



IAC-FH-CK-V1

**Upper Tribunal  
(Immigration and Asylum Chamber)      Appeal Number: UI-2021-001563  
EA/05137/2021**

**THE IMMIGRATION ACTS**

**Heard at Field House  
On the 17<sup>th</sup> June 2022**

**Decision & Reasons Promulgated  
On the 18<sup>th</sup> July 2022**

**Before**

**UPPER TRIBUNAL JUDGE KEITH**

**Between**

**'XX' (SIERRA LEONE)  
(ANONYMITY DIRECTION MADE)**

Appellant

**and**

**THE SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Respondent

Pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008, the appellant is granted anonymity. No-one shall publish or reveal any information, including the name or address of the appellant, likely to lead members of the public to identify her. Failure to comply with this order could amount to a contempt of court. The reason is because of the allegations concerning the appellant's claim to have been the victim of rape by her estranged husband.

**Representation:**

For the appellant: *Mr S Cox*, instructed by Duncan Lewis Solicitors

For the respondent: *Ms A Nolan*, Senior Home Office Presenting Officer

**DECISION AND REASONS**

**Introduction**

1. These are the approved record of the decision and reasons which I gave orally at the end of the hearing on 17<sup>th</sup> June 2022.
2. This is an appeal by the appellant against the decision of First-tier Tribunal Judge Paul (the 'FtT'), promulgated on 14<sup>th</sup> December 2021, by which he dismissed the appellant's appeal against the respondent's refusal on 12<sup>th</sup> March 2021 of her application in or around August 2020 for leave to remain under Appendix EU of the Immigration Rules. In essence, the appellant's claims involved the following issues: whether the appellant, a Sierra Leonian national, was married, as claimed, to an Irish national; and whether she and her husband had been continuously residence in the UK for five years. The respondent noted the appellant's claim that she had left her husband due to a breakdown in their relationship and had moved from Northern Ireland to London, but also noted that there was an absence of evidence of domestic violence, as she had never reported matters to the police.

### **The FtT's decision**

3. The FtT dealt first with the preliminary issue of whether there was right of appeal. The respondent disputed such a right, on the basis that the appellant did not meet the requirement of paragraph 36(3) of the Immigration (EEA) Regulations 2016, as the respondent had taken the view that the appellant had failed to provide a valid passport or EEA family permit and there was therefore insufficient evidence that she was in a relationship with an EEA national. The FtT concluded at §17 of his decision there was a right of appeal, as a decision on whether such a relationship existed was a matter for the Tribunal. There is no cross-appeal in respect of the FtT's decision on jurisdiction.
4. The FtT went on to consider at §18 that the appellant was unable to provide 'proper evidence', as required by the Appendix EU of the Immigration Rules, in respect of her relationship with her husband and continuous residence in the UK. At §20, the FtT concluded that the rules were quite clear and there was no basis, on the evidence before him, to conclude that the Rules had not been properly applied. He therefore dismissed the appellant's appeal.
5. At §21, the FtT stated that relevant Rules said that automated checks were undertaken by HM Revenue & Customs and the Department for Work and Pensions, which might provide evidence that the appellant had completed a continuous qualifying period residence in the UK. In the absence of such evidence, where continuous residence was still relied on, the respondent was obliged to invite the appellant to provide additional evidence. The FtT concluded that the respondent had made steps to contact the appellant without success and so had complied with her obligations.
6. Having considered the evidence as a whole, the FtT dismissed the appeal.

## **The grounds of appeal and grant of permission**

7. The appellant lodged grounds of appeal which are essentially that the FtT had erred in concluding, at §22, that the respondent had made attempts to contact the appellant, which the appellant had ignored. The appellant had written to the respondent explaining her circumstances, which were that she could not obtain further evidence because of the breakdown in the relationship with her husband, following which the respondent ought to have made further enquiries. There was no evidence that the respondent had done so. The FtT had therefore erred in concluding that the respondent had discharged her duty or applied relevant guidance, noting the well-known authority of Amos v SSHD [2011] EWCA Civ 552.
8. First-tier Tribunal Judge Robinson granted permission on 7<sup>th</sup> February 2022. She regarded it as arguable that the FtT had erred in concluding that the respondent had complied with Appendix EU of the Immigration Rules and the published guidance, given that no evidence was adduced by the respondent regarding relevant checks, in particular in relation to the allegations of domestic violence, and about which the FtT made no clear findings.

## **The hearing before me**

### **Preliminary applications to amend the grounds and adduce new evidence**

9. The appellant made a late application on 14<sup>th</sup> June 2022 to amend the grounds and adduce new evidence, as the result of evidence disclosed by the respondent in response to a data subject access request on the same day.
10. The evidence included the respondent's own records which confirmed that before the time of the appellant's current application, when the appellant had applied successfully for entry clearance in July 2016, the respondent had information that the appellant's now estranged husband had lived in the UK since 1957; that he continued to do so at the date of application for entry clearance; that he had retired and was in receipt of a personal independence payment as evidenced in correspondence from the Department for Work and Pensions, bank statements and HM Revenue and Customs, and the respondent had a telephone contact number for the appellant's husband, should it need updated information.
11. The evidence was also said to show the appellant's solicitor's response to enquiries from the respondent, and the lack of any records about other unanswered enquiries.
12. As an additional ground of appeal, the respondent's failure to acknowledge this evidence before the FtT was in breach of her duties not knowingly mislead the FtT in the materials she placed before him (see: R (Cindo) v IAT [2002] EWHC 246 (Admin)).

### The respondent's response to the applications

13. Ms Nolan objected to both of the applications. She argued that neither in the appellant's witness statements nor in the original grounds of appeal to the FtT had the appellant ever disputed that she had failed to respond to enquiries. Even if the respondent's own records were silent on the issue, it had never been substantively disputed. The respondent could not, therefore, be accused of misleading the FtT over an issue that had never been disputed. The application to adduce relevant evidence similarly should be refused as disclosing no evidence that was relevant to the original grounds that were before the FtT.

### **Decision on the applications**

14. My decision is to grant both applications. I am conscious that first, they are late applications, and second, that permission was not previously granted for the amended ground to proceed. However, the lateness of the application to amend is explained by the timing of the respondent's response to the data subject access request. I also regard the evidence as relevant to the issue of whether the respondent had the means to check the sponsoring husband's UK residence, including by using his contact details, in the context of the appellant's claim that he would not respond to her, and that she had been the victim of domestic violence. The evidence could have had an importance influence on the unamended ground.
15. It is also noteworthy in these additional records that there is an absence of any unanswered contact by the respondent, beyond correspondence between the appellant's former solicitors and the respondent, which I deal with below. The records, included at pages [48] of the bundle onwards, indicate documents being uploaded in November 2020 (page [52]); an acknowledgement by the respondent of these documents in January 2021 (page [54]); a chasing email from the respondent in February 2021, followed by correspondent from the appellant's solicitors on 5th March 2021, which was referred to by the FtT. That letter referred to a telephone conversation with the respondent's officers the previous day, setting out the appellant's estrangement from her husband and the circumstances of that estrangement, including allegations of sexual violence perpetrated against the appellant and why that meant that she could provide no further evidence of her husband's residence. The issue of the adequacy of the respondent's response was unquestionably a ground before the FtT. Mr Cox makes the point that on the respondent's case, that there was a lack of any response from the appellant between October 2020 and 4<sup>th</sup> March 2021, was plainly not accurate (there was an acknowledgment in January 2021 to documents provided). Moreover, the same records were also relevant to the ground on which permission was granted, in respect of checks which the respondent could have carried out, but the appellant could not, because of domestic violence.

16. I therefore grant the application to amend (and extend time, to the extent necessary to do so); grant permission to proceed on the amended ground; and grant the application to adduce additional evidence.

### **Discussion and conclusions on the grounds of appeal**

17. I find that the FtT erred in law, as he had failed to explain adequately his conclusion that the respondent had properly considered why it was not appropriate to make further enquiries. I noted Ms Nolan's submission that Appendix EU does not oblige the respondent to make enquiries. However, Mr Cox submits, and I accept, that there is at least a duty to have considered whether such further enquiries were appropriate. The FtT's conclusion at §21 of his decision that the respondent met that obligation because there was no contact between October 2020 and 4<sup>th</sup> March 2021 is not adequately explained, in the context of the correspondence referred to. That correspondence includes the respondent's acknowledgment in January 2021 of documents, and apparent telephone contact on 4<sup>th</sup> March 2021, followed the next day by correspondence explaining the appellant's circumstances.
18. Moreover, I accept Mr Cox's submission that the FtT's analysis, which started at §18, contains gaps from the beginning. The FtT said at §18 of his decision that the appellant's position in 2021 was now exactly the same as it was in 2016, with her unable to provide evidence of continuous residence. The analysis ignored that on the appellant's case, her circumstances were entirely different. She had been granted a family permit on the basis of relevant documentary evidence in 2016. There was no question that she had since made specific allegations of domestic violence, which provided the context of her marriage breaking down and her inability to obtain further documents. That, specifically, had been an issue before the FtT.
19. In that context, the FtT's further conclusion at §18, that the appellant was "*simply unable to provide proper evidence in accordance with the Rules in relation to her husband and/or demonstrate five years' continuous residence in accordance with the terms of the Rules*" ignored the issue of the respondent's discretion to make enquiries. The FtT's answer at §20 that there was no evidence before him to conclude that the Rules had not been properly applied begged the question of which Rules the FtT was considering. The FtT referred at §21 to the respondent's attempts to communicate, which discharged her obligations. None of that analysis addressed the point posed by the appellant's representations to the respondent, which was before the FtT, about her inability to obtain documents, which she had informed the respondent about, and whether the respondent was then obliged to make further enquiries, in light of the fact that the respondent had already granted the appellant a family permit in 2016. The FtT's lack of adequate analysis amounts to an error of law.
20. In terms of the amended ground, putting to one side the allegation of domestic violence, the respondent's position was advanced on the basis

that there was a lack of evidence that the sponsoring husband had been or was resident in the UK for a relevant 5-year period (§§5 and 9). That case ignored that the respondent had, in her own records, evidence that the husband had lived in the UK since 1957, was now retired, in receipt of a personal independence payment and the respondent knew his identity and contact details. Through no fault of the FtT, the FtT erred on the basis that the respondent advanced a case that was materially inaccurate, in circumstances where she ought to have known of that inaccuracy and made representations accordingly. There was, as a result, a material error of law.

21. On both grounds, the FtT's decision contains material errors of law, such that is unsafe and cannot stand.

### **Disposal**

22. With reference to paragraph 7.2 of the Senior President's Practice Statement and the necessary fact-finding, this is clearly a case that has to be remitted to the First-tier Tribunal for a complete rehearing. Both representatives were agreed on this course of action should I find there to be material errors of law.
23. The remittal shall involve a complete rehearing of the appeal. All aspects of the claims must be addressed, including the allegations of domestic violence.

### **Notice of Decision**

**The decision of the First-tier Tribunal contains material errors of law and I set it aside.**

**I remit this appeal to the First-tier Tribunal for a complete rehearing.**

### **Directions to the First-tier Tribunal**

**This appeal is remitted to the First-tier Tribunal for a complete rehearing with no preserved findings of fact.**

**The remitted appeal shall not be heard by First-tier Tribunal Judge Paul.**

**Anonymity directions apply.**

Signed J. Keith

Date: 29<sup>th</sup> June 2022

Upper Tribunal Judge Keith