



**IN THE UPPER TRIBUNAL**  
**IMMIGRATION AND ASYLUM CHAMBER**

Case Nos: UI-2022-006178

First-tier Tribunal No: EA/14335/2021

**THE IMMIGRATION ACTS**

**Decision & Reasons Issued:**  
**On 14 July 2023**

**Before**

**UPPER TRIBUNAL JUDGE KEITH**  
**DEPUTY UPPER TRIBUNAL JUDGE MAHMOOD**

**Between**

**THE ENTRY CLEARANCE OFFICER**

Appellant

**and**

**MR JOHN NYAMEKYE BLAY**  
**(NO ANONYMITY ORDER MADE)**

Respondent

**Representation:**

For the Appellant:

Mr E Terrell, Senior Presenting Officer

For the Respondent:

The Appellant did not attend and was not represented

**Heard at Field House on 26 May 2023**

**DECISION AND REASONS**

1. This our decision which we have delivered orally at the hearing.
2. No anonymity order has been sought and we do not see any reason to anonymise this decision.
3. We reached the end of our list at 3.15pm today. There was no attendance by or on behalf of Mr Blay. We caused enquiries to be made both this morning and again shortly before the hearing to see if anyone had attended for this hearing. We also caused enquiries to be made to see if the notice of hearing had been sent to Mr Blay and to any other persons on record. That notice has been properly submitted. We canvassed with Mr Terrell, a Senior Presenting Officer who appears on behalf of the Entry Clearance Officer whether the hearing ought

to proceed. Mr Terrell submitted that we should proceed with the hearing in the Appellant's absence.

4. Having considered the Presidential Tribunal decision in **Nwaigwe (adjournment: fairness) [2014] UKUT 00418 (IAC)** we conclude that there is no good reason to adjourn the matter. There has been proper notice to the parties and we remind ourselves of The Tribunal Procedure (Upper Tribunal) Rules 2008, including the overriding objective. We conclude that it is both proportionate and necessary to hear this matter today.
5. Turning to the substantive case itself, this is an appeal by the Entry Clearance Officer [ECO] against the decision of First-tier Tribunal Judge Ali. For ease of following we shall continue to refer to Mr Blay as the Appellant and the Entry Clearance Officer as the Respondent. The First-tier Tribunal's [FtT] decision was promulgated on 6 March 2022 following an appeal on the papers against the decision of the ECO dated 5 September 2021. In a well-structured determination the FtT set out his consideration of the facts and background and assessed the applicable law.

### **Background**

6. The determination noted that the Appellant is a citizen of Ghana who was born on 28 December 2000. The Appellant had appealed against the ECO's decision to refuse his application for an EU Settlement Scheme (EUSS) family permit under Appendix EU (Family Permit) to the Immigration Rules. The Appellant's application was made on the basis that he is a family member of a relevant EEA citizen. The judge noted that he had been provided with DNA evidence that the Appellant was the son of Kwame Frimponga. The judge also noted that the Appellant's father had customarily married the Appellant's EEA Sponsor, a citizen of the Netherlands, Ms Rosemary Duah on 26 December 2020 and by way of an official marriage on 7 April 2021. The judge recorded that at the time of the application the applicant was under the age of 21. The Appellant asserted that his father is married to his stepmother who is an EEA national exercising treaty rights in the UK and thus the Appellant is the family member of a relevant EEA citizen. The judge recorded that the ECO had refused the application because, for amongst other reasons, the ECO was not satisfied that the Appellant was a family member of a relevant EEA citizen. That was because the Appellant's father's marriage to the Appellant's 'stepmother' (who is his EEA Sponsor) took place on 7 April 2021 which was after the specified date of 11 p.m. on 31 December 2020 for the purposes of the EUSS. The judge correctly cited the legal framework, namely that the requirement for an EEA family permit can be found in the EU Settlement Scheme (EUSS) Family Permit under Appendix EU (Family Permit) to the Immigration Rules.

### **FtT's Decision**

7. In his findings the judge concluded:

“Looking at the evidence before me it is clear that the Appellant's father and stepmother's official wedding took place on the 7<sup>th</sup> April 2021 and there is a marriage certificate at page 6 of AB. This fact is also not disputed by the Respondent. While the Respondent's position is that the marriage took place after the specified date of 11pm on the 31<sup>st</sup> December 2020 and therefore the application does not succeed, the situation is not as simple as that. This is because there is a caveat which is that the Respondent extended the

deadline to make any relevant applications under the EUSS settlement scheme to the 30<sup>th</sup> June 2021 and I need to consider the evidence that is before me at the date of the appeal hearing. The Respondents position was that given she did not accept that the Appellant's father and step mother were married then they needed to show that they were in a durable relationship and the Respondent asserts that they had not done so. In light of the marriage certificate that is before me and given that this was before the 30<sup>th</sup> June 2021 (the cut-off point) the issue of 'durable relationship' ceases to become an issue of dispute. I find that the Appellant's father and his stepmother are officially married withing the relevant time period and thus I find that the Appellant is the family member of a relevant EEA National. I therefore find that the appeal succeeds on that basis".

### **Appeal of the Entry Clearance Officer**

8. The ECO's grounds of appeal contend:

"The First tier Tribunal has erred in law in misconstruing the statute by which - in certain limited circumstances - some 2016 Regulations were extended during the Grace Period from 31 December 2020 to 30 June 2021. The Judge has thereby created an effect which in any event would not have entitled this appellant to succeed. This appellant had at 31 December 2020 no claim either under the EUSS or the 2016 regulations. The definition of 'extended family member' did not reach the descendants of an unmarried partner of an EEA national, and in any event there had been no attempt to facilitate entry and residence on that basis in accordance with the only feasible path for an Extended family member. Any extension of EEA Regulation 7 in respect of the appellant's father such that his post-2021 marriage provided a belated claim under the Regulations (which is denied in any event) could not change the fact of the appellant's status (or rather non-status) as at 31/12/20".

The ECO's grounds of appeal also state:

"In passing, the Secretary of State has noted that the appellant's father - upon whose 2021 marriage the claim is now based - had his own appeal against refusal of an EUSS family permit dismissed on 12 March 2022 under reference EA/14674/2021. This plainly creates some tension with the conclusions reached by the Tribunal in this case".

9. In respect of this latter aspect relating to the Appellant's father's appeal in the ECO's grounds of appeal, we discussed with Mr Terrell whether he needed to rely on that aspect and he stated that he was merely providing that information to us for completeness. We do not take the result of the Appellant's father's appeal into account in considering the error of law.
10. Permission to appeal was granted and we today heard brief submissions from Mr Terrell who, in summary, said that although there was an extension period or grace period, that did not permit this Appellant to succeed because there was no valid basis upon which he could succeed as of 31 December 2020.

### **Decision on Error of Law**

11. In our view the FtT materially erred in law. That is because as of the cut-off date of 31 December 2020 the Appellant had no relevant status, nor did the

Appellant's father. The Appellant's father and stepmother were not married other than by way of a customary marriage. That marriage was only later registered in April 2021. Whilst the FtT correctly said that there was an extension of consideration of EUSS applications in certain circumstances, this was not one of those circumstances. This was not an appeal which was merely lodged late or out of time beyond the cut-off date of 31 December 2020 in which an apparent right to an EUSS permit existed, the difficulty for the Appellant being that the right to a permit only materialised in April 2021, well after the cut-off date of 31 December 2020.

### **Disposal and Re-Making of Decision**

12. Accordingly, we therefore set aside the decision of the FtT. We have applied **AEB [2022] EWCA Civ 1512** and **Begum (Remaking or remittal) Bangladesh [2023] UKUT 00046 (IAC)**, and carefully considered whether to retain the matter for remaking in the Upper Tribunal in line with the general principle set out in Paragraph 7 of the Senior President's Practice Statement. We take into account the history of this case, the nature and extent of the findings to be made and that this was an appeal on the papers before the FtT. In considering paragraph 7.1 and 7.2 of the Senior President's Practice Statement and given the limited scope of the issues, we consider that it is appropriate that we re-make the decision. The facts are readily available and this appeal concerns the interpretation of Appendix EU(FP) and the 2016 Regulations. Therefore we are able to undertake task of re-making the decision without any unfairness to the Appellant.
13. We conclude that because the Appellant's father and stepmother were not married before the cut-off date of 31 December 2020 and that they only married in April 2021, we conclude that the Appellant was not the family member of a relevant EEA national. The Appellant had no other right to a family permit. Therefore, the Appellant's application was correctly refused by the Entry Clearance Officer.

### **Notice of Decision**

14. **The decision of the First-tier Tribunal contains a material error of law and we set it aside.**
15. **We re-make the decision.**
16. **Mr Blay's appeal against the decision of the ECO is dismissed.**
17. **No anonymity direction is made**

**Deputy Upper Tribunal Judge Mahmood**

Judge of the Upper Tribunal  
Immigration and Asylum Chamber

**26 May 2023**

