



**Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: EA/06660/2019 (V)**

THE IMMIGRATION ACTS

Heard at : Field House

On : 28 April 2021

**Decision & Reasons
Promulgated**

On : 06 May 2021

Before

**UPPER TRIBUNAL JUDGE KEBEDE
UPPER TRIBUNAL JUDGE OWENS**

Between

COMFORT ANTWI

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

Respondent

Representation:

For the Appellant: Ms H Gore, instructed by Gans & Co Solicitors

For the Respondent: Mr S Whitwell, 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 skype for business. 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 27 July 2000, appeals, with permission, against the decision of the First-tier Tribunal dismissing her appeal against the respondent's decision to refuse her admission to the UK under regulation 11 of the Immigration (European Economic Area) Regulations 2016 ("the EEA Regulations"), as the family member (daughter) of an EEA national exercising treaty rights in the UK.

3. On 13 October 2018 the appellant was issued with a family permit under the EEA Regulations, as the family member of an EEA national (Italian), her father Matthew Kwasi Antwi. She arrived in the UK on 25 October 2019 and sought admission at the airport on the basis of the family permit which was endorsed in her Ghanaian passport. She was not accompanied by the sponsor, but it was stated that he was on his way to meet her at the airport. Concerns were raised at immigration control owing to the fact that the appellant was found to be holding a crib sheet containing questions that may be asked about her sponsor. As a result, the appellant was interviewed and the sponsor was also subsequently questioned and inconsistencies were identified between their accounts of the nature and length of her stay.

4. The appellant was interviewed further on 13 November 2019 and was questioned in particular about the birth certificate she had used to obtain her passport and family permit. Following the interview, the appellant was served with a refusal decision in which it was stated that the birth certificate had been examined and had been found to have been fraudulently obtained. The respondent could not, therefore, be satisfied that the appellant was related to the sponsor as claimed and was not satisfied that she was the family member of an EEA national. As a result, it was considered that she did not have the right to be admitted to the UK under regulation 11. Removal directions were set for the appellant's removal on 18 November 2019, but she did not attend at the airport on that day owing, it was claimed, to medical problems.

5. On 22 November 2019 the appellant was given notice of the immigration decision refusing her admission to the UK under regulation 30, on the basis that she did not have the right to be admitted under regulation 11, as the birth certificate provided in the application process for her Ghanaian passport and EEA family permit had been fraudulently obtained and it was not accepted that she was a family member of an EEA national.

6. In a refusal report dated 27 January 2020 the respondent responded to the appellant's grounds of appeal and maintained the decision to refuse admission, noting that the birth certificate had been scrutinised by a forgery officer and found to have been fraudulently obtained.

7. The appellant's appeal was heard by First-tier Tribunal Judge Thapar on 18 February 2020. The appellant and the sponsor attended but did not give oral evidence. The Home Office Presenting Officer made an application under

section 108 of the Nationality, Immigration and Asylum Act 2002 for the judge to investigate the forgery allegation on the basis of a forgery report in relation to the appellant's birth certificate, in camera, in the absence of the appellant and the appellant's representative. The judge granted the application and concluded that the document was not authentic. On that basis, and in light of the report of the appellant being in possession of crib sheets and the inconsistencies in the information provided by the appellant and the sponsor, the judge concluded that the appellant had failed to establish that she was the biological daughter of the sponsor. The judge found that the appellant could not, therefore, meet the requirements of regulation 7(1)(b) of the 2016 Regulations and she dismissed the appeal in a decision promulgated on 9 April 2020.

8. The appellant sought, and was granted, permission to appeal to the Upper Tribunal.

9. The grounds of appeal, which were subsequently amended in response to directions from Upper Tribunal Judge Plimmer following an adjourned hearing on 29 September 2020, were as follows: firstly, that the appellant had not received a fair hearing as the judge had failed to engage with the relevant issue in the appeal, namely whether the respondent had proved that the appellant was not entitled to be admitted to the UK under regulation 11(2)(b)(i) and (ii), and had denied the appellant the right to answer the case made in the document relied on by the judge but not disclosed to her; secondly, that the judge had failed to proceed on the premise that the respondent bore the burden of proof, given that there was an allegation of fraud; thirdly, that the judge had failed to address her mind properly or at all to the lawfulness of issuing removal directions at a time when the appellant had a valid family permit which had not been revoked on grounds of fraud; and fourthly, that the judge had relied on section 108 of the NIAA 2002 when it was irrelevant on the facts of the case, because the document relied upon by the appellant in seeking admission to the UK pursuant to regulation 11 was her passport which contained a family permit, neither of which had been alleged to be forged or fraudulently obtained.

10. Both parties provided skeleton arguments. In the respondent's skeleton argument, prepared by Mr Tan of the Specialist Appeals Team, it was conceded that the judge had proceeded on an unfair basis as the drafting of the 2016 EEA Regulations did not appear to provide for the application of section 108 to appeals lodged under regulation 36. It was accordingly accepted that the judge's decision contained a material error of law and should be set aside. It was stated further that the decision of 13 November 2019 to refuse admission under regulation 30(1)(a) was correct and that, contrary to the appellant's skeleton argument, the EEA family permit relied upon by the appellant had been revoked on account of fraud. Reference was made to regulation 24(6)(b) in that regard. An application was made under rule 15(2A) of the Tribunal Procedure (Upper Tribunal) Rules 2008 for the respondent to rely upon a more recent document verification report dated 17 March 2021 in relation to the appellant's birth certificate, in re-making the decision.

11. At the hearing we pointed out to Mr Whitwell that, whilst we were in agreement that Judge Thapar's decision had to be set aside, we considered it appropriate to seek clarification on some matters. We noted in particular that Mr Tan's reasons for conceding the appeal did not appear to correlate with those actually raised by the appellant in the grounds of appeal, as the appellant's reason for asserting in her grounds that section 108 was not applicable was that the forgery allegation did not relate to the documents upon which she relied, namely her passport and family permit. That was not the reason given by Mr Tan as to why section 108 did not apply. Further, Mr Tan referred to the appellant's family permit having been revoked and to the appellant's admission to the UK being refused on that basis, with reference to regulation 24(6)(b), yet the decision letter made no mention of the family permit having been revoked. Mr Whitwell clarified that the respondent's position was that section 108 was not the appropriate mechanism to have been used and that it was on that basis that it was conceded that the judge's decision was materially flawed, on grounds of unfairness. However, the decision to refuse admission to the UK itself was maintained and the judge gave various reasons for making the adverse credibility findings that she did. Mr Whitwell agreed that there did not appear to be any specific mention of the family permit having been revoked.

12. Ms Gore was in agreement with our understanding of the various issues and was of the view that the matter ought to be remitted to the First-tier Tribunal for a *de novo* hearing. Mr Whitwell had no objection to that course.

13. In light of the concession made by the respondent we agree that the judge's decision has to be set aside on grounds of unfairness. In addition, we would make it clear that we have found merit in all of the appellant's grounds of appeal. The judge clearly failed to engage with the relevant issue, namely the lawfulness of the respondent's decision to refuse admission to the appellant under regulation 11(2)(b) when she had a valid family permit which had not, it seems, been revoked on account of fraud. Further, the judge did not acknowledge the respondent's burden of proving fraud and her reference to the appellant's submission in that regard at [9] was not sufficient to show that she properly engaged with the matter.

14. For all of these reasons we set aside Judge Thapar's decision. None of the judge's findings can be preserved and the decision will need to be re-made *de novo* by a different judge in the First-tier Tribunal. We made it clear to Mr Whitwell that the respondent may wish to clarify the status of the appellant's family permit in the meantime, since there is no evidence before us to show that it has been revoked.

DECISION

15. 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 in its entirety. 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 Thapar.

S Kebede
Upper Tribunal Judge Kebede

Dated: 28 April 2021