



**Upper Tribunal
(Immigration and Asylum Chamber)**

Appeal Number: EA/12702/2016

**Heard at Field House
On 25 January 2018**

**Decision & Reasons
Promulgated
On 26 January 2018**

THE IMMIGRATION ACTS

Before

UPPER TRIBUNAL JUDGE HANSON

Between

**SHER AFGAN
(anonymity direction not made)**

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: no appearance.

For the Respondent: Mr Duffy - Senior Home Office Presenting Officer.

DECISION AND REASONS

1. On 15 September 2017 the Upper Tribunal found the First-tier Tribunal had erred in law and set aside the decision of that Tribunal promulgated on 29 December 2016. The matter comes before the

Upper Tribunal today for the purposes of a Resumed hearing after which this tribunal shall substitute a decision to either allow or dismiss the appeal.

Background

2. The appellant, a citizen of Pakistan born on 20 September 1970, entered the United Kingdom on 20 October 2010 with a student Visa. Whilst in the United Kingdom the appellant married a Polish national. An application for a residence card, as proof of a right to reside in the United Kingdom made on the 6 October 2016, was rejected by the Secretary of State who was not satisfied the appellant had established that the EEA national was exercising treaty rights in the United Kingdom.
3. Notice of hearing was sent out to the parties informing them of the Resumed hearing before the Upper Tribunal on 25 January 2018. The appellant's representatives wrote two letters to the Upper Tribunal in relation to this matter the first of 10 January 2018 confirming that they had already sent a paginated bundle to the Upper Tribunal on 18 July 2017, which is the bundle the appellant is seeking to rely upon for the purposes of the Resumed hearing. The letter also confirms receipt of notice of hearing on 8 January 2018 confirming the hearing on 25 January 2018.
4. On 24 January 2018 a second letter was received from the appellants representatives in which it is confirmed they continue to represent the appellant in the matter but which then contains the following text:

"The appellant requests the tribunal that the hearing be decided on the papers submitted to the tribunal. However, also requests the tribunal to consider the appellant's exceptional circumstances and witness statements enclosed in the bundle.

We again repeat the issue need to resolve is whether the sponsor was exercising treaty rights at the time of making an application and in response the appellant confirms that the sponsor was exercising treaty rights by working in the UK and had produced wealth of evidences confirming the same, enclosed in the bundles."

Discussion

5. The Tribunal had not agreed that the matter could be disposed of on the papers and it is for the appellant whether he wishes to attend the hearing of which he has received adequate notice either in person, with his representative, or with only his representative attending.
6. The Tribunal has available to it to the earlier bundle of evidence which has been considered together with submissions made by Mr Duffy.
7. The first observation made by the Tribunal at this stage relates to the relevant date at which these issues are being considered. The representatives letter of the 24 January 2018 states that the issue to be resolved is whether the sponsor was exercising treaty rights at the time of the making of an application. This is legally incorrect. A

residence card does not confer a right to reside in the same way that a grant of an application for leave under the domestic Immigration Rules may, but merely confirms an entitlement to a right to reside that arises under European law.

8. The application made by the appellant was for a residence card on the basis that his wife is an EEA national exercising treaty rights in the United Kingdom.
9. As noted by the First-tier Tribunal Judge, the only evidence initially provided were two payslips from a company named Ammoray Limited showing employment in February and March 2016 paid in cash. That company traded under the name "Pizza World".
10. In the latest information provided by the appellant a number of other payslips have been disclosed for the appellant's EEA national spouse, but only covering the period February 2016 to December 2016.
11. Even though the appellant applied for the residence card on 6 October 2016 and it appears the above wage slip show the EEA national was exercising treaty rights at that time, the relevant date in an EEA appeal is the date of the hearing. This is confirmed by a number of authorities of the Upper Tribunal including *SGC and others [2005] UKAIT 00179* in which the Tribunal said that in an EEA appeal under the 2002 Act the relevant date is the date of hearing. Although now overruled in relation to the burden of proof finding, the date of hearing issue was confirmed in *IS (marriages of convenience) Serbia [2008] UKAIT 00031*. A more recent decision is that of *Boodhoo and another (EEA Regs: relevant evidence) [2013] UKUT 00346* in which Mr Justice Blake held that neither section 85A Nationality, Immigration and Asylum Act 2002 nor the guidance in DR (Morocco)* [2005] UKAIT 38 regarding a previous version of section 85(5) of that Act has any bearing on an appeal under the Immigration (European Economic Area) Regulations 2006. In such an appeal, a tribunal has power to consider any evidence which it thinks relevant to the substance of the decision, including evidence which concerns a matter arising after the date of the decision.
12. The burden is therefore upon the appellant to establish that his EEA national wife is exercising treaty rights within the United Kingdom at the date of this hearing, 25 January 2018. Even if she was exercising treaty rights at the date of application but shortly thereafter, for example in light of the evidence the company who previously employed her may have ceased trading, she no longer is, she may no longer be exercising treaty rights. The earlier evidence disclosed is therefore only relevant to the situation at the date to which it relates. As this is the case, the appellant cannot be said to have discharged the burden of proof to show that at the date of the hearing such treaty rights were being exercised by the EEA national.
13. As stated above, the only evidence provided is the wage slips from February 2016 to December 2016 with no evidence having been filed for any later date and no attendance from either the appellant or the EEA national to provide any additional oral evidence to confirm the current situation.

14. I do not consider this is a case in which it is appropriate to adjourn the matter further for additional evidence to be sought as the directions given in the Error of Law finding are very specific in relation to the need to provide all evidence the appellant is seeking to rely upon for the purposes of this hearing. The appellant is represented by solicitors who should be fully aware of the relevant date at which matters are to be considered and of the need to provide evidence to discharge the burden which falls upon the appellant.
15. On the basis of the information that has been made available; I make a finding of fact that the appellant has failed to discharge the burden of proof upon him to the required standard to show that at the date of hearing his EEA national wife was exercising treaty rights in the United Kingdom sufficient to enable him to succeed with his appeal. The appellant has not established entitlement to a residence card he seeks.
16. If this is a matter in relation to which the evidence exists but has not been disclosed, it is always open to the appellant to make a fresh application supported by appropriate evidence that his wife is a qualified person which can be considered by the respondent on its merits.

Decision

17. **I remake the decision as follows. This appeal is dismissed.**

Anonymity.

18. The First-tier Tribunal did not make an order pursuant to rule 45(4)(i) of the Asylum and Immigration Tribunal (Procedure) Rules 2005.

I make no such order pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008.

Signed.....
Judge of the Upper Tribunal Hanson

Dated the 25 January 2018