



**Upper Tribunal
(Immigration
Chamber)**

and

Asylum

Appeal Numbers: UI-2022-000937

UI-2022-000938

on appeal from EA/05374/2021

EA/05382/2021

THE IMMIGRATION ACTS

**Heard at Field House
On 8 August 2022**

**Decision & Reasons Promulgated
On 27 September 2022**

Before

UPPER TRIBUNAL JUDGE GLEESON

Between

**DA ANUNCIAÇÃO RODRIGO MARTINS
PEDRO HENRIQUE LORIANO MARTINS
(NO ANONYMITY ORDER)**

Appellants

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the appellant: Mr Gordon Lee of Counsel, instructed by M Reale Solicitors Ltd

For the respondent: Ms Amrika Nolan, a Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellants appeal with permission from the decision of the First-tier Tribunal dismissing their appeal against the respondent's decisions on 15 and 18 March 2021 to refuse them residence cards as the extended family members of an EEA citizen exercising Treaty rights in the UK, pursuant to the Immigration (European Economic Area) Regulations 2016 (as saved).

2. The appellants are citizens of Brazil and are a father and son. The first appellant's wife, Mrs Luana Cristina Loriani Martins (Mrs Martins) who is the mother of the second appellant, also applied for a residence card at the same time. Her appeal is not linked and was heard in June 2022 in the First-tier Tribunal as an oral hearing.
3. All three applications depended on evidence that Mrs Martins' brother-in-law, Luiz Carlos Gazzola (Mr Gazzola), a joint Italian/Brazilian citizen, was working in the UK or otherwise exercising Treaty rights.

Refusal letter

4. The respondent in her refusal letter accepted that the appellants were related as claimed to the sponsor but considered that the evidence of Mr Gazzola's exercise of Treaty rights was insufficient to meet the requirements of the Regulations.
5. The appellants appealed to the First-tier Tribunal, asserting in their grounds of appeal that they would provide evidence that the sponsor was working and exercising Treaty rights in the UK.

Evidence before the First-tier Tribunal

6. On 25 May 2021, the First-tier Tribunal wrote to the appellants and respondent requiring them to provide the evidence upon which they wished to rely in the appeal. No such evidence was provided.

First-tier Tribunal decision

7. The appellants' appeals were decided on the papers, as they had not sought an oral hearing.
8. The First-tier Judge dismissed their appeals, noting that the appellants had submitted no evidence to the Tribunal whatsoever, despite having been directed to do so:

"7. On that basis, and given the complete lack of any evidence whatsoever from the appellants, I find they have failed to discharge the burden upon them and have not demonstrated [that] their EEA family member has been exercising Treaty rights as they assert."

9. The appellants appealed to the Upper Tribunal.

Permission to appeal

10. Permission to appeal was granted on the basis of alleged failures by the appellants' former representative, an OISC Level 1 adviser, Juliana Vargas, trading as Vargas Consultancy. The appellants complain that she failed to ask for an oral hearing and/or to adduce key evidence of the exercise of Treaty rights by Mr Gazzola, on which the appellants' applications depended.

11. Upper Tribunal Judge Pickup noted that no criticism was levelled at the First-tier Judge in the grounds and 'it cannot be said that there was any procedural failure on the case as put before the First-tier Tribunal'. One might have expected that this observation would have been the end of the permission application.
12. However, Judge Pickup then found an arguable material error of law in the following terms:

"5. However, it is at least arguable that the failure of the appellants' representative to present their case and evidence in support amounted to procedural unfairness in that there was no proper consideration of the appellants' case on appeal. The appellants will have to demonstrate that they had asked for an oral hearing, and that the absent evidence sufficient to meet the requirements of the Regulations had been provided to the legal representative in good time for it to be submitted to and considered by the Tribunal."
13. There was no Rule 24 Reply.

Evidence before the Upper Tribunal

14. The appellants have now produced, albeit late, a small bundle containing an OISC complaint made by both of them and their mother, Mrs Martins. No appeal for Mrs Martins is before me today.
15. The bundle contains email correspondence between Mrs Martins on behalf of herself and these appellants, and Juliana Vargas, their representative. I note, in particular, an email sent by Ms Vargas on a date which is unclear, enclosing a copy of the acknowledgment by the First-tier Tribunal of the application for permission to appeal, and the First-tier Judge's decisions dismissing the appeals of these appellants. That email is in Portuguese.
16. The basis of the OISC complaint, made by the appellants and Mrs Martins, as it appears in the English language version is as follows:

"[Ms Juliana Vargas] led us to believe that she is a lawyer and that no application process of hers is refused. We were very hopeful after watching her videos on YouTube and Instagram. She did not provide clear explanations or understanding of what was happening with our application. She told us she would continue with our process from start to finish but after the second refusal she abandoned us and said we needed to hire someone else."
17. The family sought a refund of sums paid. They had heard about the OISC through a solicitor. The OISC complaint remains outstanding.
18. The new bundle contains an 8 December 2021 email from Ms Indre Gimziunaite of M Reale Solicitors Ltd, their current representatives, to the Tribunals, as follows:

“The above appeals were lodged by an OISC regulated Level 1 adviser who are not authorized to do any appeal work. The same adviser requested for the appeals to be heard on paper and have never informed the appellants of any other steps, such as the need to provide an appeal bundle. The Appellants had no idea what stage their appeals were at until after their (Appellant 1 and Appellant 2) appeals were dismissed on the 22nd November 2021. We are not aware of what happened to the Appellant 3 (mother) appeal as they have not yet received any updates nor determination.

We shall also be grateful if you could please forward us a Notice of hearing for the Appellant 3 as soon as possible and please kindly make sure that the appeal is heard in person. If no relevant fee was paid at the time of lodging the appeal for it to be heard in person, the Appellant will be happy to pay the remainder. PLEASE NOTE that due to the nature of this case it is extremely important that the appeal is heard in person and that we are afforded the opportunity to prepare the appeal bundle on behalf of the Appellant (and for this reason, and in the interests of justice, it may be necessary to adjourn the appeal).

In *FP (Iran) v SSHD* [2007] EWCA Civ 13, [2007] Imm. A.R. 450, [2007] I.N.L.R. 224 Sedley LJ said that [§46]; ‘Accordingly I would hold...that there is no general principle of law which fixes a party with the procedural errors of his or her representative.’

In *Mansur (immigration adviser’s failings: Article 8) Bangladesh* [2018] UKUT 00274 (IAC) the Tribunal noted that one of the key factors in play in *FP (Iran)* was that the advisers failings in that case had led to the Appellants in that case being ‘denied a hearing before an independent tribunal’.

The actions of the Appellants’ advisors in this case resulted in the Appellants being denied a fair hearing. They were denied both an oral hearing and the ability to put in material evidence without which the appeal was doomed to fail. It is well-established that parties to court proceedings have a ‘fundamental common law right to participate in the proceedings in accordance with the common law principles of natural justice and open justice’ (*Al Rawi v Security Service* [2011] UKSC 34 [2012] 1 AC 531) and that ‘the rule of law enforces minimum standards of fairness, both substantive and procedural’ (*R v SSHD, ex p Pierson* [1998] AC 539).

This is a case where there can be no criticism of the Judge’s approach to the evidence before him but that the Appellants were denied a fair hearing by the actions of their advisors. That denial of a fair hearing has the result that, absent the setting aside of the Judge’s determination, the Appellants can no longer qualify under the EEA Regulations (because of the end of the transition period) and therefore the consequences are particularly stark.”

First appellant’s witness statement

19. On 3 August 2022, the first appellant made a statement in English, which he checked by having it read back in Portuguese. He speaks little English. He said that his sister Leticia Gazzola had married a dual Italian/Brazilian citizen, Luiz Carlos Gazzola and moved with him in the UK. Mr Gazzola had worked in the UK as an EEA citizen, for more than 7 years. When the appellants and Mrs Martins first arrived in the UK, they stayed with his sister and her husband, who later sponsored the family for residence cards.

20. No details of Mr Gazzola's employment are provided. The first appellant said that the Home Office had never contacted his family about evidence of Mr Gazzola's employment, or if they did, the request went to their former adviser, Ms Vargas, who did not pass on the request.
21. All three family members were represented by Ms Vargas, who advised them to appeal the refusal of EEA extended family member status. Ms Vargas had assured the family that all they had to do was pay £80 appeal fees 'and she would do the rest'. The appellants were unaware that they had to provide any evidence until after their appeals were dismissed. They had made a complaint against Ms Vargas to OISC.
22. It was Mrs Martins who mainly dealt with the immigration matters and with Ms Vargas. The first appellant did not know whether she had discussed the option of an oral hearing: 'Perhaps she just said that there was no need for a hearing in person and that she would send the papers to the Judge'. Mrs Martins' appeal was not linked to that of these appellants. It was heard at an oral hearing in June 2022, with the assistance of the family's current representatives, M Reale Solicitors Ltd.
23. They had since provided additional evidence and 'hope that the Home Office will reconsider the refusal'. The first appellant had 'plenty of evidence' that would have been relevant to their appeal. None has been provided to this Tribunal and the nature of Mr Gazzola's employment (if any) in the UK remains unclear.

Mrs Martins' statement

24. Mrs Martins' witness statement is in identical terms to that of her husband, although she is the person who was said to have dealt with their immigration affairs and with Ms Vargas. She gives no detail of Mr Gazzola's employment in the UK, confining herself to saying that the family were unaware that the Home Office wanted this information.
25. There was no statement from the second appellant. That was the basis on which the appeal came before me.

Error of law hearing

26. For the appellants, Mr Lee argued that they should not be disadvantaged by the inadequacy of their former OISC Level 1 representative, Ms Vargas. Her agreement to represent them was in all probability a criminal offence: she was not authorised to represent them before a Tribunal.
27. Mr Lee relied upon *MM (unfairness, E and R) Sudan* [2014] UKUT 105 (IAC) and on *FP (Iran) v SSHD* [2007] EWCA Civ 13. Ms Vargas' incompetence had denied the appellants an oral hearing, and she had failed to obtain from them evidence which could be placed before the First-tier Tribunal. The interests of justice required that the appellants be given a further opportunity to make their case.

28. Mr Lee emphasised that there was no criticism of the First-tier Judge nor any procedural error in his analysis of the appeals before him, given the absence of any information which could have assisted him.
29. For the respondent, Ms Nolan observed that the case as now put was not the claim made in the OISC complaint. Whilst there might be some doubt as to whether directions had been sent to the parties, or only to Ms Vargas, there was in reality no procedural error in these proceedings.

Analysis

30. I have considered with care the authorities relied upon in this appeal. None of them is on all fours with the present appeal.
31. The evidence from the first appellant and Mrs Martins in their witness statements is that they do not remember what Ms Vargas told them or to what they agreed. They have, however, produced an email which plainly includes the First-tier Tribunal decision as an attachment. Both the respondent's refusal letters and the First-tier Tribunal decision make it plain that the absence of any evidence as to how Mr Gazzola earns his living is fatal to these appeals.
32. One would expect, therefore, that the witness statements of Mrs Martins or the first appellant would contain some information to assist the Upper Tribunal with understanding whether Mr Gazzola is indeed exercising Treaty rights in the UK. They do not even say what his job might be.
33. Mr Lee accepted that there was no procedural or legal error by the First-tier Judge. Even if, which I do not admit, the inadequacy of Ms Vargas deprived the appellants of an oral hearing, absent any evidence beyond assertion that at an oral hearing they could produce evidence of how Mr Gazzola exercises his Treaty rights in the UK, such error is not material. The appeal would fail again.
34. The appellants have provided additional information directly to the Home Office, which is the proper course. It can then be considered as paragraph 353 further submissions and if there is evidence of the exercise of Treaty rights at the material time, the Secretary of State may exercise discretion in their favour.
35. There is no material error of law in the decision of the First-tier Tribunal and these appeals are accordingly dismissed.

DECISION

36. For the foregoing reasons, my decision is as follows:

The making of the previous decision involved the making of no error on a point of law

I do not set aside the decision but order that it shall stand.

Signed [Judith AJC Gleeson](#)

Date: 9 August 2022

Upper Tribunal Judge Gleeson