UT Neutral Citation Number: [2024] UKUT 00064 (IAC)

MD and Others (‘joining’ – Appendix EU Family Permit) Ghana

UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Heard at Birmingham Civil Justice Centre

THE IMMIGRATION ACTS

Heard on 25 July 2023
Promulgated on 26 January 2024

Before

UPPER TRIBUNAL JUDGE MANDALIA

Between

Secretary of State for the Home Department

Appellant

and

(1) MD
(2) MSD
(3) JD
(ANONYMITY DIRECTION MADE)

Respondent

Representation
For the Appellant: Mr P Lawson, Senior Home Office Presenting Officer
For the Respondent: Mr M Marziano, Westkin Associates

ANONYMITY
The respondents are children. Pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008, the respondents granted anonymity. No-one shall publish or reveal any information, including the name or address of the respondents, likely to lead members of the public to identify them. Failure to comply with this order could amount to a contempt of court.”

The word 'joining' in paragraph FP6.(1)(d) of Appendix EU (Family Permit) means that the applicant is being united or reunited with the relevant EEA citizen within six months of the date of the application. It is not sufficient for the applicant to establish travel to the UK to join the relevant EEA citizen or their spouse.

Decision and Reasons

1. The appellant in the appeal before me is the Secretary of State for the Home Department ("SSHD") and the respondents to this appeal are; (1) MD, (2) MSD, and (3) JD. However, for ease of reference, in the course of this decision I now adopt the parties' status as it was before the FtT. Hereafter, I refer to the three respondents as the appellants, and the Secretary of State as the respondent.

BACKGROUND

2. The three appellants are siblings. They are the children of Mr Dah ("Mr Duah") and Ms Felicia Pokuaa. Following the appellants' birth, in April 2014, their father came to the UK, and he has remained here since. The appellants' continued to live in Ghana with their mother. Mr Duah was married to Lydia Afua Opoku ("Ms Opoku"), a national of the Netherlands, by way of a customary marriage on 11 March 2017. In July 2019 Mr Duah was issued with an EEA Residence Card as the family member of an EEA national exercising treaty rights in the UK. On 22 August 2020 Ms Opoku was granted settled status under the EU Settlement Scheme.

3. On 8 December 2020, the appellants applied for entry clearance to the UK under Appendix EU (Family Permit) as family members of a relevant EEA Citizen. On 5 November 2021 they had each been issued with an EU Settlement Scheme family permit, which is a form of entry clearance granted under Appendix EU (Family Permit) of the Immigration Rules. They arrived in the United Kingdom on 2 December 2021.

4. Following enquiries made upon the appellants arrival in the UK, the respondent issued and served a 'Notice of Cancellation of Leave to Enter'. The Immigration Officer was satisfied that there had been a change in the appellants' circumstances that was, or would have been, relevant to their eligibility for entry clearance. The Notice served on each of the appellants is for all intents and purposes in similar terms. The respondent said:

> "You were eligible for that entry clearance on the basis that Lydia Afua Opoku is resident in the UK or would be travelling to the UK within six months of the date of your application, and you would be accompanying them to the UK or joining them in the UK. As Lydia Opoku is not present in the UK nor accompanying you today, I am satisfied that there has been a change of circumstances which would have been directly relevant to your eligibility for entry clearance under FP6(1)(d) of Appendix EU (Family Permit).
>
> When you arrived in the United Kingdom on 2nd December 2021 accompanied by your two siblings … you claimed to be joining your father Fred Kwaku Duah

> … (who holds limited leave to remain until 20 August 2024) and your stepmother Lydia Afua Opoku who holds EU Settled Status. Numerous attempts were made on the date of your arrival to contact your stepmother (your sponsor) without success. An appointment was scheduled for 17 December 2021 for your father and stepmother to attend for further interview together. On 17 December 2021 your stepmother Lydia Afua Opoku attended at Terminal 5 with an unknown male. During the interview she stated that she had not sponsored yours or your siblings' applications for a EUSS Family Permit and that your father had done so without her knowledge or consent. Furthermore, she confirmed that she was unwilling to sponsor your applications."

THE DECISION OF THE FIRST-TIER TRIBUNAL

5. The appellants' appeals were allowed by First-tier Tribunal Judge Phull for reasons set out in a decision promulgated on 5 September 2020. The appellants and their father attended the hearing. In summary, Judge Phull found that Ms Opoku was resident in the UK when the children arrived in the UK on 2 December 2021 and on balance, the appellants satisfy the requirement that they travelled to the UK to join the relevant EEA citizen and their father in the UK.

THE APPEAL TO THE UPPER TRIBUNAL

6. The respondent claims Judge Phull erred in finding, at [24], that the respondent's guidance dated 6 April 2022 concerning FP6(1)(c) and FP6(1)(d) of Appendix EU (Family Permit), only requires the EEA citizen to be resident in the UK before the appellants arrival, and does not require her consent. The respondent claims the guidance clearly identifies that *"the applicant will be accompanying the relevant EEA citizen (or, as the case may be, the qualifying British citizen) to the UK (or joining them in the UK) within 6 months of the date of application. (my emphasis)"*

7. The respondent claims the decision of Judge Phull is vitiated by a material error of law. In particular, the evidence of the appellant's father was that he is no longer in a relationship with Ms Opoku and they no longer live together. The respondent claims there had clearly been a change in circumstances, and Judge Phull erred in concluding the appellants will be "joining" their step mother when she did not know of or support the applications, does not wish to sponsor the appellants, and she has neither resided with them in the past nor will she do so in the future.

8. Permission to appeal was granted by Upper Tribunal Judge Lane on 12 January 2023. He said:

> "It is arguable that the use of the word *'joining'* in paragraph FP(6)(1)(d) of Appendix EU (Family Permit) should properly be construed to require the applicant to reside together with the sponsor in the United Kingdom and that the paragraph is not satisfied simply by the applicant and sponsor both being in the United Kingdom at the same time but otherwise not associating."

9. The appellants have filed a Rule 24 response. It is accepted by the appellants that they had not lived with, or had any significant relationship with the EU Citizen sponsor, Ms Opoku. Rather, they are the biological children of the spouse of the EU Citizen sponsor. The appellants submit Judge Phull was right to say at paragraph [24] of her decision that that Home Office guidance, dated 6 April 2022, is to be read as meaning that the EEA Citizen's presence in the UK on the date of arrival is required, but nothing more. There is, the appellants claim, nothing in that guidance which interprets FP6(1)(c) or (d) as requiring cohabitation or further association.

10. Before me, Mr Lawson submits that here, the appellants must establish that, at the date of application, the relevant EEA citizen (Ms Opoku) is in the UK (FP6(1)(c)) and the appellants would be joining her in the UK (FP6(1)(d)). He accepts the word 'joining' is not defined in Appendix EU (Family Permit) and submits the ordinary 'Oxford Dictionary' definition of that word as a verb is "to put (things) together, so that they become physically united or continuous". It involves, Mr Lawson submits, 'two things either connecting or being united'. Here, Mr Lawson submits Ms Opoku had said when she was interviewed on 17 December 2021 that her husband (Mr Duah) had made the applications for entry clearance without speaking to her, and, that she had not seen the appellants. She claimed she had not 'sponsored' the appellants and did not want to do so.

11. In reply, Mr Marziano adopted the appellants' skeleton argument that was prepared for the hearing before the FtT. He submits the word "joining" referred to in FP6.(1)(d) of Appendix EU (Family Permit) is not defined, and the 'continued consent of Ms Opoku' is not required. He submits the respondent's guidance; EU Settlement Scheme Family Permit and Travel Permit, published on 6 April 2022 states:

> "Under rule FP6(1)(c) and (d) or, as the case may be, rule FP6(2)(c) and (d) of Appendix EU (Family Permit), in an application for an EUSS family permit (and where rule FP8A does not apply), you must be satisfied, including in light of any relevant information or evidence provided by the applicant, at the date of application both that:
>
> • the relevant EEA citizen (or, as the case may be, the qualifying British citizen) is resident in the UK or will be travelling to the UK with the applicant within 6 months of the date of application
>
> • the applicant will be accompanying the relevant EEA citizen (or, as the case may be, the qualifying British citizen) to the UK (or joining them in the UK) within 6 months of the date of application
>
> This means that the relevant EEA citizen (or, as the case may be, the qualifying British citizen) must either:
>
> • <u>be travelling with the applicant, at the same time, from the same country</u>
>
> • <u>be resident in the UK before the applicant arrives (emphasis added)</u>"

12. Mr Marziano submits that all that is required therefore, is that the relevant EEA citizen is in the UK at the date of the application, unless they are overseas, in which case there must be evidence that they will be accompanying the applicant to the UK within six months of the date of the application. Here, the respondent does not deny that Ms Opoku was in the UK at the date of the application or the date of the decision to grant the appellants an EU Settlement Scheme family permit.

13. Mr Marziano submits that whilst it is unfortunate that Ms Opoku made negative comments about the appellants and Mr Duah in her interview, and appeared to withdraw her consent to the appellants living in the UK with Mr Duah, that is not to say that she was not in the UK or not resident in the UK at the material time. She had attended an interview in the UK, which of itself, is proof of her presence in the UK.

14. Mr Marziano submits the definition of 'joining' in this context is much wider than that contended for by the respondent. 'Joining' includes the place, or junction, at which two parts are joined. Here, the 'junction' or conduit is the United Kingdom. The appellants were 'joining' in the sense that they were coming to the UK. Appendix EU (Family Permit) does not require there to be a subsisting relationship between the appellants and the relevant EEA citizen. Ms Opoku remains married to the appellant's father and the appellants continue to be a 'family member of a relevant EEA citizen' as defined in Appendix 1. Where the applicant is the child of the spouse or civil partner of a relevant EEA citizen that relationship is required to have existed before the specified date (save as set out), and all the family relationships must continue to exist at the date of application. Here, Ms Opoku remained married to the appellant's father and the relationship between the appellants and their father plainly continued to exist.

15. In the circumstances, Mr Marziano submits it was open to the judge to allow the appeal for the reasons she gave.

THE RELEVANT LEGAL FRAMEWORK

16. Appendix EU (Family Permit) sets out the basis on which a person will, if they apply under it, be granted an entry clearance:

> "FP6. (1) The applicant meets the eligibility requirements for an entry clearance to be granted under this Appendix in the form of an EU Settlement Scheme Family Permit, where the entry clearance officer is satisfied that at the date of application:
>
> (a) The applicant is not a British citizen;
>
> (b) The applicant is a family member of a relevant EEA citizen;
>
> (c) The relevant EEA citizen is resident in the UK or will be travelling to the UK with the applicant within six months of the date of application;

(d) The applicant will be accompanying the relevant EEA citizen to the UK (or joining them in the UK) within six months of the date of application; and

(e) The applicant ("A") is not the spouse, civil partner or durable partner of a relevant EEA citizen ("B") where a spouse, civil partner or durable partner of A or B has been granted an entry clearance under this Appendix, immediately before or since the specified date held a valid document in that capacity issued under the EEA Regulations or has been granted leave to enter or remain in the UK in that capacity under or outside the Immigration Rules.

17. Insofar as is relevant, the words "family member of a relevant EEA citizen" are defined in Annex 1 as follows:

"a person who has satisfied the entry clearance officer, including by the required evidence of family relationship, that they are:

…

(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

…"

18. Finally, insofar as cancellation, curtailment and revocation of leave to enter is concerned, the relevant provision of Appendix EU (Family Permit) here is paragraph A.3.4 (c):

"A3.4. A person's leave to enter granted by virtue of having arrived in the UK with an entry clearance that was granted under this Appendix may be cancelled where the Secretary of State or an Immigration Officer is satisfied that it is proportionate to cancel that leave where:

...

(c) Since the entry clearance under this Appendix was granted, there has been a change in circumstances that is, or would have been, relevant to that person's eligibility for that entry clearance, such that their leave to enter ought to be cancelled"

DECISION

THE PROPER CONSTRUCTION OF PARAGRAPH FP6.(1)(D) OF APPENDIX EU (FAMILY PERMIT)

19. In his skeleton argument and the rule 24 response Mr Marziano makes repeated reference to the 'date of decision' or the appellants 'date of arrival in the UK'. To begin with, it is worth highlighting that the eligibility requirements set out in paragraph FP6. of Appendix EU (Family Permit) must be satisfied at the date of application.

20. Where entry clearance in the form of an EUSS Family permit has been granted, the question whether the Secretary of State or an Immigration Officer is satisfied that it is proportionate to cancel any leave granted, falls to be considered by reference to the position at the date of that subsequent decision.

21. In order to meet the eligibility requirements for entry clearance under Appendix EU (Family Permit), paragraph FP6.(1)(c) requires that the relevant EEA citizen is either resident in the UK, or will be travelling to the UK with the applicant within six months of the date of application. The focus of FP6.(1)(c) is upon the relevant EEA citizen. They must either already be in the UK *(i.e. resident in the UK)* or they will be travelling to the UK with the applicant.

22. Paragraph FP6.1(d) imposes an additional requirement and is directed to the applicant. That is, the applicant will be accompanying the relevant EEA citizen to the UK (or joining them in the UK) within six months of the date of application. The reference to "them" in "joining them in the UK" can only sensibly be read as a reference to the applicant joining the relevant EEA citizen.

23. I do not accept that the definition of 'joining' in this context is much wider than that contended for by the respondent. The difficulty with the construction of the word *'joining'* contended for by Mr Marziano, is that paragraph FP6.1(d) is not concerned with 'the junction at which two parts are joined', so that all that is required is that at the date of application the EEA citizen is resident in the UK and the applicant will be coming to the UK. That is to entirely misread and misconstrue the provisions. It involves either importing words into the provision that are not there, or to disregard the wording of the provision. If, as Mr Marziano submits, all that is required is that the EEA citizen in question be resident in the UK, unless they are overseas at the date of application, paragraph FP6.(1)(d) would be otiose. Paragraph FP6.(1)(c) on its own deals with the requirement that the relevant EEA citizen is in the UK, or will be travelling to the UK with the applicant

within six months of the date of the application. On Mr Marziano's construction, FP6.1(d) would add nothing.

24. The published guidance that Mr Marziano relies upon is simply guidance. It cannot be construed in the same way as primary or secondary legislation. The guidance refers to FP6.(1)(c) and (d) and states:

> "This means that the relevant EEA citizen (or the qualifying British citizen) must either:
>
> • be travelling with the applicant, at the same time, from the same country
>
> • be resident in the UK before the applicant arrives"

25. As far as it goes, that is undoubtedly correct but that guidance is not in any way exhaustive. It assumes that the applicant is either travelling to the UK with the relevant EEA citizen or joining a relevant EEA citizen who is resident in the UK before the applicant arrives. There is no concession within that guidance that, as Mr Marziano submits, all that is required is that at the date of application, the relevant EEA citizen is resident in the UK, unless they are overseas, in which case there must be evidence of them travelling to the UK with the applicant.

26. If there were any doubt about that, one only has to turn to what is said in the guidance immediately preceding the passage that is emphasised by Mr Marziano, that I have cited at paragraph [11] above. The published guidance is absolutely clear that paragraphs FP6.(1)(c) and(d) must both be satisfied at the date of application.

27. In my judgment, the focus of paragraph FP6.(1)(d) is upon keeping the applicant and EEA citizen together (*the applicant will be accompanying the relevant EEA citizen*), or uniting or reuniting with them (*joining them in the UK*). If the relevant EEA citizen is resident in the UK at the date of application for the purposes of paragraph FP6.1(c), the applicant will not be accompanying the relevant EEA citizen to the UK because the EEA citizen is already resident in the UK. The applicant must therefore establish that they are 'joining' the relevant EEA citizen in the UK.

28. I accept, as Mr Lawson submits that the word 'joining' in this context must, applying the ordinary meaning of the word in the English language, mean that the applicant is being united or reunited with the relevant EEA citizen.

29. Mr Lawson and Mr Marziano both agree that the purpose of Appendix EU (Family Permit) is to provide, *inter alia,* a basis, consistent with the Withdrawal Agreement with the European Union reached on 17 October 2019, and with the citizens' rights agreements reached with the other EEA countries and Switzerland, for EEA and Swiss citizens resident in the UK by the end of the transition period at 2300 GMT on 31 December 2020, and their family members, to apply for the required leave to remain or enter.

30. Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States was concerned with the right of the family members, and other dependents of the Union citizen, also to exercise those rights. In summary, the primary objective of the Directive was to promote the right of free movement of EEA nationals. Having to live apart from family members or members of the family in the wider sense may be a powerful deterrent to the exercise of that freedom. An EEA national would not be 'free' to exercise the right of free movement under the underlying Directive absent consideration of their family circumstances and domestic responsibilities.

31. The primary objective of the underlying Directive is to promote the right of free movement of EEA nationals subject to limitations and conditions of public policy, public health, and public security. (See Recital 1). Family reunification is a corollary to the exercise of that right. It is axiomatic that an EEA national would not be 'free' to exercise the right of free movement absent consideration of their family circumstances. In my judgment, the focus of paragraph FP6.(1)(d) of Appendix EU (Family Permit) is upon keeping the applicant and EEA citizen together, uniting or reuniting them, and that is entirely consistent with the Directive.

THE DECISION OF THE FTT

32. In summary, the FtT judge recorded the undisputed facts at paragraphs [10] to [13] of her decision. She noted the appellants are the children of Mr Duah and that he is married to Ms Opoku, an EEA national resident in the UK with leave under Appendix EU. She noted that Mr Duah had been granted settled status on 7 July 2022 and that both he and Ms Opoku were employed in the UK when the appellants arrived on 2 December 2021.

33. The judge went on to refer to the applications made by the appellants and the reasons provided by the respondent for cancelling the entry clearance to the appellants following their arrival in the UK. She noted the claim made by the respondent that as at 29 December 2021 (*the date of the decision to cancel the entry clearance granted)* there has been a change of circumstances that is, or would have been, relevant to the appellants' eligibility for entry clearance.

34. The judge found that Mr Duah and Ms Opoku remain married, and that the appellants are 'family members of a relevant EEA citizen' as defined in Appendix EU (Family Permit). That is, they are the children of the spouse or a relevant EEA citizen, and that all the family relationships continued to exist at the date of application.

35. At paragraphs [23] and [24] the judge said:

> "23. I find on balance the above evidence satisfies that Lydia was resident in the UK when the children arrived on the 02 December 2021. I therefore find on balance the Appellants satisfy the requirement that they travelled to the UK to join the relevant EEA citizen and their father in the UK.

> 24. As regards the change in circumstances, I find on balance, Mr Duah's evidence satisfies that Lydia gave her documents to be submitted with the Appellants applications to join them in the UK. I find the Home Office Guidance dated 06/04/2022 on FP6 (1) (c) and FP6 (1) (d) of Appendix EU (Family Permit), only requires the EEA citizen to be resident in the UK before the Appellants arrival and not her consent (page 53. I find on balance the unchallenged evidence satisfies, that Lydia has been resident in the UK, since the 01 January 2015. She was at work in the UK when the Appellants arrived on the 02 December 2021 to join her and their father."

ERROR OF LAW

36. The appeal before the FtT was against the respondent's decision dated 29 December 2021 to cancel/revoke the appellants' EUSS Family Permits, and refuse leave to enter the UK under Appendix EU (Family Permit). The issue at the heart of the appeal was whether it is proportionate to cancel that leave because since the entry clearance was granted, there has been a change in circumstances that is, or would have been, relevant to the appellants' eligibility for that entry clearance such that their leave to enter ought to be cancelled.

37. The issue is dealt with in paragraph [24] of the judge's decision. The reasons given are brief. I accept the reasons do not need to be lengthy, but reading the decision as a whole I am satisfied that the judge erred when she concluded at [24], relying upon the published guidance she had been referred to, that paragraphs FP6.(1)(c) and (d) *"only requires the EEA citizen to be resident in the UK before the Appellants arrival and not her consent".* That, for the reasons I have set out in my analysis of the proper construction of paragraph FP6.(1)(d), is wrong in law.

38. To remain eligible for entry clearance, it was for the appellants to establish that they are *'joining'* the relevant EEA citizen in the UK. That is, they were being united or reunited with the relevant EEA citizen. I add that paragraph FP6.1(d) is not concerned with the applicant travelling to the UK to join the relevant EEA citizen or their spouse *(my emphasis)*. The words used in the provision expressly require that the applicant is accompanying the relevant EEA citizen or joining them. (*my emphasis).* A 'relevant EEA citizen', is defined in Annex 1 and the focus is upon the EEA citizen. Neither party suggests the definition of a 'relevant EEA citizen' extends to include the spouse or civil partner of an EEA citizen. It was not therefore sufficient that the appellants had come to the UK to join their father.

39. Although the judge referred to the interview of Ms Opoku conducted by an Immigration Officer on 17 December 2021, the judge did not engage with the record of the claim made by her during that interview that that she had not sponsored the appellants' applications for a EUSS Family Permit, that their father had done so without her knowledge or consent, and her claim that she was unwilling to sponsor the applications. The appeal was heard in July 2022 and in her decision the judge accepted the evidence of Mr Duah that Ms Opoku had provided the documents that were required to be submitted with the appellants applications to join them in the UK.

40. The judge failed to engage with the information provided by Ms Opoku when she was interviewed and it was obvious from the evidence of Mr Duah himself that he and his partner had been separated for several months by the time the appeal was heard. The judge made no findings as to whether the appellants had in fact ever met Ms Opoku. Although the judge said she found the appellants had arrived on 2 December 2021 "to join [Ms Opoku] and their father", by the 29th December 2021 and certainly by the time the appeal was heard, the relationship between Ms Okolu and Mr Duah had broken down and Ms Opoku did not support the appellants' application and they were not joining her in the UK. In my judgement, the judge's assessment of the evidence was infected by the judge's misinterpretation of the requirements of paragraph FP6.(1)(d), and her understanding that the "consent" of Ms Opoku, as the judge put it, was not required.

41. Standing back and reading the decision of the FtT as a whole, I am satisfied that the decision of the judge is infected by material errors of law and must be set aside.

REMAKING THE DECISION

42. Having found that the decision of the FtT involved the making of an error on a point of law, together with the FtT's findings of fact, I have before me the evidence which was before the FtT on which I can re-make the decision in relation to the appellants' appeals pursuant to section 12(2)(b)(ii) of the Tribunals, Courts and Enforcement Act 2007. By virtue of section 12(4) of that Act, I may make any decision which the FtT could make if it were re-making the decision and may make such findings of fact as I consider appropriate.

43. I have already referred to the findings that were made by the Judge. The judge found Mr Duah to be a credible witness.

44. There is no evidence that the appellants have ever lived with Ms Opoku either before, or after their arrival in the UK. As the judge found previously, Ms Opoku was resident in the UK at the date of the applications for entry clearance. The judge accepted Ms Opoku had provided Mr Duah with the documents necessary to support the appellants applications to join them in the UK. I am prepared to accept that at the date of the applications the appellants were to be joining Ms Opoku (*the relevant EEA citizen*) in the UK within six months of the date of the application. That much is uncontroversial because the appellants were granted entry clearance and the relevant EUSS Family Permits were issued to them by the respondent.

45. The question is whether it is proportionate to cancel that leave because since the entry clearance was granted, there has been a change in circumstances that is, or would have been, relevant to the appellants' eligibility for that entry clearance, such that their leave to enter ought to be cancelled.

46. The record of the discussions between an Immigration Officer and the appellants upon their arrival in the UK [RB/C2/page 36] records that the

appellants claimed they had been in regular contact with their father but *"did not really know or had met their step mother Lydia"*. When Ms Opoku was interviewed on 17 December 2021 [RB/D2/pages 38 – 41], she said that she had not seen the appellants, she only knew the name of one of the appellants and she did not wish to sponsor the appellants.

47. The evidence of Mr Duah as set out in his witness statement dated 30 June 2022 was that after the appellants' applications had been submitted Ms Opoku's behaviour towards him changed, and when she was told the applications were granted *"...her behaviour was awful and I could sense danger for my children because when Lydia is angry, she could do bad and worsen things.."*. His evidence was that when he bought the tickets and confirmed the date the appellants would be coming to the UK, her answer was awkward, unwelcome and she told him that she could not go with him to welcome them at the airport. He explains the difficulties that were encountered establishing contact with Ms Opoku when the appellants arrived in the UK and the events leading to their respective interviews. He states that on 21 December 2021, Ms Opoku met the appellants for the last time. There is no reference in the statement to her having ever met the children previously. He claims that on 22 December 2021, Ms Opoku left London for Amsterdam to celebrate Christmas with her own children. It was hoped she would return after Christmas but it appears she did not do so. Mr Duah confirms that he is no longer in a relationship with Opoku, albeit they remain married. He states he cannot trust her to give a truthful account of her actions.

48. The account set out in the statement of Mr Duah regarding the reservations Ms Opoku demonstrated about the appellants coming to the UK, is consistent with the claim made by Ms Opoku when she was interviewed, that she does not support the applications. Even if she supported the applications for entry clearance when they were first made, it is clear she did not support the applications by the time of the appellants arrival in the UK. I find that by the date of the appellants arrival in the UK, 2 December 2021, the appellants application was no longer supported by Ms Opoku and on the evidence before me, I find that the appellants were not joining her in the UK. By 29 December 2021, on the evidence before me, I find that the appellants could not and cannot satisfy the eligibility requirement in paragraph FP6.(1)(d) that they were joining Ms Opoku in the UK.

49. I find that since the entry clearance was granted to the appellants, there has clearly been a change in the appellants' circumstances that is, or would have been relevant to the appellants' eligibility for that entry clearance such that by 29 December 2021, it was open to the Immigration Officer to conclude that it is proportionate to cancel that leave. As to proportionality, the appellants had for a number of years lived in Ghana and were cared for by their mother. There is no evidence that they were not adequately cared for. When the appellants spoke to the Immigration Officer on 2 December 2021, the appellants confirmed they lived with their biological mother in Ghana and that the whole family had dropped them off at the airport. Their mother was pleased to see them go, because she thought they would have a

better life in the UK. They said they have no other family here in the UK. In his witness statement, Mr Duah states they hope to remain in the UK to have a family life which they have been missing for many years and to have a good quality education. I have no doubt that the appellants would wish to live in the UK with their father, but that does not equate to a right to do so. The benefit they gain of living with their father is to the detriment of the stability they enjoyed in Ghana, and the relationships and attachments they have to their mother and wider family in Ghana. The appellant's may wish to benefit from an education in the UK, but again, that does not equate to a right to be educated in the UK, in circumstances where they are unable to meet the rules, and in particular the eligibility requirements as set out in Appendix EU (Family Permit).

50. It follows that I remake the decision and dismiss the appeal.

NOTICE OF DECISION

51. The decision of First-tier Tribunal Judge Phull is set aside

52. I remake the decision and dismiss the appeal.

V. Mandalia
Upper Tribunal Judge Mandalia

Judge of the Upper Tribunal
Immigration and Asylum Chamber

4 January 2024