



IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2022-003361
First-tier Tribunal No: EA/01053/2022

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On 26 April 2023

Before

UPPER TRIBUNAL JUDGE BLUNDELL

Between

KENNETH BANASCO KWARTENG
(NO ANONYMITY ORDER MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Cyprian Amgbah, of UK Law Associates
For the Respondent: David Clarke, Senior Presenting Officer

Heard at Field House on 17 April 2023

DECISION AND REASONS

1. The result in this appeal – in relation to both the error of law in the FtT’s decision and the remaking of the decision – was agreed between the parties. This decision is in short form as a result of that agreement.
2. The appellant is a Ghanaian national who was born on 29 August 1978. He appeals, with permission granted by Upper Tribunal Judge Keith, against the decision of First-tier Tribunal Judge Robinson (“the judge”). By her decision of 12 May 2022, the judge dismissed the appellant’s appeal against the respondent’s refusal of his application for settled or pre-settled status under the EU Settlement Scheme (“EUSS”).
3. The relevant chronology is not the subject of any material dispute. The appellant entered the United Kingdom in 2015. On 28 August 2020, he entered into a customary marriage (by proxy) with a Romanian national called Stefania Diana-Stanciu.

4. On 24 May 2021, the appellant made an application for leave to remain under the EUSS, relying on his relationship with Ms Stanciu. The Secretary of State sought further evidence in support of that application but the applicant's former representatives failed to respond to these requests and the application was refused on 22 August 2021. It was not accepted that the appellant had completed five years' continuous residence in the UK so as to satisfy the requirements for settled status. Nor was it accepted that the appellant had been resident in the UK or Islands in the six months prior to the specified date (31 December 2020) so as to meet the requirements for pre-settled status.
5. The appellant sought Administrative Review of the respondent's decision on 8 September 2021, submitting that the failure on the part of his former solicitors had deprived him of the opportunity to prove that he had been residing with his wife in the UK before 31 December 2020. He submitted further evidence in support of his contention that he had been present and residing in the UK since before that date.
6. There is nothing before me to suggest that the respondent responded to the application for Administrative Review. The appellant was also entitled to appeal against the respondent's decision to the First-tier Tribunal, and he did so on 2 September 2021. He sought before the FtT to rely on the same arguments and essentially the same evidence he had submitted in support of his application for Administrative Review.
7. So it was that the appeal came before the judge, sitting at Hatton Cross on 9 May 2022. The appellant was represented by Ms Amgbah, as he was before me. The respondent was represented by counsel, Ms Dogra (wrongly thought by the judge to be a Presenting Officer). The hearing proceeded by way of submissions only, as agreed by the advocates. The judge recorded at [12] that there was a single issue, which was whether the appellant met the requirements for pre-settled status under paragraph EU14 of Appendix EU.
8. The judge concluded that the appellant was required to establish that he had been in the UK for a period of six months in any 12 month period prior to 31 December 2020: [24]. She accepted that the appellant and the sponsor were living in the UK on the date of their marriage in August 2020 but that the evidence as a whole was insufficient to establish that the appellant was resident in the UK for a six month period prior to the specified date: [27] and [33]. She therefore dismissed the appeal.
9. The appellant sought permission to appeal. Permission was refused by the FtT but granted, as I have said, by Upper Tribunal Judge Keith. There were two grounds of appeal, and it was only the second ground which persuaded Judge Keith to grant permission. He considered it arguable that the judge had overlooked material evidence which tended to show that the appellant had been resident in the UK at the relevant time. He refused permission on the first ground, by which it was argued that the judge had misinterpreted the Immigration Rules in requiring the appellant to have been in the United Kingdom for at least six months prior to the specified date.
10. The respondent filed a response to the grounds of appeal but Mr Clarke stated in terms that he did not seek to rely upon it and I shall not dwell any further on what was said in that document.

11. At the outset of the hearing, Mr Clarke indicated that there was common ground between the parties. That common ground was actually in relation to the point on which Judge Keith had refused permission and Mr Clarke invited me to consider that ground notwithstanding the refusal of permission upon it. I considered that it would be in furtherance of the over riding objective to permit the parties to litigate what they considered to be the real issue in the case.
12. Mr Clarke submitted that the judge had erred in her approach to paragraph EU14. The appellant had married in August 2020 and had clearly been resident in the UK at that point. What was required was that he was in the United Kingdom before the specified date; that he had married before then; and that his marriage continued to subsist. The judge had also made a finding that the appellant had been resident in the UK on 1 December 2020. There was nothing in the Immigration Rules or the policy to show that the appellant had to have been continuously resident for a six month period prior to 31 December 2020 and the judge had erred in so concluding. Mr Clarke invited me to set aside the decision of the First-tier Tribunal and to remake the decision on the appeal.
13. Mr Amgbah was content for me to adopt that course and I was satisfied that Mr Clarke's concession was properly made. I invited him to consider the appellant's bundle (which he had not previously been able to access electronically) and to indicate whether he was in a position to proceed. At his request, I gave him twenty minutes in order to consider the bundle and to raise any matters on which he required clarification with Mr Amgbah.
14. On resuming, Mr Clarke indicated that he required no further time. He was content for me to remake the decision on the appeal by allowing it on the basis that the appellant satisfied the requirements for pre-settled status under paragraph EU14. He noted that there were utility bills in the appellant's bundle which showed that the appellant and the sponsor had continued to reside together after the specified date and this, taken together with the favourable findings which the judge had made in the FtT, sufficed for the appeal to be allowed.
15. Mr Amgbah indicated that he was content with the course proposed by Mr Clarke and I indicated that I did not need to hear from him. I announced that the appeal would be allowed for the reasons given by Mr Clarke.

Decision

16. I accept that the judge fell into error in her consideration of paragraph EU14. The appellant is the family member of a relevant EEA citizen. The sponsor is an EEA national; the marriage was contracted before the specified date; and the application was made before the end of the grace period (on 30 June 2021). The Immigration Rules also required the appellant to show that the relationship continued to exist at the date of the application. Mr Clarke was correct, in my judgment, to submit that the Immigration Rules did not require anything more. He helpfully referred me to the respondent's current guidance *EU Settlement Scheme: EU, other EEA and Swiss citizens and their family members*, version 19, at page 21:

To apply under the family member of a relevant EEA citizen provisions (save as a dependent relative of a specified relevant person of Northern Ireland or as a relevant EEA family permit case), an applicant must have been resident in the UK by the end of the transition period

at 11pm GMT on 31 December 2020 on a basis which met the definition of 'family member of a relevant EEA citizen' in Annex 1 to Appendix EU and thereafter not have broken the continuity of their residence.

17. Mr Clarke accepted in terms that the judge had erred insofar as she had concluded that the appellant was also required to show continuous residence of a certain period before the specified date. Standing back for a moment and considering the purpose of these provisions, that must be right. The spouse of an EEA national had an automatic right to reside in the United Kingdom under the EEA Regulations subject, of course, to countervailing considerations of public policy, security or health. Where an applicant asserted that that right existed before the specified date, and was able to show that it subsisted at the date of application, the clear intention behind the Rules was that they should be granted leave to remain, thereby converting an existing right under the Directive into a domestic status. There was never any requirement for such a person to establish a certain period of qualifying residence and there is nothing in the Rules which enforced such a requirement. In concluding otherwise, I am satisfied that the judge fell into error.
18. It seems that the judge was wrongfooted by the reference in the refusal letter to "a continuous qualifying period of less than five years' residence", whereas it is quite clear that an applicant for pre-settled status is not required to show more than what is summarised in the excerpt from the Guidance which I have set out above. In fairness to the judge, mistakes such as this will inevitably occur when the Rules themselves are so complex and where they are accompanied by guidance documents which often add further layers of complexity. The relevant Rules themselves are so difficult to comprehend, with a raft of interlocking definitions set out in an Annex which is dense to the point of impenetrability. The fact that the Guidance comfortably exceeds 200 pages speaks for itself. If the intention was to create a simple set of Rules which would assist applicants, advisers and decision-makers to consider the many cases which came about as a result of the UK's withdrawal from the EU, the failure to implement that intention is palpable.
19. Returning to the appellant's case, and applying the proper approach to the Rules, I am satisfied that Mr Clarke's concession as to the disposal of the appeal was also properly made. The evidence in the appellant's bundle is sufficient to establish on the balance of probabilities that the appellant and the sponsor were living together in a subsisting relationship at the date of the application and beyond. In the circumstances, I accede to Mr Clarke's submission that the appeal should be allowed under the Immigration Rules, on the basis that the appellant meets the requirements for pre-settled status under EU14 of those Rules.

Notice of Decision

The decision of the First-tier Tribunal is set aside. I remake the decision on the appeal by allowing it under the Immigration Rules.

M.J.Blundell

Judge of the Upper Tribunal
Immigration and Asylum Chamber

26 April 2023