IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case Numbers: UI-2023-001949
UI-2023-001954, UI-2023-001956

On appeal from: EA/06798/2022
EA/06045/2022, EA/06048/2022

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On 29 August 2023

Before

UPPER TRIBUNAL JUDGE GLEESON

Between

TEJ BHANDARI
RAJAN BHANDARI
SABHYATA BHANDARI
(NO ANONYMITY ORDER MADE)

Appellants

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellants: Mr Jay Gajjar of Counsel, instructed by Gordon and Thompson Solicitors

For the Respondent: Ms Julie Isherwood, a Senior Home Office Presenting Officer

Heard at Field House on 16 August 2023

DECISION AND REASONS

Introduction

1. The appellants challenge the decision of the First-tier Tribunal dismissing their appeals against the respondent's decisions on 7 June 2022 (for the

first appellant) and 14 March 2022 (for the second and third appellants) refusing them a family permit under the EU Settlement Scheme (EUSS).

2. All three appellants are citizens of Nepal. The principal appellant is the sponsor's father, the second appellant is his brother, and the third appellant is his niece. The sponsor, his wife and child are all British citizens and the respondent considers that they live in the UK. The sponsor was granted a permanent residence card by the Spanish authorities on 31 July 2020 and is a qualified person.

3. The appeals turn on whether the appellants can show that before coming to the UK, they lived with the sponsor in Spain, and that their residence there was genuine, creating or strengthening genuine family life during that time and was not for the purpose of circumventing UK immigration laws.

4. The respondent was not satisfied that these appellants were living with the sponsor in Spain at the specified date and also at the date of application. It is not disputed that the second and third appellants were resident in Nepal, not Spain, on the specified date. The appellants' case in the First-tier Tribunal was that if the first appellant was entitled to pre-settled EUSS status as the sponsor's dependent, they should also be given EUSS status in line with him, to avoid splitting the family unit.

5. For the reasons set out in this decision, I have come to the conclusion that the First-tier Tribunal decision must be set aside and remade, dismissing the appeals of all three appellants.

Background

6. The principal appellant has an Article 50 family member residence card in Spain, which expires on 20 August 2025, as the family member of the sponsor, Mr Rojan Bhandari, who is a British citizen.

7. **Sponsor's residence.** The sponsor is a solicitor of the Supreme Court, having qualified as a solicitor on 2 September 2019. On 18 December 2020, the sponsor was admitted as a solicitor in the Republic of Ireland. It appears that the sponsor has also applied to be a Spanish advocate, his application being acknowledged by Abogacia Espanola on 2 November 2021. On 22 June 2022, the Order of Advocates of the Regional Council of Lisbon refused to admit him as an advocate there, apparently based on his Irish registration as a solicitor.

8. The sponsor has a Spanish permanent residence card issued in July 2020, because he had then held a Spanish residence card since 2015. He was fully UK-resident between March 2018 and September 2019, during his training contract as a UK solicitor, but continued to visit Spain every one or two months during that period. He renewed his practising certificate as a UK solicitor in 2020, 2021, 2022, and 2023.

9. The sponsor's evidence was that he returned to Spain on 1 October 2019, and was mostly based in Spain after that. He had rather modest accommodation provided by his employer, which his parents were reluctant to visit for long periods. In June 2021, the sponsor bought his own flat in Spain.

10. The sponsor's employment position was complex: in the UK, he worked in a self-employed capacity; from 14 November 2019, he had an employed role as a marketing officer for Kathmandu Tandoori House in Madrid, which he was able to perform remotely from his UK home; and he also worked on a self-employed basis in Nepal, and in Portugal. He was able to work remotely in his non-UK jobs from his UK home, and it seems that his British citizen wife and children live permanently in the UK.

11. At [20] in the First-tier Tribunal decision, the judge recorded that the sponsor accepted in his evidence that these appellants did not join him in Spain before the specified date of 11 p.m. on 31 December 2020. The first appellant had returned to Nepal, to sell his house there, but it was not sold until 13 February 2022. The second and third appellants remained in Nepal and did not come to Spain until after the specified date.

Appellants' visits to Spain.

12. The claimed residence of the appellants with the sponsor in Spain may be summarised as follows:

13. **Second and third appellants.** It was common ground that the second and third appellants did not live in Spain before 2020. There is some limited evidence in the bundle of funds sent in 2021 by the sponsor to them, all sent to Nepal. The argument put to the First-tier Judge was that if the first appellant qualified for status, the second and third appellants should also qualify, to avoid dividing the family unit. The First-tier Judge rejected that argument.

14. **First appellant.** The first appellant came to the UK from Nepal in early 2020 to attend the sponsor's admission ceremony as a UK solicitor, travelling via Brussels and Barcelona. He left Barcelona for the UK on 29 February 2020, the admission ceremony being set for 20 March 2020. His visa application made no mention of residence in Spain, or of intending to live in Spain with his sponsor son.

15. When interviewed, the first appellant said he lived in Nepal, and gave a UK address for his sponsor son. While in the UK, he intended to spend time with the sponsor, with his daughter-in-law (the sponsor's wife) and his grandchildren. On 14 October 2020, he went back to Nepal.

16. The first appellant visited Spain on the following dates:

    (1)**17 - 29 February 2020** (12 days, to make an in-country application for EU family permit in Spain, granted June 2020);
    (2)**30 July 2020 - 1 August 2020** (2 days, travelled from UK to Spain);

(3)**20 August 2020 - 21 August 2020** (2 days, travelled back to UK);
(4)**8 - 14 October 2020** (7 days, travelling to and from UK)

The first appellant therefore spent just 23 days in Spain before the specified date of 31 December 2020.

17. On 14 October 2020, the first appellant left the UK for Nepal, where he remained during the Covid-19 pandemic. He did not come back during the pandemic period. On 9 March 2022, he left Nepal again, arriving in Brussels on 10 March 2022 and travelling on to see the sponsor from there.

First-tier Tribunal decision

18. The First-tier Judge dismissed the appeal principally because he found that at all material times, the residence of all three appellants was Nepal, and that only the first appellant had travelled to Spain, for short periods. At [35], the judge said it was only 'one or two days', which was incorrect, as there were two longer periods. The First-tier Judge found that there was no evidence of genuine joint residency in Spain for any of the appellants.

19. The judge then went on to consider abuse of rights, which had not been raised by the respondent. He gave no notice to either party that he intended to do so. The test for abuse of rights includes 'a subjective element consisting in the intention to obtain an advantage from the Community rules by creating artificially the conditions laid down for obtaining it' and can be established by 'evidence of collusion'. Those are very serious allegations, particularly given the sponsor's role as a solicitor and officer of the court.

20. The judge's conclusion is at [41]:

> "41. In assessing the evidence as a whole, on a balance of probabilities, I do find that the appellants had genuine and effective residence with the sponsor. I find that the stamps in the first appellant's passport show that he spent only days in Spain and the UK, *in an attempt to solely satisfy the criteria to access benefits and take advantage from Community rules.* The appellants do not meet the requirements of the EU Settlement Scheme."
> [*Emphasis added*]

21. The appellants appealed to the Upper Tribunal.

Permission to appeal

22. UTJ Blundell granted permission to appeal as follows:

> "2. … I cannot readily see how the appellants can hope to satisfy the requirement that they were residing with the British sponsor in Spain before 2300 hrs on 31 December 2020. Taking full account of the chronology set out at [12] of the rather diffuse grounds, I cannot see how the judge could rationally have concluded that the first appellant had resided in Spain at all; he had merely visited that country for a few days before the specified date.

> Whatever else might be said about the judge's decision, I suspect that the adverse finding she reached in this respect was properly open to her and was determinative of the appeal. As noted in the renewed grounds, however, that is (ordinarily) a matter for argument if I am satisfied that there is an arguable legal error in the decision of the judge.
>
> 3. There is arguably an error of law in the judge's decision. As asserted in the third ground of appeal, the judge was arguably wrong to consider abuse of rights when it had not been alleged by the respondent. Given that the sponsor is a solicitor who practises in this field, and that the judge appears to have found that his residence in Spain was a contrivance designed to ensure that his family members could be admitted to the UK from Nepal, it was arguably a serious error to reach that finding without any notice of the point."

23. The respondent did not file a Rule 24 Reply.

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

Upper Tribunal hearing

25. The oral and written submissions at the hearing are a matter of record and need not be set out in full here. I had access to all of the documents before the First-tier Tribunal.

26. It is a plain error of law to have dismissed these appeals on the basis of abuse of rights, without putting the parties on notice. The respondent, on whom the burden of abuse of rights lies, had not taken the point and the consequences for the sponsor as a solicitor are potentially very serious.

27. In the first sentence of his conclusions at [41], the judge stated that 'I do find that the appellants had genuine and effective residence with the sponsor', while in the second sentence he found that the first appellant 'spent only days in Spain'. The first sentence of [41] is inconsistent with the second and third sentences of that paragraph.

28. It seems likely that there should have been a 'not' in the first sentence, but this paragraph records the judge's decision and it is not open to the reviewing judge to read in such an important amendment.

29. The decision in [41] is one to which no reasonable Tribunal could have come: see *R (Iran)* at [90] in the judgment of Lord Justice Brooke, and *Volpi & Anor v Volpi* [2022] EWCA Civ 464 (05 April 2022) at [65]-[66] in the judgment of Lord Justice Lewison, with whom Lord Justices Males and Snowden agreed.

30. I consider, therefore, that there is no alternative but to set aside and remake the decision of the First-tier Tribunal.

Remaking the decision

Regulation 9 of the Immigration (European Economic Area) Regulations 2016

31. At the date of application, in order to be entitled to an EUSS family permit, on *Surinder Singh* grounds, the appellants were required to show that they met the requirements of Regulation 9 of the 2016 Regulations, as follows:

> "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.
>
> (1A) These Regulations apply to a person who is the extended family member ("EFM") of a BC as though the BC were an EEA national if—
>
> (a) the conditions in paragraph (2) are satisfied; and
>
> (b) the EFM was lawfully resident in the EEA State referred to in paragraph (2)(a)(i).
>
> (2) The conditions are that—
>
> (a) BC— …(ii) has acquired the right of permanent residence in an EEA State;
>
> (b) F or EFM and BC resided together in the EEA State;
>
> (c) F or EFM and BC's residence in the EEA State was genuine.
>
> (d) either—
>
> (i) F was a family member of BC during all or part of their joint residence in the EEA State;
> (ii) F was an EFM of BC during all or part of their joint residence in the EEA State, during which time F was lawfully resident in the EEA State; or
> (iii) EFM was an EFM of BC during all or part of their joint residence in the EEA State, during which time EFM was lawfully resident in the EEA State;
>
> (e) genuine family life was created or strengthened during F or EFM and BC's joint residence in the EEA State; and
>
> (f) the conditions in sub-paragraphs (a), (b) and (c) have been met concurrently."

32. It is not in dispute that the sponsor meets Regulation 9(2)(a)(ii) and is a qualified person. His Spanish permanent residence was acquired in July 2020.

33. However, the appellants also needed to meet the requirements of sub-paragraphs 9(2)(b) and (c). The uncontested evidence was that the second and third appellants spent no time in Spain before the specified date, while the first appellant spent only 23 days in total in Spain in 2020,

and was not living with the sponsor in Spain on the specified date, or on the date of application.

34. The appellants cannot show that they have resided together with the sponsor in the EEA state or that such residence was genuine. They also cannot meet (e), since in the absence of joint residence, they cannot have created or strengthened genuine family life together there.

35. These appeals, therefore, must fail.

Abuse of rights

36. I make no decision on abuse of rights: the Secretary of State has not relied upon it in her refusal letters for these appellants and I am not seised of that issue in these proceedings.

37. For completeness, I record that it appears that the First-tier Tribunal is dealing, or has dealt, with the appeals of a further ten of Mr Rojan Bhandari's family members whose circumstances, I understand, are very similar to those in these proceedings. He, his wife or his son have sponsored them all.

38. On 31 July 2023, the First-tier Tribunal directed as follows:

> "1. By no later than 4.00pm on 7 August 2023 the appellant's representative must upload a complete list of appeals in which Mr Rojan Bhandari and/or his wife and/or his son had been the sponsor to applications that had led to decisions subsequently appealed to the First-tier Tribunal, together with the current progress of those appeals.
>
> 2. By no later than 4.00pm on 7 August 2023 the appellant's representative must send a copy of that list, accompanied by these directions and the directions dated 27 July 2023 to the Upper Tribunal in connection with [these appeals]. At the same time the appellant's representative must upload to this appeal confirmation of the same."

A letter complying with that direction and naming ten further appellants was sent to the Upper Tribunal on 5 August 2023.

39. I have not had regard to the 5 August 2023 letter in considering the appeals of these appellants. Those First-tier Tribunal proceedings are not linked to these proceedings.

40. It is a matter for the respondent whether she raises any issue of abuse of rights (on proper notice) in relation to any of those appellants, but their names, and the status of their First-tier Tribunal appeals, are not relevant to what I have to decide today.

Notice of Decision

41. For the foregoing reasons, my decision is as follows:

The making of the previous decision involved the making of an error on a point of law.
I set aside the previous decision. I remake the decision by dismissing the appeals.

Judith A J C Gleeson
Judge of the Upper Tribunal
Immigration and Asylum Chamber

Dated: 17 August 2023