeit of the

spouse of a relevant EEA citizen) after 31 December 2020, a Family Permit granted on that basis and arrival in the UK after the specified date with an application for pre-settled status also after the specified date.

32. In Rexhaj, the Court of Appeal rejected the appellant's argument which is, as here, that the Family Permit granted under Appendix EU (FP) operates as leave granted under paragraph EU3A of Appendix EU. The Judge was therefore wrong to find as she did that the grant of the family permit operated as leave granted under Appendix EU. Accordingly, the provision that an applicant does not have to show dependency having been granted leave under Appendix EU simply does not apply.

33. It follows from the foregoing that the Judge was wrong to find that the Appellant did not need to provide evidence of dependency because she had leave granted "under this Appendix" (by reference to the definition of "dependent parent", in particular sub-paragraph (c)(i)).

34. It is of course the case that the error would not be material if the Appellant had established that she was dependent on the Sponsor. In this regard, I have at [B/41-43] the statement of the Appellant and at [B/44-46] the statement of the Sponsor. Both assert that the Appellant is dependent on the Sponsor. The Sponsor admits that at the time of the Covid-19 pandemic, he was not working. He became ill and was unable to work for a period but he asserts that the Appellant is now dependent on him. She lives with him and his family. She does not work due to her age, is unable to speak much English and is unfamiliar with the UK. She is therefore financially supported and accommodated by the Sponsor who is now working.

35. The difficulty with that evidence is, first, that it was not tested by cross-examination in the First-tier Tribunal (as the Respondent was unrepresented because an adjournment was refused), second, that there are therefore no findings made about that evidence and, third, there is a general lack of other supporting evidence as to dependency. The only evidence which is potentially relevant is the financial evidence about the Sponsor's position (bank statements at [B/81-100] and employment letter at [B/105]).

36. As I have already noted, there was no application by the Appellant to adduce any further evidence before this Tribunal.

37. The error made by the Judge is therefore material. The Decision falls to be set aside in its entirety. Since a full de novo hearing is required in order to consider the evidence of dependency, I am satisfied that it is appropriate to remit the appeal to the First-tier Tribunal.

CONCLUSION

38. For the reasons set out above, the Decision contains an error of law. I therefore set that aside and remit the appeal to the First-tier Tribunal for determination of the issue of dependency.

NOTICE OF DECISION

The Decision of First-tier Tribunal Judge Anthony promulgated on 8 December 2023 involves the making of an error of law. I set aside the Decision. I remit the appeal to the First-tier Tribunal for rehearing.

L K Smith
Upper Tribunal Judge Smith
Judge of the Upper Tribunal
Immigration and Asylum Chamber

8 October 2024