



IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2023-002728
UI-2023-002729
First-tier Tribunal No: EA/04928/2022
EA/04929/2022

THE IMMIGRATION ACTS

**Decision & Reasons Issued:
On 27th March 2024**

Before

UPPER TRIBUNAL JUDGE LINDSLEY

Between

**MARYAM SAJID
MUHAMMAD ANAS MUJADID
(NO ANONYMITY ORDER MADE)**

Appellant

and

ENTRY CLEARANCE OFFICER

Respondent

Representation:

For the Appellant: Mr J Dhanji, of Counsel, instructed by ATM Law Solicitors
For the Respondent: Ms Gilmour, Senior Home Office Presenting Officer

Heard at Field House on 10 January 2024

DECISION AND REASONS

Introduction

1. The appellants are citizen of Pakistan, and mother and son. They were born in February 1986 and June 2017. On 28th January 2022 they applied for a family permit under the EU settlement scheme as family members of a qualifying British citizen, the first appellant's husband and second appellant's father, namely Sajid Mahmood, a British citizen. Their applications were refused on 9th May 2022. Their appeal against the decision was dismissed by First-tier Tribunal Judge Rea in a determination promulgated on the 19th December 2022.

2. Permission to appeal was granted by Upper Tribunal Judge Blundell on 5th December 2023 on the basis that it was arguable that the First-tier judge had erred in law in the assessment of the genuineness of the appellants' and sponsor's residence in Portugal. The First-tier Tribunal was required to follow ZA (Reg 9. EEA Regs; abuse of rights) Afghanistan [2019] UKUT 281 (IAC) and arguably overlooked the registration certificate issued to the sponsor by the Portuguese authorities in 2018 which was in the First-tier Tribunal bundle.
3. The matter came before me to determine whether the First-tier Tribunal had erred in law, and if so to determine whether any such error was material and whether the decision of the First-tier Tribunal should be set aside and remade.

Submissions - Error of Law & Remaking

4. In the grounds of appeal it is, in short summary argued as follows. Firstly, it is argued that the First-tier Tribunal erred in law by failing to apply the principles in ZA when considering whether the appellants' residence in Portugal was genuine, the key aspects being whether the relocation to Portugal strengthened family life and was intended by the appellants and sponsor as an exercise of Treaty rights. Further it is argued that the First-tier Tribunal wrongly considered whether the appellants and sponsor had integrated in Portugal and whether they had given up their accommodation in Pakistan. This was contrary to point (iii)(3) of ZA which states: "There is no requirement for the EU national or his family to have integrated into the host member state, nor for the sole place of residence to be in the host state; there is no requirement to have severed ties with the home member state; albeit that these factors may, to a limited degree, be relevant to the qualitative assessment of whether the exercise of Treaty rights was genuine."
5. Secondly, it is argued that there was a failure to take into account the sponsor's registration certificate that was issued on 17th September 2018, the document being at page 36 of the appellants' bundle before the First-tier Tribunal. The First-tier Tribunal referred only to the residence card issued on 7th November 2022 which did not demonstrate a lengthy period of residence.
6. The respondent did not provide a Rule 24 response. It was however conceded by Ms Gilmour that the first ground was made out, and that the First-tier Tribunal had materially erred in law.
7. It was further agreed by both representatives that the appeal could be remade and allowed by consent on the basis of the properly made findings by the First-tier Tribunal that the sponsor had genuinely exercised Treaty rights.

Conclusions - Error of Law & Remaking

8. The guidance in ZA is that the relevant question is whether the sponsor genuinely exercised Treaty rights in another member state. The test for this being whether the exercise of Treaty rights was real, substantive or effective rather than marginal or ancillary. There was no need to assess any intentions beyond this matter. There is no requirement that there was integration in Portugal nor for the sole place of residence to have been Portugal or for ties to have been severed with the home member state. If an abuse of rights is alleged the burden is on the Secretary of State.
9. The key question of the genuine nature of the sponsor's exercise of Treaty rights is set out at paragraph 5 of the decision. At paragraph 6 the First-tier Tribunal finds: " that the sponsor exercised Treaty rights in Portugal at the relevant time". It is accepted that the appellants were in Portugal for 4 months from the airline tickets and that they were given residence permits by the Portuguese authorities at paragraph 9 of the decision. The points at paragraph 9(iii), (iv) and (v) of the decision of the First-tier Tribunal, which are found to be factors against the appellants having genuinely resided in Portugal, are not ones which could lawfully have been taken into account, applying ZA, as they were: not giving up accommodation in Pakistan, not being integrating in Portugal and relating to primary purpose issues with respect to the sponsor and first appellant's triplet babies who were born in Portugal.
10. The First-tier Tribunal erred in law in taking into account irrelevant matters which led to the appeal being dismissed. It was sufficient to allow the appeal that the First-tier Tribunal found that the sponsor genuinely exercised Treaty rights in Portugal and that the appellants had genuinely resided with him in Portugal whilst he did so.

Decision:

1. The making of the decision of the First-tier Tribunal involved the making of an error on a point of law.
2. I set aside the decision of the First-tier Tribunal dismissing the appeal.
3. I re-make the decision in the appeal by allowing it under Appendix EU of the Immigration Rules.

Fiona Lindsley

Judge of the Upper Tribunal
Immigration and Asylum Chamber

10th January 2024