



**Upper Tribunal
(Immigration and Asylum Chamber) Appeal Numbers: EA/04693/2019
(V)**

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THE IMMIGRATION ACTS

**Heard at Field House
On 27th October 2020**

**Decision & Reasons Promulgated
On 02nd November 2020**

Before

UPPER TRIBUNAL JUDGE LINDSLEY

Between

QAYNAT [S] (1)

[J H] (2)

[Z H] (3)

[M H] (4)

(ANONYMITY ORDER NOT MADE)

Appellants

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr N Sadeghi, of Counsel, instructed by JML Solicitors

For the Respondent: Mr T Melvin, Senior Home Office Presenting Officer

DECISION AND REASONS

Introduction

- 1.** The appellants are citizens of India, the first appellant being the mother born in 1981 and the second, third and fourth appellants being her three children born in 2007, 2010 and 2012, who are the wife and children of Mr Asfak [H], whom it is said is a citizen of Portugal. The appellants were issued with EEA family permits dated 21st May 2019 but were refused admission to the UK on the basis of serious grounds of public policy on 22nd August 2019. They lodged appeals against these refusals, which were dismissed under the Immigration (EEA) Regulations 2016 (henceforth the EEA Regulations) in a decision of First-tier Tribunal Judge KR Moore promulgated on 12th March 2020.
- 2.** Permission to appeal was granted by Judge of the First-tier Tribunal L Murray on the 8th July 2020 on all grounds but principally on the basis that it was arguable that the First-tier Tribunal had erred in law in failing to make any clear finding as to the nationality of the sponsor when it appears he was granted settlement under the EU scheme after the decision to refuse the appellants entry but prior to the hearing of the appeal; and because it was arguable the test under Regulation 27 of the EEA Regulations had not been applied; because there was an arguable failure to consider the best interests of the children; and because there were arguably irrational conclusions relating to the complicity of the first appellant in any fraudulent behaviour of the sponsor (her husband).
- 3.** The matter came before me to determine whether the First-tier Tribunal had erred in law. The hearing was held at a remote Skype for Business hearing in light of the need to reduce the transmission of the Covid-19 virus, and in light of this being found to be acceptable by both parties, and being a means by which the appeal could be fairly and justly determined. There were problems with audibility at the start of the hearing but these were resolved by muting of microphones before submissions were heard.
- 4.** The appellants submitted some further documentation by email on 22nd October 2020 which consisted of birth certificates for two baby girls born on 23rd June 2020 in the UK to the first appellant and the sponsor, and copies of their British citizen passports. Mr Melvin said this documentation amounted to a new matter and that the respondent did not consent to it being admitted, and expressed the opinion of the respondent that the decision of the Presidential Panel in Birch (Precariousness and mistake: new matters) [2020] UKUT 86 was wrongly decided, and informed me that it was under appeal. It was ultimately agreed by Mr Sadeghi that he did not need to rely upon this material and so it was not admitted and was not considered in this appeal.

Submissions - Error of Law

- 5.** In grounds of appeal to the Upper Tribunal, drafted by Mr Sadeghi for the appellants, and in oral submissions from Mr Sadeghi it is argued for the appellants, in summary, as follows.

- 6.** It is argued that the First-tier Tribunal errs in law firstly in failing to make a finding as to the nationality of the sponsor. At paragraph 34 of the decision it is said that there is no clear evidence as to how the sponsor was able to obtain Portuguese citizenship but it is not disputed that he has a Portuguese passport. The First-tier Tribunal then throws doubt on this issue, without making a clear finding and without considering that the respondent had not have any apparent interactions with the Portuguese authorities regarding this issue; and without considering that the respondent had granted the sponsor settled status under Appendix EU of the Immigration Rules; and that the sponsor had renewed his documents with the Portuguese authorities two months after the decisions appealed and registered his marriage and births of his children with them. Further, the sponsor had indicated that he was entitled to this nationality through his mother, and offered at the First-tier Tribunal to provide further evidence if required. If, as is argued must be the case on the evidence before the First-tier Tribunal, the sponsor must be seen as an EU national then the appeal must then be determined by reference to Regulation 27 of the EEA Regulations, which only permits exclusion of the family on public policy, public security and public health grounds.
- 7.** The second ground of appeal is that there was a failure to apply Regulation 27 of the EEA Regulations There are no express findings that the behaviour of the first appellant demonstrates a genuine, present and sufficiently serious threat to the integrity and effectiveness of the immigration control system. The First-tier Tribunal simply decided that the first appellant's evidence was not credible or plausible, and then wrongly decided the matter under Regulation 26(3) of the EEA Regulations on the basis that it found that there are grounds to suspect that the first appellant has misused the right to reside.
- 8.** The third ground of appeal is that there was a failure to engage with the evidence with respect to the second, third and fourth appellants that they are quite possibly Portuguese citizens as they have passport applications pending and have been registered with the Portuguese authorities; and that they have derived rights to reside under Regulation 16(3)-(4) of the EEA Regulations because they are children in education in a host member state where their EEA parent works. Further it is argued that the assessment of the best interests of the children is inadequate.
- 9.** Fourthly it is argued that the findings at paragraphs 25 and 37 of the decision that the first appellant was complicity in fraudulent behaviour by the sponsor are irrational, as it is accepted by the First-tier Tribunal Judge that there are cultural differences in India which might mean she knows little of her husband's conduct at paragraph 29, and it is clear that she gave this explanation in response to the respondent's questioning before the First-tier Tribunal. However, the First-tier Tribunal then concludes that the first appellant had complicitly signed false documents at paragraph 36 of the decision. Further this is not consistent with the legal test for deception, correctly cited at paragraph 17 of the decision.

- 10.** In written submissions in the form of a Rule 24 reply and in oral submissions from Mr Melvin it is argued, in summary, for the respondent as follows.
- 11.** Firstly it is argued that the hearing did not relate to the Portuguese spouse as recorded at paragraph 9 of the decision, and at paragraph 12 it was stated that it was not necessarily disputed that the spouse and sponsor is a Portuguese citizen. However, it is the conclusion of the First-tier Tribunal that the sponsor's nationality had not been genuinely or reliably obtained.
- 12.** Secondly it is argued that there was reference to Regulations 23(1) and 24(6) of the EEA Regulations at paragraphs 10,25 and 37 of the decision, and that this was correct and sufficient.
- 13.** Thirdly it is argued that the best interests of the children were dealt with adequately at paragraph 37 of the decision as they had only been in the UK for a few months at the time of hearing.
- 14.** Fourthly it is argued that the findings on the complicity of the first appellant are detailed and rationally made at paragraph 28 of the decision.
- 15.** It is argued as a result that the decision should be upheld as it makes complete sense read holistically.

Conclusions - Error of Law

- 16.** The respondent revoked the family permits for the appellants and refused them admission to the UK under Regulations 23(1) and 24(6) of the EEA Regulations. It is clear that the First-tier Tribunal rightly found that the refusal was made with reference to Regulation 27 of the EEA Regulations based on there being serious grounds of public policy to exclude the appellants as set out at paragraphs 1 and 2 of the decision.
- 17.** At paragraph 26 of the decision the First-tier Tribunal finds that the appellants are related as claimed to the sponsor on the basis of DNA evidence.
- 18.** I find that the next question for the First-tier Tribunal ought logically to have been whether the sponsor is a Portuguese citizen, however this was not address explicitly as the next issue, and instead the First-tier Tribunal engaged in a consideration of whether the first appellant was aware and complicit with the sponsor's history of applications to come to the UK as an Indian citizen using fake documents between 2005 and 2010, and his residence in this country working illegally.
- 19.** The evidence on the issue of the sponsor's nationality accepted in his favour at various points in the decision is that it was found that he holds a Portuguese passport and a Portuguese nationality card (paragraph 34). I find that there was an error of law in not also considering in favour of the

sponsor being Portuguese evidence that he had been issued with EU residence cards by the respondent, and in particular that he had been granted settlement under Appendix EU of the Immigration Rules, as per page 10 of the appellant's bundle. I also find that it was an error not to have considered the lack of any evidence that the respondent had reported her concerns to the Portuguese authorities and the lack of any evidence from the Portuguese authorities that they were considering these concerns. The specific evidence found to be against the sponsor being Portuguese is that his passport records his place of birth wrongly (Sanjan Valsad Guj and not Daman), and this, together with his history of use of false documents for British visa applications, is found to be evidence that the passport was not properly obtained.

- 20.** I find that the lack of a clear finding that the sponsor is a Portuguese citizen is irrational on the evidence, as there is no evidence that the issue with place of birth would invalidate the passport as good evidence of his nationality at the date of hearing. Even if the respondent has uncovered evidence casting doubt that the sponsor's Portuguese nationality was properly obtained there was no evidence that he did not remain a Portuguese citizen at that point in time and so the appeal should have been determined on that basis.
- 21.** If the sponsor was a Portuguese citizen at the time of appeal then it was an error of law to fail to consider whether his children, the second, third and fourth appellants, were entitled to remain in the UK on the basis that they were his family members under Regulation 7 of the EEA Regulations as they are found to be his children and were all under the age of 21 years; and potentially (although it is unclear why this would be necessary) on the basis that they had been in education for 6 months at the time of the hearing and the sponsor was working, by reference to derived rights of residence under Regulation 16 of the EEA Regulations, given the documentation in the appellant's bundle at pages 44 to 46 with respect to their being in schooling and the evidence of the sponsor's work.
- 22.** If the sponsor is a Portuguese citizen the first appellant, his wife, still might be liable to be refused entry to the UK if it were in the interests of public policy to do so under Regulation 27 of the EEA Regulations. It is noted by the First-tier Tribunal at paragraph 29 of the decision that culturally Indian wives might be "subordinate and know little of their husband's conduct", and it is recorded that her evidence was that she had blindly signed applications in her name in 2007. However the First-tier Tribunal concludes that the first appellant did know about a number of applications the sponsor made, which he accepts were fake, in the period 2006 to 2010, and further, contrary to her evidence, did know he was working illegally in the UK between period 2006 to 2010 because it was not "implausible" (paragraph 31) that she did not know this. It is not clear from the decision of the First-tier Tribunal why her evidence that she had no knowledge of the fraudulent visa applications was implausible as the only reasons given are her failure to identify herself and the sponsor in

pictures on the applications at paragraph 33, which is described as a minor issue only, and her inability to explain how he had got his Portuguese passport beyond saying it was because of his mother and her heritage, as recorded at paragraph 35. I find that this is insufficient reasoning to explain how it is found that the first appellant was complicit in the past false visa applications. In addition there is an unlawful total absence of reasoning as to how the high test of exclusion on the basis of public policy is met even if the first appellant had on two occasions colluded in making false visa applications in 2007, and had known the sponsor was living and working illegally in the UK in the period 2006 to 2010.

- 23.** I therefore set aside the decision of the First-tier Tribunal dismissing the appeal and all of the findings except that finding that the appellants and the sponsor are related as claimed based on the DNA evidence.
- 24.** It was agreed by both parties, after I informed them that I found that the First-tier Tribunal had erred in law and after a short adjournment for Mr Sadeghi to take instructions, that the appeal could also be remade on the basis of submissions only at this hearing.

Submissions - Remaking

- 25.** Mr Melvin submitted for the respondent that he relied upon the immigration decision of 22nd August 2019 in relation to the appellants. From this document and the explanatory statement the essence of the respondent's case is as follows. The first appellant fell to be refuse entry on the basis that there was evidence that her husband and sponsor had made a number of false applications for entry clearance using false Indian passports between 2006 and 2007, and had then travelled to the UK and worked illegally between 2007 and 2010. The respondent says she has a reasonable suspicion that the sponsor's Portuguese citizenship is suspect because the sponsor had previously been able to obtain false Indian documents. It was contended that the first appellant was involved with the two false visa applications made in 2007 because she initially claimed the sponsor had been in India when he had been in the UK between 2007 and 2010, and said she did not recognise a picture of herself and him from 2007 when the sponsor had confirmed they were their photographs. As a result it was concluded that the sponsor was not a Portuguese citizen, and she was not a family member under Regulation 7 of the EEA Regulations and her exclusion was consistent with Regulation 27 as she had attempted to enter the UK through an abuse of the Immigration Rules. The decision was considered to be consistent with s.55 of the Border, Citizen and Immigration Act 2009 as the other appellants had been living with the first appellant separated from the sponsor since 2014 and were not in school until September 2019.
- 26.** Mr Melvin added that the Portuguese authorities had been informed of the respondent's concerns but there was nothing from them revoking the

citizenship of the sponsor, so he accepted that the sponsor is currently a Portuguese citizen. He candidly accepted that he was not in the strongest position to argue that the first appellant posed a real and present risk to immigration control in this context.

- 27.** Mr Sadeghi submitted for the appellants that he relied upon his skeleton argument as before the First-tier Tribunal. In short he argued that the sponsor has shown on the balance of probabilities that he is a Portuguese citizen, and that the second, third and fourth appellants are therefore entitled to succeed as his family members in accordance with Regulation 7 of the EEA Regulations, and in accordance with their derivative rights based on their education. It was also in their best interests to remain in the UK.
- 28.** With respect to the first appellant it is argued that she does not fall to be excluded from the UK on the basis of Regulation 27 as the respondent has not shown on the balance of probabilities that she has been dishonest. The allegations made are against the sponsor for the most part and concern events which took place prior to 2007. The first appellant was subjected to rigorous cross examination by the Home Office Presenting Officer in the First-tier Tribunal and she was consistent but was found to lack the same level of detail the sponsor was able to provide. Her evidence is that she blindly signed documents, and this clearly would not amount to her deliberately making false statements to the British authorities. Before the First-tier Tribunal the respondent's representative said that no enquiries had been made with the Portuguese authorities about these matters, but today Mr Melvin has said that something had been sent about the concerns of the Secretary of State but as yet nothing had been received back. It follows that this was not seen as a pressing matter by the respondent, and that it is not something on which the Portuguese authorities have seen fit to act to date. Ultimately it is not possible to say that the first appellant poses a real present and sufficiently serious threat to immigration control on the basis of matters that took place over 12 years ago in relation to two visa applications, which were in fact refused because she failed to have sufficient documentary evidence, even if it were found that she had been complicit with the sponsor in putting forward a false applications at that time, and particularly because no action has been taken against the sponsor for these matters.

Conclusions - Remaking

- 29.** It is rightly conceded for the respondent that the sponsor is currently a Portuguese citizen, and I find that this is the case in light of his having a Portuguese passport and identity card, and having been granted indefinite leave to remain in the UK under the EU Settlement Scheme on 29th October 2019.
- 30.** As the sponsor is a Portuguese citizen and it is accepted that the second, third and fourth appellants are his children and all under the age

of 21 years I find that they are all his family members under Regulation 7(1)(b)(ii) of the EEA Regulations and thus entitled to succeed in their appeals on this basis, there being no contention that they fall to be excluded from the UK on any basis. I do not need to consider whether they are entitled to derivative rights to reside based on their being in education in the UK under Regulation 16 of the EEA Regulations in these circumstances.

- 31.** The basis on which the first appellant was refused entry to the UK is that she fell to be excluded under Regulations 23 of the EEA Regulations as this was justified on grounds of public policy in accordance with Regulation 27. Such a decision must be proportionate, be based exclusively on her personal conduct and she must represent a genuine, present and sufficiently serious threat to a fundamental interest of society. It is contended that in 2007 in relation to two visa applications to come to the UK she colluded with her husband, the sponsor, to put forward false applications with false documents. The evidence for this is said to be that the first appellant initially denied that the sponsor had left India in the period 2007 to 2010 and afterwards has given vague evidence about what she understood about his whereabouts in this time; that she claimed not to recognise the photograph of herself used in one or both of these applications whereas the sponsor said it was a picture of her; and that she lacked detailed understanding of how he had obtained his Portuguese citizenship. The evidence of the first appellant was that she had no knowledge of the visa applications and had “blindly signed” them as her role in their marriage was simply to look after the house and the children, and thus she had not colluded in any deception. This was also the evidence of the sponsor. Her evidence about his Portuguese citizenship was that he was entitled through his mother’s heritage.
- 32.** I find that the first appellant was not wholly candid about the sponsor’s whereabouts during the period 2007 and 2010 at interview, but I do not find that the respondent has shown on the balance of probabilities that she consciously colluded with her husband, the sponsor, in making two false visit visa applications in 2007. I find that it is irrelevant that she did not recognise her photograph from 2007 (which does look different from the photographs submitted with applications made in 2016 and 2017) and I find that her level of understanding of his entitlement to Portuguese citizenship is what might be normally expected of a lay person. Her evidence and that of her husband, the sponsor, who was very candid about his own past fraudulent applications, was that she had no involvement with these applications. I accepted that evidence as consistent with the role it is said she has had in their marriage. Further, even if she had been aware of and to some extent involved with the applications that her husband was making in 2007, I would not have found that this would have meant that she was a present and sufficiently serious threat to the maintenance of immigration control. She has never travelled on any visa issued in her name as a result of the presentation of false

documents; clearly since 2007 she has respected immigration control and made proper applications with genuine documents, one in 2016 and one 2019, for EEA family permits, and did not attempt to travel after the 2016 application was refused but reapplied again in 2019, and thus has only travelled to the UK with the correctly issued family permit as the wife of an EU citizen.

- 33.** I therefore find that the first appellant is also entitled to succeed in her appeal as she is a family member of an EU national under Regulation 7 of the EEA Regulations, and does not fall to be excluded from the UK under Regulation 23 and Regulation 27 of the EEA Regulations.

Decision:

1. The making of the decision of the First-tier Tribunal involved the making of an error on a point of law.
2. I set aside the decision of the First-tier Tribunal dismissing the appeal.
3. I remake the appeals allowing them under the EEA Regulations.

Signed: Fiona Lindsley
Upper Tribunal Judge Lindsley

Date: 27th October 2020