



IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case Nos: UI-2022-002770
UI-2022-002771
First-tier Tribunal Nos:
EA/10301/2021
EA/09895/2021

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On the 17 July 2023

Before

UPPER TRIBUNAL JUDGE SHERIDAN

Between

MR MUHAMMAD IMRAN KHAN
(NO ANONYMITY ORDER MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms S Saifolahi, Counsel (Direct Access)
For the Respondent: Ms A Ahmed, Senior Home Office Presenting Officer

Heard at Field House on 23 June 2023

DECISION AND REASONS

1. The appellant is a citizen of Pakistan who applied for an EEA family permit under the Immigration (EEA) Regulations 2016 to join his brother and sister-in-law in the UK. Two applications were made, one naming his brother as the sponsor and the other his sister-in-law as the sponsor. In this decision, when I refer to the sponsor I am referring to the appellant's brother.
2. The appellant claims that he is dependent on the sponsor and as such is his extended family member. His application was rejected. In the respondent's refusal decision, it was not accepted that the appellant and his sponsor were brothers or that the appellant was dependent on the sponsor.
3. The appellant appealed to the First-tier Tribunal where his appeal came before Judge of the First-tier Tribunal Birrell ("the judge"). In a decision promulgated on 21 April 2022 the judge dismissed the appeal.
4. The judge stated in para. 10 that the issue "*before the sponsor gave oral evidence*" was whether the appellant was dependent on the sponsor for his essential needs. This was because the respondent no longer disputed the relationship between the appellant and sponsor. Despite the parties proceeding

at the hearing on the basis that the only issue in dispute between them was whether the appellant was dependent on the sponsor, the judge did not make findings on this issue and instead decided the appeal in the respondent's favour on the basis that the sponsor had not demonstrated that he had been exercising Treaty Rights in the UK. It is apparent that the judge reached this conclusion in the light of the sponsor's oral evidence.

5. The grounds as drafted are somewhat confusing. However, I was assisted by the First-tier Tribunal's grant of permission which identifies a procedural unfairness point, which is that it does not appear that the issue of whether the sponsor had been exercising Treaty Rights had previously been raised.
6. I heard helpful submissions from Ms Saifolahi and Ms Ahmed and, having considered their submissions, I am satisfied that the issue identified in the grant of permission constitutes an error of law which undermines the decision.
7. The question of whether the sponsor had been exercising Treaty Rights in the UK was not raised by the respondent in the refusal decision or at any point prior to the hearing. It appears from para. 10 of the decision that the issue only arose after the sponsor gave oral evidence.
8. The question of whether a person has been exercising Treaty Rights is a matter that can usually best be determined by consideration of documentary evidence, such as HMRC records and payslips. As, prior to the hearing, the appellant would not have had reason to believe that the question of whether or not the sponsor had been exercising Treaty Rights would be in dispute, he cannot be faulted for not having submitted documentary evidence establishing that this was the case. In my view, it was procedurally unfair for the judge to find the sponsor was not exercising Treaty Rights on the basis of his oral evidence without first giving the appellant an opportunity to submit documentary evidence on the issue. For this reason, the decision cannot stand.
9. Both Ms Saifolahi and Ms Ahmed were of the view that the case should be remitted to the First-tier Tribunal to be made afresh. I agree. The question of whether the appellant is dependent on the sponsor has not yet received judicial consideration as the judge did not make any findings on this issue. In these circumstances, the loss of the two-tier decision making process that would be a consequence of the decision being retained in the Upper Tribunal is a factor weighing in favour of remitting the case to the First-tier Tribunal. I also consider it likely that extensive fact-finding on the question of dependency will be necessary. This is therefore a case where the exception to the general principle of retaining cases in the Upper Tribunal, as set out in paragraph 7(2) of the Practice Statement, is appropriate.

Notice of Decision

10. The decision of the First-tier Tribunal involved the making of an error of law and is set aside. The cases remitted to the First-tier Tribunal to be heard afresh by a different judge.

D. Sheridan

Judge of the Upper Tribunal
Immigration and Asylum Chamber

14.7.2023