IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2022-006166
UI-2022-006167

First-tier Tribunal No:
EA/04236/2022
HU/51133/2022

THE IMMIGRATION ACTS

Decision & Reasons Issued:

17th October 2023

Before

UPPER TRIBUNAL JUDGE KOPIECZEK
DEPUTY UPPER TRIBUNAL JUDGE HANBURY

Between

MISS MERCY OMOVIGHO EGBIRI (1)
MR ENEBI AJIBOGWU (2)
MISS RHODA OJOMA AJIBOGWU (3)
MR AJIBOGWU STEPHEN OKOGWU (4)
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

ENTRY CLEARANCE OFFICER

Respondent

Representation:
For the Appellant: Ms Kogulathas of counsel
For the Respondent: Mr D Clarke a Home Office Presenting Officer

Heard at Field House on 8 September 2023

DECISION AND REASONS

Introduction and background

1. The present appeal is by the respondent who will continue to be referred to by her designation before the First -tier Tribunal (FTT), notwithstanding that her role is reversed in the present appeal.

2. There were originally four appellants but sadly two have died, namely, Mercy Omivigho Egbiri (appellant number 1) who had been born on 3 March 1986 but who died on 7 April 2023 and Mr Enebi Ajibogwu (appellant number 2) who was

born on January 1990 but who died on 14 July 2022. There are therefore only two remaining appellants - Miss Rhoda Ojoma Ajibogwu (3) born on 3 October 1997 (Rhoda) and Mr Ajibogwu Stephen Okogwu (4) born on 3 October 1993 (Stephen). Because of their decease, the appeals of Mercy Omovigho Egbiri and Enebi Ajibogwu no longer exist and their appeals before the Upper Tribunal have, therefore, come to an end *(FZ (human rights appeal: death: effect) Afghanistan* [2022] UKUT 00071 (IAC)). That decision has already been made by Upper Tribunal Judge Blum in respect of Mercy Omivigho Egbiri in a decision dated 7 August 2023.

3. The respondent appeals to the Upper Tribunal (the tribunal) with permission of FTT Judge Mills against the decision of FTT Judge Sweet (the judge). On 22 August 2022 the judge allowed the appellants' appeal against the respondent's refusal of their applications under the EU settlement scheme (EUSS) for family permits under Appendix EU of the Immigration Rules. Their applications, which were made on 9 August 2021 in the case of Mercy, 28 June 2021 in the case of Rhoda and Enebi and 9th August 2021 in the case of Stephen, on the basis that they were family members of a relevant EEA citizen sponsor, namely Jome Gowini Groenhart (the EEA citizen sponsor), a Dutch citizen. He is the partner of Esther Folashade Joseph, their mother (Ms Joseph). At the time of the applications she was his partner, but they have since married.

4. The respondent refused their applications for reasons set out in a refusal letter dated 29 December 2021 (in respect of the second and third appellants(i.e. including Rhoda)) and 24 January 2022 (in respect of the first and fourth appellants (i.e. including Stephen).

5. When he granted permission to appeal to the respondent on 20 November 2022, Judge Mills identified potentially material errors of law in that the judge may have misunderstood the definition of a "family member of a relevant EEA citizen" for the purposes of the application under the EU Settlement Scheme (EUSS) by reference to Appendix EU (Family Permit) to the Immigration Rules (Appendix EU), which deals with applications under the EEA Regulations which survived exit day on 31st December 2020.

The hearing

6. At the hearing Mr Clarke submitted that the appeal concerned the correct interpretation and application of the Appendix EU (Family Members) to the Immigration and in particular the definitions within annex 1 to that appendix. At the time of the application of the remaining appellants, who are siblings and respectively the son and daughter of Ms Joseph, she was not married to her partner. Thus, although the relationship between the appellants and the EEA sponsor was accepted they failed to meet the eligibility criteria. The tribunal's attention was particularly drawn to the definition of "child" and "spouse" in that appendix.

7. Ms Kogulathas accepted that the judge made an error of law as to the nature of the relationship between the sponsor and the appellants' mother. It was recognised that they would have to have married in order to satisfy the requirements of Appendix EU. However, Ms Kogulathas informed us that on 8th December 2022 the EEA citizen sponsor and Ms Joseph had married and therefore she argued it was possible to look at the definition of "family member of a

relevant EEA citizen" at that date. She referred to various paragraphs in Appendix EU which was accessed by the tribunal online at the hearing and, in particular, she appeared to refer to paragraph (e) of FP6. (1) of Appendix EU which provides that a "family member of a relevant EEA Citizen" includes a "child" but she acknowledged that this only applied to:

> "(e) the child or dependent parent of the spouse or civil partner of a relevant EEA citizen"

8. Nevertheless, she drew our attention to the Immigration (Citizens Rights Appeals) (EU Exit) Regulations 2020, SI 2020/61 (2020 Appeal Regulations). According to the explanatory memorandum accompanying that statutory instrument its purpose was to : ".....establish, from exit day, a right of appeal for EU, other European Economic Area (EEA) and Swiss citizens and their family members against decisions affecting their entitlement to enter and remain in the UK under the EU Settlement Scheme (EUSS) or decisions in relation to EUSS family permits or travel permits". Details of these Regulations and the changes they make to legislation are included in section 7 of the Explanatory Memorandum. She said that regulation 9 (4) of those regulations (regulation 9) provided:

> "(4) The relevant authority may also consider any matter which it thinks relevant to the substance of the decision appealed against, including a matter arising after the date of the decision."

9. However, she later recognised that the respondent would need to consent before the matter could be dealt with under that regulation (see regulation 9 (5)).

10. Mr Clarke, by way of reply, indicated that he had difficulty in accepting Ms Kogulathas's last submission. He said he did not consent to the matter being dealt with as she suggested under regulation 9 (4) of the Appeal Regulations. He said that the definition of a child was found in paragraph (a) (ii) (aa) of annex 1 of Appendix EU which refers to a person dependent on the "relevant EEA citizen or their spouse or civil partner". The respondent considered that the appellant had been unable to show dependency on a spouse who was married to an EEA national and the application was rightly refused by the respondent. He then referred to a document called "Rights of appeal", Version 14.0 "Guidance on when there is a Right of Appeal against Decisions in Immigration Cases, including mechanisms to prevent rights of appeal and prevent delay from appeals against unfounded claims". This was also accessed online by the panel at the hearing. He referred to page 28 of the PDF bundle. That document refers to new matters and states as follows:

> "If a new matter is raised before an appeal hearing, for example in the grounds of
> appeal, the SSHD should try to consider the matter before the appeal hearing so that
> consent can be given and the Tribunal can consider all matters relating to that
> appellant in a single appeal."

11. Mr Clarke submitted that regulation 9 (4) was subject as to the provisions found in section 85 (2) of the 2002 Act, whereby a new matter can be considered in the

circumstances set out there (which considers the circumstances in which a statement may constitute a ground of appeal within section 120 of that Act which itself deals with the circumstances in which the appellant may raise additional grounds in certain types of application).

12. At this point, Ms Kogulathas made her client's application to adduce fresh evidence. This was not available to us at the start of the hearing. We considered whether we should adjourn the appeal to consider the new evidence but after we rose to consider the application decided having considered the opposition of Mr Clarke to an adjournment and for the reasons below, we concluded our deliberations at the tribunal on the day of the hearing. Mrs Kogulathas provided evidence that in July 2023 the marriage between the EEA citizen sponsor and the Ms Joseph had taken place. Obviously, in the event that the decision was to be re-made by the tribunal, this was important evidence to be taken into account as it confirmed that the marriage had taken place between the EEA Citizen Sponsor and Ms Joseph by the date of the hearing in the tribunal. It would be more expedient than making a new application, she said. That scenario suggested a long delay.

13. The respondent, by way of response, said the refusal to consider fresh evidence was not justiciable in the current appeal, which solely related to the judge's decision on EEA grounds but would have to be the subject of a judicial review application.

14. Mr Clarke said that a refusal of consent by his client was not justiciable and it would be a waste of court time to have a further hearing. The tribunal should make a decision as soon as possible dismissing the appeal.

15. Ms Kogulathas submitted that the tribunal had power to adjourn the hearing and following the death two of the appellants it would be necessary to obtain an updated witness statement in support of the EEA application.

16. At the conclusion of the hearing we announced that we had decided that the FTT had erred in law such that its decision must be set aside, and that the decision would be re-made, dismissing the appeals. We were not satisfied that an adjournment of the hearing was warranted for the reasons given in paragraph 12. It was recorded that the respondent did not consent to the appellant reducing fresh evidence under regulation 9(4) of the 2020 Appeal Regulations which allows the authority to "…consider any matter which it thinks relevant to the substance of the decision appealed against, including a matter arising after the date of the decision."

Discussion

17. The issues in this appeal appear to be as follows:

(i) Whether the remaining appellants fell within the definition of a child of an EEA national for the purposes of Appendix EU;

(ii) If not, what is the correct method of disposal of the current appeal given that the FTT's decision, it is conceded, would amount to a material error of law and in particular;

(iii) Should the tribunal adjourn the case and allow the appellant to present new evidence, whether under regulation 9 (4) or otherwise, which might satisfy Appendix EU at the date of the hearing, or simply dismiss the appeal.

Conclusions

Definition of a "child of a relevant EEA citizen"

18. The definition of "child" in Annex 1 of Appendix EU (Family Permit) for the purposes of the above definition is:

> "(a) the direct descendant under the age of 21 years of the relevant EEA citizen (or, as the case may be, of a qualifying British citizen) or of their spouse or civil partner"

19. It is clear that the definition above does not include a child of unmarried partners but only children of married or those in a civil partnership.

20. The judge failed to engage fully with this point, concluding at paragraph 8 of his decision that those children of durable partners of EEA citizens were a "permitted category". That was not the case before the judge, who should have looked closely at the definition of "child of relevant EEA citizen" and asked whether the appellants fell within that category or not.

21. Plainly the judge did not do so, as Ms Kogulathas appeared to accept. This was a material error of law review justifying the setting aside of the decision in our view.

Correct method of disposal and regulation 9

22. In relation to regulation 9, Ms Kogulathas submitted that the respondent was a "relevant authority" which had jurisdiction to consider "any matter" including any matter arising "after the date of the decision". But, as Mr Clarke pointed out, that only arises where the Secretary of State has consented to that in accordance with regulation 9 (5). Given an opportunity to do so, Mr Clarke nevertheless declined to consent on behalf of the respondent.

23. Therefore, although we considered the option of ordering a further hearing in the circumstances outlined we did not consider that that was an appropriate course, bearing in mind the overriding objective of deciding cases justly and at proportionate expense including the need to avoid unnecessary delay.

24. Accordingly, we conclude that given the error of law which the tribunal has found to be present in the decision of the FTT and in particular the fact that the remaining appellants do not fall within the definition of "family member(s) of a relevant EEA citizen", the proper course is to re-make the decision by dismissing the appeals of each remaining appellant.

Notice of Decision

The decision of the FtT involved the making of an error on a point of law. Its decision is set aside and the decision is re-made, dismissing the appeals of the remaining appellants.

W.E.HANBURY

Judge of the Upper Tribunal
Immigration and Asylum Chamber

10 October 2023