Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Numbers: UI-2022-002988**
[EA/15604/2021]

THE IMMIGRATION ACTS

Heard at Field House
On the 17 November 2022

Decision & Reasons Promulgated
On the 11 January 2023

Before

UPPER TRIBUNAL JUDGE KOPIECZEK
DEPUTY UPPER TRIBUNAL JUDGE DAVEY

Between

GURPRIT SINGH
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Ms F Allen, Counsel instructed by TMC Solicitors Ltd
For the Respondent: Mr E Tufan, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellant is a citizen of India born in 1977. He made an application on 28 April 2021 for an EU Settlement Scheme ("EUSS") family permit under Appendix EU of the Immigration Rules as the family member of a British citizen, spouse. That application was refused in a decision dated 21 October 2021.

2. The appellant appealed that decision and his appeal came before First-tier Tribunal Judge Herwald ("the FtJ") at a hearing on 1 March 2022 following which the appeal was dismissed in a decision promulgated on 10 March 2022. Permission to appeal having been granted by a judge of the First-tier Tribunal, the appeal came before us.

3. The grounds of appeal, in summary, contend that the FtJ was wrong to apply a test of integration in terms of the host member state (Italy), that not being a requirement of EU law. Secondly, that the FtJ made unwarranted factual adverse findings, and thirdly that he made a finding of abuse of EU rights which was procedurally unfair.

The FtJ's decision

4. In a very detailed decision the FtJ summarised the basis of the decision to refuse the family permit. In summary, the respondent was not satisfied that the appellant, as the family member of a qualifying British citizen, could show that he had resided in the EEA country (Italy) with the qualifying British citizen whilst that British citizen exercised free movement rights under EU law. The appellant had provided an Italian residence permit issued on 9 April 2021 but had not supplied adequate evidence of residency nor joint residency, given the appellant's apparent residence in Italy since 2020.

5. The FtJ heard evidence from the sponsor, the appellant's wife, Kulwinder Kaur. She was not cross-examined because there was no appearance on behalf of the respondent.

6. At [11] the FtJ summarised the relevant requirements of the Immigration Rules in that the joint residence of the appellant and his spouse in Italy must have been genuine, with various factors to be taken into account and that genuine family life must have been created or strengthened during that joint residence in Italy. With reference to *O and B* [2014] EUECJ C-456/12 he referred to a submission by the appellant's legal representative that the only requirement was that the appellant must show that the residence was genuine in Italy for at least three months and that the purpose of that residence was not in any way to avoid UK immigration law or to use such residence to circumvent the Immigration Rules.

7. The FtJ next set out a detailed chronology of events up to the date of the decision to refuse the application.

8. He then summarised the appellant's evidence but stating at [12(c)] that it was not possible to understand from the documents before him "why this couple have suddenly decided to migrate to Italy, direct from Australia, without passing either through India or the United Kingdom, India being their joint homeland, the United Kingdom, having been until recently before then the home of the Sponsor".

9. In the next subparagraph he noted that the address in Italy that the appellant lived at "was in fact the address of a number of what turns out to be Indian persons". He also referred to the sponsor's evidence that she said that they had gone to Italy together "because I knew I could use EU rights so that my husband could migrate to Italy and then to Britain".

10. Under the subheading of 'My Findings of Fact' the FtJ made some findings, referred to aspects of the evidence and made observations. These were, variously, as follows.

11. He noted the sponsor's evidence that she and the appellant left Australia together and arrived in Italy on 30 August 2020 and adding that "They were there for a very short time". He noted that the sponsor said that the appellant barely worked in Italy, just a few days occasionally. At [15(b)] he said as follows:

> She worked in Italy. It later transpired that this was simply part-time work. Furthermore, it could not possibly be said that she was integrated into Italian society. And the 'work' was of such duration, and of such a nature, as not to fit in to the category of 'meaningful work'.

12. He next said that the sponsor had no idea who the "great writer Dante Alighieri was", and did not know what province she was living in. He said that she had no Italian whatsoever and worked in a shop which was an Indian grocery shop where the vast majority of customers were Indian. If anyone came in who spoke Italian "the boss" had to deal with them. Next, the FtJ observed that she lived in a house which appeared to have been owned by other Indians who had migrated to Italy and that she could not precisely describe the relationship between them and her.

13. At [15(e)] he said that the appellant claimed to have been living with the sponsor during that period and yet his name does not appear on the document of those registered to reside at that address, although he noted what were described as "hospitality documents" showing that for part of the time the sponsor appeared to have the same address as the appellant.

14. At [15(g)]–[15(m)] the FtJ said as follows:

> "15. (g) It must be said that the Appellant and the Sponsor have been 'economic with the truth' as to why they migrated directly to Italy from Australia. At first, the Sponsor claimed that they had gone to Italy because 'I went there first in 2016 for a holiday and I'd seen it before so we went there and I liked it.'
>
> (h) Later on she revealed the truth, namely that 'I knew I could use my EU rights if I went to Italy so my husband could migrate there.'
>
> (i) Thus, while it is not against the law, I am satisfied that the sole purpose of this couple living in Italy for a brief period, and for the wife showing that she was working part-time for a brief period, was in essence to avoid UK immigration law, and to enable the husband to come and live here.

(j) I take into account the immigration history of the Appellant, showing that this has been the sole aim of the Appellant over a number of years.

(k) The Appellant was seeking to obtain an advantage from the EU Rules by artificially creating what was in effect a fiction, of living in Italy, working in Italy, and integrating into Italy.

(l) The length of the joint residence in Italy is relatively brief, given the history of the relationship. There is no evidence whatsoever of the Appellant's own integration into Italy, and scant evidence, as I find above, that the British citizen has integrated into Italy.

(m) On behalf of the Appellant it was said that genuine family life between the couple was strengthened during the joint residence in the EEA host country. There is no overt evidence to support that assertion".

Submissions

15. Ms Allen relied on the grounds of appeal. She submitted that it was not clear from [10]–[11] that the FtJ applied the correct legal framework. For example, he referred to the appellant having to show that he cannot meet his essential living needs in whole or in part without the support of the sponsor, and referred to dependence. However, that was not one of the matters in issue in the appeal.

16. As regards [11], the FtJ had referred to the need for the appellant to show integration in Italy but that was not a relevant factor as is clear from the decision in *ZA (Reg 9. EEA Regs; abuse of rights) Afghanistan* [2019] UKUT 00281 (IAC). The paragraphs from [15(b)] onward are all about integration in respect of which the FtJ made a number of findings.

17. Furthermore, at [15(b)] the FtJ said that the work that the sponsor was doing in Italy could not fit into the category of "meaningful work" but no reasons were given for that conclusion.

18. Contrary to what is said at [15(c)] the sponsor *did* know what province she lived in.

19. It appeared from [15(d)] where the FtJ referred to the sponsor living in a house which appeared to have been owned by other Indians who had migrated to Italy, that he was drawing some sort of inference but what that inference was is not clear.

20. As regards [15(e)] where the FtJ said that the appellant's name does not appear on the document showing who was registered to reside at the address, he did not make an actual finding that they were not cohabiting. Such a finding was contrary to the evidence in any event. It was also important to bear in mind that the appellant was issued with a residence card in Italy.

21. As regards [15(h) to (i)] the FtJ was importing considerations of 'motive' and appeared to conclude that there was an abuse of EU rights. However, this was not a matter raised by the respondent in the decision or at the hearing. Furthermore, it was for the respondent to show that this was the case.

22. In his submissions, Mr Tufan accepted that arguably the FtJ's apparent conclusion in relation to abuse of rights could be said to undermine his decision. It was also accepted that he had appeared to concentrate on the issue of integration.

Assessment and Conclusions

23. At the conclusion of the hearing we announced that we were satisfied that the FtJ's decision does contain errors of law requiring the decision to be set aside. The following are our reasons.

24. The convoluted provisions of the Immigration Rules Appendix EU (Family Permit) apply to the application for a family permit in this case. Appendix EU, paragraph FP6.(2)(b), requires that the appellant be a family member of a qualifying British citizen. Annex 1 defines what is meant by "family member of a qualifying British citizen", and in particular for present purposes this requires the appellant to satisfy Regulation 9(2), (3) and (4)(a) of the Immigration (European Economic Area) Regulations 2016 ("the EEA Regulations").

25. Regulation 9 of the EEA Regulations, so far as is relevant, provides as follows:

> "**Family members of British citizens**
>
> 9. (1) If the conditions in paragraph (2) are satisfied, these Regulations apply to a person who is the family member ('F') of a British citizen ('BC') as though the BC were an EEA national.
>
> (2) The conditions are that –
>
> (a) BC –
>
> (i) is residing in an EEA State as a worker, self-employed person, self-sufficient person or a student, or so resided immediately before returning to the United Kingdom; or
>
> (ii) has acquired the right of permanent residence in an EEA State;
>
> (b) F and BC resided together in the EEA State; and
>
> (c) F and BC's residence in the EEA State was genuine;
>
> (d) F was a family member of BC during all or part of their joint residence in the EEA State; and

(e) genuine family life was created or strengthened during their joint residence in the EEA State.

(3) Factors relevant to whether residence in the EEA State is or was genuine include –

(a) whether the centre of BC's life transferred to the EEA State;

(b) the length of F and BC's joint residence in the EEA State;

(c) the nature and quality of the F and BC's accommodation in the EEA State, and whether it is or was BC's principal residence;

(d) the degree of F and BC's integration in the EEA State;

(e) whether F's first lawful residence in the EU with BC was in the EEA State.

(4) This Regulation does not apply –

(a) where the purpose of the residence in the EEA State was as a means for circumventing any immigration laws applying to non-EEA nationals to which F would otherwise be subject (such as any applicable requirement under the 1971 Act to have leave to enter or remain in the United Kingdom)

..."

26. Amongst other things, the residence period must be genuine. Although the grounds suggest at [8a] that the case of *O and B* states at [54] that a period of at least three months is required, that is not in fact our reading of that decision, and certainly not at [54]. However, that is not relevant for our purposes.

27. What we do consider relevant, however, is what was said in *ZA* at [56] and [75(vii)] about integration. In summary, the conclusion in *ZA* is that there is no requirement to show integration. We agree with the analysis of this issue in *ZA*.

28. Accordingly, we are satisfied that the FtJ erred in law in his decision in seeming to incorporate a test of integration where no such test exists. Whilst integration is relevant, it does seem to us that the FtJ elevated this issue to a requirement. For example, he said at [15(b)] that it could not possibly be said that the sponsor had integrated into Italian society and at (l) that there was no evidence whatsoever of the appellant's own integration into Italy and scant evidence that his wife had so integrated.

29. We are similarly satisfied that the FtJ fell into error in concluding that the sole purpose of the appellant and his wife living in Italy for a brief period and the appellant's wife's part-time work for a brief period "was in essence to avoid immigration law", evidently a reference to reg.9(4)(a) of the EEA Regulations. Quite apart from anything else, we are satisfied that this

does import an irrelevant consideration of motive (see, for example, *Akrich* [2003] EUECJ C-109/01 at [55]).

30. Furthermore, in apparently concluding that the purpose of the residence in Italy was to circumvent UK immigration laws, the FtT failed to have regard to the fact that the burden of proof in such respect lies on the respondent. In addition, this was not a matter raised by the respondent in the decision under challenge and was not raised at the hearing on behalf of the respondent (the respondent not having been represented).

31. The errors of law to which we have referred above are such as to require the FtJ's decision to be set aside.

32. We should also say that we also have significant reservations about the FtJ's observation about the sponsor not knowing about Dante, or having knowledge of the province in which she lived, but we need say nothing further about those matters. Likewise in relation to the concerns expressed in submissions on behalf of the appellant relating to the implications of the sponsor having effectively confined herself in Italy to association with other Indian nationals.

33. At the hearing before us, although announcing that we were satisfied that the FtJ had erred in law, we did not express a concluded view about whether the decision ought to be re-made in the Upper Tribunal or remitted to the First-tier Tribunal. Having reflected on the matter, we are satisfied that the appropriate course is for the appeal to be remitted to the First-tier Tribunal given the nature and extent of the fact-finding required. In coming to that view we have considered the Senior President's Practice Statement at paragraph 7.2

Decision

34. The decision of the First-tier Tribunal involved the making of an error on a point of law. Its decision is set aside and the appeal is remitted to the First-tier Tribunal for a hearing *de novo* before a judge other than First-Tribunal Judge Herwald.

A.M. Kopieczek

Upper Tribunal Judge Kopieczek 3 January 2023