



IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2022-003718
First-tier Tribunal No:
EA/15679/2021

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On the 06 July 2023

Before

DEPUTY UPPER TRIBUNAL JUDGE SAFFER

Between

KUTUBUN NESSA
(No anonymity order made)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: None

For the Respondent: Mr McVeetie a Senior Home Office Presenting Officer

Heard at Manchester Civil Justice Centre on 29 June 2023

DECISION AND REASONS

1. For consistency with the First-tier Tribunal decision I will hereafter, and in the heading above, refer to the Secretary of State for the Home Department as the Respondent, and Mrs Nessa as the Appellant.
2. The Appellant was born on 12 August 1945. He is a citizen of Bangladesh. He appealed against the decision of the Respondent dated 11 November 2021, refusing to grant a Family Permit as the requirements of Appendix EU Family Permit were not met. Her appeal was allowed by First-tier Tribunal Judge Birrell in a decision promulgated on 1 July 2022. It is against that decision that the Respondent appeals.
3. Neither the Appellant nor a representative on her behalf attended by the time the hearing was called on at 10.30. Having checked the electronic portal file, I was satisfied she had been served as the notice of hearing was sent to the Solicitor on record as a acting for her on 12 June 2023 at 9.25am. That notice identified that the hearing was due to commence at

10am today at the Manchester Civil Justice Centre. I was satisfied it was fair to proceed as there was no reason given why I should not.

Permission to appeal

4. Permission was granted by First-tier Tribunal Judge Chinweze on 22 July 2022 who stated:

“3. It is arguable that the judge made a material error in stating that the only issue between the appellant and the respondent was whether the sponsor was an EEA national, (para 3(a) of the determination). In her refusal decision the respondent was also not satisfied that the sponsor and the appellant resided together in the host EEA state in accordance with Regulation 9(2)(b) of the 2016 Regulations. As the judge did not address this issue at all, it is arguable that the decision discloses an arguable error of law by failing to address a relevant consideration.”

The First-tier Tribunal decision of 1 July 2022

5. Judge Birrell made the following findings:

“4 The issue in the case was identified at the last PHR which I conducted. The Appellants case was that the Sponsor was a British citizen who had exercised Treaty rights in Portugal where she met and married the Appellants son. They then returned to the UK. The VAF made clear that this was a ‘Surinder Singh’ application. The case was adjourned to give the Appellant the opportunity to evidence the exercise of treaty rights by the Sponsor in Portugal .

...

6 The only issue raised in the refusal letter was whether the Sponsor, who is a British citizen, Hasina Begum had established that she exercised treaty rights in Portugal which was the basis of the application because it was described as a Surinder Singh application in the VAF. The Appellants bundle contained only evidence of the residence card of the Sponsors husband who was described as a ‘joint sponsor’ which was not the basis of the application which named only Hasina Begum as the Sponsor. Mr Timson requested the adjournment to obtain this evidence. Mrs Newton did not object as she was initially concerned that there may have been another potential ground for refusal in relation to whether the daughter in law met the definition of ‘family member’ of a relevant EEA citizen however having looked at the definition section of Annex 1 I am satisfied this issue was not taken because she can be a sponsor. However ultimately Mrs Newton conceded that the only fact in issue would be whether the Sponsor had met the evidential burden of establishing that she exercised treaty rights in Portugal. Given the limited nature of the issues I see no requirement for either party to produce skeleton arguments

...

11 The only matter put in issue on the last occasion was whether. As a British citizen, the Sponsor had exercised treaty rights herself in Portugal and could therefore Sponsor the Appellant herself. I heard oral evidence from the Sponsor and I found her to be a credible witness who gave evidence that was consistent with the documentary evidence and consistent with the oral evidence of her husband. The Sponsor gave oral evidence that she worked in Portugal for 7 months picking raspberries. She has now produced what I accept is a contract of employment from Portugal and salary slips that corroborate her claim to have exercised treaty rights in Portugal and she must therefore succeed.

12 Mr Timson also advanced an argument that in accordance with the definition of dependent family member in the Definition section of Appendix EU she was also able to sponsor the Appellant herself in accordance with that definition as the application was made before 1.7.20 and not on 2.7.2020 as stated in the history. The date of application is stated in the VAF: it is unclear where the Respondent’s date comes from. So even if I were wrong about the Appellant having exercised

treaty rights herself I am satisfied that on this alternative basis the Appellant would succeed."

The Respondent's grounds seeking permission to appeal

6. The grounds asserted that:

"a) ... the First Tier Tribunal Judge (FTTJ) has materially erred in law by misconstruing the nature of the refusal as being restricted to the issue of whether the Appellant's British Citizen sponsor was exercising treaty rights in Portugal. It is submitted that this overlooks the other grounds for refusal contained in the refusal notice dated 19 November 2021. The refusal notice contains the following paragraph (emphasis added), "A 'qualifying British citizen' is a British citizen **who has exercised their free movement rights in another EEA state and their family members have resided there with them.** You have not provided any evidence that your sponsor is a 'qualifying British citizen'."

b) It is respectfully submitted that the FTTJ has failed to address this issue when allowing the Appellant's appeal. It is submitted that the FTTJ has failed to refer to any evidence that indicates that the British Citizen daughter in law/ Sponsor and the Appellant resided together in the host EEA state in accordance with Regulation 9(2) (b) of the 2016 Regulations.

c) It is submitted that this is a requirement of contained within the definition of a "qualifying British citizen" contained within Annex 1 of Appendix EU (Family Permit) which contains the following definition,

(b) satisfied regulation 9(2), (3) and (4)(a) of the EEA Regulations (as the British citizen ("BC") to whom those provisions refer, with the applicant being treated as the family member ("F") or, as the case may be, as the extended family member ("EFM"), to whom those provisions refer):

d) As the FTTJ has failed to address this issue or take into account the fact that the Appellant does not appear to have resided in Portugal with the British Citizen sponsor, it is submitted that the FTTJ has a materially erred in law by failing to take into account and resolve this material issue."

Rule 24 notice

7. There was no rule 24 notice.

Oral submissions

8. Mr McVeetie submitted that the second limb of the "Surinder Singh" test was in issue, namely whether the Appellant had resided in the host EEA country, in this case Portugal, with the Sponsor. This had not been addressed. There was no claim by the Appellant to have ever lived in Portugal. Indeed there was no history of any travel to Europe. It was submitted that this was a material error of law, and that I should proceed to dismiss the appeal outright given the lack of evidence on this issue and as it was a limited issue. Even the witness statement referred to money being sent to Pakistan.

Discussion

9. The Respondent in essence is seeking to withdraw a concession made at the hearing before Judge Birrell. The heading of the decision from Judge Birrell identifies that there was no Home Office Presenting Officer at the hearing. That cannot be correct as the Judge then goes on to refer to Mrs

Newton not objecting to the Appellant's Counsel's adjournment application and concession of the issue being the Sponsor's exercise of EEA Treaty rights in Portugal.

10. I note MSM (journalists; political opinion; risk) Somalia [2015] UKUT 00413 (IAC) headnote (5) that;

"in cases where the Secretary of State seeks to withdraw a concession, or admission, the Tribunal should adopt a broad approach, taking into account in particular its inquisitorial jurisdiction, the public law overlay, the imperative of considering all relevant evidence and fairness to the litigant."

11. I also note NR (Jamaica) v SSHD [2009] EWCA Civ 856 which states that;

"12. As Kennedy LJ makes clear, the Tribunal may in its discretion permit a concession to be withdrawn if in its view there is good reason in all the circumstances for that course to be taken. Its discretion is wide. Its exercise will depend on the particular circumstances of the case before it. Prejudice to the applicant is a significant feature. So is its absence. Its absence does not however mean that an application to withdraw a concession will invariably be granted. Bad faith will almost certainly be fatal to an application to withdraw a concession. In the final analysis, what is important is that as a result of the exercise of its discretion the Tribunal is enabled to decide the real areas of dispute on their merits so as to reach a result which is just both to the appellant and the Secretary of State."

12. The Immigration (European Economic Area) Regulations 2016 state at regulation 9 that (my emphasis);

(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**;...

13. The Respondent appears to have conceded at the hearing that there was no issue regarding the Appellant and Sponsor residing together in Portugal. It is that concession which the Respondent through the grounds seeks to withdraw. The Appellant has been put on notice of this through the grounds seeking permission to appeal, and that it would be considered today following the grant of permission to appeal. She has not filed a Rule 24 notice or attended through a representative to challenge that. As it is a regulatory condition of joint residence in the EEA State, I am satisfied it is fair to allow the Respondent to withdraw the concession. Whilst there is prejudice to the Appellant, having not objected to it despite being on notice, it will enable the Tribunal to decide a significant area of dispute to enable it to reach a just decision.

14. As the concession is accordingly withdrawn, the Judge materially erred in not considering the issue.

15. It would be unfair on the Appellant, despite her being on notice of today's hearing, to proceed to determine this issue without her having the chance to file evidence on this specific issue. As the issue is of a fact not determined, despite it being a single issue, in my judgement it is fairest to remit the appeal back to the First-tier Tribunal for a hearing on this issue only. The findings in [11] of the decision stand.

Notice of Decision

16. The Judge made a material error of law.
17. I set aside the decision.
18. I remit the decision back to the First-tier Tribunal for the appeal to be determined by a Judge other than Judge Birrell.

Laurence Saffer

Deputy Judge of the Upper Tribunal
Immigration and Asylum Chamber

29 June 2023

NOTIFICATION OF APPEAL RIGHTS

1. A person seeking permission to appeal against this decision must make a written application to the Upper Tribunal. Any such application must be **received** by the Upper Tribunal within the **appropriate period** after this decision was **sent** to the person making the application. The appropriate period varies, as follows, according to the location of the individual and the way in which the Upper Tribunal's decision was sent:
2. Where the person who appealed to the First-tier Tribunal is **in the United Kingdom** at the time that the application for permission to appeal is made, and is not in detention under the Immigration Acts, the appropriate period is **12 working days (10 working days, if the notice of decision is sent electronically)**.
3. Where the person making the application is in detention under the Immigration Acts, **the appropriate period is 7 working days (5 working days, if the notice of decision is sent electronically)**.
4. Where the person who appealed to the First-tier Tribunal is **outside the United Kingdom** at the time that the application for permission to appeal is made, the appropriate period is **38 days (10 working days, if the notice of decision is sent electronically)**.
5. A "working day" means any day except a Saturday or a Sunday, Christmas Day, Good Friday or a bank holiday.
6. The date when the decision is "sent" is that appearing on the covering letter or covering email.

