



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: EA/00967/2018

THE IMMIGRATION ACTS

At: Field House
On: 14th May 2019

Decision & Reasons Promulgated
On: 15th May 2019

Before

UPPER TRIBUNAL JUDGE BRUCE

Between

Sivakumar Ponnudurai
(no anonymity direction made)

Appellant

And

The Secretary of State for the Home Department

Respondent

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

DECISION AND REASONS

1. The Appellant is a national of Sri Lanka born on the 10th June 1959. He appeals with permission the decision of the First-tier Tribunal (Judge E.M.M Smith) to dismiss his appeal under the Immigration (European Economic Area) Regulations 2016 ('the Regulations').

2. The matter in issue before the First-tier Tribunal was whether the Appellant qualified for a further residence card as the family member of his Danish wife. The Secretary of State, in his refusal letter dated 5th January 2018 had decided not, for two reasons. First the application had not been supported by documentary evidence establishing a direct family relationship. Second, the application had not been supported by evidence demonstrating that the Appellant's wife was exercising treaty rights.
3. The First-tier Tribunal determined the first matter in the Appellant's favour. It accepted that he is married to his wife, and that they have five children together. They had all lived together in Denmark for 27 years before moving to the United Kingdom in 2005. There is no challenge to that part of the Tribunal's decision and that finding of fact is to stand.
4. As to the second issue the Tribunal was presented with the following evidence:
 - a) The application form which states that the Appellant's wife is employed by 'Royal Chicken & Pizza' in Leicester;
 - b) A reference from a Mr Shafeek, purportedly the proprietor of Royal Chicken & Pizza, dated 25th August 2017 stating that the Appellant's wife is employed there;
 - c) A number of payslips issued by 'Roy Chicken & Pizza' in 2017;
 - d) The Appellant's oral evidence that his wife was employed there, and that in fact the family had paid £21,500 to Mr Shafeek in order to take over the business but this had not been a success and their interest had ceased in January 2018;
 - e) Further oral evidence that his wife had other employment which had not been mentioned in the application form;
 - f) A print out from Companies House in respect of 'Roy Chicken & Pizza Ltd'.
5. Against all of this was the Respondent's refusal letter in which it is said that the caseworker was unable to verify this claimed employment since the telephone number was out of order, no record could be found for the company at Companies House and the take-away delivery website Just Eat no longer carried a listing for it.
6. The Tribunal concluded that the Appellant's evidence relating to his wife's economic activity was a muddle. Neither he nor his wife had been able to satisfactorily answer questions put to them; no accounts had been submitted in respect of the purported takeover of the company; the Companies House registration was in a different name from that the company was apparently using day to day. At paragraph 24 the Tribunal notes that the hearing was "further complicated by the sponsor's lack of understanding of the questions asked of her[r] either because she simply did not know the answers or did not

understand the questions". Finding the burden of proof had not been discharged, the Tribunal dismissed the appeal.

7. The Appellant now has permission to appeal against the First-tier Tribunal decision on the grounds that he was prejudiced by the lack of court interpreter. He further asserts that his then representatives had failed to properly advise/prepare the evidence required.
8. As I explained to the Appellant in open court, I am only able to interfere with a decision of the First-tier Tribunal if it is established that the Tribunal erred in law to the extent that the decision should be set aside. As such any failings by the Appellant's previous representatives are not something I can take into account in evaluating the fairness and legality of the First-tier Tribunal decision.
9. The issue of the interpreter is another matter. The Tribunal itself expressed some doubts about whether the witnesses were able to understand the questions being put to them, and I therefore agree that in fairness the Tribunal ought to have either enquired whether the witnesses were able to understand, or whether they wished the proceedings to be halted so that an interpreter could be summoned. That remains the case regardless of the fact that an interpreter was not requested by the former representatives.
10. That does not however mean that the First-tier Tribunal decision should be set aside. As Mr Melvin points out in his 'Rule 24 response', the Appellant failed to discharge the burden of proof because of a lack of *documentary* evidence. The Tribunal expressly declined to adopt the HOPO's position that the witnesses were being untruthful [at §25]. It simply did not have before it sufficient documentary evidence of the sponsor's employment to be satisfied that she was exercising treaty rights in the United Kingdom, and for that reason the appeal fell to be dismissed. The evidence that there was was relatively old, piecemeal and inconsistent on its face *vis-a-vis* the name of the employer. In the circumstances where the Respondent was putting the Appellant to proof on this matter, this was a defect that could not have been remedied simply by oral evidence.
11. I am satisfied that the decision of the First-tier Tribunal was open to it on the evidence that was before it, and notwithstanding the issue in respect of the interpreter, I am satisfied that the decision can be upheld.
12. I note that post hearing the Appellant adduced the clearest possible evidence of his wife's economic activity in the form of a statement from HMRC confirming that in the year ending 5 April 2018 she earned £7020 at M Three & Sons, and £7800 at Roy Chicken & Pizza Ltd. The Appellant said that he had requested this letter before the hearing but it had not arrived in time. As I explained to the Appellant, this was good evidence but since it was not before the First-tier Tribunal, it cannot be criticised for failing to take it account. In those

circumstances the best option would be for the Appellant to make a new application, properly supported by all of the relevant evidence including the determination of the First-tier Tribunal, and this decision (the matter of the Appellant's marriage having been determined in his favour). The Appellant informed me that he has been unable to do so because the Respondent has retained his passport whilst this appeal is pending. Now that this appeal has been determined the passport can no doubt be returned to him so that he can make the appropriate application. Given that the Appellant has already spent many years living in the United Kingdom, and that he has twice been issued with a five-year residence card (on 23rd June 2008 and 31st January 2012) he may wish to consider making an application for permanent residence.

Decisions

13. The decision of the First-tier Tribunal contains no material error of law and it is upheld.
14. There is no order for anonymity.



Upper Tribunal Judge Bruce
14th May 2019