IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2023-001996

First-tier Tribunal No: EA/05510/2022

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On 6 August 2023

Before

UPPER TRIBUNAL JUDGE BLUNDELL

Between

ENTRY CLEARANCE OFFICER, PRETORIA

Appellant

and

LINDA CHAWA KAWONGA (+1)

Respondents

Representation:
For the Appellant: Mr Wain, Senior Presenting Officer
For the Respondent: Mr Burrett, instructed by Direct Access

Heard at Field House on 21 July 2023

DECISION AND REASONS

1. The Entry Clearance Officer appeals, with the permission of First-tier Tribunal Judge Hollings-Tennant, against the decision of First-tier Tribunal Judge Maurice Cohen ("the judge"). By a decision which was issued on 1 March 2023, the judge allowed Ms Kawonga's appeal against the ECO's refusal to issue her a Family Permit under Appendix EU (FP) to the Immigration Rules.

2. To avoid confusion, I will refer to the parties as they were before the FtT: Ms Kawonga as the appellant and the Entry Clearance Officer as to the respondent.

Background

3. The appellant is a citizen of Malawi who was born on 20 January 1992. Her daughter Comfort Ivy Mlundira, born 10 August 2008, is dependent upon her appeal.

4. On 14 January 2022, the appellant and her daughter applied for family permits to enter the United Kingdom so as to join the sponsor, Steven Eric Mlundira. The sponsor is the appellant's husband and Comfort's father. The appellant and Mr Mlundira have been in a relationship since January 2007 and they married (by proxy) in Malawi on 10 July 2019.

5. Mr Mlundira is a Malawian national who came to the United Kingdom in 2013. He was granted a residence card as the extended family member of an EEA national in 2014. It was subsequently accepted by the respondent, following judicial review proceedings before Lang J in the Administrative Court, that he had acquired a right to reside permanently in the United Kingdom under the Immigration (EEA) Regulations 2016. He was granted Indefinite Leave to Remain under the EU Settlement Scheme on 13 December 2021.

6. The respondent refused the appellant's application on 27 May 2022. The material part of the decision was in these terms:

> Our records show that the person you have stated is acting as your sponsor for this application is a citizen of Malawi, a country outside of the European Economic Area (EEA) and Switzerland. As your sponsor is not an EEA national they cannot be considered as a 'relevant EEA citizen' as stated in Appendix EU (Family Permit) to the Immigration Rules. Therefore, you are not eligible to apply for the EUSS Family Permit.

The Appeal to the First-tier Tribunal

7. The appellant gave notice of her appeal to the First-tier Tribunal (IAC) on 15 June 2022. The point made in the grounds of appeal may be stated quite shortly. The sponsor (for it was the sponsor who wrote the grounds of appeal) contended that he was not required to satisfy the definition of a relevant EEA citizen because he was exempt from immigration control.

8. The appeal was heard by the judge at Taylor House on 17 January 2023. The appellant was represented by Mr Burrett of counsel, as she was before me. The respondent was represented by a Presenting Officer (not Mr Wain). The judge heard no oral evidence and resolved the appeal on the basis of submissions only.

9. The judge concluded that the respondent had been 'oblivious to her own guidance' and that the sponsor was 'clearly eligible as a person who is exempt from immigration control having obtained permanent residence under the EEA Regulations in 2017'. The judge found that the decision was 'contrary to the Withdraw [sic] Agreement' because the decision would 'force the sponsor to leave the EU, plainly undermining the integrity of the agreement'. The judge concluded by stating that the appeal was allowed 'under the Regulations'.

The Appeal to the Upper Tribunal

10. The Secretary of State sought permission to appeal. There were two grounds of appeal. The first was that the judge misunderstood the Immigration Rules. The second was that the judge had not correctly understood the meaning of the term 'exempt from immigration control'. Judge Hollings -Tennant considered both points to be arguable.

11. When the appeal was called on before me on 21 July 2023, I told Mr Burrett that I had not been able, despite spending some time reading the papers before the First-tier Tribunal and the Upper Tribunal in detail, to understand the basis upon which the judge had allowed the appeal. I asked Mr Burrett whether it was contended that the sponsor was exempt from immigration control. Mr Burrett accepted that the sponsor was not. I suggested to him that that concession necessarily resulted in the FtT's decision being set aside. Mr Burrett did not seek to make any submissions in defence of the FtT's decision, other than to suggest that it might have been brought about by some confusion in the respondent's own guidance. I announced that I would set aside the decision of the FtT. Both representatives then invited me to remake the decision on the appeal immediately. Mr Burrett accepted that there was no proper basis upon which he could invite me to allow the appeal. I informed Mr Wain that I did not need to hear from him and that I would substitute a decision dismissing the appellant's appeal.

Analysis

12. It is really very unfortunate that this appeal has progressed as far as this. It was as clear as day that the respondent's decision was unanswerable on the facts of this case. It seems that the sponsor became confused when attempting to navigate the labyrinthine requirements of the Immigration Rules and that the judge also became confused.

13. The ground of refusal in this case was that the appellant was not the family member of a 'relevant EEA citizen'. That she was obliged to meet that requirement is clear from paragraph FP6(1) of Appendix EU (FP) of the Immigration Rules. I do not understand there to have been any confusion in this respect before the FtT. The confusion appears to have arisen when considering whether the sponsor met the *definition* of a 'relevant EEA citizen'.

14. That definition is to be found in Annex 1 of Appendix EU (FP), which contains a lengthy and daunting set of definitions, many of which are themselves lengthy and daunting. There are two different definitions of a relevant EEA citizen. One applies to applications which were made before the end of the 'Grace Period' – up to and including 30 June 2021. The second definition applied to application such as this, which were made after the end of the Grace Period – on or after 1 July 2021. One of the categories of person who is stated to be a 'relevant EEA citizen' is 'a person exempt from immigration control'.

15. The term 'person exempt from immigration control' is itself defined in Annex 1 of Appendix EU (FP). At the date of the appellant's application for entry clearance and at all times thereafter, that definition has been as follows:

> a person who:
>
> (a) is a national of: Austria, Belgium, Bulgaria, Croatia, Republic of Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Iceland, Ireland, Italy, Latvia, Liechtenstein, Lithuania, Luxembourg, Malta, Netherlands, Norway, Poland, Portugal, Romania, Slovakia, Slovenia, Spain, Sweden or Switzerland; and
>
> (b) is not a British citizen; and

> (c) is exempt from immigration control in accordance with section 8(2), (3) or (4) of the Immigration Act 1971; and
>
> (d) the entry clearance officer is satisfied, including by the required evidence of qualification, would have been granted indefinite leave to enter or remain or limited leave to enter or remain under (as the case may be) paragraph EU2 or EU3 of Appendix EU to these Rules, if they had made a valid application under it before 1 July 2021, and that leave would not have lapsed or been cancelled, curtailed, revoked or invalidated before the date of application under this Appendix

16. It is readily apparent from the word 'and' which appears at the end of each of these provisions that they are conjunctive. In other words, each of those provisions must be satisfied. There can be doubt that the sponsor does not fall within (a) of the definition. He is a Malawian national and he holds no other nationality.

17. Nor can there be any doubt that the sponsor does not fall within (c) of the definition. Section 8(2), (3) and (4) of the Immigration Act 1971 refer to those who are exempted from immigration control by order of the Secretary of State, diplomats and their family members, and members of the armed forces. The sponsor has never contended that he falls within any of those categories, nor is there any conceivable basis that he might do so. It is absolutely clear, therefore, that he is not and never has been a person exempt from immigration control, as that term is defined in the Appendix EU (FP) of the Immigration Rules.

18. Unfortunately, it seems that the confusion persisted even to the hearing before me, despite the clarity and focus in the Secretary of State's grounds of appeal to the Upper Tribunal.

19. Mr Burrett revealed during the course of his submissions that he was looking not at Appendix EU (FP) of the Immigration Rules but at Appendix EU. Appendix EU contains the definition of 'person exempt from immigration control' which I have set out above, only that the final part of that definition ((d)) has been removed. Appendix EU also contains a definition of an 'exempt person', however, and it is seemingly this which has given rise to much of the confusion in this case. The term 'exempt person' is not to be used interchangeably with the term 'person exempt from immigration control' and it seems that the sponsor, Mr Burrett and the judge in the FtT might have erred in failing to recognise that. Whether a sponsor is an 'exempt person' is a question which arises in a wholly different context to that which obtains in this case. It arises in the context of considering claims connected to a right to reside in the UK under the *Zambrano* principle. This case is immeasurably divorced from that category of case. In particular, paragraph EU12 of Appendix EU was of no relevance whatsoever in this appeal, and the sponsor errs in his written submissions to the Upper Tribunal in suggesting otherwise.

20. If all parties in the FtT had focused on the self-contained terms of Appendix EU (FP) to the Immigration Rules, the result of this case could not have been clearer. The sponsor is a Malawian national with indefinite leave under the Immigration Rules. He has never been exempt from immigration control. The very fact that he was granted leave to remain establishes that he is not exempt from immigration control. As the ECO held, he was not a relevant EEA citizen for the purposes of the appellant's application, and she had no claim whatsoever under

these provisions of the Immigration Rules. The only proper outcome insofar as the appeal was brought in reliance on the Immigration Rules, therefore, was for it to be dismissed.

21. The respondent's guidance was of no assistance to the FtT or to the Upper Tribunal. The Immigration Rules are clear. There is no need to refer to the terms of any guidance. There is, in any event, no ground of appeal available to the appellant that the respondent's decision was not in accordance with the law, including any guidance issued by her.

22. I do not understand why the judge held that the respondent's decision was 'contrary to the Withdraw Agreement'. The sponsor is evidently within the personal scope of that agreement but the judge did not explain why the appellant was thought to be. Mr Burrett did not submit that there was any proper basis for concluding that the appellant fell within Article 10 of the Agreement and there plainly is not. In respect of the second ground of appeal available to the appellant in this case, therefore, the only proper outcome was for the appeal to be dismissed.

23. I therefore set aside the decision of the FtT and substitute a decision dismissing the appellant's appeal. She and the sponsor will wish to consider with the benefit of proper legal advice whether she and her daughter might yet be able to make an application to enter the United Kingdom on a different basis. Given that the sponsor has Indefinite Leave to Remain under the Immigration Rules, it might be thought that they should apply under Appendix FM of those Rules but that is a matter for them.

Notice of Decision

The First-tier Tribunal erred in law in allowing the appellant's appeal. I set aside its decision. I remake the decision on the appeal by dismissing it.

M.J.Blundell

Judge of the Upper Tribunal
Immigration and Asylum Chamber

24 July 2023