Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: EA/05387/2020 (V)

THE IMMIGRATION ACTS

Heard at : Field House
On : 16 December 2021

Decision & Reasons Promulgated
On : 6 January 2022

Before

UPPER TRIBUNAL JUDGE KEBEDE

Between

GLORIA MENSAH

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr S Acheampong of Safe Visas Limited (in Ghana)
For the Respondent: Mr E Tufan, Senior Home Office Presenting Officer

DECISION AND REASONS

1. This has been a remote hearing to which there has been no objection from the parties. The form of remote hearing was Microsoft Teams. A face to face hearing was not held because it was not practicable and all issues could be determined in a remote hearing.

2. The appellant, a national of Ghana born on 4 May 1987, appeals with permission against the respondent's decision to refuse to issue her with an EU Settlement Scheme Family Permit under Appendix EU (Family Permit) of the Immigration Rules following her application made on the basis of being a family member of a relevant EEA citizen, namely her spouse.

3. The appellant applied for an EUSS family permit on 19 August 2020 and submitted, as evidence of her being a 'family member' of her Dutch sponsor, a Ghanaian marriage certificate showing her marriage to the sponsor on 18 October 2019. The respondent, in refusing the application in a decision of 28 September 2020, did not accept that she was a family member of a relevant EEA citizen or their spouse or civil partner in accordance with Appendix EU (Family Permit) of the immigration rules. That was because it was not accepted that the marriage was conducted lawfully, since there was a discrepancy in the information as to her sponsor's place of residence. The respondent noted that the marriage certificate stated that the sponsor was residing in Accra at the time of the marriage, yet the appellant had stated in her application form that her sponsor had been residing continuously in the UK.

4. The appellant appealed against that decision, submitting in her grounds of appeal that the sponsor was residing temporarily in Ghana at the time of the marriage and therefore had his address in Ghana on the marriage certificate, although his permanent place of residence was the UK. The marriage was contracted according to Ghanaian law and was therefore valid. A copy of the sponsor's passport, showing his entry and exit stamps for Ghana, was produced.

5. At the appellant's request, her appeal was determined on the papers. In a decision promulgated on 19 April 2021, First-tier Tribunal Judge Clegg dismissed the appeal. In so doing, he found that the appellant had not proved that the sponsor lived in the UK and he considered that to be material because the focus of the EU settlement scheme was on residence rather than the exercise of treaty rights. The judge noted that the marriage certificate gave an address in Accra for the sponsor, that the appeal form gave an address in Accra and that there was no documentation such as utility bills or payslips indicating where the sponsor lived. Neither was there any evidence showing that the sponsor had pre-settled or settled status in the UK. Although the judge was satisfied, from the evidence of money transfer receipts and a travel itinerary for the sponsor, that he had flown in and out of the UK and had sent money from the UK, he was not satisfied that he had proved his entitlement to be a sponsor pursuant to the rules. The judge accepted that the sponsor was a Dutch national who spent time in the UK but did not consider that the evidence showed he had residence in the UK and was a relevant EEA sponsor. The judge concluded that the appellant did not, therefore, meet the requirements of paragraph FP6 of Appendix EU (Family Permit).

6. The appellant sought permission to appeal that decision to the Upper Tribunal on the ground that there was not a fair hearing, for the following reasons: that the respondent had failed to provide an appeal bundle in accordance with the relevant time period with the result that she did not have adequate time to make submissions and provide evidence in response before the Tribunal made its decision; and that the judge made findings on matters which the respondent had not raised as a reason for refusal and had failed to consider the fact that the sponsor had settled status in the UK.

7. Permission was granted on the second ground, on the basis that the judge arguably erred in his approach to the sponsor's residence and failed to address the central issue which was the legal validity of the marriage.

8. The matter came before me.

9. Mr Tufan accepted that the decision had to be set aside and re-made, since the judge had decided the appeal on a different basis to that upon which the EUSS Family Permit application had been refused by the respondent. He said that there was, however, a further complication in that the appellant had made a subsequent application, on 4 October 2020 which had been refused on 28 October 2020 on different grounds raising concerns about the different signatures appearing for the sponsor.

10. Mr Acheampong confirmed that the appellant had made a subsequent application which had been refused, but he said that she had not received the decision on that application and that she had not appealed the decision. Mr Tufan emailed a copy of that decision to Mr Acheampong.

11. After some discussion it was agreed by all parties that the appropriate course was for Judge Clegg's decision to be set aside by reason of error of law and for the matter to be remitted to the First-tier Tribunal for the decision to be re-made. With regard to the second decision, it was accepted by all parties that that was not a matter before me. I indicated to Mr Acheampong, however, that the First-tier Tribunal, in re-making the decision in the appeal on the refusal of 28 September 2020, would now be aware of the subsequent decision of 28 October 2020 and that that could, of course, impact upon their decision in the appeal. It was considered by the parties that it was open to the appellant to seek to appeal that subsequent decision out of time if she so wished and that the First-tier Tribunal would consider whether or not to accept an out of time appeal.

12. Accordingly, I set aside Judge Clegg's decision. The decision will need to be re-made *de novo* by a different judge in the First-tier Tribunal.

DECISION

13. The making of the decision of the First-tier Tribunal involved the making of an error on a point of law. The decision is set aside. The appeal is remitted to the First-tier Tribunal to be dealt with afresh, pursuant to section 12(2)(b)(i) of the Tribunals, Courts and Enforcement Act 2007 and Practice Statement 7.2(a), before any judge aside from Judge Clegg.

Signed: S Kebede
Upper Tribunal Judge Kebede Dated: 16 December 2021