



IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2021-001794
First-tier Tribunal No: EA/06007/2021

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On 3 April 2023

Before

UPPER TRIBUNAL JUDGE HANSON

Between

AN ENTRY CLEARANCE OFFICER

Appellant

and

HASSAN MUSTAFA
(NO ANONYMITY ORDER MADE)

Respondent

Representation:

For the Appellant: Mr Tan, a Senior Home Office Presenting Officer.

For the Respondent: No appearance.

Heard at Manchester Civil Justice Centre on 7 February 2023

DECISION AND REASONS

1. The Secretary of State appeals with permission a decision of First-tier Tribunal Judge Latta ('the Judge'), promulgated on 15 November 2021, following the Judge's consideration of the merits of the appeal on the papers.
2. Mr Mustafa is a citizen of Pakistan born on 26 February 1989. He appealed the decision of an Entry Clearance Officer (ECO) who refused his application for an EEA Family Permit to join his UK based sponsor ('the Sponsor') as a spouse/civil partner.
3. The Judge's findings are set out from [12] of the decision under challenge. The Judge notes it is accepted that the Sponsor is a Spanish national.
4. The Judge finds at [16] that Mr Mustapha and the Sponsor are married as claimed.
5. In relation to the question of whether the Sponsor is exercising treaty rights in the UK, a point of challenge to the ECO's refusal, the Judge accepts the explanation provided as to why the HMRC documents had been provided late, as the company had only recently been formed, but that such evidence had now been provided [17].

6. The Judge at [18] notes the Sponsor has been granted pre-settled status in the UK and that, taking the evidence in the round, was willing to find the Sponsor has been exercising treaty rights in the UK.
7. The Judge finds that Mr Mustapha had demonstrated he is a family member of an EEA national in accordance with Regulation 7 of the Immigration (European Economic Area) Regulations 2016 and therefore allowed the appeal.
8. The ECO sought permission to appeal asserting the Judge had erred in law by allowing the appeal.
9. It was raised in the refusal notice that the Sponsor had failed to evidence of any income or any HMRC documents which verified her earnings being declared and being subject to tax and National Insurance contributions.
10. The grounds assert the Judge's finding that HMRC documents had been provided was not sufficient as that did not demonstrate that the Sponsor is earning an income from self-employment, merely that the correct registration had taken place. The grounds assert that no business or personal bank statements were submitted which would have indicated an income derived from self-employment and no invoices either.
11. In relation to the Judge's finding that the Sponsor had been granted pre-settled status, the grounds assert that exercising treaty rights is not a requirement for pre-settled status and was therefore not applicable in establishing the claim on the facts of this appeal.
12. Permission to appeal was granted by another judge of the First-tier Tribunal, on 28 December 2021, on the basis is said that they disclose an arguable error of law.

Error of law finding

13. The decision under appeal raised the concerns in the mind of the ECO in relation to the question of whether the Sponsor was exercising treaty rights. The refusal reads:

THE DECISION

- You state that your spouse is a Spanish national. You have provided evidence that your sponsor holds a Spanish passport and identity card.
- On your application you state that your sponsor is self-employed as a director of Snoopi Limited and a search on company's house found that the company was incorporated on 11 September 2020. However, you have not provided any further documentation evidencing an income or any HMRC documentation, in the form of a tax return that verifies your sponsors earnings have been declared and subject to tax and national insurance contributions. This leads me to doubt that her stated employment is genuine and without further evidence to corroborate this I am not satisfied that she is an EEA National exercising her treaty rights in the United Kingdom.
- You have failed to provide evidence that your EEA national family member is a qualified person in accordance with Regulation 6 of the Immigration (European Economic Area) Regulations 2016. I am, therefore, not satisfied that your EEA national family member is residing in the UK in accordance with the Immigration (European Economic Area) Regulations 2016.

- As evidence of your relationship to your spouse, you have submitted a marriage registration certificate issued 24 September 2020. However, this certificate is not a format that is accepted by this office and contains discrepancies that lead this office to doubt its authenticity. As a result, it cannot be accepted as reliable evidence of your relationship to your sponsor and casts doubt upon any further relationship documents submitted with your application.
 - Given the above, I am led to question the credibility of your claim to be a family member of an EEA national. I am therefore not satisfied that you are a family member in accordance with Regulation 7 of the Immigration (European Economic Area) Regulations 2016. I therefore refuse your EEA Family Permit application because I am not satisfied that you meet all of the requirements of regulation 12 (see ECGs EUN2.23) of the Immigration (European Economic Area) Regulations 2016.
14. The Judge sets out the documents that were provided at [10] of the decision under challenge and in relation to the issue of whether sponsor was exercising treaty rights in the UK writes:
17. The second issue raised in the refusal letter was whether the sponsor was exercising treaty rights in the UK. In the grounds of appeal, the appellant has explained why no HMRC documents had been provided with the original application. I accept his submission that the company had only been recently formed. I also note that supporting documentary evidence from HMRC has now been provided. Appeal Number: EA/060072/2021 4 18. In addition, I note that the sponsor has now been granted pre-settled status in the UK. Therefore, when taking all of the evidence in the round, I am willing to find that sponsor has been exercising treaty rights in the UK.
15. Despite notices having been sent out to the parties advising them of the date, place, and time of the hearing, there was no attendance on Mr Mustapha's behalf.
16. I find the Secretary of State has established legal error material to the decision in relation to the second issue, whether the Sponsor was exercising treaty rights in the UK.
17. It is not disputed that the company Snoopi Limited was set up and registered at Companies House. Information from that source shows the company was incorporated on 11 September 2020 with the company address being that provided for the Sponsor. Companies House records show notice the company will be struck off having been sent, but subsequently rescinded, but then reset later, resulting in the company being struck off on 18 October 2022 and formally dissolved on 25 October 2022. There is nothing on the record held by Companies House to show the company ever traded or filed accounts and there was only before the Judge the letters from HMRC which are letters issued to a new company, rather than evidence that the company is trading.
18. I find the Judge erred in law as on the evidence before the Judge, other than establishing tax details had been recorded and a tax account opened for the company, there was no evidence the company was actually trading and insufficient evidence the Sponsor was exercising treaty rights as a self-employed person, or otherwise, in the UK.
19. The appeal was determined on the papers as there was no attendance before the Judge, a similar situation to that which exists today.

20. In relation to the Judge's finding that the Sponsor had been granted pre-settled status which is an indication that she was exercising treaty rights, I find the Judges erred in this respect too. The requirements for an individual who is an EU citizen to acquire such status as set out in paragraph EU3 of Appendix EU of the Immigration Rules. The relevant criteria do not include evidence that an individual is exercising treaty rights at the relevant time.
21. I find that in concluding Mr Mustapha had established his UK based Sponsor is an EU national exercising treaty rights on the evidence, the Judge has erred in law.
22. There is no cross-appeal to the Judge's findings concerning the relationship issue.
23. I set the decision of the Judge aside.
24. In relation to the future conduct of this appeal; in light of the failure of anybody on Mr Mustapha's behalf to engage with the appeal proceedings, and the original request for the matter to be determined on the papers, the lack of any further evidence in support of the appeal having been filed pursuant to paragraph 15(2A) of the Upper Tribunal Procedure rules, and in light of the overriding objective, I proceed to substitute a decision to dismiss the appeal on the basis the evidence does not establish the EEA national is exercising treaty rights in the UK at the relevant time.

Notice of Decision

25. The First-Tier Tribunal materially erred in law. I set the decision of that Tribunal aside.
26. I substitute a decision to dismiss the appeal.

C J Hanson

Judge of the Upper Tribunal
Immigration and Asylum Chamber

7 February 2023