



**Upper Tribunal  
(Immigration and Asylum Chamber)**

**Appeal Number:  
UI-2022-001223 [PA/11794/2021]  
UI-2022-001225 [PA/11798/2021]**

**THE IMMIGRATION ACTS**

**Heard at Birmingham CJC  
On the 30 August 2022**

**Decision & Reasons Promulgated  
On the 10 October 2022**

**Before**

**UPPER TRIBUNAL JUDGE HANSON**

**Between**

**BENEDICTA AMPOMAH BOAKYE  
SERWAA AKOTO ISIFU  
(Anonymity direction not made)**

Appellant

**and**

**THE SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Respondent

**Representation:**

For the Appellant: Miss Rutherford instructed by VKM Solicitors.  
For the Respondent: Mr Bates, a Senior Home Office Presenting Officer.

**DECISION AND REASONS**

- 1.** The appellants' appeal with permission a decision of First-tier Tribunal Judge Mulholland ('the Judge') promulgated on 11 March 2022 following a remote hearing at Taylor House on 2 March 2022.
- 2.** The appellants are citizens of Ghana.

- 3.** The appeal before the Judge arose out of a decision made on an application dated 9 June 2021 under the EU Settlement Scheme as family members of an EEA national with the right to reside in the United Kingdom. It does not appear to be disputed that the reality of the situation is that the application made was an application that was bound to fail as the appellants could not satisfy the definition of a 'family member' set out in the relevant provisions.
- 4.** The appellant's claim to be dependent upon a paternal uncle who is in the UK exercising treaty rights. The thrust of their claim before the Judge was that the respondent had failed to decide a validly linked EEA Family Permit application submitted online on 20 January 2020 under the Immigration (European Economic Area) Regulations 2016 that they stated had never been withdrawn.
- 5.** The appellant's claim to have enrolled their biometric information following the lodging of the application, on 26 October 2020 and on 28 October 2020 filing supporting documents in the usual manner at the Visa Application Centre Accra. It was claimed there was delay in enrolling biometrics due to the suspension of TLS contract operations in Ghana due to the COVID-19.
- 6.** There was no appearance by the Secretary of State before the Judge.
- 7.** The 9 June 2021 application was for an EU Settlement Scheme (EUSS) Family Permanent under Appendix EU (Family Permit) to the Immigration Rules on the basis of being a 'family member of a relevant EEA citizen.'
- 8.** The Judge noted that the appellants in their notices and grounds of appeal relied upon the EEA Regulations 2016, yet the decision appealed against was taken under the EUSS Scheme. The Judge notes the Secretary of State had not embarked on considering whether the appellants were dependent on their sponsor as claimed and concluded therefore that the Tribunal had no jurisdiction to do so for itself and that the appeals must fail.
- 9.** It is unfortunate that this appeal seems to have been affected by problems beyond the control of either the appellants or the respondent's representative.
- 10.** The Upper Tribunal has recently provided further guidance in relation to interpretation of the Withdrawal Agreement and ability of individuals to proceed with appeals under similar circumstances to that faced by these appellants in the cases of Celik [2022] UKUT 00220 and Batool [2022] UKUT 00219. A common finding in both these cases was that an extended family member whose entry and residence had not been facilitated by the United Kingdom before 11 PM on 31 December 2020 and who had not applied for facilitation of entry and residence before that time cannot rely upon the Withdrawal Agreement or Immigration Rules.
- 11.** In Celik it was found that a person with no substantive right i.e. a person whose entry has not been facilitated by the UK before 31 December 2020 or had not applied for such facilitation before that time, could not invoke the concept of proportionality in Article 18.1 of the Withdrawal Agreement or the principle of fairness.

- 12.** It is not disputed that the United Kingdom had not granted anything to the two appellants to facilitate their entry prior to the 31 December 2020.
- 13.** It does not appear to be in dispute that in addition to the appeal against the decision under the EUSS Scheme the Judge was asked to consider the impact of the earlier application made prior to the 31 December 2020 and its implications under the Withdrawal Agreement. This was therefore a matter before the First-tier Tribunal.
- 14.** It is appreciated that the Judge did not have the benefit of either the two Upper Tribunal cases referred to above, which have only recently been decided, but they considered the law that prevailed at the date of the hearing before the Judge in this appeal.
- 15.** It is not disputed the appellant's claim that an application had been made, which required a specific finding to be made by the Tribunal of whether that application was a valid application in the sense that such a term is understood. An application that is, for whatever reason, not valid will not satisfy the definition of an application for facilitation before 31 December 2020.
- 16.** If it had been found that a valid application was made, as a matter of fact, it was then necessary for the Tribunal to consider whether the concept of proportionality or fairness enables the appellants to succeed under the EU (Exit) Regulations 2020. That will be a question of both fact and law.
- 17.** It is not made out that article 8 ECHR was raised before the Judge and as noted in Celik, the First-tier Tribunal can considering human rights grounds of appeal subject to the prohibition imposed in regulation 9(5) upon the Tribunal considering new matter without the consent of the Secretary of State.
- 18.** I consider it appropriate in all the circumstances to allow the appellant's appeal and remit the matter to the First-tier Tribunal at Birmingham, the nearest court of the appellant's sponsor and representative.
- 19.** I give no indication as to the likely outcome of the appeal. As stated in court it may be that the result will be exactly the same, it may not, but the appellants are entitled to a proper examination of the merits of the challenge as pleaded. I cannot say at this time that the error found is not material.
- 20.** The Judge's findings dismissing the appeal against the post 31 December 2020 application shall stand as it is not disputed the appellants are not family members as defined in Appendix EU.
- 21.** Further directions, if required, for the effective management of the appeals can be given by the First-tier Tribunal at Birmingham.

## **Decision**

- 22. The Judge materially erred in law. I remit the appeal to the First-tier Tribunal at Birmingham.**

Anonymity.

The First-tier Tribunal made no order pursuant to rule 45(4)(i) of the Asylum and Immigration Tribunal (Procedure) Rules 2005. I make no such order pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008. No-one shall publish or reveal any information, including the name or address of the appellant/respondent, likely to lead members of the public to identify the appellant/respondent. Failure to comply with this order could amount to a contempt of court.

Signed.....  
Upper Tribunal Judge Hanson

Dated 30 August 2022