Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: EA/50866/2020
(UI-2021-001439); IA/02751/2020

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 6 September 2022	**On 14 October 2022**

Before

UPPER TRIBUNAL JUDGE KEBEDE
DEPUTY UPPER TRIBUNAL JUDGE HUTCHINSON

Between

BHAKTA BAHADUR KARKI
[NO ANONYMITY ORDER]

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the appellant: Mr L Youssefian, of Counsel
For the respondent: Mr D Clarke, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellant appeals with permission from the decision of the First-tier Tribunal dismissing his appeal, under Regulation 36 of the Immigration (European Economic Area) Regulations 2016 (the 2016 Regulations) against the respondent's decision, on 1 December 2020 to refuse to issue a residence card as confirmation of a right of residence as the spouse of

an EEA national (Ms Inga Rascevska) in the UK. The appellant is a citizen of Nepal, born on 2 September 1986.

Background

2. The appellant claimed to have entered the UK on 19 October 2009 and was granted T4–General Student Leave to Remain on 6 May 2011. This was curtailed on 5 May 2012. The appellant's application for a biometric residence card as the spouse of an EEA national, made on 2 November 2012, was refused on 2 July 2013. The appellant's appeal against that decision was successful on 14 July 2014. The appellant applied, on 1 July 2019, for a permanent residence card, under retained rights. On 1 October 2019 the appellant applied for a residence card confirming that he is a family member of an EEA national exercising treaty rights in the UK. It was the appellant's appeal against the respondent's refusal of that decision, dated 1 December 2020, that was considered by the First-tier Tribunal.

3. The respondent's refusal accepted that the appellant had been married to an EEA national for 9 years but noted that although the appellant indicated that the relationship had broken down, no notice of divorce had been provided and the appellant's application was therefore considered in line with Regulation 15 of the 2016 Regulations, as a direct family member. The respondent submitted a request for the appellant's sponsor's tax and national insurance contributions with HM Revenue and Customs in line with Section 40 of the UK Borders Act 2007. It was apparent to the respondent from that evidence, that the sponsor had not been exercising Treaty Rights for a continuous period of five years. The respondent refused the appellant's application as he did not qualify for a retained right of residence under Regulation 10 and had not demonstrated under Regulation 15, that his EEA sponsor had continuously exercised Treaty Rights for a period of five years.

First-tier Tribunal decision

4. The appellant's appeal was heard by First-tier Tribunal Judge Haria on 29 October 2021. It was argued on behalf of the appellant that the sponsor was a job-seeker and as such was a qualified person as defined in the EEA Regulations. In a decision dated 5 November 2021, promulgated on 18 November 2021, Judge Haria dismissed the appellant's appeal under the 2016 Regulations. The judge was satisfied there was insufficient or any compelling evidence before her, to find that the sponsor was seeking employment or had a genuine chance of being employed and concluded that she was not a job-seeker under the terms of the EEA Regulations. The judge found that the sponsor was not a qualified person. The appellant's appeal therefore, against the decision of the respondent to refuse to issue a permanent residence card to the appellant, as the family member of the EEA sponsor, was dismissed.

Permission to appeal

5. Permission to appeal was sought by the appellant on the grounds that the judge had erred in considering the appellant's appeal solely on the basis that the EEA national spouse was not a qualified person as a job seeker, with the grounds asserting that there was no requirement to have exercised treaty rights for 5 years to have settled status under the 'current EEA guidelines.' The grounds also argued that the judge failed to give adequate weight to the best interests of the child under section 55 of the Borders, Citizenship and Immigration Act 2009 and that there had been a failure to consider whether the appellant qualified for a derivative right of residence under the Zambrano guidance as the appellant had shared responsibility for the upbringing of the children. Permission was granted, on all matters, by the First-tier Tribunal on 17 January 2022.

Rule 24 Reply

6. The respondent opposed the appellant's appeal submitting that the judge had directed herself appropriately and that it was confirmed at the First-tier Tribunal hearing that the appellant was not divorced and the appellant was therefore still a family member of the EEA national, it being agreed that the only issue before the Tribunal was whether the EEA sponsor was a Qualified Person for the purposes of the 2016 Regulations. The respondent submitted that the First-tier Tribunal Judge engaged with the evidence and gave adequate reasons for finding that the EEA national was not a Qualified Person and the appellant could not meet the requirements of Regulation 7.

7. That is the basis on which this appeal came before the Upper Tribunal.

Upper Tribunal hearing

8. Both parties made submissions. Mr Youssefian (who had not drafted the grounds of appeal before us) conceded that he was in some difficulties: ground 1 was essentially arguing that the First-tier Tribunal failed to take into account Appendix EU (Mr Youssefian acknowledging that references in the grounds to 'current EEA guidelines' must be a reference to guidance relating to Appendix EU Settlement Scheme). Mr Youssefian properly conceded that the appeal before the First-tier Tribunal was an appeal only under Regulation 36 of the 2016 Regulations and was not an Appendix EU appeal. He submitted that his only point on this ground was that the judge ought to have attached more significant weight to oral evidence that the appellant's current wife was a job seeker with intention to work. Mr Youssefian did not seek to develop ground 2, conceding that Section 55 of the Borders, Citizenship and Immigration Act 2009 was not before the First-tier Tribunal and was not germane to an appeal under the 2016 Regulations. In relation to ground 3 and Zambrano derivative rights of residence, Mr Youssefian again conceded, with reference to paragraph 17 of Judge Haria's decision, that this was not an issue pursued before the First-tier Tribunal. Even if it had been, Mr Youssefian acknowledged that it would likely have been a new matter and that in any event the Tribunal would not have had jurisdiction (as derivative rights of residence had not

been preserved by the saving regulations). Although Mr Youssefian submitted that Judge Haria may have erred at paragraph 18 in her consideration of regulation 10(5)(d)(iii) as Regulation 10(5)(d) only requires the divorce proceedings to have been initiated, even so, he submitted he was in some difficulties as this was not in the grounds of appeal. Even if he were given permission to argue such grounds, under Regulation 10(5)(d)(iii) the appellant would have to be a former spouse and Regulation 10 would not have assisted the appellant. Mr Youssefian acknowledged that the highest he could put his submissions, was that there was scope for the First-tier Tribunal to attach more weight to the appellant's evidence that his current wife was a jobseeker, on the basis of the oral and written evidence before the First-tier Tribunal.

9. Mr Clarke submitted that given Mr Youssefian's acknowledgement, there was 'very little left'. He submitted that Mr Youssefian's argument that there was scope for the Tribunal to attach more weight to the evidence the EEA sponsor was a jobseeker, was inconsistent with the argument in the grounds, that there was no requirement for the appellant to demonstrate the sponsor was a jobseeker. Mr Clarke submitted that this was an EEA appeal, under Regulation 36 of the 2006 Regulations, whereas the grounds are clearly referencing Appendix EU. In terms of the argument made under Regulation 10(5)(d)(iii), although made originally in paragraph 6 of the skeleton argument before the First-tier Tribunal, Mr Clarke submitted that paragraph 17 of the judge's decision confirmed that both representatives agreed that the only issue to be determined was whether the sponsor was a qualified person. The grounds of appeal to the Upper Tribunal were inconsistent with the appellant's case before the First-tier Tribunal. Equally with the Zambrano issue under the EU Settlement Scheme, this was not before the First-tier Tribunal as the appeal was not one under the EU Settlement Scheme. The grounds were unmeritorious and the appeal should be dismissed.

Findings

10. We agree with Mr Clarke (and as noted, Mr Youssefian was aware that he was in some difficulty with all the grounds) that the grounds of appeal are unmeritorious. The appeal before Judge Haria was considered solely an appeal under Regulation 36 of the 2016 Regulations. In a very clear decision, Judge Haria set out, at paragraph 16, that despite the end of free movement that EEA Regulations continued (with some modifications) to apply to appeals against a decision to refuse residence cards to EEA nationals and their family members, where applications were made before 11pm on 31 December 2020.

11. There was no application and no appeal to the First-tier Tribunal in relation to Appendix EU Settlement Scheme. It was entirely misconceived therefore to argue, as the first and third grounds of appeal to the Upper Tribunal did, that the First-tier Tribunal should have had regard to the guidance and rules applicable under the EU Settlement Scheme. Indeed it

would have been an arguable error of law had the First-tier Tribunal done so.

12. In relation to ground 2 and the argument that the First-tier Tribunal failed to 'give adequate weight to the best interests of the child under section 55 of the Borders, Citizenship and Immigration Act 2009', Mr Youssefian conceded that this was not argued before the First-tier Tribunal and we agree that such is not a relevant consideration under Regulation 6 of the 2016 Regulations (which sets out the relevant provisions in relation to a 'qualified person' (including jobseekers) which was the sole focus of the appeal before the First-tier Tribunal.

13. Although (as set out by the First-tier Tribunal at paragraphs 5 and 6) the appellant had initially made an application for a permanent residence card under Regulation 10 (retained rights of residence) with the respondent also considering the application under Regulation 15 as a direct family member, given that divorce proceedings had not been finalised, as both representatives before us identified, Judge Haria set out unequivocally at paragraph 17, that the appellant was now relying on Regulation 7, as he was still a family member of an EEA national and:

"*Both representatives agreed that the only issue to be determined by the Tribunal was whether the sponsor is a qualifying person.*"

14. Therefore, any argument in relation to retained rights of residence, under Regulation 10, including as discussed by Mr Youssefian in his submissions (although not with any particularly force), is misconceived.

15. In relation to Mr Youssefian's argument that the judge ought to have attached more significant weight to the oral and written evidence that the appellant's wife was a job seeker with an intention to work, we note that this was not a ground of appeal, and we agree with Mr Clarke that it is the polar opposite of the pleaded grounds, that the appellant did not need to demonstrate that his spouse was a qualified person as a job seeker.

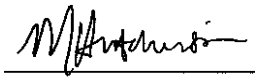
16. In any event, even if it were a ground before us (and we note that Mr Youssefian did not seek permission to expand such an argument), it would have no merit: Judge Haria set out the relevant provisions and applicable case law before considering the facts of the case before her. She took into consideration, and set out in some detail, the appellant's written and oral evidence at paragraphs 28 to 33 of the decision and reasons. The judge made detailed findings from paragraphs 34 to 41, which comprehensively addressed why the judge was not satisfied that the appellant's estranged wife was a jobseeker. This included (but was not limited to) findings at paragraph 34, that the appellant's evidence was based on recent conversations with the sponsor and was, in the judge's findings, vague, lacking in detail and was not supported by further evidence. The appellant provided no details as to what steps the sponsor had taken to look for work and there was no supporting evidence to show what efforts she had

made. Judge Haria concluded that the evidence of the appellant was unreliable as it was vague, lacking in detail and in part inconsistent.

17. We are satisfied that the findings of Judge Haria are more than adequately reasoned and sustainable. No error of law is disclosed in the grounds before us and we uphold the decision of the First-tier Tribunal

DECISION

The making of the decision of the First-tier Tribunal did not involve an error on a point of law requiring it to be set aside. The decision to dismiss the appeal shall stand.

Signed  Date: 12 September 2022

Deputy Upper Tribunal Judge Hutchinson