IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2022-003894
UI-2022-03893
FtT No: EA/00877/2022
EA/00879/2022

THE IMMIGRATION ACTS

Decision & Reasons Issued:
29 May 2023

Before

UPPER TRIBUNAL JUDGE BLUNDELL

Between

ENTRY CLEARANCE OFFICER

Appellant

and

(1) JOSEPH DAPAAH
(2) EMMANUELL ASARE

Respondents

Representation:
For the Appellant: Ms Lecointe, Senior Presenting Officer
For the Respondent: Mr Khushie, Solicitor of Bedfords Solicitors

Heard at Field House on 2 December 2022

DECISION AND REASONS

1. The Entry Clearance Officer appeals, with permission granted by First-tier Tribunal Judge Gumsley, against the decision of First-tier Tribunal Judge Hawden-Beal, to whom I shall refer as 'the judge'. By her decision of 25 July 2022, the judge allowed the appeals on the basis that the ECO's decision was discriminatory and therefore contrary to Article 12 of the Withdrawal Agreement.

2. In order to avoid confusion, I shall refer to the parties as they were before the FtT: Mr Dapaah and Mr Asare as the appellants and the ECO as the respondent.

3. It was accepted before me by Mr Khushie that the respondent's grounds of appeal were made out and that the decision of the FtT cannot stand. The reasons for that entirely proper concession may be stated quite shortly.

4. Firstly, as Mr Khushie readily accepted, the decision of the FtT is vitiated by procedural impropriety. It was no part of his written or oral submissions before the judge that the respondent's decision was discriminatory under Article 12 of the Withdrawal Agreement. If that was a matter of concern to the judge, and certainly if it was to be the basis upon which she allowed the appeals, it was incumbent upon her as a matter of procedural fairness to raise the point with the respondent so that submissions could be made upon it. In failing to do so, the judge fell into error.

5. Secondly, and in any event, the basis upon which the judge allowed the appeal was simply not open to her. She found at [19] that the appellants could not succeed under the Immigration Rules and then she turned, quite correctly, to consider whether they could succeed under the only other ground of appeal available to them, which was with reference to the salient provisions of the Withdrawal Agreement. At [24], she concluded (again, correctly) that the appellants did not fall within the personal scope of the Agreement as defined at Article 10. That conclusion should have been determinative of the appeal but the judge did not treat it as such; she proceeded to consider Article 12 but that Article could not avail the appellants because it only applied, on its face, to 'the persons referred to in Article 10 of this Agreement'.

6. In the circumstances, it was not open to the judge to conclude that Article 12 of the Withdrawal Agreement could avail the appellants. The point was not raised by the appellants' solicitors, and for good reason, given that it could not succeed on the clear wording of the Agreement itself.

7. Mr Khsushie frankly accepted these difficulties before me and he accepted that the decision could not stand. Upon my indicating that the decision would be set aside, however, he submitted that the appeals should be remitted for hearing afresh before the FtT. I invited him to explain to me how the appeals stood any chance of succeeding before that Tribunal. He was unable to give any answer to that question, other than to indicate that he had advised the sponsor (who is presently in Ghana) on the prospects of success on the basis of the law as it currently stands.

8. I am indebted to Mr Khsuhie for his realistic stance. Whilst he was entitled to request a remittal to the FtT so that the sponsor can be present at a further hearing in this appeal, the reality of the situation is quite clear. The appellants cannot hope to succeed under the Immigration Rules or the Withdrawal Agreement for the reasons given by the judge and a remittal to the FtT would serve no proper purpose. The situation is quite different from that which was recently considered by the Court of Appeal in AEB v SSHD [2022] EWCA Civ 1512. In the circumstances, the correct course is

to set aside the decision of the FtT and to remake the decision on the appeals by dismissing them without a further hearing.

Notice of Decision

The decision of the First-tier Tribunal involved the making of an error on a point of law and that decision is set aside. The decisions on the appeals are remade and dismissed.

M.J.Blundell

Judge of the Upper Tribunal
Immigration and Asylum Chamber

5 December 2022