IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2022-004437

First-tier Tribunal No: EA/16538/2021

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On 15 August 2023

Before

UPPER TRIBUNAL JUDGE HANSON
DEPUTY UPPER TRIBUNAL JUDGE ROBERTSON

Between

MICHEL OTSHUDI ESOMANGUA
(NO ANONYMITY ORDER MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr Khan, Solicitor with Kings Law Solicitors.
For the Respondent: Mr C Bates, a Senior Home Office Presenting Officer.

Heard at Birmingham Civil Justice Centre on 1 August 2023

DECISION AND REASONS

1. The appellant appeals with permission a decision of First-tier Tribunal Judge Shepherd ('the Judge'), promulgated on 3 August 2022, in which the Judge dismissed his appeal against the refusal of his application made under the EU Settlement Scheme (EUSS).
2. The relevant EU national, Koyenyi Donda Prisca ('the Sponsor'), was granted indefinite leave to remain in the United Kingdom under paragraph EU2 of Appendix EU to the Immigration Rules, also known as settled status, on 10 March 2021.
3. The application leading to the decision under challenge was made on 25 April 2021 under the EUSS. That was refused on 11 November 2021 on the basis the decision-maker was not satisfied the appellant had provided sufficient evidence to confirm the dates he was resident in the UK and Islands and so had not established an entitlement to settled status on the basis of a continuous qualifying period of five years. Consideration was given to whether the appellant qualified for pre-settled status on the basis of completing a continuous qualifying period of less than five years residence, but it was not found he met that

requirement for the same reason, in that he had failed to provide sufficient evidence to confirm the dates he was resident in the UK and Islands. Therefore, it was found the appellant did not met the eligibility requirements for settled status set out in rule EU 11 or for pre-settled status set out in rule EU 14, leading to a refusal under paragraph EU 6.

4. The Judge notes the appellant is a citizen of the Democratic Republic of Congo whose case is that he is a family member of the EEA national Sponsor and that his application/appeal should be allowed.

5. The Judge had the benefit of seeing and hearing oral evidence being given by the appellant and Sponsor in addition to the documentary evidence provided.

6. The Judge records during the course of the hearing an application being made by the Secretary of State's representative to raise a new issue, not in the refusal letter, about the relationship. The Judge refused the application on the basis it was considered unfair for such an issue to be raised at this late stage. At [18] the Judge notes the appeal proceeded on the basis of the single agreed issue to be determined, whether the appellant was in the UK prior to the specified deadline and was therefore a family member (spouse) of a relevant EEA citizen as defined by Annex 1 to Appendix EU of the Immigration Rules, and the proportionality of refusal.

7. The Judge's findings are set out from [54] which, at [55], contains a chronology of the events extracted from the evidence provided by the appellant in the following terms:

> 55. Looking at the evidence provided by the Appellant, the chronology of events is as follows:
>
> (i) The Sponsor came to the UK in 2012.
> (ii) The Appellant claimed asylum in France in 2017.
> (iii) On 2 May 2019 he and the Sponsor had a 'cultural marriage' remotely in Congo.
> (iv) On 6 July 2020 the Appellant was issued with a Carte Badgeo by CTSStrasbourg, being a card which can be used to pay for public transport in Strasbourg.
> (v) On 21 October 2020 he was issued a new Congolese passport with which he says he applied for Settled Status in the UK.
> (vi) On 12 November 2020 he and the Sponsor married through a ceremony in Congo, their families acted for them in Congo as they were not physically there; he was in France at the time.
> (vii) On 24 December 2020 he arrived in the UK and made his way to Birmingham to join the Sponsor.
> (viii) On 27 December 2020 he attended Heaven Gate Centre Church.
> (ix) On March 2021 the Sponsor was granted settled status in the UK.
> (x) On 25 April 2021 the Appellant made his application under the EUSS.

8. The Judge did not find the appellant met the requirements of EU 11, did not have valid evidence of indefinite leave to enter or remain under condition 2 and could not meet any of the other remaining conditions [56].

9. The Judge accepted that the appellant and Sponsor had been married by proxy in the DRC on 4 December 2020, before the specified deadline, and was therefore married by the specified date [64 – 65].

10. The Judge records several concerns about the evidence as to when the appellant was in the United Kingdom which are set out at [73 (i) – (ix)] which were found to undermine the credibility and reliability of his evidence.

11. At [75] the Judge writes: *"Overall, I do not find it proved on balance that the Appellant was in the UK on or prior to 31 December 2020. Indeed, I cannot make a finding as to when he did in fact arrive in the UK save that I note he registered*

with a GP on 18 March 2021 so must have arrived on or before that date". The Judge did not find the appellant met the requirements of EU 14 of Appendix EU as he did not complete the continuous qualifying period of residence of any period on or before the specified date [76] and could not meet the requirements of the relevant immigration rule [77].

12. The Judge went on to consider a further submission that there had been a breach of the Withdrawal Agreement from [78], concluding that as the appellant did not fall within Article 10 of the Withdrawal Agreement there had been no breach of the same [87]. The decision was also found not to be disproportionate [88].

13. The appellant sought permission to appeal which was granted by another judge of the First-tier Tribunal on 21 September 2022, the operative part of the grant being in the following terms:

> 2. The Judge has arguably made an error of law in that having made findings of fact that (a) the Appellant and sponsor were married before the specified date at paragraph 65 and (b) that the Appellant is the spouse and therefore the family member of the EEA sponsor, he has misapplied the requirements of Appendix EU as they relate to eligibility for indefinite leave to enter or remain, rather than the requirements of paragraph EU14, which deals with eligibility for limited leave to remain.
> 3. The Judge has therefore arguably reached conclusions which he was not entitled to reach on the basis of the facts found.

14. The Secretary of State has filed a Rule 24 response dated 4 October 2022 in the following terms:

> 3. The Respondent opposes the appellant's appeal.
> 4. The GOA assert that neither party went on to consider the implications of the findings made [Para 6], it is then stated that the appellant meets the requirements for limited leave to remain as a joining family member [Para 8].
> 5. It is submitted that these arguments were not put before the Judge of the First-tier Tribunal. The appellant's case was that he is a family member of an EEA national [4], not a joining family member. The Judge asked for confirmation that the appellant applied as a family member of a relevant EEA citizen [11]. The Judge sets out that the single issue to be determined was whether the appellant was in the UK prior to the specified deadline and was therefore a family member [18].
> 6. No issues are taken in the GOA as to the Judge's findings that the appellant was not present in the UK prior to the 31st December 2020 [66-75].
> 7. It is submitted that the appellant did not meet the definition of a joining family member in Annex 1 of Appendix EU which is why the Judge does not consider this in the determination [48] as it was the appellant's case that he was present in the UK before the specified date.
> 8. In summary, the Respondent will submit inter alia that the judge of the Firsttier Tribunal directed himself appropriately.

Discussion and analysis

15. The Secretary of State's challenge is based upon the specific terms of the grounds of appeal. These refer initially to the finding of the Judge in relation to the marital relationship and at [6] to the issue between the parties at the hearing being the question of whether the appellant was in the United Kingdom before 11 PM on 31 December 2020 or not. It is accepted the Judge did not accept the evidence that he was and thus dismissed the appeal. That finding is not challenged in the Grounds seeking permission to appeal.

16. The grounds of appeal raise what appears to be a new matter, drafted by Counsel who was not before the Judge. The Grounds set out the text of paragraph

14A of Appendix EU and the criteria for persons eligible for limited leave to enter or remain as a joining family member of a relevant sponsor (our emphasis). There is reference to Annex 1 of Appendix EU which provides that to qualify as a joining family member or spouse a person must show (a) the marriage was contracted or the civil partnership formed before the specified date; or (b) the appellant was the durable partner of the relevant sponsor before 1 January 2021 and the partnership remained durable at that date.

17. The grounds assert nothing in Appendix EU or elsewhere prevents an application as a joining family member being made in-country, arguing para EU3A envisages such an application. At [11] of the Grounds it is written:

> 11. The Appellant's application was for limited leave to remain under Appendix EU. The grounds of appeal per Reg 8 of the Immigration (Citizens Rights Appeals) (EU Exit) Regulations 2020 are that the decision is not in accordance with Appendix EU. Having accepted that the Appellant was a spouse, and that the marriage was lawfully contracted prior to 31 December 2020, the Appellant qualified for pre-settled status either as a family member, or as a joining family member.

18. There is a clear move within the tribunals for a more disciplined and robust approach being taken to the conduct of litigation. The recent decision of the Upper Tribunal by a panel composed of the President of UTIAC, Dove J, and the President of the First-tier Tribunal, Judge Plimmer reported as TC (PS compliance, "issue-based" reasoning) [2023] UKUT 00164 is an example of this, the headnote of which reads:

> 1. Practice Statement No 1 of 2022 ('the PS') emphasises the requirement on the part of both parties in the FTT to identify the issues in dispute and to focus on addressing the evidence and law relevant to those issues in a particularised yet concise manner. This is consistent with one of the main objectives of reform and a modern application of the overriding objective pursuant to rule 2 of the Tribunal Procedure (FTT)(Immigration and Asylum Chamber) Rules 2014. It ensures that there is an efficient and effective hearing, proportionate to the real issues in dispute.
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> 2. A PS-compliant and focussed appeal skeleton argument ('ASA') often leads to a more focussed review, and in turn to a focussed and structured FTT decision on the issues in dispute. Reviews are pivotal to reform in the FTT. The PS makes it clear that they must be meaningful and pro-forma or standardised responses will be rejected. They provide the respondent with an important opportunity to review the relevant up to date evidence associated with the principal important controversial issues. It is to be expected that the FTT will be astute to ensure that the parties comply with the mandatory requirements of the PS, including the substantive contents of ASAs and reviews.
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> 3. The identification of 'the principal important controversial issues' will lead to the kind of focussed and effective FTT decision required, addressing those matters, and only those matters, which need to be decided and concentrating on the material bearing upon those issues. The procedural architecture in the FTT, including the PS under the reformed process, is specifically designed to enable these principal important controversial issues to be identified and for the parties' preparation, as well as the hearing to focus upon them.
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> 4. FTT decisions should begin by setting out the issues in dispute. This is clearly the proper approach to appeals under the online reform procedure where at each major stage there is a requirement to condense the parties' positions in a clear, coherent and concise 'issues-based' manner.
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> 5. The need for procedural rigour at every stage of the proceedings applies with equal force when permission to appeal to the UT is sought and in the UT, including a focus on the principal important controversial issues in the appeal and compliance with directions.

> The requisite clear, coherent and concise 'issues-based' approach continues when a judge considers whether to grant permission to appeal. This means that the judge should consider whether a point relied upon within the grounds of appeal was raised for consideration as an issue in the appeal.
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> 6. The reasons for the permission to appeal decision need to focus upon, in a laser-like fashion, those grounds which are arguable and those which are not. To secure procedural rigour in the UT and the efficient and effective use of Tribunal and party time in resolving the issues that are raised, it is necessary for the grant of permission to clearly set the agenda for the litigation for the future.

19. The Judge clearly focused on the important issues that had been identified with the parties at the outset of the litigation which did not include matters which it is alleged the Judge should have dealt with in the opinion of the author of the grounds, even though they were not live issues before the Judge.
20. The grounds seeking permission to appeal fail to identify anything in the decision actually made that shows the Judge made an error of law, let alone a material error of law, in his focused findings on the identified core issues. There is not.
21. The grounds assert the Judge has erred in law in failing to consider an issue that was specifically excluded from consideration, as not having been identified as one of the important controversial issues at large. Accordingly, we do not find the grounds establish material legal error.
22. If the appellant believes that he is entitled to the remedy sought on the grounds set out in the application for permission to appeal, i.e. a completely different basis from that he originally claimed to be entitled to and which he maintained before the Judge, it is open to him to make a fresh application which can be considered on its merits. It may be that some of the factual findings made by the Judge will assist him but that will be for the decision-maker to consider if such an application is made.
23. We find no material legal error made out in the Judge's findings in relation to the issues identified as being at large in the appeal.
24. We also referred the matter of anonymity. An application was made before the Judge for an anonymity order on the basis the appellant had claimed asylum in France and may face a risk. In the determination under challenge the Judge comments that having reviewed the matter an anonymity order is not appropriate although, as it was stated at the hearing that one will be granted, it was left in place. Having reviewed the matter we do not consider in this era of open justice that any reason has been established for why an anonymity order should be made in relation to this appeal. A case to the contrary was not put by Mr Khan. On that basis we make no anonymity order.

Notice of Decision

25. The First-tier Tribunal has not been shown to have materially erred in law. The determination shall stand.

C J Hanson

Judge of the Upper Tribunal
Immigration and Asylum Chamber

2 August 2023