



**Upper Tribunal
(Immigration and Asylum Chamber)
EA/07081/2019 (V)**

Appeal Number:

THE IMMIGRATION ACTS

Heard by Teams via Field House

Decision & Reasons

On 15th June 2021

Promulgated

On 13 July 2021

Before

UPPER TRIBUNAL JUDGE LINDSLEY

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

**FARAN AL AZIZ
(ANONYMITY ORDER NOT MADE)**

Respondent

Representation:

For the Appellant: Mr D Clarke, Senior Home Office Presenting Officer

For the Respondent: None

Interpretation:

Mr N Mursalin in the Urdu language

DECISION AND REASONS

Introduction

1. The claimant is a citizen of Pakistan born on 26th October 1980. He applied for an EEA family permit to come to the UK as an extended

family member of his sponsor and uncle, Asghar Hussain Chaudhry, who is a German citizen, under the Immigration (EEA) Regulations 2016. The application was refused on 25th October 2019. His appeal against the decision was allowed on the papers by First-tier Tribunal Judge Trevaskis in a determination promulgated on the 10th December 2020.

2. Permission to appeal was granted to the Secretary of State and I found that the First-tier Tribunal had erred in law for the reasons set out in my decision at Annex A to this decision.
3. The matter came before me to remake the appeal. In light of the need to take precautions against the spread of Covid-19 and with regard to the overriding object set out in the Upper Tribunal Procedure Rules this hearing took place via Teams, a format to which neither party raised objection. There were no significant issues of connectivity or audibility during the hearing, although due to internet problems the claimant was only able to join by telephone. His connection was lost at the point when the appeal hearing had just terminated but I was satisfied that by then he had understood my willingness to consider any further evidence with respect to the sponsor's exercise of Treaty Rights, if submitted within 14 days, in my determination of the appeal. It was lawful for the claimant to participate in these proceedings from Pakistan because Pakistan raises no legal or diplomatic objection to this happening, and so it is permissible under the Hague Convention.
4. I found in my error of law decision that the First-tier Tribunal did not err in law in finding that the claimant was dependent on his sponsor. The First-tier Tribunal accepted the evidence of the claimant, supported with documentary evidence, that he had been reliant for his basic needs on the sponsor who had paid his rent, provided money for groceries, medical fees and school fees. It was accepted that the sponsor had substantial financial resources and was in a position to do this. The First-tier Tribunal properly directed itself that it was irrelevant why this state of dependency existed, so long as a true state of dependency existed. As there was no error of law in the findings of dependency I preserved paragraphs 18 to 20 of the First-tier Tribunal.
5. The outstanding question that must be answered in this remaking appeal is whether the sponsor is residing in the UK in accordance with EU Regulations and thus whether 12(1)(a) of the Immigration (EEA) Regulations 2016 is met.

Evidence & Submissions - Remaking

6. The evidence for the claimant was that at the time of application in 2019 his uncle and sponsor, Mr Asghar Hussain Chowdhry, lived in Germany and had intended to travel to the UK to set up a grocery business in which he was intending to work when he, the claimant,

was granted entry clearance. This is supported by the affidavits before the entry clearance officer. The affidavit at page B31 of the respondent's bundle states: "I confirm that I intend to travel to the United Kingdom in the company of the applicant within two weeks of the issuance of the visa which I expect will be issued in two weeks." The sponsor's affidavit of 7th October 2020 found in the claimant's bundle before the First-tier Tribunal gives a Pakistani address in Rawalpindi for the sponsor, and sets out that "I want to start a grocery store business in the United Kingdom and want to shift my above nephew (the appellant) there, who can stay and look after my business. As soon as I get his approval I would move to UK for a quick business set up for him."

7. The sponsor has now provided an updating statement which asserts that he came to the UK prior to 31st December 2020, has applied under the EU settlement scheme and intends to remain in the UK on a long-term basis. In addition he has provided a licence to occupy a property in London dated 1st June 2020, a number of receipts for the period September to November 2020, an acknowledgement of an application to remain in the UK under the EU settlement scheme on 1st June 2021 and a letter regarding his obtaining pre-settlement under that scheme dated 10th June 2021.
8. In answer to questions from Mr Clarke the claimant explained that the sponsor is currently in the UK having come recently, and also on a couple of previous visits last year. He said that the sponsor was not going to attend the hearing as he was not well, had gone somewhere and had sent his documents. The claimant did not know how long the sponsor's visits to the UK had lasted. He said he believed that he was working in the UK and has started a business. He said he did not understand why he was being asked about the details of this business as his understanding of the last hearing was that he had to show simply that his sponsor was in the UK, and he had provided evidence to show that this was the case. He believes that his sponsor has medical insurance. His answers made it clear that he had not understood what evidence of the sponsor exercising EU Treaty rights, as referred to in the first direction of my decision of 28th April 2021, meant.
9. Mr Clarke for the Secretary of State argued that the claimant has not shown that Regulation 12(1)(a) of the EEA Regulations is met because he needs to show that the sponsor is exercising Treaty rights, for instance working, being self-employed or being a self-sufficient person with comprehensive sickness insurance for himself and the claimant, and the documentary evidence provided does not show this and the claimant's oral evidence with respect to the sponsor's activities was simply too vague. To obtain limited leave under the EU Settlement Scheme there is no requirement to submit evidence of the exercise of Treaty rights as the scheme simply requires presence in the UK. A grant of leave under this

discretionary scheme is not therefore an acknowledgement by the Secretary of State that the sponsor is exercising Treaty rights in the UK. As a result, he submits, the appeal should be dismissed.

10. The claimant appeared annoyed as he had felt, following the previous error of law hearing, that all that he needed to show was that the sponsor was present in the UK, and evidence of his travel had now been provided. He argued that as the sponsor was within the "3 month" period he did not need to comply with any conditions. He felt that what was required in terms of evidence of presence had been provided so he ought to be allowed to win the appeal as otherwise it would be unfair.
11. In light of the claimant's contention that the hearing was unfair because he had not understood the evidence needed and as he clearly felt the Upper Tribunal was now raising a new matter, and with the agreement of Mr Clarke, I directed that the claimant had a period of 14 days from today to email to myself and Mr Clarke via the email addresses he had used to provide the other evidence any evidence of his sponsor's work/self-employment/self-sufficiency in the UK or other exercise of Treaty rights. I directed that Mr Clarke would have 7 days after receipt of any evidence from the claimant to make submissions on that evidence. I would determine the appeal after this time had elapsed in light of any additional evidence and submissions by the parties and in the context of the totality of the evidence.
12. As a result of my directions at the conclusion of the hearing, which gave the claimant an opportunity to submit evidence that the sponsor was exercising Treaty rights the claimant submitted two further documents by email dated 24th June 2021: a certificate of incorporation of AH Chaudhry Traders Ltd dated 23rd June 2021, and an undated letter from this company confirming that the sponsor, Mr Asghar Hussain Chaudhry had been working as a director of that company and was engaged in "various business activities".
13. In response Mr Clarke submitted in written email submissions dated 30th June 2021 that the documents did not show that the sponsor was exercising Treaty rights in the UK. This was because the company had only been incorporated on 23rd June 2021 and so it was only possible for Mr Chaudhry to have been working as a director for it for one day, and further the letter is signed on behalf of him and so is not independent evidence of any exercise of Treaty rights, and fails to particularise what the business activities are or provide other independent evidence of them such as invoices, receipts or contracts, and thus fails to meet the tests for demonstrating genuine and effective employment in Raulin C-357/89 at paragraphs 21-30 and Jany v Staatssecretaris van Justitie C-268/99 at paragraph 37.

Conclusions – Error of Law

14. Regulation 12 of the Immigration (EEA) Regulations 2016, which deals with the issuing of family permits, requires at Regulation 12(1)(a) that to issue a family permit to the family member of an EEA national that EEA national should either be residing in the UK in accordance with the EEA Regulations or it must be shown that they “will be travelling to the United Kingdom within six months of the date of the application and will be an EEA national residing in the United Kingdom in accordance with these Regulations on arrival in the United Kingdom”.
15. This application was made in October 2019 and there is no evidence that the sponsor travelled to the UK within 6 months of that date so my focus is whether the sponsor is currently residing in the UK in accordance with the EEA Regulations.
16. The contention is that he is residing in the UK as a worker, working as a director of AH Chaudhry Traders Limited which from affidavits submitted by the sponsor with the application in 2019 and in 2020 would appear to have intended, at that time at least, to be a grocery store. There is evidence which demonstrates that the sponsor Mr Chaudhry has been in the UK and has obtained limited leave under the discretionary pre-settlement scheme, and I accept that he has been periodically present, perhaps in the summer or autumn of 2020 and in 2021. However, from the totality of the evidence submitted but I do not find that the sponsor has shown that he is exercising Treaty rights as a working as a director in the UK for the following reasons. As Mr Clarke has submitted all of the evidence going to this issue is extremely vague: the appellant was able to tell us nothing about it in his oral evidence. It is not even clear what type of business AH Chaudhry established on 23rd June 2021 operates, as opposed to his plans in 2019/2020. There is no particularisation of any work done by Mr Chaudhry in the undated letter from AH Chaudhry Traders Limited and no supporting documentation for that business. The only document is the letter signed by someone on his behalf and so is not independent evidence, and the company was only established one day prior to the letter being written.
17. As a result I find that the claimant cannot show that he can meet the requirements of Regulation 12(1)(a) of the Immigration EEA Regulations 2016 as he has not shown on the balance of probabilities that the sponsor is exercising Treaty rights in the UK and so is not entitled to a family permit.

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 allowing the appeal under the EEA Regulations.
3. I remake the appeal by dismissing it under the Immigration EEA Regulations 2016.

Signed: Fiona Lindsley
Upper Tribunal Judge Lindsley

Date: 3rd July 2021

Annex A: Error of Law Decision

DECISION AND REASONS

Introduction

1. The claimant is a citizen of Pakistan born on 26th October 1980. He applied for an EEA family permit to come to the UK as an extended family member of his uncle, Asghar Hussain Chaudhry, who is a German citizen, under the Immigration (EEA) Regulations 2016. The application was refused on 25th October 2019. His appeal against the decision was allowed on the papers by First-tier Tribunal Judge Trevaskis in a determination promulgated on the 10th December 2020.
2. Permission to appeal was granted to the Secretary of State by Judge of the First-tier Tribunal Martin on 25th January 2021 on the basis that it was arguable that the First-tier judge had erred in law in finding the claimant entitled to an EEA family permit to come to the UK when his sponsor was residing in Germany.
3. The matter came before me to determine whether the First-tier Tribunal had erred in law. In light of the need to take precautions against the spread of Covid-19 and with regard to the overriding object set out in the Upper Tribunal Procedure Rules this hearing took place via Skype for Business, a format to which neither party raised objection. There were no significant issues of connectivity or audibility during the hearing, although the claimant was only able to join via audio as he did not have a camera on his phone. It was lawful for the claimant to participate in these proceedings from Pakistan because Pakistan raises no legal or diplomatic objection to this happening, and so it is permissible under the Hague Convention.

Submissions – Error of Law

4. The Secretary of State in the grounds of appeal and the oral submissions of Mr Avery argues firstly that the First-tier Tribunal erred in law because it failed to engage with the fact that the claimant's sponsor lives in Germany and is not settled or exercising Treaty rights in the UK. It is argued that this is determinative of the appeal. This is because under Regulation 12(1)(a) of the Immigration (EEA) Regulations 2016 to issue a family permit the sponsor must be residing in the UK in accordance with the Regulations or be travelling to do so within 6 months. This issue, even though not raised by the entry clearance officer, had to be satisfied for the appeal to be allowed under the EEA Regulations. Mr Avery argued that notwithstanding the evidence in the bundle which indicated that the sponsor did intend to travel to the UK with the claimant there needed to be a decision

that he would be remaining in accordance with the EEA Regulations if he did this.

5. Secondly, it is argued for the Secretary of State that the conclusion that the claimant was dependent on the sponsor due to his claimed inability to work and back problems was inadequately reasoned as the sponsor says he will employ him in the UK when he opens a business here, and so it looks as if the claimant is capable of work and will no longer be dependent on the sponsor as he will be working for him in the UK.
6. The claimant issued no formal Rule 24 notice but in an email response to the hearing stated that his sponsor was currently unwell and residing in Pakistan and had been for the past two months, but that when he recovered he intended to go to the UK to sort out the claimant's status there. The claimant said in oral argument that there was nothing contesting whether the sponsor would travel to the UK and be a qualifying person in the refusal notice and there was evidence before the First-tier Tribunal, in the affidavits of the sponsor and his affidavit and in the additional information and sponsor's details on the application form, which made it clear that the sponsor intended to go with him to the UK to establish a business once he, the claimant, had entry clearance to travel too.
7. I found that the First-tier Tribunal had erred in law by failing to consider whether the claimant's sponsor was going to travel to and remain in the UK as a qualified person with him and make findings on this issue for the reasons I set out below. I set aside the decision of the First-tier Tribunal allowing the appeal but preserved the findings with respect to dependency which, for the reasons I set out below, I did not find erred in law. I decided that the appeal will be remade in the Upper Tribunal at the first available date via Skype for Business. The parties attention was drawn to the fact that the UK had now left the EU, and the transition period had elapsed, so the remaking would have to consider how the sponsor was now able to re-enter the UK and become a qualifying person under the EEA Regulations.

Conclusions - Error of Law

8. The First-tier Tribunal notes at paragraph 17 of the decision that the evidence of the claimant is that his sponsor lives in Germany, and wants to start a grocery business in the UK and to appoint the claimant to manage that business. The intentions of the sponsor with respect to travel to the UK and what he planned to do if he did travel here are not dealt with at all in the decision however. The First-tier Tribunal failed to engage with the evidence in the sponsor's affidavit at B31 of the respondent's bundle and in

application form at B27 in the sponsor's details and additional information about the sponsor's intention to travel to the UK.

9. I find that the First-tier Tribunal erred in law in failing to consider the evidence and make findings on this issue as to decide the appeal this was necessary. Regulation 8(2)(b) of the Immigration (EEA) Regulations 2016 requires that the extended family member is accompanying the EEA national to the UK or has joined the EEA national in the UK. Further Regulation 12 of the Immigration (EEA) Regulations 2016, which deals with the issuing of family permits, requires at Regulation 12(1)(a) that to issue a family permit to the family member of an EEA national that EEA national should either be residing in the UK in accordance with the EEA Regulations or it must be shown that they "will be travelling to the United Kingdom within six months of the date of the application and will be an EEA national residing in the United Kingdom in accordance with these Regulations on arrival in the United Kingdom".
10. Nothing was said about this issue in the refusal notice however it was a necessary component of the Regulations on which the claimant relied and therefore the claimant had to show that he could meet these requirements on appeal for that appeal to be allowed under the EEA Regulations, and so it was necessary that they had to be addressed in the decision of the First-tier Tribunal.
11. I do not find, however, that the First-tier Tribunal erred in law in finding that the claimant was dependent on his sponsor. The First-tier Tribunal accepted the evidence of the claimant, supported with documentary evidence, that he had been reliant for his basic needs on the sponsor who had paid his rent, provided money for groceries, medical fees and school fees. It was accepted that the sponsor had substantial financial resources and was in a position to do this. The First-tier Tribunal properly directed itself that it was irrelevant why this state of dependency existed, so long as a true state of dependency existed. As there is no error of law in the finding of dependency I preserve the findings at paragraphs 18 to 20 of the First-tier Tribunal.

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 allowing the appeal under the EEA Regulations but preserve the findings that the claimant is dependent on his sponsor at paragraphs 18 to 20 of the decision.
3. I adjourned the remaking hearing.

Directions:

1. The claimant may file an updating statement or affidavit from the sponsor, with any relevant supporting evidence, with respect to any past time spent exercising EU Treaty rights in the UK; any preserved EU right to reside in this country; and/or future plans to travel to the UK to exercise EU Treaty rights explaining how this is lawfully possible in light of the UK having left the EU.
2. Any such statement must be filed with the Upper Tribunal and served on the Secretary of State **within 28 days of the date of this decision**.
3. The remaking hearing will take place via Skype for Business at the earliest available date.

Signed: Fiona Lindsley
2021
Upper Tribunal Judge Lindsley

Date: 28th April