IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2023-004817
First-tier Tribunal No: EU/51751/2023
LE/01150/2023

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On the 22 August 2024

Before

DEPUTY UPPER TRIBUNAL JUDGE FROOM

Between

THE ENTRY CLEARANCE OFFICER

Appellant

and

MONA MARDI ELMAMOUN ELMARDI
(ANONYMITY ORDER NOT MADE)

Respondent

Representation:
For the Appellant: Ms E Blackburn, Senior Home Office Presenting Officer
For the Respondent: Ms L King, Counsel, instructed by Newfields Law, Solicitors

Heard at Field House on 8 August 2024

DECISION AND REASONS

1. The Secretary of State appeals with the permission of the First-tier Tribunal against a decision, signed on 26 October 2023, of Judge of the First-tier Tribunal O'Rourke ("the judge") allowing the appeal brought by Mrs Elmardi, a citizen of Sudan, against the decision, dated 7 March 2023, refusing her application for an EUSS Family Permit in order to join her son, Dr Mardi Hamra, an Irish citizen residing in the United Kingdom ("the sponsor").

2. Although the appellant in this appeal is the Secretary of State, it is more convenient to refer to the parties as they were before the First-tier

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Tribunal. I shall therefore refer in this decision to Mrs Elmardi as "the appellant" and to the Entry Clearance Officer as "the respondent".

3. The First-tier Tribunal did not make an anonymity order and I saw no reason to do so.

The factual background

4. The appellant is a widow, born in 1956, who resided in Sudan until she was displaced to Egypt by the political instability affecting her country. The sponsor has resided in the United Kingdom since 2016 and works as a medical doctor in the NHS. The application was accompanied by submissions to the effect that the appellant did not need to show dependency on the sponsor but in any event adequate evidence was provided. Alternatively, to refuse entry clearance would breach family life rights under Article 8 of the Human Rights Convention.

5. The notice of decision[1] set out the following reasons for refusal:

> "On 21 November 2022 you made an application for an EU Settlement Scheme (EUSS) Family Permit under Appendix EU (Family Permit) to the Immigration Rules on the basis you are a 'family member of a relevant EEA citizen'.
> I have considered whether you meet the validity, eligibility and suitability requirements for an EUSS Family Permit, which are set out in Appendix EU (Family Permit) to the Immigration Rules (https://www.gov.uk/guidance/immigration-rules/appendix-eu-family-permit .
> You can also find out more about the requirements in the guidance on GOV.UK (https://www.gov.uk/family-permit/eu-settlement-scheme-family-permit).
> You have stated that the family relationship of yourself to the EEA citizen sponsor is dependent parent. As evidence of this relationship you have provided a translation of a Sudanese birth certificate. However, I note that whilst you have provided the English translation of your sponsor's Sudanese birth certificate, you have not provided the original Sudanese birth certificate. Without sight of this document, I am unable to confirm that the details on the translated copy correspond to the official Sudanese birth certificate. Therefore, without sight of the original Sudanese birth certificate, I am unable to confirm that you are related to your EEA sponsor as stated.
> I am not satisfied, based on the evidence you have provided in isolation, that you are a 'family member of a relevant EEA Citizen'.
> In addition to the above, you have not provided adequate evidence to show that you are dependent on a relevant EEA or Swiss citizen, or their spouse or civil partner, as set out in Appendix EU (Family Permit) of the Immigration Rules.
> Consideration has been made, based on the evidence and information you have provided, and having regard to your financial and social conditions, or health, as to whether you cannot meet your essential living needs (in whole

[1] The decision under appeal is dated 7 March 2023. The consolidated bundle contains an earlier decision, dated 4 April 2022. I have therefore set out the entirety of the operative section of the later decision above.

> or in part) without the financial or other material support of the relevant EEA citizen or of the spouse or civil partner.
> As evidence of your dependency upon your relevant EEA Citizen sponsor or their spouse or civil partner you have submitted your sponsor's bank statements showing payments made to financial services. However, you have not provided any evidence that you were the received of those funds. I am not satisfied that this evidence in isolation, without further documentation, is sufficient to demonstrate consistent financial assistance that could be considered as you being dependent upon the sponsor or their spouse or civil partner.
> It is also noted that you have not provided any evidence of your own domestic circumstance in Sudan. Without such evidence I am unable to sufficiently determine that you cannot meet your essential living needs without financial or other material support from your relevant EEA Citizen sponsor or their spouse or civil partner. You have not provided evidence which fully details your circumstances, income and expenditure and evidence of your financial position, including any other income you may receive or bank statements in your name. Therefore, I cannot be satisfied that any funds that your sponsor sends to you is your only or main source of income and used to meet your essential living needs.
> Your sponsor states in a letter submitted by himself that you have health care needs. However you have not provided any corroborating evidence to show that as a result of those health care needs you cannot meet your essential living needs without the support of the sponsor or their spouse or civil partner.
> It is also noted that in the same letter submitted by your sponsor it is stated that your sponsor has been managing to support you financially by physically finding colleagues/friends who are travelling to give them cash in hand to bring to Sudan to deliver to yourself. However, this cannot be proven from the evidence you have submitted. I cannot therefore be satisfied that any funds that your sponsor's colleagues/friends give to you originates from your sponsor and is your only or main source of income.
> On that basis I am not satisfied that you are dependent on a relevant EEA or Swiss citizen or their spouse or civil partner. Therefore, you do not meet the eligibility requirements for an EUSS family permit as a dependent parent of a relevant EEA or Swiss citizen.
> Your application has therefore been refused."

The judge's decision

6. The judge heard the appeal in Newport on 25 October 2023. He received a 'stitched bundle', which had been uploaded by the appellant's solicitors tougher with an appeal skeleton argument and he heard oral evidence from the sponsor. It seems the issue of the respondent not seeing the original birth certificate had fallen away and the judge noted that the family relationship between the appellant and the sponsor was no longer in issue.

7. Submissions were made to the judge by counsel appearing on behalf of the appellant on the correct application of the decision in <u>Rexhaj (dependent parents: assumed dependency)</u> [2023] UKUT 00161 (IAC). On the judge's reading of that case, he agreed with counsel's submission that

dependency should be assumed and did not need to be proven with evidence. The judge then concluded his decision in concise terms as follows:

> "Findings
>
> 12. **Dependency.** I find that the Appellant is dependent on the Sponsor, for the following reasons:
>
> > (i) She is the 'direct relative in the ascending line' of a 'relevant EEA citizen' and was so at the specified date and accordingly 'that dependency is assumed.'
> >
> > (ii) I had no reason to doubt the Sponsor's oral evidence on this point.
>
> 13. I find, therefore that the Appellant does meet the Rules in this respect.
>
> **The Immigration (Citizens' Rights Appeals) (EU Exit) Regulations 2020**
>
> 14. Conclusion. Applying the relevant law to the established facts I find that the Decision of the Respondent appealed against is not in accordance with the law and the applicable Regulations."

The issues on appeal to the Upper Tribunal

8. The grounds seeking permission to appeal make two points and the respondent was granted permission to argue both.

9. Firstly, the grounds argue the judge erred by allowing the appeal on the basis that dependency should be assumed. The Immigration Rules were clear that, where the date of application was after the specified date and where the applicant was joining a family member, unless the relevant EEA citizen was under 18 at the date of application, dependency was assumed only where the date of application was before 1 July 2021. The judge erred by applying paragraph EU11 from Appendix EU rather than Appendix EU (Family Permit). He had misapplied Rexhaj, which was concerned with the position of applicants who had already been granted entry clearance as a dependent parent and were subsequently seeking leave to enter at the border.

10. Secondly, the judge erred by failing to give adequate reasons for accepting the evidence of the sponsor.

11. No Rule 24 response has been uploaded. In fact, on the morning of the hearing, I received an email from the appellant's solicitors indicating that agreement had been reached with the respondent and that the appellant conceded she could not resist the grounds of appeal.

The submissions

12. The hearing took place remotely.

13. Ms King confirmed that she accepted there was a requirement for the appellant to show dependency and she acknowledged that the Upper Tribunal's decision in Rexhaj had been overturned by the Court of Appeal: [2024] EWCA Civ 784. She also accepted the judge's reasons for making a positive finding on the issue of dependency were inadequate. She said that the correct disposal was to remit the appeal back to the First-tier Tribunal to make clear, reasoned findings on the issue of dependency with the benefit of up to date evidence.

14. Ms Blackburn agreed with Ms King's summary of the situation.

15. At the end of the hearing I indicated that I would be allowing the respondent's appeal. I now give my reasons.

The law

16. The jurisdiction of the Upper Tribunal on an appeal from the First-tier Tribunal lies only in relation to an error of law, not a disagreement of fact. The following are possible categories of error of law, as summarised in R (Iran) & Ors v SSHD [2005] EWCA Civ 982 at [9]:

> "i) Making perverse or irrational findings on a matter or matters that were material to the outcome ("material matters");
>
> ii) Failing to give reasons or any adequate reasons for findings on material matters;
>
> iii) Failing to take into account and/or resolve conflicts of fact or opinion on material matters;
>
> iv) Giving weight to immaterial matters;
>
> v) Making a material misdirection of law on any material matter;
>
> vi) Committing or permitting a procedural or other irregularity capable of making a material difference to the outcome or the fairness of the proceedings;
>
> vii) Making a mistake as to a material fact which could be established by objective and uncontentious evidence, where the appellant and/or his advisers were not responsible for the mistake, and where unfairness resulted from the fact that a mistake was made."

Decision on error of law

17. It is not necessary to say much more than that I agree with the position of the parties and I am grateful to them for their cooperative approach. For the reasons made plain above, I find the judge applied the wrong rule and that he wrongly interpreted the rules as not requiring the appellant to show dependency. The date of application was after 1 July 2021. In order to show entitlement to a family permit, the appellant had to show that she

was at the material time dependent on the sponsor in accordance with the definition of dependent contained in the rules.

18. The experienced judge, no doubt having in mind the move towards more concise decisions, having wrongly decided that dependency could be assumed, made a finding in the alternative that the appellant was dependent on the sponsor. However, his decision is devoid of any real reasoning as to why he accepted that to be the case. In some cases oral evidence might be sufficient if the sponsor is a compelling witness and it may be that the judge believed that to be the case here. It may be that there was no challenge to the sponsor's evidence at the hearing. However, these matters are not explained in the single sentence provided by the judge at [12(ii)]. Ms King realistically accepted the circumstances demanded more given that the respondent was challenging the claimed dependency. The respondent was entitled to know why the judge found as he did.

19. The judge's decision therefore contains a material error of law and is set aside.

20. Having considered the Senior President's Practice Direction of 15 September 2012, I make an order under section 12(2)(b)(i) of the Tribunals, Courts and Enforcement Act 2007. I agree with the parties that the appropriate disposal of the appeal is to remit it to the First-tier Tribunal so that the issue can be fully considered afresh by a different judge, taking into account the up to date situation.

NOTICE OF DECISION

The decision of the First-tier Tribunal involved the making of an error of law and is set aside.

The appeal is remitted to the First-tier Tribunal to hear the appeal again.

DIRECTIONS:

1 The appeal will be heard again, not by Judge O'Rourke, with no findings preserved.

2 The sole issue is whether the appellant meets the dependency requirement of the rules.

3 The appellant should provide up to date evidence of her financial circumstances, those of the sponsor and the degree (if any) to which her essential living needs are met by the sponsor.

4 The sponsor should give oral evidence at the hearing.

5 The First-tier Tribunal should list this appeal on the first available date.

Signed: N Froom

Deputy Upper Tribunal Judge Froom Dated: 8 August 2024