



**Upper Tribunal**

**(Immigration and Asylum Chamber)**

**Appeal Number: UI-2021-001871**

**EA/01264/2021**

**THE IMMIGRATION ACTS**

Decision & Reasons Issued:

On the 31 July 2023

**Before**

**UPPER TRIBUNAL JUDGE PITT  
DEPUTY UPPER TRIBUNAL JUDGE LEWIS**

**Between**

**KELVIN GYABAAH  
(No anonymity direction made)**

Appellant

**and**

**ENTRY CLEARANCE OFFICER**

Respondent

**Representation:**

For the Appellant: Not present

For the Respondent: Mr P Deller, Senior Home Office Presenting Officer

**Heard at Field House on 6 December 2022**

**DECISION AND REASONS: ERROR OF LAW**

1. This is an appeal against the decision of First-tier Tribunal Judge N M Paul issued on 1 November 2021. The decision dismissed the appeal of the appellant against a decision dated 29 December 2020 which refused to issue an EEA Family Permit recognising him as an extended family member (EFM) of an EEA national. Permission to appeal was granted by First-tier Tribunal Judge Sills on 4 January 2022.

Preliminary Issue

2. At the hearing on 6 December 2022 there was no representative present for the appellant. The EEA sponsor who gave evidence to the First-tier Tribunal also did not attend. The Tribunal's records showed that the appellant's legal representatives, BWF Solicitors, and the sponsor had been served with notice of the hearing. At the request of the panel, the

Tribunal administration telephoned the legal representatives. The legal representatives indicated that they wanted to make an application for an adjournment. They were informed that the application should be made in writing by 12pm on 6 December 2022. If it was not, the panel would proceed to hear the appeal.

3. No written application for an adjournment was made by 12pm. The panel referred to the overriding objective in Rule 2 of the Tribunal Procedure (Upper Tribunal) Rules for there to be a fair and just hearing and also to Rule 38 which concerns hearings in the absence of a party. The Tribunal established that good service had taken place. There was no explanation for the absence of the legal representatives or the sponsor. The panel concluded that it was in the interests of justice to proceed, after taking into account factors forming part of the overriding objective, in particular cost, resources and avoiding delay. The panel proceeded to hear submissions from Mr Deller and reserved the decision.

#### Background

4. The appellant is a citizen of Ghana and was born on 11 November 2008. He and his younger brother, Bright Tuah, born on 6 October 2012, made a Family Permit application maintaining that they were EFMs as defined in Regulation 8 of the Immigration (European Economic Area) Regulations 2016. They maintained that they met this provision as they were the dependents of their paternal aunt, Ms Emelia Tuah. Ms Tuah is a Dutch national who came to the UK in 2004. The Family Permit application maintained that the appellant's mother died in 2013. His father, who was unwell, came to the UK the same year. The appellant maintained that he had been dependent on Ms Tuah since the death of his mother and the departure of his father from Ghana.
5. In the decision dated 29 December 2020 refusing the Family Permit application, the respondent did not accept that the appellant and his EEA sponsor were related as claimed. The respondent also did not find sufficient evidence of dependency on the EEA sponsor. The respondent did not accept that the sponsor was in a position to provide financial support to her nephews given her limited circumstances in the UK, being in receipt of Working and Child Tax credits.

#### First-tier Tribunal Decision

6. Judge Paul heard the appeal against the refusal of a Family Permit on 15 October 2021. He had only the appellant's appeal before him, the brother's appeal apparently proceeding separately; see paragraph 6 of the decision. Judge Paul set out the background to the appeal in paragraphs 1 to 4 of his decision. In paragraphs 5 to 12 he set out the appellant's case and submissions made at the hearing.
7. By the time of the First-tier Tribunal hearing, the appellant had provided further DNA evidence showing that he was related as claimed to the

sponsor and the relationship was not questioned by the Judge. The First-tier Tribunal refused the appeal on other grounds, however, the reasons being set out in paragraphs 13 to 16:

- “13. The burden is on the appellant to show that his application meets the requirements of the EEA Regulations, and that he has established dependency in the broadest meaning of the word. Whilst having a financial element, the authorities make it clear that it goes beyond that – to provide emotional and familial support, without which the appellant would be struggling and or bereft.
14. The background to this case appears to be that the sponsor came to the UK many years ago, and that the appellant’s father left Ghana after the death of this (sic) wife – as a result of which the 2 children have been brought up by others; it appears more recently by Mr Frimpong.
15. There was no evidence of social media contact or photographs and/or other documentation to highlight the contact between eh sponsor and her nephews. Her own circumstances in the UK appear to be fairly tight. Although the evidence suggests that she may have been making payments to Mr Frimpong, those could be construed as offering financial support. However, there is dearth of evidence to demonstrate that the appellant and his brother have become true dependents upon the sponsor. The mere fact that financial payments had been made on an intermittent basis to somebody who may be caring for them, is not indicative, in my view, of dependence. In any event, there is almost certainly a more complicated picture behind what has been revealed to the Tribunal. The fact that the appellant’s father did not attend to give evidence, and simply relied on a statement in which he relies upon his own illness as being a ground for them to be allowed into the UK, leaves many questions un-answered as to the level of contact between the nephews and their relatives such as they are in the UK.
16. This case is presented primarily on the basis that there is some tenuous evidence of financial payments being made to Ghana, which may in some form or other be used to assist the appellant and his brother form time to time. This, in my view, does not establish dependency in the true sense of the word. As I have indicated above, one would expect to see a much more complete picture of the family relationship and inter-dependence to be able to reach that conclusion. The evidence does not come near that, in my view.”

### Grounds

8. The substantive grounds begin at paragraph 11. Paragraphs 11 to 13 of the grounds can be dealt with summarily. They are misconceived. They treat the summary of the appellant’s case set out in paragraphs 7 and 11 of the decision as if they were findings of the Judge. As they were only an indication of the appellant’s position, they are not capable of showing a material contradiction with the findings in 15 of the decision. On the same basis, paragraph 16 of the grounds is misconceived as it treats the summary of the respondent’s decision set out in paragraph 4 of the First-tier Tribunal decision as a finding of fact.

9. Paragraph 14 of the grounds does not set out a legal challenge but merely puts forward the appellant's case as to how he keeps in contact with the sponsor and states that he does not have a bank account.
10. Paragraph 15 of the grounds maintains that it was not reasonable for the First-tier Tribunal to draw an adverse conclusion in paragraph 15 of the decision from the appellant's father not appearing to give evidence. We did not agree. There was nothing before the First-tier Tribunal to suggest that the appellant's father could not attend to give evidence and it was reasonable to consider that the appellant's father was in a position to give material evidence on the appellant's circumstances. It was also open to the First-tier Tribunal to find that there was very limited evidence of contact between the appellant and his relatives in the UK. The appellant's school report which referred to yearly visits by the sponsor; however the passport of the sponsor showed visits only in 2017 and 2019. The statements of the sponsor and the appellant's father did not refer to any form of direct contact between them and the appellant, even in the form of the telephone calls referred to in paragraph 14 of the grounds of appeal, to support the claim that he was very close to his relatives in the UK.
11. Paragraphs 17 to 19 and paragraph 21 to 22 of the grounds maintain that the First-tier Tribunal decision was perverse and assert that the appellant provided enough evidence of dependency. The grounds do not particularise the assertion of perversity any further, however, and do not indicate what aspects of the evidence precluded the Judge from reaching the conclusion he did. We did not find that any aspect of the First-tier Tribunal decision showed perversity or that the judge reached conclusions that were not open to him on the evidence. The judge set out in paragraph 13 of the decision the approach he took to the assessment of dependency which reflects adequately the ECJ case law on this issue, already set out in paragraph 3 of the decision as part of the summary of the respondent's refusal. It was for the judge to decide if the evidence provided showed that the appellant was dependent on his aunt and it was open to him to find that it did not for the reasons he gave. The materials were limited as to the contact and relationship between the appellant and his relatives in the UK and as to the funds sent to Ghana.
12. Paragraph 20 is misconceived. 'Proportionality' is no part of the test under regulation 8(2). In so far as the reference to 'proportionality' might have been intended as an invocation of Article 8 ECHR, no such ground of appeal was available before the First-tier Tribunal.

### **Notice of Decision**

13. The decision of the First-tier Tribunal does not disclose an error on a point of law and shall stand.

Signed: S Pitt  
Upper Tribunal Judge Pitt

Date: 14 December 2022