IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2024-003623
First-tier Tribunal No: EA/03630/2023

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On the 19 November 2024

Before

UPPER TRIBUNAL JUDGE O'CALLAGHAN
DEPUTY UPPER TRIBUNAL JUDGE RAE-REEVES

Between

ANA ILIE
(NO ANONYMITY ORDER MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr H Broachwalla, Counsel instructed by ICS Legal
For the Respondent: Ms A Ahmed, Senior Presenting Officer.

Heard at Field House on 12 November 2024

DECISION AND REASONS

Introduction

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1. At the outset of this decision, we express our gratitude to Mr Broachwalla for the aid he provided to the panel, having at times to navigate various concerns arising from the conduct of his professional client.

2. This appeal highlights the importance of both judges and legal representatives clearly identifying and applying the relevant legal regime in matters arising in the Immigration and Asylum Chamber. Immigration appeals are often complicated; a failure to address the relevant statutory regime will often, as here, lead to appeals going off-road and into troubling terrain.

Relevant Facts

3. This appeal concerns a decision of First-tier Tribunal Judge Hanley (‘the Judge’) sent to the parties on 10 May 2024. The Judge refused the appellant’s appeal against a refusal to issue her with pre-settled status under the European Union Settlement Scheme (‘the EUSS’). The sponsor is the appellant’s daughter, a Romanian national, who enjoys settled status in this country.

4. The appellant is a national of Romania, aged sixty-six, who entered the United Kingdom on 9 April 2023. She resides with her daughter, her daughter’s partner and her granddaughter who is presently aged four. The latter two are British citizens.

5. The appellant applied for status under the EUSS on 15 July 2023, a little over three months after her arrival in this country. Accompanying the application was an undated and unsigned letter from her daughter detailing that the appellant is dependent upon her close family in this country and “if she will have to go back I will have to give up my job so I can take care of our daughter and that will be very financially hard for us”.

6. Dependent parents applying under the EUSS after 30 June 2021 must prove dependency upon their sponsor.

7. The respondent refused the application by a decision dated 12 October 2023. Having identified the relevant rules for consideration as EU11, EU11A, EU14 and EU14A of Appendix EU to the Immigration Rules, she concluded that there was insufficient evidence to confirm that the appellant was dependent upon her sponsor:

> "For these purposes, 'dependent' means that, as demonstrated by relevant financial, medical or other documentary evidence:
>
> - Having regard to your financial and social conditions, or health, you cannot (or for the relevant period could not) meet you essential living needs (in whole or in part) without the financial or other material support of the relevant sponsor or of their spouse or civil partner; and
>
> - The relevant sponsor or their spouse or civil partner is providing you with such support.
>
> However, for the reasons already explained above, you have not provided any evidence to confirm that you are a dependent parent of a relevant sponsor. Therefore, you do not meet the requirements for pre-settled status on this basis."

8. At this juncture, we observe the appellant's acceptance that she was not seeking settled status through her application as she had arrived in the country some three months earlier in April 2023. Consequently, EU11 and EU11A have no relevance to this appeal.

9. The application before the respondent was for pre-settled status, with two potentially applicable rules set out in EU14 and EU14A. The former is concerned, *inter alia*, with persons eligible for limited leave to remain as a family member of a relevant EEA citizen; the latter with persons eligible for limited leave to enter or remain as a joining family member of a relevant sponsor. Having not resided in the United Kingdom by the "specified date" of 23.00 GMT on 31 December 2020 the relevant rule is EU14A. The appellant seeks pre-settled status as a joining family member of a relevant sponsor, her daughter.

10. We note that the respondent takes no issue as to the appellant's daughter meeting the relevant sponsor requirements defined in Annex 1 to Appendix EU.

11. The appellant's grounds of appeal filed with the First-tier Tribunal detail, *inter alia*:

> "The main reason that we want [the appellant], the grandmother of our child to be able to stay is because we are trying to do everything right by the [law], we manage to make her a bank account to prove her dependency on us as we transfer money every week, our daughter is emotionally invested, every day she wakes up and

> running into the grandmother s room to say good morning and the grandmother is so happy as grandma is emotionally invested too.
>
> If the grandmother has to go back to Romania one of us will have to give up work and stay home to care for our daughter, be back on benefits and it’s something that we really don’t want to happen.
>
> We are trying our best to do everything in our power and by the [law] for her to be able to stay in the country and help us with our daughter. She just came here to give us a helping hand as the cost of living it’s a problem that becomes harder and harder to handle. she is just a normal grandmother wanting to spend time and care for her niece. We are very lucky to have her as not many people can say that and do that for [their] grandkids.”

12. Additionally, the grounds detail the unsocial hours worked by the appellant’s daughter and her partner, and explain that the couple are:

> “... struggling with childcare as [it] is extremely expensive and we cannot even think about leaving our daughter in some stranger’s hands ... because of our hectic [work] schedule and if the grandmother has to go back we will have to resort to government jobseekers allowance again”.

13. The grounds do not assert that the appellant’s daughter, daughter’s partner and granddaughter would be required to accompany the appellant to Romania if she were unsuccessful in securing status in this country. Consequently, the grounds do not expressly or implicitly advance reliance upon the Court of Justice judgment in C-34/09 *Ruiz Zambrano v Office National de l'Emploi (ONEm)* EU:C:2011:124; [2012] QB 265.

First-tier Tribunal Decision

14. The appeal came before the Judge sitting at Taylor House on 1 May 2024. The appellant was unrepresented. She gave evidence as did her daughter and her daughter’s partner.

15. At [10]-[11] of his decision the Judge noted the respondent’s reasons for refusal but failed to identify the relevant rule(s) applicable to the appeal before him. Consequently, it is entirely unclear as to whether he was considering EU14, EU14A or both in his decision.

16. We consider it appropriate to detail various findings made by the Judge. He found as fact, at [39]:

- The appellant is retired as is her husband who continues to reside in Romania. The appellant receives a monthly pension of 1,300 Leu (£222). Her husband receives a pension of 2,600 Leu (£445).

- She has no savings.

- The appellant owns a two-bedroom flat in Romania where she lives with her husband. No one else lives in that flat save for the appellant and her husband.

- Her daughter and her daughter's partner are both in full-time employment. They work different shift patterns.

- The appellant has lived with her close family since her arrival in April 2023.

- A domestic bank account has been opened in the appellant's name. The sponsor and her partner pay money into that bank account. They also give her cash.

- The appellant is heavily involved in the care of her granddaughter.

17. The Judge found at [39 n]:

> "The appellant has failed to provide any evidence in connection with the cost-of-living in Romania and how much she needs to live on. I asked the appellant how much she needed to live on each month in Romania. She did not provide even a general estimate of her monthly living needs. In my judgement the evidence tends to suggest that the appellant is able to largely support herself on the basis of the pensions received in Romania. In reaching that finding I take into account the oral evidence that they own their own property in Romania. No doubt there are costs associated with the ownership of property, but they are likely to be far less significant than the payment of rent."

18. The couple confirmed that they never remitted any money to the appellant whilst she resided in Romania through the banking system or any other documented route. The Judge concluded that the appellant,

her daughter and her daughter's partner gave divergent and inconsistent evidence in connection with cash remittances. He considered that the evidence presented on this issue was vague, that the daughter's evidence as to sending cash with a driver was only mentioned after the divergence was explained to her, and ultimately the credibility of the accounts provided was undermined by the different range of values detailed for the claimed cash remittance. He concluded that the evidence failed to establish to the required standard that the daughter and her partner made any significant payments to the appellant and consequently she was not dependent on remittances from her family in the United Kingdom for her material essential living needs whilst she was living in Romania, at [39 q].

19. There is no reference made by the Judge to any witness before him stating that the entire family, including the granddaughter, would relocate to Romania if the appellant was unsuccessful on appeal.

20. In respect of dependency, the Judge found at [40]-[41]:

> "40. Reflecting on my above findings and observations on the evidence I have reached the conclusion that the appellant is not dependent on her sponsors. Indeed, the evidence strongly points towards the appellant's independence and a lack of dependency. She is not in need of any care or support herself. In her oral evidence she confirmed that the reason she came to the UK was to look after her granddaughter. The appellant said that she wanted to bring her husband to the UK. [The sponsor] said that the appellant did not want to live permanently in the UK, but just wanted to be able "to freely come and go" and look after her grandchild as much as possible.
>
> 41. In my judgement the appellant and sponsors have entered into an arrangement to address the sponsors' childcare needs. The factors at play do not come anywhere close to being properly described as one of "dependency". Whilst it is true that the sponsors have accommodated the appellant since April 2023 and met all her living expenses in the UK, there is no history of dependency prior to 30 June 2021."

21. The Judge considered the respondent's EUSS guidance, version 23.0 (4 April 2024) and concluded:

> "44. It seems to me that fundamentally this is an application that was incapable of success because the appellant was not in the UK prior to 31 December 2020. That is not a point apparently

> made by the respondent in the decision letter. The decision letter is difficult to follow and the presenting officer was unable to explain exactly what provisions in Appendix EU supported the various definitions in the decision letter."

22. The criticism of the respondent is founded upon the Judge's reading of page 21 of the guidance then in force concerned with the definition of 'family member of a relevant EEA citizen' set out in Annex 1 to Appendix EU. Whilst this provision in the guidance is relevant to EU14, it is not concerned with EU14A. In broad terms under the latter rule a joining family member is someone applying under the EUSS as a family member of an EEA national, where the EEA national has status under the EUSS based on their United Kingdom residence prior to 31 December 2020 <u>and</u> where the joining family member was <u>not</u> themselves resident in the United Kingdom prior to 31 December 2020.

23. The Judge therefore concluded that the appellant could not succeed under EU14 but reached no conclusion on EU14A. On the clear facts of this case, with the appellant having arrived in the United Kingdom in April 2023, this is a joining family member appeal to be considered under EU14A. The Judge was therefore required to consider whether the appellant met the requirements of this rule.

24. The panel has been required to assess whether sufficient consideration was given by the Judge to the individual requirements of EU14A to establish that a failure to reach a decision in respect of the joining family member appeal was not a material error of law.

<u>**Discussion**</u>

25. A striking feature of this appeal is the failure by the Judge to clearly identify the requirements of the applicable rules. We accept that he was not aided by the broad-brush approach adopted by the respondent in her decision letter. However, he is entirely silent as to whether the legal regime established by EU14 or EU14A applies. Indeed, he additionally fails to expressly dispose of EU11 and EU11A which were addressed by the respondent in her decision letter. Before this Tribunal, ICS Legal submitted that condition 1 of EU14 is the relevant rule. This condition requires the appellant to have been resident in the United Kingdom by the specified date, save for identified cohorts which we consider not applicable to the appellant. In a confused, and confusing, skeleton argument, ICS Legal submitted that the appellant fell within condition 1 because (1) she is the family member of a

relevant EEA citizen, despite not meeting the condition of residence and (2) a family member who has retained the right of residence by virtue of a relationship with a relevant EEA citizen, despite having arrived in the United Kingdom in 2023. It was also submitted by means of the skeleton argument that the appellant benefits under the EUSS as a *Zambrano* carer. We observe that Mr Broachwalla suggested EU14A as applicable. He was correct to do so.

26. It is fundamental in a statutory appeal conducted in the Immigration and Asylum Chamber that there is clear identification of the applicable legal regime.

27. We address below a real concern as to the lack of professional care exhibited by ICS Legal in the preparation of the grounds of appeal and the two skeleton arguments filed in this matter. Additionally, the firm displayed no clear understanding of rule 15(2A) of the Tribunal Procedure (Upper Tribunal) Rules 2008.

28. Turning to the grounds of appeal drafted by ICS Legal, who did not represent the appellant before the Judge, three grounds are advanced:

    i. The Judge erred in considering 'non-live issues' in his consideration at [44].

    ii. The Judge misdirected himself as to the relevant date being 31 December 2020, at [44].

    iii. The Judge erred in fact in concluding that the appellant was not being supported financially by the sponsor and her daughter prior to 31 December 2020.

29. The Upper Tribunal granted permission to appeal by a decision sent to the parties on 10 September 2024. The focus of the grant was upon the final sentence of paragraph 2 of the grounds, cited below:

> "2. Paragraph 44, the Judge accepted that the Respondent's decision letter was not clear, nor set out the correct approach to the withdrawal agreement and the matter should have been adjourned in the interests of fairness, to allow the Respondent to serve a correct decision. The Judge also considered matters that were not "live" issues."

30. For the reasons addressed below, and having taken instructions from his professional client as well as the appellant, Mr Broachwalla limited the scope of his oral argument to ground three alone and advanced a perversity argument. We consider that he was correct to adopt this approach.

31. There is no merit to ground one. Consequent to the Judge failing to clearly identify the relevant rule(s) to be considered, his decision is understandably difficult for the appellant to understand. Standing back, [44] is properly to be read as addressing the residence requirement of EU14. In respect of that rule, the Judge identifies an application for pre-settled status as a family member requiring an applicant to have been resident in the United Kingdom at the specified date, save for identified cohorts not applicable to the appellant. However, it is not possible to read [44] as addressing EU14A, as residence by the specified date is not a requirement of this rule. The 'joining family member' rule is concerned with those who were not present in the United Kingdom on the specified date. For the reasons addressed below, we do not consider the failure to make a decision in respect of EU14A to be material consequent to his attendant conclusion as to dependency.

32. We take the opportunity to express concern with paragraphs three and four of the grounds of appeal. The two paragraphs are confusing to read. They reference the Supreme Court judgment in *Serafin v Malkiewicz* [2020] UKSC 23; [2020] 1 WLR 2455 and the House of Lords judgment in *Porter v Magill* [2001] UKHL 67; [2002] 2 AC 357. On one reading they can be considered to advance a judicial partiality, or bias, challenge under the guise of a complaint as to fairness. An allegation of judicial bias is a serious one requiring evidential proof. Guidance as to procedure to be followed by the Upper Tribunal when hearing an appeal on the grounds that there has been bias or misconduct on the part of the First-tier Tribunal was provided by the Court of Appeal in *Singh v Secretary of State for the Home Department* [2016] EWCA Civ 492; [2016] INLR 679, *per* Davis LJ at [53]. The guidance includes:

> "Such an allegation, if to be sufficient to merit the grant of permission at all, should ordinarily be expected to be properly particularised and appropriately evidenced."
>
> "It will normally be likely in such as the present cases to be of assistance to the Upper Tribunal to know what the advocate for the

respondent has to say as to what happened or what was said before the First-tier Tribunal."

33. We observe that no corroborative evidence as to judicial partiality was filed with the grounds.

34. At the outset of the hearing Mr Broachwalla was asked to address the scope and nature of the two paragraphs. On instruction he explained that they were drafted as a means of noting the identification by the Supreme Court in *Serafin*, at [38], as to the importance of distinguishing between bias and unfairness. Although they overlap, they are distinct concepts. The intention of the author of the grounds was to reinforce the fairness challenge, not to assert judicial partiality. We consider that these paragraphs should properly have been drafted with greater care, but we are content to accept the explanation provided and are satisfied that the significant allegation of judicial partiality was not raised by the grounds of appeal.

35. We are required to observe the confusion arising from the original skeleton argument filed with the Upper Tribunal by ICS Legal. Only two grounds of appeal are identified as existing, not the three on which permission was granted. No reference is made to ground one. The absence of any reference to ground one, with no accompanying confirmation that it was withdrawn, required the Upper Tribunal to contact ICS Legal to ascertain the true position. A replacement skeleton argument was filed, relying upon ground one with an attendant observation that the grounds were interlinked. We are not satisfied that this is an adequate explanation for the failure to reference ground one in the original version, which necessitated the Upper Tribunal having to seek an explanation. We express our concern as to the approach adopted.

36. Ground two is fundamentally flawed. The grounds seek to advance a statutory interpretation challenge. The approach adopted in the written ground is for an incomplete section of a page of the respondent's guidance, concerned with family members, to be placed in the document by cut and paste, and a link to a second document being provided, with no reference to the second document's title. We conclude this is the reason Judge Bulpitt was unaware that the wrong rule was relied upon in ground two. One of several difficulties in using a link to guidance in grounds of appeal is that the guidance may change over time. The link now takes the Upper Tribunal to the respondent's "EU Settlement Scheme: family permit and travel permit

guidance" version 18.0 (26 September 2024), which post-dates the Judge's decision. ICS Legal have not provided the earlier version of the guidance relied upon, nor confirmed which version was in force at the time of the Judge's decision. Such failure is unsatisfactory.

37. We observe that the guidance we are directed to, in its present form, is concerned with applications under Appendix EU (Family Permit) to the Immigration Rules as confirmed in its introduction:

> "This guidance tells you how, from 05 September 2024, to consider applications for an EU Settlement Scheme (EUSS) family permit or an EUSS travel permit, **made under Appendix EU (Family Permit) to the Immigration Rules**."
>
> [Emphasis added]

38. That the guidance is concerned with Appendix EU (Family Permit) is identifiable elsewhere in the document, for example:

> "Where this guidance refers to the 'date and time of withdrawal', this means (as defined in Annex 1 to **Appendix EU (Family Permit)**) 11:00pm GMT on 31 January 2020.
>
> Where this guidance refers to the 'specified date', this means (as defined in Annex 1 to **Appendix EU (Family Permit)**) 11:00pm GMT on 31 December 2020.
>
> Where this guidance refers to the 'EEA Regulations', this means (as defined in Annex 1 to **Appendix EU (Family Permit)**)
>
> ...
>
> Applicants must apply by using the required application process, as defined in Annex 1 to **Appendix EU (Family Permit)**.
>
> ...
>
> The EU Settlement Scheme (EUSS) family permit is an **entry clearance** which facilitates travel to and entry into the UK of an eligible family member of a relevant European Economic Area (EEA) citizen or (where an application was made by 8 August 2023) of a qualifying British citizen.
>
> The family permit enables the holder to join in, or accompany to, the UK their relevant EEA citizen (as defined in Annex 1 to **Appendix EU (Family Permit)**, including provision for a relevant naturalised

> British citizen, a dual British and EEA citizen (McCarthy cases), a relevant person of Northern Ireland, a specified relevant person of Northern Ireland, a person exempt from immigration control or a frontier worker) or their qualifying British citizen (as defined in Annex 1 to **Appendix EU (Family Permit)**)."
>
> [Emphasis added]

39. If, as this Tribunal would expect, the second document had been properly identified by the author of the grounds it should have been clear that it was concerned with Appendix EU (Family Permit) and therefore related to entry clearance and not in-country applications. The entire statutory interpretation challenge is founded upon the wrong rule.

40. To compound this concerning failure no effort was made to check that the relevant rule was relied upon when both skeleton arguments were drafted.

41. In addition, a '*Zambrano*' point is raised as an element of ground two for the first time at paragraph 26 of the first version of the skeleton argument, and repeated at paragraph 28 of the second version, despite the substance of the grounds of appeal filed with the First-tier Tribunal at the outset of these proceedings and the family's evidence before the Judge being clear that neither the daughter, her partner or the granddaughter intended, or would feel required, to relocate to Romania if the appellant was unsuccessful in her appeal. The evidence presented was that the daughter would revert to benefits to provide care to her child if her mother was required to leave the country. The *Zambrano* challenge should never have been advanced, and it should not have been advanced for the first time by means of a skeleton argument.

42. Both the written ground, and its expansion in the skeleton argument, rely upon documents, including witness statements, that were not placed before the Judge. The witness statements were signed in October 2024 and various bank statements post-date the hearing. No application was made for their admittance under rule 15(2A). The documents were simply placed in the appellant's consolidated bundle and relied upon. We conclude that ICS Legal have exhibited no true understanding of rule 15(2A). The firm's failure to appreciate that an error of law hearing before the Upper Tribunal is not a second opportunity to re-run an evidential case also raises concern.

43. There is no merit to ground two.

44. The third ground as drafted enjoys no merit. It seeks to challenge the Judge's conclusions as to dependency by no more than simple disagreement. We are concerned that simple assertion, and no more, is advanced. Again, reliance is placed upon evidence not placed before the Judge.

45. Mr Broachwalla properly accepted that the appellant was required to establish that she was dependent upon her sponsor at the specified date. Being mindful that the appellant's appeal was before us, and the manifest failings of the grounds of appeal were clear to all, we permitted Mr Broachwalla to advance a perversity challenge that was not clearly identified in ground three as drafted. In so permitting, we were mindful of procedural rigour but considered on the particular facts arising from the failures of the appellant's legal representatives, fairness required that we consider the high point of the appellant's concern. In short submissions, Mr Broachwalla primarily relied upon the several favourable findings of fact made by the Judge at [39].

46. Despite Mr Broachwalla's efforts, we are satisfied that there is no merit to the perversity challenge advanced. No financial documents were provided to the Judge, or at the present time are said to exist, establishing the remitting of funds to the appellant before the specified date. The Judge considered the clear inconsistency in the evidence of the appellant, her daughter and her daughter's partner as to how money was delivered to her on occasion by people driving from the United Kingdom to Romania. That the appellant was given money when the couple visited Romania was explained before the Judge as covering the expenses of their visit. On one occasion, the appellant was given £1000 for "a rainy day". The Judge gave cogent and lawful reasons for concluding that there was no dependency as at the specified date. It cannot properly be said that the Judge's reasons, looked at objectively, are such that no judge properly directing themself could have reached the same conclusion.

47. Having reached a rational conclusion in respect of dependency, the Judge would have been required to refuse the appeal under EU14A. His failure to take this final step in his decision, whilst an error of law, was not material as the adverse dependency assessment results in the appellant being unable to succeed under EU14A. In the circumstances, this appeal is properly to be dismissed.

Hamid jurisdiction

48. The Upper Tribunal observes its inherent jurisdiction to govern proceedings before it and to hold to account the behaviour of legal representatives whose conduct of litigation falls below the minimum professional standards: *R (Hamid) v Secretary of State for the Home Department* [2012] EWHC 3070 (Admin).

49. The Hamid jurisdiction extends to OISC organisations: *R (Hoxha) (Representatives: Professional Duties) v Secretary of State for the Home Department* [2019] UKUT 124 (IAC); [2019] Imm AR 801.

50. We have given careful consideration as to whether a Hamid direction should be issued to ICS Legal, Unit 11 City Business Centre, Lower Road, London SE16 2XB. Our concerns as to competency are addressed above. However, we note that ICS Legal provided an apology to the Upper Tribunal through Mr Broachwalla at the hearing and exhibited an understanding of the failures identified. We further note Mr Broachwalla's confirmation that he would explain the Tribunal's concerns in detail to his professional client. We are satisfied that Mr Broachwalla will appropriately advise his lay client.

51. Consequently, we are satisfied that a warning as to future conduct is sufficient in the circumstances.

52. ICS Legal should properly note that further failures to abide by expected standards of professional care, including failure to understand relevant Procedural Rules, will likely lead to the Upper Tribunal revisiting this matter.

Notice of Decision

53. The decision of the First-tier Tribunal sent to the parties on 10 May 2024 is not subject to material error of law.

54. The appellant's appeal is dismissed.

D O'Callaghan

Judge of the Upper Tribunal
Immigration and Asylum Chamber

15 November 2024