IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2022-006542
First-tier Tribunal No: EA/15838/2021

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On the 14 December 2023

Before

UPPER TRIBUNAL JUDGE SMITH

Between

MR KELVIN YAW AMANKWA
(NO ANONYMITY DIRECTION MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Not in attendance and not represented
For the Respondent: Ms J Isherwood, Senior Home Office Presenting Officer

Heard at Field House on 7 December 2023

DECISION AND REASONS

1. The Appellant appeals against the decision of First-tier Tribunal Judge C J Woolley promulgated on 15 March 2022 ("the Decision"), dismissing the Appellant's appeal against the Respondent's decision dated 27 October 2021 refusing him a family permit under the EU Settlement Scheme ("EUSS") and Appendix EU (Family Permit) to the Immigration Rules ("Appendix EU (FP)").

2. The facts of this case can be shortly stated. The Appellant is a Ghanaian national now aged 23 years but just 21 years at date of application. He seeks to join his father who is resident in the UK and married to an EEA (German) citizen ("the Sponsor"). The Sponsor is Ms Charity Schroder Avoga. Although the Appellant is over 21 years, he can still succeed under Appendix EU (FP) if he can show that he is

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dependent on his father and if his father is the spouse of an EEA citizen who is in the UK.

3. The Respondent refused the Appellant's application on two bases. First, he did not accept that the relationship between the Appellant's father and the Sponsor was a genuine one. Second, he did not accept that the Appellant was dependent on his father and the Sponsor for his essential living needs.

4. The Appellant's appeal was determined on the papers at the request of the parties. The Judge found that the Sponsor was in the UK and exercising Treaty rights ([15] of the Decision). The Judge then observed that the Appellant's case was put forward on the basis of the Immigration (European Economic Area) Regulations 2016 which did not apply. Having directed himself to the correct legal framework (the EUSS and Appendix EU (FP)) the Judge found that the Appellant could not be a family member as he was no longer a child ([17] of the Decision). Although he referred to the basis of the Respondent's decision as being that the Appellant was not dependent on the Sponsor or his father at [18] of the Decision, he found that this was not a relevant issue because the Appellant was no longer a child. He therefore dismissed the appeal. He also found that Article 8 ECHR was not an issue before him.

5. The Appellant challenges the Decision on the basis that the Judge has wrongly failed to take into account DNA evidence which shows that he is related as claimed to his father and has wrongly assumed that his father must show dependency on the Sponsor. Those grounds are misconceived but I do not blame the Appellant for this as he is not legally represented.

6. The reasons why the Decision contains arguable errors of law is however set out in the permission to appeal grant of First-tier Tribunal Judge Hollings dated 4 May 2022 as follows:

> "..2. The grounds assert that the Judge erred in law by finding the Appellant did not fall within the categories of person to whom the '*grace period'* applied. However, the Judge correctly identifies that the Immigration (European Economic Area) Regulations 2016 were revoked on 31st December 2020 and that the Appellant does not fall within the categories of persons to whom the '*grace period'* applies [at paragraph 16].
>
> 3. The grounds also assert the Judge erred by finding that the Appellant was not a family member of a '*relevant EEA citizen'.* The Judge found that the Appellant is not a child of the Sponsor's spouse because he was over 21 years of age on the date of application. He also found there was no need to consider the question of dependency. It is not clear from his decision whether or not the Judge accepted that the Appellant's father is in fact the spouse of a *'relevant EEA citizen'.* As such, he arguably fell into error. This is because there is provision for direct descendants aged 21 years or over of a relevant EEA citizen **or of their spouse or civil partner** [my emphasis] where they are

dependent on such under the definition of a *'child'* set out in Annex 1 of Appendix EU (Family Permit) of the Immigration Rules.

4. The grounds have, therefore, identified what is at least an arguable error of law. Permission to appeal is granted."

7. The matter comes before me to consider whether the Decision does contain errors of law. If I conclude that it does, I then have to consider whether to set it aside in consequence. If I do so, I either have to re-make the decision or remit the appeal to the First-tier Tribunal to do so.

8. The Appellant did not attend the hearing before me. He could not do so as he remains in Ghana. However, the notice of hearing was also intended to be sent to the Sponsor. Unfortunately, it appears that the Appellant and Sponsor failed to notify the Tribunal of a change of address. Accordingly, the notice of hearing was returned undelivered. Having checked with the Appellant, the Tribunal office was given an alternative address for the Sponsor of [5 ***** Close]. So far as I can see from the Tribunal's system, however, the notice of hearing was not re-sent to this address.

9. In those circumstances, I would ordinarily have adjourned the error of law hearing. However, having heard from Mr Clarke for the Respondent, I determined that it was not in the interests of justice to do so. Mr Clarke conceded that the Decision contained errors of law as set out below. There would be no point in re-listing the hearing in order for that concession to be re-made. I was satisfied that the concession was rightly made and in those circumstances the Appellant would obtain what he wanted, namely a setting aside of the Decision.

10. It also appeared to me that the appeal would have to be remitted to be re-determined afresh in the First-tier Tribunal. That is because there was a failure by the first Judge to make findings on the relevant issues. I have noted above that neither party was represented at the hearing before First-tier Tribunal Judge Woolley which no doubt did not assist his determination of the appeal. Both parties would be well advised to have the appeal re-determined with the benefit of a face to face or remote hearing rather than on the papers. However, the fact that the Appellant requested a paper hearing on the last occasion was a further reason why I did not consider it appropriate to adjourn the error of law hearing.

11. As Mr Clarke conceded, the definition of a "child" in Annex 1 to Appendix EU (FP) is as follows:

"child (a) the direct descendant under the age of 21 years of a relevant EEA citizen … or of their spouse or civil partner; or

<u>(b) (i) the direct descendant aged 21 years or over of a relevant EEA citizen …or of their spouse or civil partner; and</u>

<u>(ii) (aa) dependent on the relevant EEA citizen or on their spouse or civil partner:</u>

(aaa) (where sub-paragraph (b)(ii)(aa)(bbb) below does not apply) at the date of application; or

(bbb) (where the date of application is after the specified date and where the applicant is not a **joining family member)** at the specified date; or …

'dependent' means here that:

(a) having regard to their financial and social conditions, or health, the applicant cannot meet their essential living needs (in whole or in part) without the financial or other material support of the relevant EEA citizen … or of their spouse or civil partner; and

(b) such support is being provided to the applicant by the relevant EEA citizen …or by their spouse or civil partner; and

(c) there is no need to determine the reasons for that dependence or for the recourse to that support

[underlining is my emphasis]

12. Accordingly, as the Respondent's decision under appeal makes clear, the issue for the Judge was whether the Appellant, who was aged 21 or above on the date of application, fell within the definition of "child" and therefore "family member" on the basis of dependency on his father and/or the Sponsor.

13. As Mr Clarke also pointed out, the lack of evidence of dependency was not the only reason for the Respondent's decision. The Respondent also did not accept that the Appellant's father was the spouse of Ms Schroder Avoga. The Judge did not determine that issue.

14. For those reasons, I conclude that the Decision contains errors of law as the Judge failed to make findings on what were the relevant issues. It is therefore appropriate to set aside the Decision.

15. For the reasons also set out above, as the appeal requires to be re-determined entirely afresh, it is appropriate for the appeal to be remitted to the First-tier Tribunal for re-determination.

16. I observe, having briefly perused the Appellant's bundle before the First-tier Tribunal, that it does not appear to contain documents relevant to the issues as set out above. I would therefore urge the Appellant and the Sponsor to take note of what is set out above regarding the two issues which a second Judge will have to determine and to provide the First-tier Tribunal with whatever evidence they have before the next hearing before that Tribunal. As above, they should also consider whether it would be more appropriate to attend a hearing on the next occasion rather than asking for a determination of the appeal on the papers.

NOTICE OF DECISION

The decision of Judge C J Woolley promulgated on 15 March 2022 contains errors of law which are material. I set that

decision aside and remit the appeal to the First-tier Tribunal for re-hearing before a Judge other than Judge C J Woolley

L K Smith
Upper Tribunal Judge Smith
Judge of the Upper Tribunal
Immigration and Asylum Chamber

8 December 2023