



IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2023-003858

First-tier Tribunal No: EA/09646/2022

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On 7 December 2023

Before

UPPER TRIBUNAL JUDGE FRANCES
DEPUTY UPPER TRIBUNAL JUDGE BAGRAL

Between

DJANULA FELICIANA FERNANDEZ CABRAL
(NO ANONYMITY ORDER MADE)

Appellant

and

ENTRY CLEARANCE OFFICER

Respondent

Representation:

For the Appellant: Mr Gervasio Silva Lopes, the sponsor

For the Respondent: Ms S McKenzie, Senior Home Office Presenting Officer

Heard at Field House on 10th November 2023

DECISION AND REASONS

1. The appellant is a national of Guinea-Bissau born on 4 March 1978. She appeals against the decision of First-tier Tribunal Judge Shergill ('the judge') promulgated on 9 June 2023 dismissing her appeal against the refusal of a family permit under the EU Settlement Scheme ('EUSS'). Neither the appellant nor respondent attended the hearing before the First-tier Tribunal and the appeal was decided on the papers.
2. The appellant is the unmarried partner of the sponsor, a British citizen. It is the appellant's case that the sponsor was exercising Treaty rights as a student in Portugal. The appellant made her application on 31 January 2022 under Appendix EU (Family Permit) ('FP') on the basis she was a family member of a qualifying British citizen.
3. The application was refused by the respondent on the grounds there was insufficient evidence that the sponsor was exercising Treaty rights in Portugal. In addition, there was insufficient evidence of joint residence, genuine residence,

family member or extended family member status or that genuine family life was created or strengthened in Portugal. The documents submitted with the application were not translated and there was no evidence the appellant and sponsor had comprehensive sickness insurance.

4. The respondent considered the definition of durable partner under Appendix EU (FP) and acknowledged the birth of the appellant's child as further evidence of the relationship with the sponsor. However, the respondent found that the appellant had failed to provide adequate evidence that she was a family member of a qualifying British citizen.

Judge's relevant findings

5. The judge found that the appellant's evidence amounted to a bare denial and failed to rebut the matters in the refusal notice, save that the sponsor was a student in Portugal, although the issue of sickness insurance was unresolved. The judge found that the appellant had no status in Portugal until her residence card was issued on 12 April 2021 and if she did have such status the evidence before the judge did not show it adequately. The judge found the appellant became lawfully resident in Portugal when her residence card was issued which was after the 'Brexit deadline'.
6. The judge concluded that the appellant could not bring herself within Article 10 of the Withdrawal Agreement ('WA'). The appellant did not reside in the host state 'in accordance with Union law' before the end of the transition period (31 December 2020) because the appellant was not a family member and her residence had not been facilitated by the host state contrary to Article 10.1(e). Further, Article 10.4 was not met because the appellant had not been able to have the 'durable relationship' duly attested before the end of the transition period.
7. The judge found that the appellant could not rely on Article 18 of the WA (access to judicial redress). The judge dismissed the appellant's appeal under the Immigration (Citizens' Rights Appeals) (EU Exit) Regulations 2020 ('the Exit Regulations').

Grounds of appeal

8. The appellant appealed on the grounds the judge erred in law in finding she could not rely on Articles 10 and 18 of the WA because the appellant had status in Portugal before 31 December 2020. The grounds state that the appellant's residence cards were attached in PDF.
9. The appellant submitted that her first residence card was issued on 31 January 2018 and expired on 3 May 2019. She renewed her residence card and the second one was issued on 16 April 2019 and expired on 11 April 2021. Her current residence card was issued on 12 April 2021 and expired on 12 April 2024. She submitted she was lawfully resident in Portugal in accordance with Union law before 31 December 2020.
10. Permission to appeal was granted by First-tier Tribunal Judge Bulpitt on 5 September 2023 for the following reasons:

“Although it is not identified in the grounds I consider it arguable that there has been a procedural unfairness and therefore a material error of law. The question which concerned the Judge of whether the appellant’s residence in Portugal was being facilitated prior to the UK leaving the EU, was not one which the respondent took issue with when making her decision to refuse the appellant’s application. There was therefore no reason for the appellant to anticipate this issue being raised by the Judge and to adduce the evidence she clearly had of earlier residence cards. It is arguable that in finding against the appellant in this way the judge has therefore materially erred.”

11. In the rule 24 response the respondent was concerned that Judge Bulpitt granted permission on a matter not raised in the grounds relating to a point not relied on in the refusal notice and submitted the question of facilitation by the Portuguese authorities was implicit in what was said in the refusal notice about lawful residence.

The hearing

12. At the hearing before us the sponsor attended and produced the appellant’s residence cards from 31 January 2018 to date. They were not on the digital court file appended to the grounds of appeal in PDF. Ms McKenzie accepted the appellant was lawfully resident in Portugal in accordance with EU law prior to 31 December 2020.
13. Ms McKenzie relied on Article 7 of Directive 2004/38/EC (‘the Directive’) and submitted the appellant’s appeal should be dismissed because the appellant and sponsor had failed to show they had comprehensive sickness insurance.
14. The sponsor produced his Portuguese ID card and submitted that comprehensive sickness insurance was not required. The sponsor submitted there was nothing in the respondent’s guidance which supported the respondent’s submission and the Directive did not apply.

Error of law

15. The appellant’s residence cards were not before the judge and he cannot be criticised for failing to take into account evidence which was not before him. However, we accept that it was not apparent from the refusal notice that the appellant was required to provide evidence that her residence in Portugal was being facilitated in accordance with EU law prior to 31 December 2020.
16. The respondent now accepts that the appellant’s residence in Portugal was lawful in accordance with EU law prior to 31 December 2020. Accordingly, we find there is a procedural impropriety amounting to an error of law and we set aside the judge’s decision to dismiss the appeal. The judge accepted the appellant’s evidence that the sponsor was a student in Portugal and the respondent did not challenge this finding. We preserve the judge’s findings at [5] to [8] and set aside his findings at [9] to [13].
17. We proceed to remake the decision on the basis the sponsor was exercising Treaty rights in Portugal as a student and the appellant’s status as an extended family member, unmarried partner, was recognised in Portugal before the date of withdrawal on 31 January 2020, prior to the specified date: 31 December 2020, at

the date of application and at the date of hearing. The appellant's current Portuguese residence card expires on 12 April 2024.

Conclusions and Reasons

18. It is not in dispute that the sponsor is a British citizen and the appellant's child is a British citizen born on 12 April 2021. At the date of application, the appellant had not been living with the sponsor for two years but there was other evidence of a durable relationship, namely the birth of their child. The respondent accepted in the refusal notice that the appellant had provided evidence of this in the form of photographs and a birth certificate.
19. The respondent accepts that the appellant has been residing in Portugal lawfully as the unmarried partner of the sponsor having accepted the appellant's evidence of her residence cards. Ms McKenzie did not seek to argue otherwise. She only took issue with the lack of evidence of comprehensive sickness insurance.
20. Appendix EU FP 6(2) states:

"The applicant meets the eligibility requirements for an entry clearance to be granted under this Appendix in the form of an EU Settlement Scheme Family Permit, where the entry clearance officer is satisfied that at the date of application:

 - (a) The applicant is not a British citizen;
 - (b) The applicant is a **family member of a qualifying British citizen**;
 - (c) The qualifying British citizen is resident in the UK or will be travelling to the UK with the applicant within six months of the date of application;
 - (d) The applicant will be accompanying the qualifying British citizen to the UK (or joining them in the UK) within six months of the date of application; and
 - (e) The applicant ("A") is not the spouse, civil partner or durable partner of a qualifying British citizen ("B") where a spouse, civil partner or durable partner of A or B has been granted an entry clearance under this Appendix, immediately before or since the specified date held a valid document in that capacity issued under the EEA Regulations or has been granted leave to enter or remain in the UK in that capacity under or outside the Immigration Rules."
21. Ms McKenzie was unable to direct us to the requirement to have comprehensive sickness insurance in Appendix EU or in the definition of family member of a qualifying British citizen. It forms no part of the respondent's guidance on Appendix EU (FP) and is only referenced in relation to the definition of a relevant naturalised British citizen which appears to specifically exclude it. Evidence of comprehensive sickness insurance was not required as one of the mandatory documents in the application form. We find there was no requirement under Appendix EU (FP) for the appellant or sponsor to provide evidence of comprehensive sickness insurance.
22. Further and alternatively, the sponsor and the appellant's child are British citizens and do not require comprehensive sickness insurance in the UK. The appellant applied for a family permit under Appendix EU (FP). She has not resided in the UK under the Immigration (EEA) Regulations 2016. The Comprehensive Sickness Insurance and EEA Qualified Person's Guidance demonstrates that settled status can be obtained without comprehensive sickness insurance and

following VI v HMRC Case 247/20, affiliation to a public sickness insurance system is sufficient to satisfy the meaning in Article 7(1)(b) of the Directive.

23. For these reasons, we are not persuaded by Ms McKenzie's submission that Article 7 of the Directive requires the appellant or sponsor to have comprehensive sickness insurance. Ms McKenzie did not seek to make an argument under the WA. We accept the sponsor's evidence that as a Portuguese national he did not require comprehensive sickness insurance in Portugal.
24. In any event, there are two grounds of appeal under the Exit Regulations 2020. Firstly, the decision breaches any right the appellant has by virtue of the WA and secondly the decision was not in accordance with the immigration rules, in this case Appendix EU (FP).
25. We find the judge also erred in law in failing to consider the immigration rules. Looking at all the evidence in the round, the appellant satisfies the requirements of Appendix EU (FP) and we allow the appeal on the grounds the refusal of entry clearance was not in accordance with the immigration rules under Regulation 8(3) of the Exit Regulations 2020.
26. Having considered all the evidence and the submissions by both parties we find there is a material error of law in the judge's decision promulgated on 9 June 2023. We set aside the decision and remake it allowing the appellant's appeal.

Notice of Decision

Appeal allowed under the Immigration (Citizens' Rights Appeals) (EU Exit) Regulations 2020.

J Frances

Judge of the Upper Tribunal
Immigration and Asylum Chamber

21 November 2023