IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2021-001755
UI-2021-001756
First-tier Tribunal No: EA/03157/2021
EA/03159/2021

THE IMMIGRATION ACTS

Decision & Reasons Promulgated
On 21 February 2023

Before

UPPER TRIBUNAL JUDGE BLUNDELL

Between

(1) AUGUSTINE NKRUMAH
(2) RAYMOND NKRUMAH
(NO ANONYMITY ORDER MADE)

Appellants

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr Rahman, instructed by BWF Solicitors
For the Respondent: Mr Clarke, Senior Presenting Officer

Heard at Field House on 16 January 2023

DECISION AND REASONS

1. The appellants are Ghanaian nationals who were born on 20 June 1988 and 28 April 1989 respectively. They appeal, with permission granted by First-tier Tribunal Judge Gibbs, against the decision of First-tier Tribunal Judge Paul, who dismissed their appeals against the respondent's refusal of their applications for entry clearance under Appendix EU (FP) of the Immigration Rules.

Background

2. The appellants applied for EU Settlement Scheme family permits on 15 December 2020. It was submitted in those applications that the appellants were the family members of a relevant EEA citizen who held ILR under the EU Settlement Scheme. The EEA citizen in question is Hannah Antwi, a national of the Netherlands who was born on 28 December 1969. It was said in the application form that the sponsor was the appellants' mother and that they were dependent upon her.

3. The respondent did not accept that the appellants were dependent upon the sponsor. The appellants had relied on a large number of money transfers but the respondent did not accept that these were for the appellants, and she did not accept as a result that the sponsor was responsible for meeting the appellants' essential living needs. Nor did she accept that the appellants were living in a house owned or rented by the sponsor; the tenancy agreement was dated 2017 and the utility bills did not name the sponsor.

The Appeals to the First-tier Tribunal

4. The appellants appealed and their appeal came before the judge, sitting at Taylor House on 15 October 2021. The appellants were legally represented, the respondent was not represented. The judge heard oral evidence from the sponsor and submissions from the representative before reserving his decision.

5. In his reserved decision, the judge stated that there was a 'significant factual discrepancy in the sponsor's account that cannot easily be overlooked': [14]. The sponsor had moved to Holland in 1984 or 1985 yet the sponsor stated that the appellants had been born in 1988 and 1989. He noted that 'no explanation had been provided in the witness statement as to the circumstances therefore in which the children were born to a mother who apparently was not in Ghana at the time of their birth and/or conception.'

6. There was another aspect of the case which troubled the judge. He set this out at [15]-[16] of his decision. The first appellant had applied for entry clearance as a visitor in 2019 and he had stated in that application that he was self-employed and in receipt of money from a different person in the UK (ie not the sponsor). The appellant's representative stated that she was unaware of this because she had not received the respondent's bundle in advance of the hearing. The judge had given her time, after which she had stated that the 2019 application was 'of no relevance to the current application'.

7. In the final paragraph of his decision, the judge stated as follows:

> [17] However, the fact is that one of the appellants had made an application previously, in which no mention had been made of the support supposedly provided by the mother, and referred to a family friend as funding the proposed trip to the UK in or about 2019. It seems to me that this evidence was highly germane, and cast doubt upon the reliability of the evidence that had been submitted on behalf of the appellants. Taking this into account (which seems to demonstrate that the appellant was contending in 2019 that he was self-sufficient and indeed supported by somebody in the UK and/or Ghana, who had nothing to do with the current appeal), and the fact that the appellants' mother has given evidence about her coming to Holland before the children were born, has led me to conclude that the evidence submitted so far is not reliable. On that basis I am

not satisfied that dependence here has been established. This appeal must be dismissed.

The Appeal to the Upper Tribunal

8. The grounds of appeal are overlong and diffuse. In essence, however, there are three complaints. Firstly, that the judge's focus on the appellant's relationship to the sponsor and the visit visa application was procedurally unfair. Secondly, that the visit visa application was irrelevant and the judge had erred in concluding otherwise. Thirdly, that the judge had erred in focussing solely on financial dependency.

9. Judge Gibbs granted permission. She was particularly concerned that the judge had failed to note that there was DNA evidence before him which shed light on the 'significant factual discrepancy' he had identified at [14] of his decision.

10. In a rule 24 response dated 4 February 2022, the respondent submitted that there was no material legal error in the FtT's decision. The judge might not have mentioned the DNA report but that was immaterial to the issue of dependency. The main issue which had concerned the judge was the statements made in the visit visa application, which sufficed to show that the suggestion of dependency was unreliable.

Submissions

11. Mr Rahman provided a skeleton argument for the hearing. In development of the submissions therein, he submitted orally that the decision of the FtT was vitiated by procedural unfairness and that the judge had failed to consider the DNA evidence. The sponsor's step-children had been admitted to the UK and this was potentially a compelling case.

12. Mr Clarke maintained the stance in the rule 24 response. There was no procedural impropriety; the judge had given the representative an opportunity to consider the respondent's bundle and she had not applied for an adjournment. The judge had complied with the Surendran guidelines in his approach. He had not dismissed the appeal on a basis which had not been raised by the respondent and his concerns about the relationship had been brought to bear on the question of dependency. He had plainly taken the DNA evidence into account. The chronology was very odd, as the judge had noted. The visit visa application clearly shed light on the assertion that the appellants were dependent on the sponsor.

13. In reply, Mr Rahman submitted that the judge had strayed outside the refusal. Emotional dependency was also relevant, although he accepted when pressed on the point that there was no evidence before the judge of any such dependency between the sponsor and her adult children.

14. I reserved my decision at the end of the submissions.

Analysis

15. There is a good deal of chaff in the grounds of appeal, the inclusion of which was seemingly borne out of a desire to cite authorities about the concept of dependency in EU Law. Assuming for the present that (a) these principles continue to apply to cases such as this, brought under the Immigration Rules and (b) that emotional dependency is a relevant

component of such an assessment, the reality is that there was no evidence of emotional dependency in this case. This was not a case in which the statements made any reference to such dependency, as Mr Rahman was constrained to accept. It would, frankly, have been rather unusual to see any such reference, given the ages of the appellants.

16. The judge's focus was therefore quite properly on what was said to be the financial dependency of the appellants on the sponsor. In evaluating that question, I am satisfied that the judge fell into material legal error, for the following reasons.

17. Firstly, in making reference to his concern about the 'significant factual discrepancy' over the appellants' place of birth, the judge erred in failing to have regard to the DNA evidence which had been submitted to the respondent ECO. The appellants were both born in Kumasi, Ghana, as is clear from their passports. The sponsor said that she had left for Ghana in 1984 or 1985. Prima facie, therefore, there were three possibilities. Firstly, that the sponsor was not the appellants' mother because she was in Holland when they were conceived and born. Secondly, that the sponsor is their mother, and had returned to Ghana after she left for Holland, whereupon the two appellants were conceived and born. Thirdly, that the sponsor is their mother, but she had lied about leaving for Holland in the mid-eighties, and had actually arrived in the Netherlands significantly later, after the birth of the appellants.

18. The DNA report which was before the judge shed a good deal of light on this issue. It was from a credible provider (Anglia DNA) and had been sent directly to the appellants' solicitors on 14 October 2020. Samples had been taken in person. Proof of identity had been taken from those who provided the samples. Statements had been made by the samplers in the UK and Ghana. The results provided 'extremely strong support' for the assertion that the appellants were related to the sponsor as claimed.

19. That sufficed, in my judgment, to discount the first of the possibilities I have outlined above. The ECO did not suggest that the appellants were not related as claimed to the sponsor and she was right not to do so. At most, therefore, the judge was presented with something of a puzzle about the sponsor's travel history, given that she had stated that she left for Ghana in 1984 or 1985. He failed, in my judgment, to come to grips with that puzzle. His decision reads, instead, as one in which he had doubts about the sponsor's relationship to the appellants and in which that doubt was factored into his assessment of the critical question of financial dependency. The judge was bound to consider the DNA report and to consider these questions with that report in mind. In failing to do so, he erred in law and that error was clearly material to the outcome of the appeal. As Judge Gibbs put it when granting permission, it seems that the concerns the judge had about the relationship 'affected the entire decision'. I agree.

20. There is, in any event, a further concern about the procedural propriety of the judge's consideration of the visit visa application made by the first appellant in 2019. As is so often the case, the respondent's bundle had not been provided to the appellants' solicitors in advance of the hearing. That is often not problematic, since the respondent's bundle frequently contains material which appellants will have seen in the past, such as the evidence they supplied with their application and the notice of decision against which the appeal is brought.

21. In this appeal, however, the ECO had included additional evidence in the respondent's bundle, in the form of the first appellant's visit visa refusal from 2019. The judge quite rightly provided a copy of this decision to the appellants' representative when it became

clear to him that the bundle had not been provided to her. He allowed her an opportunity in which to take instructions. That too was the correct course of action.

22. The judge then received a submission from the appellant's representative that the visit visa application was irrelevant. I very much doubt that that submission – which was repeated in the grounds of appeal to the Upper Tribunal – was correct. The appellants were contending in this appeal that they had been dependent on the sponsor since at least 2018 (that being one of the dates I can read on the money transfer slips) yet the first appellant seemingly stated in his visit visa application in 2019 that he was self-employed and that he received support from someone else in the UK.

23. In my judgment, it was incumbent on the judge to consider whether he was able to proceed fairly with the hearing or whether he was required to adjourn the hearing of his own volition in order to give the appellants an opportunity to respond to this new evidence with evidence of their own. Mr Clarke observed that the appellant's representative had not applied for an adjournment. That is relevant but it is not determinative. The obligation to observe the over-riding objective is the judge's obligation and it is not discharged by reference to submissions made (or not made) by a representative. The late disclosure of this material was plainly prejudicial to the appellants and the judge should have considered whether they required a fuller opportunity to respond to it, whether by providing statements or otherwise. That might well have yielded little information in answer to this obvious difficulty but that is nothing to the point when the critical consideration is whether the appellants had been unfairly ambushed by late disclosure.

24. In the circumstances, and despite the able submissions made by Mr Clarke in defence of the FtT's decision, I am satisfied that it is vitiated by legal error. Since the conclusion which I have expressed immediately above is one of procedural impropriety, and in light of the decision of the Court of Appeal in AEB v SSHD [2022] EWCA Civ 1512, I am satisfied that the proper course of action is to set aside the decision of the FtT and to remit the matter to the FtT to be heard afresh by a decision other than Judge Paul.

Notice of Decision

The appeal to the Upper Tribunal is allowed. The decision of the FtT is set aside in full. The appeal is remitted to the FtT to be heard de novo by a different judge.

M.J.Blundell

Judge of the Upper Tribunal
Immigration and Asylum Chamber

1 February 2023