Upper Tribunal
(Immigration and Asylum Chamber) Appeal Numbers: EA/12495/2016
EA/12496/2016

THE IMMIGRATION ACTS

Heard at: UTIAC Liverpool **Decision & Reasons Promulgated**
On: 30 November 2018 **On 10 December 2018**

Before

UPPER TRIBUNAL JUDGE KEBEDE

Between

FULESHWARI KASHYAP
RAMCHARAN KASHYAP

Appellants

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr J Greer instructed by Jackson & Canter Solicitors
For the Respondent: Mr Bates, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellants are nationals of India born on 1 July 1948 and 9 April 1943 respectively. They appealed against the respondent's decision to refuse to issue them with EEA family permits under the Immigration (European Economic Area) Regulations 2006 ("the EEA Regulations") to accompany their British daughter-in-law, Shanty Kashyap, to the UK.

2. The appellants' son, Kunj Kashyap, became a British citizen on 10 April 2011 and his wife, the sponsor Shanty Kashyap, became a British citizen on 23 November 2013. They were married in August 2008 and had two children. In October 2015 the sponsor moved to Latvia with her children and on 3 July 2016 the appellants moved to Riga. The family decided to move back to the UK after the Brexit vote and the appellants made their application for a family permit on 26 September 2016.

3. The appellants' case is that the sponsor had moved the centre of her life to Latvia, she had been living there for two years and had been exercising treaty rights there, her children were enrolled in a nursery there and also had a nanny and she and the appellants had purchased a property there. The appellants' son had tried to transfer his employment to Riga but had been unable to do so. The sponsor had moved to Latvia because the cost of living was cheaper and they had managed to save money by renting out a room in their house in the UK.

4. The appellants' application was refused by the respondent on 5 October 2016. The respondent noted that the appellants had previously applied for entry clearance to the UK as adult dependant relatives of their son in October 2013 but their applications had been refused in January 2014 and their appeals against the decision dismissed on 20 January 2015. The respondent considered that the appellants' current application had been made solely in order to secure residence in the UK and had been engineered to circumvent the immigration rules under which they had previously been refused. The respondent did not accept that it was cost effective for the sponsor to move to Latvia and therefore did not find the reason for the move to be credible. The respondent did not accept the explanation for moving back to the UK, namely the Brexit referendum, given that the referendum pre-dated the appellants' move to Latvia. The respondent did not accept the evidence produced by the appellants as reliable evidence of the sponsor's employment in Latvia. The respondent did not, therefore, accept that the sponsor had moved the centre of her life to Latvia and did not accept that she was exercising treaty rights as claimed. The respondent was not satisfied that the appellants met the requirements of regulation 9 of the EEA Regulations.

5. The appellants appealed against that decision. Their appeal was heard by First-tier Tribunal Judge Henderson on 11 October 2017. The judge accepted that the sponsor was genuinely resident in Latvia but did not accept the evidence of her employment as reliable and did not accept that she had genuinely been exercising treaty rights in Latvia throughout her residence as a worker. The judge concluded that there had been an intention to obtain an advantage from the Community rules by creating artificially the conditions laid down for obtaining it. She dismissed the appeals.

6. The appellant sought permission to appeal that decision to the Upper Tribunal on three grounds: firstly that the judge had applied the wrong burden and standard of proof and had failed to show that the respondent had met the burden of proving that the appellants' residence in Latvia was fraudulent,

considering that they had been issued with residence permits by the Latvian authorities; secondly, that the judge's reasons for concluding that the sponsor was not actually working in Latvia were lacking in cogent reasoning and involved speculation; and thirdly, that the appellants' intentions as regards circumventing the immigration rules were irrelevant and the judge erred by finding that they were relevant.

7. Permission was granted on 12 June 2018, with particular reference to the judge's consideration of the residence cards issued by the Latvian authorities.

8. Mr Greer submitted firstly that the judge had failed to deal with the crucial issue of the appellants' and sponsor's residence cards, which was evidence of the Latvian authorities' recognition that the sponsor was exercising treaty rights. Mr Greer relied on the case of Sadovska & Anor v Secretary of State for the Home Department (Scotland) (Rev 1) [2017] UKSC 54 in submitting that the judge, having effectively found that there had been an abuse of rights, had failed to consider that the burden of proof lay upon the respondent. Secondly, Mr Greer submitted that the judge's reasons for concluding that the sponsor was not working were speculative and irrational and she had misunderstood the information in the tax declaration forms. He submitted that the judge had been nit-picking, whereas there was overall evidence of genuine employment. Thirdly he submitted that the sponsor's and appellants' motives were irrelevant, provided there was no abuse of rights.

9. Mr Bates submitted that the issue of residence cards to the appellants and sponsor was declaratory and was a snapshot of circumstances at the time, but was not relevant to the situation at the time of the hearing before the judge. The judge was right to consider matters at the time of the hearing and was entitled to have concerns about the evidence of the sponsor's employment and exercise of treaty rights.

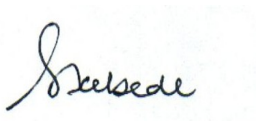
10. In response, Mr Greer relied on the case of OB (EEA Regulations 2006 - Article 9(2) - Surinder Singh spouse) Morocco [2010] UKUT 420, whereby it was found that the exercise of treaty rights need not be immediately prior to the return to the UK, in submitting that the issue of residence cards to the appellants and sponsor was of relevance to the issues in this appeal.

11. I am in agreement with Mr Greer that the issue of residence cards to the appellants and sponsor is a matter of relevance to the questions arising in this appeal and that the judge's failure to take that into consideration is a material error of law. It is correct that the issue of residence cards is merely declaratory and Mr Bates properly submitted that that was a snapshot of circumstances at the time. Nevertheless the issue of the residence cards is evidence that in December 2015, when the sponsor's residence card was issued, the Latvian authorities were satisfied that she was exercising treaty rights in Latvia and that in July 2016, when the appellants' residence cards were issued, they were satisfied that the appellants were family members of an EU citizen exercising treaty rights in Latvia. Accordingly there is evidence that the Latvian authorities were satisfied that the sponsor was exercising treaty rights at

certain times. That has to be a relevant and material consideration in assessing whether the sponsor was genuinely exercising treaty rights during the period of her residence in Latvia, in particular where the judge's finding was effectively that there had been an abuse of rights. Contrary to the respondent's submission at [3] of the Rule 24 response, there was never any suggestion in the grounds seeking permission and the grant of permission that the mere issuing of residence cards in Latvia was determinative of the appellants' appeals, but it was plainly a matter to be taken into consideration in an overall assessment of the sponsor's and appellants' intentions and the question of whether their residence in Latvia was genuine for the purposes of Regulation 9(3) of the EEA Regulations 2006. The judge's failure to consider that matter is plainly a material omission which undermines the sustainability of her credibility findings. Accordingly it seems to me that the judge's decision is materially flawed and has to be set aside in its entirety. I am in agreement with Mr Greer that it is appropriate, in such circumstances, for the matter to be considered afresh in the First-tier Tribunal.

DECISION

12. 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(b), before any judge aside from Judge Henderson.

Signed 

Upper Tribunal Judge Kebede Dated: 3 December 2018