IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2024-000102
First-tier Tribunal No.: EA/02898/2023

THE IMMIGRATION ACTS

Decision & Reasons Issued:

On 25th of June 2024

Before

UPPER TRIBUNAL JUDGE STEPHEN SMITH
DEPUTY UPPER TRIBUNAL JUDGE SHEPHERD

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

And

SS (GHANA)
(ANONYMITY ORDER MADE)

Respondent

Representation:
For the Appellant: Mrs Arif, Senior Home Office Presenting Officer
For the Respondent: No one attended on behalf of the Respondent

Heard at Birmingham Civil Justice Centre on 10 June 2024

DECISION AND REASONS

Background

1. To avoid confusion, we shall refer to the parties as they were before the First-tier Tribunal i.e. to Samuella Sarpong as the Appellant and the Secretary of State of the Home Department as the Respondent.

2. This matter concerns an appeal against the Respondent's decision letter of 21 June 2023, refusing the Appellant's application made under the EU settlement scheme (EUSS).

3. The Appellant is a national of Ghana born on 4 March 2023. Her claim is made on the basis that she is a family member of an EEA national under the EUSS, specifically that she is the granddaughter of Mr Kofi Kyerematen Dapaah ("the Sponsor") born on 22 June 1962 of Italian nationality. The application said that

the Sponsor entered the UK on 1 July 2017 and provided the Appellant with financial support of £50 a month.

4. The Respondent refused the Appellant's claim on the basis that she had not proved, pursuant to rules EU11 and EU14 of the EUSS, that she is a 'family member of a relevant EEA citizen' as defined in Appendix EU (Family Permit) of the immigration rules. Whilst it was not disputed that the Appellant was the Sponsor's grandchild, the Refusal Letter said that this in itself was insufficient for the requirements of the relevant immigration rules given the definition of family member contained therein.

5. The appeal was heard by First-tier Tribunal Judge Hosie ("the Judge") at Hatton Cross on 26 of January 2023, after which the Judge allowed the appeal in her decision promulgated on 22 November 2023.

6. The Respondent applied to the First-tier Tribunal for permission to appeal to this Tribunal on the grounds that the Judge had materially misdirected herself in law because:

(a) the Judge had misunderstood/misinterpreted the requirements of the EUSS as regards children born after the specified date, which led to her making a mistake to a material fact and allowing the appeal on a flawed basis.

(b) the Appellant cannot be sponsored by her grandfather (the Sponsor) unless he is the Appellant's legal guardian, which is made clear by the Home Office guidance, EU Settlement Scheme Family Permit and Travel Permit – Version 16.0.

(c) the Sponsor had not provided evidence that they had either adopted or become the legal guardian for the Appellant.

7. We note that paragraph 1b of the grounds refers to the Respondent having conducted a review, but we have not been provided with a copy of this.

8. Permission to appeal was granted by First-tier Tribunal Judge Buchanan on 3 January 2024, with the pertinent parts of his decision stating:

> "3. The FTTJ refers to definitions under Appendix EU Annex 1 at #10 but then finds that the appellant meets the definitions and requirements of Appendix EU (family permit) at #12.
>
> 4. The application is made on behalf of a grandchild.
>
> 5. The respondent argues that there is no provision for the grandfather to sponsor the grandchild; and cites guidance at pages 25-26 of HO guidance.
>
> 6. The guidance states at page 26 – 'In addition, where the applicant is a child either who was born after the specified date … they meet one of the following requirements … both of their parents are a relevant EEA citizen (etc) …'
>
> 7. An issue arises as to whether Guidance accurately reflects the terms of Immigration Rules Appendix EU (Family Permit); and an issue arises as to whether definitions in Appendix EU apply to applications assessed under Appendix EU (Family Permit).

> 8. It is arguable by reference to the Grounds of Appeal that there may have been error of law in the Decision as identified in the application. I grant permission to appeal".

9. The Appellant did not file a response to the appeal.

The Hearing

10. The matter came before us for hearing on 10 June 2024 to determine whether the decision of the Judge is infected by a material error of law.

11. Mrs Arif attended on behalf of the Respondent. No one attended on behalf of the Appellant and no contact was had with the Tribunal to explain the reason for this.

12. At the outset of the hearing we referred to the Tribunal's power under rule 38 of The Tribunal Procedure (Upper Tribunal) Rules 2008 to proceed with the hearing if the Tribunal—

> "(a) is satisfied that the party has been notified of the hearing or that reasonable steps have been taken to notify the party of the hearing; and
>
> (b) considers that it is in the interests of justice to proceed with the hearing".

13. Mrs Arif had no submissions to make as to the appropriateness of proceeding in the Appellant's absence.

14. Having checked the Tribunal's case management system, we were satisfied that the Appellant had been properly notified of the hearing by a notice of the hearing having been served by both post and email. In terms of the interests of justice, we noted that the Appellant was a very young child such that her interests were a primary consideration. We bore in mind the overriding objective contained in rule 2 of the above-mentioned Tribunal Procedure Rules, which is to deal with cases fairly and justly. We concluded that it was in the interests of justice to proceed with the hearing notwithstanding the absence of anyone representing the Appellant. This was because the case had been originally dealt with on paper at the Appellant's request and without a hearing; actions in the application and appeal had been taken by adults on her behalf which included her grandfather in the UK; being a child did not mean that the Appellant was/had been unable to participate in the proceedings given the involvement of those adults; notice of the hearing had been properly served; no communication had been received from anyone on behalf of the Appellant; there was a need to avoid delay; and it was unclear whether an adjournment would result in a different situation than the one that was before us.

15. We proceeded to hear submissions from Mrs Arif. She took us through the grounds of appeal and confirmed that the Respondent's view was that the Judge erred by assessing the Appellant's claim as if it had been made under the Immigration (European Economic Area) Regulations 2016 rather than the EU settlement scheme contained within the Immigration Rules; the Appellant did not fall within the latter.

16. Having considered all of the evidence and discussed the matter, Upper Tribunal Judge Stephen Smith confirmed that we as a panel were satisfied that there is a material error of law in the decision of the Judge so that it must be set aside. He further explained that we would remake the decision, and dismiss the

Appellant's appeal. In summary, the Appellant cannot meet the eligibility requirements for indefinite leave to enter or remain as the family member of a relevant EEA Citizen as defined in Appendix EU (Family Permit). Her application under the EU Settlement Scheme cannot therefore succeed.

17. We said we would provide full reasons for our decision in writing, which we now do.

Discussion and Findings

18. We remind ourselves of the important guidance handed down by the Court of Appeal that an appellate court must not interfere in a decision of a judge below without good reason. The power of the Upper Tribunal to set aside a decision of the First-tier Tribunal and to proceed to remake the decision only arises in law, if it is found that the tribunal below has made a genuine error of law that is material to the outcome of the appeal.

19. As highlighted in the grant of permission to appeal, at [7] the Judge refers to Appendix EU rather than the correct part of the immigration rules referred to in the Refusal Letter, which is Appendix EU (Family Permit). Having cited the provisions of Appendix EU, the Judge later refers to Appendix EU (Family Permit) in [12]. Considering the decision as a whole, we consider that it is the provisions of Appendix EU (Family Permit) that the Judge has applied, but that she fell short of applying all of the requisite/applicable parts of the relevant definitions.

20. Having considered the definitions and the evidence of relationship provided (referred to at [9]), the Judge makes her conclusive findings as follows:

> "10. In terms of the definitions under Appendix EU Annex 1, I find that the Appellant meets the definition of the direct descendant as the grandchild of relevant EEA citizen. As such, there is no requirement for a child under 21 to be dependent on the relevant EEA citizen.
>
> 11. There is no requirement for the relevant EEA citizen grandfather to be her legal guardian.
>
> 12. I therefore find that the Appellant meets definitions and requirements of Appendix EU (family permit)."

21. She allowed the appeal on this basis.

22. There is no dispute as to the basis of the Appellant's appeal, brought as it was under The Immigration (Citizens' Rights Appeals) (EU Exit) Regulations 2020.

23. The applicable immigration rules (having been referred to in the Refusal Letter) are contained in Appendix EU (Family Permit). The pertinent parts of this Appendix state as follows (our emphasis in bold):

> "FP6. (1) The applicant meets the eligibility requirements for an entry clearance to be granted under this Appendix in the form of an EU Settlement Scheme Family Permit, where the entry clearance officer is satisfied that at the date of application:
>
> ….
>
> (b) The applicant is a family member of a relevant EEA citizen…

FP9. (1) Annex 1 sets out definitions which apply to this Appendix. Any provision made elsewhere in the Immigration Rules for those terms, or for other matters for which this Appendix makes provision, does not apply to an application made under this Appendix.

Annex 1 Definitions

"child"

> (a) **the direct descendant** under the age of 21 years of a relevant EEA citizen (or, as the case may be, of a qualifying British citizen) or of their spouse or civil partner…
>
> …

In addition:

…

(b) '**direct descendant' also includes a grandchild** or great-grandchild; and

(c) 'spouse or civil partner' means (as the case may be) the person described in sub-paragraph (a)(i) or (a)(ii) of the entry for 'family member of a qualifying British citizen' in this table or in sub-paragraph (a) of the entry for 'family member of a relevant EEA citizen' in this table

"family member of a relevant EEA citizen"

a person who has satisfied the entry clearance officer, including by the required evidence of family relationship, that they are:

…

(d) the child or dependent parent of a relevant EEA citizen, and the family relationship:

> (i) existed before the specified date (unless, in the case of a child, the person was born after that date, was adopted after that date in accordance with a relevant adoption decision or after that date became a child within the meaning of that entry in this table on the basis of one of sub-paragraphs (a)(iii) to (a)(xi) of that entry); and
>
> (ii) continues to exist at the date of application…

in addition, where the person is a child born after the specified date … they meet one of the following requirements:

(a) (where sub-paragraph (b) below does not apply), one of the following requirements is met:

> (i) both of their parents are a relevant EEA citizen; or
>
> (ii) one of their parents is a relevant EEA citizen and the other is a British citizen who is not a relevant EEA citizen; or
>
> (iii) one of their parents is a relevant EEA citizen who has sole or joint rights of custody of them, …); or

> (b) where they were born after the specified date to (or adopted after that date in accordance with a relevant adoption decision by or after that date became, within the meaning of the entry for 'child' in this table and on the basis of one of sub-paragraphs (a)(iii) to (a)(xi) of that entry, a child of) a Swiss citizen or their spouse or civil partner (as described in the first sub-paragraph (a) in this entry), the Swiss citizen or their spouse or civil partner is a relevant EEA citizen
>
> "specified date"
>
> (a) (where sub-paragraph (b) below does not apply) 2300 GMT on 31 December 2020".

24. It is not in dispute that the Appellant is under 21 years old, having been born on 4 March 2023, (which is after the specified date of 31 December 2020) and is the granddaughter of her EEA national Sponsor.

25. As above, the definition of 'child' within Appendix EU (Family Permit) includes the grandchild of a relevant EEA citizen. However, this is not the only requirement that needs to be fulfilled given the definition of "family member of a relevant EEA citizen" and the additional requirements therein that apply to children born after the specified date. As per these requirements, because the Appellant was born after the specified date, at least one of her parents needs to be a relevant EEA citizen or there needs to have been a relevant adoption decision.

26. There was no evidence (or even argument) before the Judge that either of the Appellant's parents was a relevant EEA citizen or that there had been a relevant adoption decision in respect of her. Given the absence of such evidence, the Appellant cannot have met the relevant definitions; simply being the grandchild of a relevant EEA citizen is not sufficient.

27. We therefore respectfully consider that the judge fell into error by failing to apply the additional requirements found in the definition of "family member of a relevant EEA citizen" in relation to children born after the specified date. The Appellant was incapable of meeting any of the additional requirements and there was no basis under Appendix EU (Family Permit) for the appeal to be allowed.

28. We do not consider that we need to refer to the Respondent's guidance referred to in the grounds of appeal, nor make any findings as to its compatibility with the rules, as we consider the relevant part of the rules to be sufficiently clear and self-explanatory. For the avoidance of doubt, we also do not consider that the Judge applied the provisions of the 2016 Regulations referred to above as there is simply no evidence of this within the decision.

29. We therefore find the grounds of appeal made out and we set the Judge's decision aside.

30. Given the narrowness of the issue under appeal, and that, on the evidence, the Appellant is unable to meet the applicable definitions, we consider it appropriate to proceed to remake the decision without hearing any further evidence. On the basis that the Appellant's application cannot succeed for the reasons set out above, her appeal must be dismissed.

Anonymity and the need for a litigation friend

31. We have made an order for the Appellant's anonymity in view of her age.

32. We also observe that, in the ordinary course of events, a litigation friend should be appointed for a very young child appellant such as this Appellant. Her mother, who remains with the Appellant in Ghana but has entry clearance in her own capacity, would have been an ideal candidate, since she has plainly cared for the Appellant, and dealt with all her immigration matters on her behalf. On the material before us, that would be consistent with the Appellant's best interests. However, since there has been no further engagement by the Appellant's mother, or grandfather, in these proceedings, it would serve no purpose for us to purport to identify and appoint a litigation friend at this stage. All matters concerning these proceedings before this tribunal have now been resolved.

Notice of Decision

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

2. We remake the decision, dismissing the Appellant's appeal.

L. Shepherd
Deputy Judge of the Upper Tribunal
Immigration and Asylum Chamber
17 June 2024