IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2024-000168
UI-2024-000169
First-tier Tribunal No:
EU/51499/2023 EA/50190/2023

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On the 07 August 2024

Before

UPPER TRIBUNAL JUDGE BLUNDELL
UPPER TRIBUNAL JUDGE BULPITT

Between

Entry Clearance Officer

Appellant

and

Oscar Nhyiraba Senior Agyei
Osborn Nhyiraba Junior Agyei

Respondent

Representation:
For the Appellant: Ms Blackburn – Senior Home Office Presenting Officer
For the Respondent: Not Represented

Heard at Field House on 26 July 2024

DECISION AND REASONS

1. This is an appeal brought by the Secretary of State for the Home Department against the decision of First-tier Tribunal Judge J G Richards (the Judge) promulgated on 9 November 2023 in which the Judge allowed the appeals of Oscar and Osborn Agyei against decisions to refuse to grant them family permits under Appendix EU (Family Permit) of the Immigration Rules. To avoid confusion, although it is the Secretary of State who brings this appeal, in this decision we will refer to the parties as they were in the First tier Tribunal where Oscar and Osborn Agyei were the appellants and the Entry Clearance Officer was the respondent.

Factual Background

2. The appellants are twins born in Accra, Ghana on 26 October 2021, they were therefore on the day of the hearing approaching their third birthday. They are citizens of Ghana. Their mother is Dorcus Appiah a Ghanaian national. Ms

Appiah has two other children: David who is eleven years old and Loyce who is nine years old, who are also Ghanaian citizens. The appellants' maternal grandmother is Grace Boampong, an Italian citizen who is living and working in the United Kingdom having been granted indefinite leave to remain. We will refer to Ms Boampong as "the sponsor".

3. On 21 October 2020 Ms Appiah, David and Loyce made applications for EEA Family Permits under the Immigration (EEA) Regulations 2016 (the 2016 Regulations) to enable them to enter and settle in the United Kingdom on the basis of their relationship to the sponsor. During the time that her application for a Family Permit under the 2016 Regulations was being considered Ms Appiah gave birth to the appellants in October 2021. By that time the United Kingdom had left the European Union, the transition period following that departure had ended and the 2016 Regulations had been revoked. In November 2022 while she still awaited a decision concerning the applications she, David and Loyce had made, Ms Appiah submitted applications on behalf of the appellants seeking Family Permits under the European Union Settlement Scheme (EUSS).

4. On 23 January 2023 the respondent issued decisions refusing the appellants' applications because she was not satisfied that the appellants met the definition in the EUSS of a family member of a relevant EEA citizen and so was not satisfied that they were entitled to the family permit. The decision letters say this conclusion was reached because children born after the 31 December 2020 will only be eligible if (i) both their parents are relevant EEA citizens, or (ii) one of their parents is an EEA citizen and the other is a British citizen, or (iii) one of their parents is a relevant EEA citizen who has sole or joint rights of custody of them and the appellants did not meet this criteria.

5. Three days later on 26 January 2023 the respondent issued decisions granting Ms Appiah, David and Loyce's applications concluding that they met the criteria for family permits under the 2016 Regulations but because those Regulations were revoked issuing them with equivalent permits under the EUSS.

6. On 6 March 2023 the appellants appealed to the First-tier Tribunal against the respondent's decisions refusing their applications. While they waited for those appeals to be resolved, in July 2023 Ms Appiah, David and Loyce moved to the United Kingdom where they have remained, living with the sponsor while the appellants remain in Accra in the care of an aunt.

The Judge's decision

7. At the request of Ms Appiah, the appellant's appeals were considered by the Judge on the papers. At [8] and [9] of his decision the Judge identified that the issue in dispute was whether the appellants had established on the balance of probabilities that they were the family members of a relevant EEA citizen in accordance with Appendix EU (FP) of the Immigration Rules. At [10] of his decision the Judge sets out part of the definition of "a family member of a relevant EEA citizen" provided in Annex 1 to Appendix EU (FP) referring to the fact that it includes at (d) the child of a relevant EEA citizen and the family relationship existed before the specified date (31 December 2020) unless the child was born after that date; and the family relationship continues to exist at the date of the application. At [11] of his decision the Judge sets out the definition of a child in Annex 1 as "(a) the direct descendant under the age of 21 years of a relevant EEA citizen" and "(b) 'direct descendant' also includes a grandchild". At [12] the Judge says that having considered these provisions with care he was satisfied that because they were the grandchildren of the sponsor

the appellants met these definitions and that "there is no cause for the apparently different interpretation placed on these paragraphs by the Home Office Guidance". The Judge therefore allowed the appeals.

The respondent's appeal

8. The respondent appealed against the Judge's decision on the basis that the Judge had failed to consider the full definition of "a family member of a relevant EEA citizen" provided in Annex 1 to Appendix EU (FP) and that had he done so it would have been apparent that the definition includes additional requirements which children born after the specified date must meet. It was the failure to meet these additional requirements which led to the refusal of the applications and had the Judge considered these additional requirements he would have been compelled to dismiss the appeals. It is argued that for this reason the Judge's decision contains an error of law. Permission to appeal was granted by resident Judge Froom.

The appellant's reply

9. Although the appellants were not represented at the hearing, a skeleton argument was drafted on their behalf by a Mr Sam Kwesi Andoh. In that skeleton argument it is argued that the Judge was right to find that the appellants met the definition of "a family member of a relevant EEA citizen" provided in Annex 1 to Appendix EU (FP) which clearly includes grandchildren of a relevant EEA citizen. Alternatively it is argued that the respondent's decision to refuse the applications was an unlawful interference with their Article 8 Convention right to respect for their private and family life.

The Hearing

10. Ms Appiah attended the hearing and confirmed that though he had been helping her, she was not expecting Mr Andoh to attend to represent the appellants. She confirmed that she wished the hearing to proceed. We heard submissions from Ms Blackburn and Ms Appiah after which we reserved our decision which we now provide.

Analysis of Error of Law

11. It is abundantly clear that the Judge made an error of law when considering the definition of "a family member of a relevant EEA citizen" provided in Annex 1 to Appendix EU (FP). Because of the confusion that has arisen we set that definition out in full below, but we have highlighted the parts of the definition that are relevant to the appellants' appeals in bold:

> **<u>family member of a relevant EEA citizen</u>**
> **a person who has satisfied the entry clearance officer, including by the required evidence of family relationship, that they are**:
> (a) the spouse or civil partner of a relevant EEA citizen, and:
> (i) (aa) the marriage was contracted or the civil partnership was formed before the specified date; or
>
> (bb) the applicant was the durable partner of the relevant EEA citizen before the specified date (the definition of 'durable partner' in this table being met before that date rather than at the date of application)

and the partnership remained durable at the specified date; and

(ii) the marriage or civil partnership continues to exist at the date of application; or

(b) the specified spouse or civil partner of a Swiss citizen; or

(c) the durable partner of a relevant EEA citizen, and:
(i) the partnership was formed and was durable before the specified date; and

(ii) the partnership remains durable at the date of application; and

(iii) the date of application is after the specified date; and

(iv) where they were resident in the UK and Islands as the durable partner of the relevant EEA citizen before the specified date, the definition of 'durable partner' in this table was met before that date as well as at the date of application, and the partnership remained durable at the specified date; or

(d) **the child** or dependent parent **of a relevant EEA citizen, and the family relationship:**
(i) existed before the specified date (unless, in the case of a child, the person was born after that date, was adopted after that date in accordance with a relevant adoption decision or after that date became a child within the meaning of that entry in this table on the basis of one of sub-paragraphs (a)(iii) to (a)(xi) of that entry); and

(ii) continues to exist at the date of application; or

(e) the child or dependent parent of the spouse or civil partner of a relevant EEA citizen, as described in subparagraph (a) above, and:
(i) the family relationship of the child or dependent parent to the spouse or civil partner existed before the specified date (unless, in the case of a child, the person was born after that date, was adopted after that date in accordance with a relevant adoption decision or after that date became a child within the meaning of that entry in this table on the basis of one of sub-paragraphs (a)(iii) to (a)(xi) of that entry); and

(ii) all the family relationships continue to exist at the date of application; or

(f) a person who the entry clearance officer is satisfied by evidence provided by the person that they would, if they had made a valid application under Appendix EU to these Rules before 1 July 2021, have been granted (as the case may be) indefinite leave to enter under paragraph EU2 of that Appendix or limited leave to enter under paragraph EU3 and that leave would not have lapsed or been cancelled, curtailed, revoked or invalidated before the date

of application under this Appendix (and, in respect of that application, the requirements in paragraph FP6(1)(c) and (d) of this Appendix do not apply):

(i) as a family member who has retained the right of residence by virtue of a relationship with a relevant EEA citizen (as defined in Annex 1 to Appendix EU); or

(ii) on the basis that condition 6 of paragraph EU11 of Appendix EU is met; or

(g) the dependent relative of a specified relevant person of Northern Ireland

in addition, **where the person is a child born after the specified date [….], they meet one of the following requirements:**

(a) (where sub-paragraph (b) below does not apply), one of the following requirements is met:

(i) both of their parents are a relevant EEA citizen; or

(ii) one of their parents is a relevant EEA citizen and the other is a British citizen who is not a relevant EEA citizen; or

(iii) one of their parents is a relevant EEA citizen who has sole or joint rights of custody of them, […]; or

(b) where they were born after the specified date to […], the Swiss citizen or their spouse or civil partner is a relevant EEA citizen

12. It is apparent from his decision that the Judge has considered the first part of this definition, including the fact that a family member of a relevant EEA citizen can include a child of a relevant EEA citizen. It is also apparent that the Judge has considered the fact that the definition of a child in Appendix EU (FP) encompasses the grandchild of a relevant EEA citizen.

13. It is however quite clear that the Judge has not gone on to consider the whole of the definition of a family member of a relevant EEA citizen reproduced above. In particular it is clear that he has not given any consideration to the additional requirements which follow the words “in addition” and appear after part (g) of the definition. There can be no sensible doubt that the failure to recognise and consequently consider this vital part of the definition was an error of law by the Judge. This part of the definition applies directly to the appellants’ circumstances and the Judge was clearly required to assess whether the appellants met the requirements in this part of the definition in order to determine the disputed issue of whether the appellants are the family members of a relevant EEA citizen as defined in the Rules. We note that the respondent’s decisions provided the judge with little assistance on the location of the relevant provisions within Appendix EU (FP) but that is nothing to the point; it was the duty of the judge to locate and apply those provisions correctly despite that lack of assistance.

14. There can be no sensible doubt that the Judge’s failure to consider the full definition amounted to a material error of law which means his decision must be set aside. References to Home Office Policy in the appellants’ skeleton argument and the Judge’s decision miss the point. It is the Judge’s failure to consider the

full definition of a family member of a relevant EEA citizen that appears in the relevant Immigration Rules which has led him into a material error of law and means the decision cannot stand; this is nothing to do with the policy.

Remaking of the decision

15. Having set aside the Judge's decision we proceed to remake it having considered the skeleton argument prepared on behalf of the appellants and the submissions made in the hearing before us.

16. Once the full definition of a "family member of a relevant EEA citizen" is considered it is immediately clear that the appellants cannot meet that definition for the reasons identified in the respondent's decision letter. There has never been any suggestion that either of the appellants' parents are EEA citizens and no evidence has been adduced to indicate that the appellants meet any of the requirements at (a) (i) – (iii) in the part of the definition that follows the words "in addition." The fact that the sponsor is an EEA citizen has no bearing on this part of the definition, where it is the nationality of the parents that is relevant.

17. In short therefore, while the appellants are children of the sponsor as defined in the Rules, they do not meet the additional requirements that are set out in those Rules and which apply to children who were born after the transition period following the United Kingdom leaving the European Union which ended on 31 December 2020.

18. It is relevant to note that this part of the definition directly reflects what was agreed in Article 10(1)(e)(iii) of the Withdrawal Agreement between the United Kingdom and the European Union. That provision makes it clear that is only in the circumstances set out in part (a) (i)-(iii) of the additional requirements to the definition (i.e. both their parents are EU citizens or one parent is and the other is a British citizen or one parent is an EU citizen and has sole or joint rights of custody for the child) that a child born after the end of the transition period following the United Kingdom's departure from the European Union will come within the scope of the Agreement.

19. It follows therefore that the respondent's decisions to refuse the appellants' applications for Family Permits were consistent with both the EUSS and the Withdrawal Agreement and therefore that the appellants' appeals brought on the only grounds available to them, namely that the decision was not in accordance with the EUSS and / or breached a right they had under the Withdrawal Agreement must be dismissed.

20. The skeleton argument drafted by Mr Andoh includes reference to an "alternative" argument that there is a "positive obligation under article 8". This alternative argument is not elucidated further in the document and of course Mr Andoh did not appear before us. It is difficult to follow therefore what is the basis for this assertion. We note however that the respondent's decision to refuse applications under the EUSS did not involve the refusal of a human rights claim and the only permitted grounds of appeal against the decisions made by the respondent were those already identified, namely that the decisions were not in accordance with the EUSS or breached a right under the Withdrawal Agreement. There was therefore no basis for considering the appellants' rights under article 8 of the Convention in this appeal.

21. When appearing before us Ms Appiah was visibly distressed by her continued separation from the two appellants and it is easy to sympathise with her failure to understand why her older children were granted permission to come and settle in the United Kingdom while her younger children have not been granted such permission. The respondent's decisions were however in accordance with the law and provisions that were put in place following the United Kingdom's departure from the European Union and were designed to preserve rights that existed prior to that departure but not to extend rights beyond it.

22. The appellants may yet be able to make applications for entry clearance on a different basis but the outcome of these appeals is clear. The Entry Clearance Officer was undoubtedly correct to refuse the applications on the basis that he did, and the judge was undoubtedly wrong to hold otherwise.

Notice of Decision

The decision of Judge J G Richards contained an error of law and is set aside.

We remake the decision and dismiss both appellants' appeals against the respondent's refusal of their EUSS applications.

Luke Bulpitt

Judge of the Upper Tribunal
Immigration and Asylum Chamber

30 July 2024