IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2024-003576

First-tier Tribunal No: EU/56409/2023

THE IMMIGRATION ACTS

Decision & Reasons Issued:

On 19th of November 2024

Before

UPPER TRIBUNAL JUDGE PINDER

Between

CAROLINA GONCALVES LEAO DE PAULO
(NO ANONYMITY ORDER MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Ms A Jones, Counsel instructed by Terence Ray Solicitors.
For the Respondent: Mr E Tufan, Senior Presenting Officer.

Heard at Field House on 9 October 2024

DECISION AND REASONS

1. The Appellant appeals with the permission of First-tier Tribunal Judge Chowdhury against the decision of First-tier Tribunal Judge Young-Harry. By her decision of 12th June 2024, Judge Young-Harry ('the Judge') dismissed the Appellant's appeal against the Respondent's decision to refuse to grant her pre-settled status/limited leave to remain under the EU Settlement Scheme.

Background

2. The Appellant is an Italian national, whose application under the EU Settlement Scheme ('EUSS') was refused on 25th October 2023. In summary, the Appellant was born in Brazil and also holds Brazilian citizenship. Her father is a dual Brazilian-Italian citizen. The Appellant first came to the UK when she as 9 years old in 2001 and she lived in the UK with her parents until she returned to Brazil shortly before she turned 18 years old.

3. The Appellant then returned to the UK in 2018 when she was aged 26 years old, travelling on her Brazilian passport. The Appellant's evidence is that she started the process of arranging for her Italian citizenship documents from the UK, with a plan to secure these before 31st December 2020. The Appellant did not obtain these however until 27th January 2022 when she was issued with an Italian Identity Document and on 7th February 2022 with an Italian passport. The Appellant stated that this delay was a result of the pandemic and the necessary procedures set by the Italian authorities. Furthermore, in order to obtain these documents, the Appellant was required to travel to Italy, which she did on 9th September 2021.

4. Thereafter, the Appellant returned to the UK and applied to the Respondent on 9th February 2022 for confirmation of her status as an Italian citizen resident in the UK. When refusing the Appellant's application, the Respondent accepted that the Appellant was at the time of her application an Italian citizen but did not accept that she had provided sufficient evidence to demonstrate that she was such a citizen, and therefore that she met the definition of 'relevant EEA citizen', as defined in Annex 1 to Appendix EU to the Immigration Rules, before the specified date of 31st December 2020.

5. The Appellant duly appealed the Respondent's decision and her appeal was heard on 16th May 2024 by the Judge. The Appellant pursued her appeal on the basis that she accepted that she did not have a document confirming her Italian citizenship by the specified date but that in effect, she was an Italian citizen by law, by descent from her father, by the specified date. The Appellant was represented by Ms Khan of Counsel and the Respondent by a Presenting Officer. The Judge heard oral evidence from the Appellant only and submissions from the advocates before reserving her decision.

The Decision of the First-tier Tribunal Judge

6. In her reserved decision at [10], the Judge recorded that the Appellant had failed to provide any supporting evidence from the Italian authorities or from some other competent authority, to support the contention that one who is born to an Italian parent can be considered an Italian citizen/national, *"before the person formally acquires Italian citizenship and is issued with an Italian identity document"*. The Judge then concluded at [11] that she could not be satisfied that the Appellant had shown that she was an Italian national, thus an EEA national, prior to the specified date. At [12], the Judge found that the Appellant could not satisfy the requirements of Appendix EU.

The Appeal to the Upper Tribunal

7. In seeking permission to appeal to this Tribunal, the Appellant submitted that the Judge had erred in law in failing to properly assess the status of a child born to an Italian citizen. It was submitted that such a person has an *"inherent right to that citizenship from birth"* and *"any procedural process that (the Appellant) had to go through would have been only to confirm the citizenship without a possibility of refusal".*

8. Permission was granted by First-tier Tribunal Judge Chowdhury, who considered that it was just arguable that the principle that citizenship by descent is declarative – as opposed to constitutive – and that this principles holds true across the European Union/European Economic Area. Further, that the

obligations and position of the Respondent were not fully explored at the hearing.

9. There was no response before me from the Respondent pursuant to Rule 24 of the Tribunal Procedure (Upper Tribunal) Rules 2008. In advance of the hearing, the Appellant lodged an application under Rule 15(2A) to rely on new evidence. I have addressed this application in further detail below.

Submissions

10. For the Appellant, Ms Jones confirmed that she was seeking to rely on the new evidence both to establish the material error of law pursued and as part of any necessary re-making of the appeal, should she be successful in the former. She otherwise continued to accept that the Appellant's passport and identity card had not been obtained by her until 2022 but Ms Jones submitted that those documents were not what made the Appellant an Italian citizen.

11. Ms Jones then helpfully took me through the submissions and the evidence that were relied upon before the Judge. These were as follows:

    (a) §3 of the Appellant's skeleton argument before the Judge which submitted that the Appellant was entitled to Italian citizenship at birth. Reference was there made to internal page 20 of the Appellant's bundle. The submission was also made that the Appellant had initiated the process of *"confirmation of citizenship"* while she was living in the UK prior to the specified date, the process for which did not end until January/February 2022. The page referred to in the Appellant's bundle (before the Judge) was to an Italian document, issued in Italian by - it would appear - the authorities in Turin on 27th January 2022. This document appears to record the Appellant's parentage and birth in Brazil.
    (b) The Appellant's witness statement prepared for her FtT appeal, which recounted as I have summarised above at §2-4 above, the relevant history to the appeal, her EUSS application to the Respondent and the times of her entries and residence in the UK and what the procedures entailed in relation to her exchanges with the Italian authorities and the issuing of her Italian identity and travel document.
    (c) Her Brazilian birth certificate, accompanied by an official English translation confirming the Appellant's birth in Brazil and her paternity as claimed;
    (d) The Italian document that I have already referred to at (a) above;
    (e) The Appellant's Italian identity card issued on 27th January 2022;
    (f) The Appellant's Italian passport issued on 8th February 2022;
    (g) The Italian passports of the Appellant's father issued to him on 23rd November 2007 and 11th November 2022.

12. Ms Jones otherwise accepted that there was no expert evidence before the Judge setting out the circumstances by which a child of an Italian citizen would be Italian by descent but Ms Jones submitted that the Judge had erred in law by not making a finding as to the Appellant's claim on the evidence that was available before her. Ms Jones added that the Judge's recording that the Appellant had failed to provide any supporting evidence from the Italian authorities or from some other competent authority, to support the Appellant's claim, was not a correct characterisation of the evidence that had been provided since there had been evidence of the Appellant's father's Italian citizenship.

13. In answer to my question, Ms Jones confirmed that there was not evidence of the father's Italian citizenship as at the time of the Appellant's birth but Ms Jones added that the Appellant had lived in the UK as a child and as her father's dependant and thus, this provided sufficient evidence for the Judge to find in favour of the Appellant on this issue on the balance of probabilities. Ms Jones emphasised that it was incumbent upon the Judge to consider, on the evidence before her, why it was that she was issued with the Italian ID card and passport in 2022. Ms Jones submitted that the only reasonable conclusion that could have been drawn from the evidence before the Judge was that it was because her father was Italian and because the Appellant was Italian by descent. In contrast, Ms Jones submitted that the Judge proceeded straight to whether there was any supporting evidence, from either the authorities or another relevant and authoritative source, to support the Appellant's contention.

14. Turning to the new evidence, Ms Jones submitted that this supported the Appellant's ground of appeal that the Judge had made a material error of law. Ms Jones asked me to consider that it would be reasonable to have regard to that evidence when determining whether or not the Judge did make a material error of law. She added that it was material and relevant evidence, that it ought to be admitted even if this had not been available to the FtT since it furthered the overriding objective.

15. The new evidence, relied upon by Ms Jones for the purposes of establishing the pursued error of law, consisted of a letter dated 14th August 2024 from a qualified lawyer in Italy, Mr Luigi Colombino. Mr Colombino confirmed in his letter that the Appellant is a citizen of Italy and has had the right to have her Italian citizenship granted since birth according to Italy's law nº 09 of February 5, 1992, with implementing regulations, such as Presidential Decree No. 572 of October 12, 1993, and Presidential Decree No. 362 of April 18, 1994. Mr Colombino reaffirmed that the aforementioned Citizenship Act allowed the descendants of persons who were citizens of Italy to have their citizenship *"GRANTED"*. Ms Jones also submitted that Mr Colombino's letter (cited in more detail in the section below) assisted the Appellant as he described the Appellant being part of a group of persons, who were able to apply to have their citizenship *"recognised"*.

16. Mr Tufan opposed the appeal and focused his submissions on the lack of expert evidence before the Judge and that this, with hindsight, ought to have been submitted at the time. Mr Tufan emphasized the parts of Mr Colombino's letter addressing the group of adults, who wish <u>to become</u> Italian citizens and that this would indicate that there was no automatic recognition of the Appellant's citizenship at birth or at any time before the specified date, until such time as she was issued with the Italian ID card. Mr Tufan also suggested that the guidance in the *Shamima Begum* litigation on the distinction between *de jure* citizenship and *de facto* citizenship (albeit in a stateliness context) may have application to this appeal as well. Drawing this analogy, Mr Tufan submitted that the Appellant had elected to exercise her right to in effect acquire Italian citizenship, as she was eligible to do so through her father, which is why Mr Colombino stated that she had *"applied for citizenship on 9th September 2021 on the basis that she was eligible to do so due to her paternal Italian ancestry"*. Mr Tufan invited me to dismiss the Appellant's appeal in this Tribunal and to uphold the Judge's decision.

17. In reply, Ms Jones submitted that the *de jure* and *de facto* distinctions that Mr Tufan had sought to draw did not in her view assist me. A person was either a citizen of a country or they were not and the Supreme Court's guidance was also given in the context of statelessness, which was arguably very different.

18. At the conclusion of the submissions, I reserved my decision on the error of law advanced by the Appellant as well as the Appellant's Rule 15(2A) application, having confirmed that I would hear the Appellant's appeal with submissions on the new evidence *de bene esse*, i.e. on a provisional basis, without determining its admissibility.

Analysis and Conclusions

19. I am satisfied that the Judge has made an error of law in the manner in which she has directed herself at [10] of her determination. This is because the Judge referred to the Appellant having formally acquired Italian citizenship when being issued with an Italian identity document. When the Appellant was said to have acquired Italian citizenship was an issue in dispute between the parties and it was the Appellant's case that her being issued with an Italian identity document was not the act that granted her the citizenship but was instead a declaration of her citizenship that she already held.

20. All matters considered, I do not find however that the error of law identified above is material. The fact remains that there was no expert or authoritative evidence before her supporting the Appellant's contention that she was in law an Italian citizen prior to 11pm on 31st December 2020.

21. It is well established that foreign law, including nationality law, is a question of fact that must be proved by the party relying on the contents of a foreign law. There was no evidence before the Judge to demonstrate the basis upon which she was to be considered Italian prior to the issuing of the identity card in 2022. The only evidence before the Judge consisted of the Appellant's and her father's own evidence and the assertion that she would not have been able to obtain her identity card and passport had she not been considered Italian by descent, at the time of her birth and subsequently. The latter is not sufficient and in light of this being the sole issue raised by the Respondent in the refusal decision, the Appellant ought to have addressed this by way of expert evidence, or at the very least, with translated extracts of the foreign laws in their primary source relied upon in the event that these can be interpreted on a simple reading of their contents.

22. I have also borne in mind the authority of *Hussein and Another (Status of passports: foreign law)* [2020] UKUT 00250 (IAC), where the then Vice-President of the Upper Tribunal stated as follows at [9]:

> Foreign law needs to be proved by expert evidence directed precisely to the questions under consideration, so that the Tribunal can reach an informed view in the same way as anybody taking advice on an unfamiliar area of law. It is surprising that this well-known principle has apparently escaped the notice of the appellant's professional advisers: if authority is needed it can be found in *CS* [2017] UKUT 00199 (IAC).; see also *R(MK) v SSHD* [2017] EWHC 1365 (Admin) at [5]-[8]. There is no evidential basis in the present case for any of the arguments about Somali, Kenyan or Tanzanian law that were made before the First-tier Tribunal or in the grounds.

23. I return to the new evidence relied upon by the Appellant. In a more detailed section of his letter, Mr Colombino addressed the issue of citizenship by descent, otherwise known as the principle of *ius sanguinis*. In this section, Mr Colombino explained the procedures for acquiring citizenship by descent contrasting two different groups. The first group concerns children under the age of 18, born from a parent who is an Italian citizen, and whose birth certificate is registered with the Italian authorities, including when born outside of Italy, before the child turn 18 years old. Those children are, to cite directly from Mr Colombino's letter, *"automatically Italian"*. The second group relates to adults, *"who wish to become Italian citizens and whose birth certificates have never been registered with the Italian authorities"*. Mr Colombino further explained that those adults *"will have to submit an application for recognition of Italian citizenship iure sanguinis*".

24. Coming back to the Appellant, Mr Colombino then confirmed that the Appellant had used this right and had applied for Italian citizenship on 9th September 2021 on the basis that she was eligible to do so due to her paternal Italian ancestry. Mr Colombino then recounted the delays that the Appellant encountered and the chronology of events that ensued in the Appellant's case in so far as her contact with the Italian authorities was concerned, that I have already summarised above in this decision. Mr Colombino concluded as follows:

> According to the aforementioned law on citizenship, (the Appellant) has had the right to have her Italian citizenship granted since birth and falls into the category of persons who are allowed to be citizens of both Italy and another state (in her case – Brazil) at the same time.

25. I now consider if this letter should be admitted for consideration as to whether or not the Judge committed a material error of law. I have already recorded the basis upon which Ms Jones asked me to grant her application to have the new evidence admitted. I have considered those submissions very carefully but do not consider that these meet the test set out in *E and R v Secretary of State for Home Department* [2004] EWCA Civ 49 applying a relaxed *Ladd v Marshall* framework and more recently confirmed in *Kabir v Secretary of State for the Home Department* [2019] EWCA Civ 1162, [2020] Imm AR 49.

26. Under Rule 15(2A), the party seeking to adduce new evidence must, when making their application, provide an explanation as to why the evidence was not submitted to the First-tier Tribunal. This is a mandatory requirement. In addition, §4 of the Practice Directions of the Immigration and Asylum Chambers of the First-tier Tribunal and the Upper Tribunal states as follows:

> UT rule 15(2A) imposes important procedural requirements where the Upper Tribunal is asked to consider evidence that was not before the First-tier Tribunal. UT rule 15(2A) must be complied with in every case where permission to appeal is granted and a party wishes the Upper Tribunal to consider such evidence. Notice under rule 15(2A)(a), indicating the nature of the evidence and explaining why it was not submitted to the First-tier Tribunal, must be filed with the Upper Tribunal and 6 served on the other party within the time stated in any specific directions given by the Upper Tribunal; or, if no such direction has been given, as soon as practicable after permission to appeal has been granted.

27. The Court of Appeal held in *E and R* at [23(ii)] the following:

> New evidence will normally be admitted only in accordance with "*Ladd v Marshall* principles" (see *Ladd v Marshall* [1954] 1 WLR 1489), applied with some additional flexibility under the CPR (see *Hertfordshire Investments Ltd v Bubb* [2000] 1 WLR 2318, 2325; White Book para 52.11.2). The *Ladd v Marshall* principles are, in summary: first, that the fresh evidence could not have been obtained with reasonable diligence for use at the trial; secondly, that if given, it probably would have had an important influence on the result; and, thirdly, that it is apparently credible although not necessarily incontrovertible. As a general rule, the fact that the failure to adduce the evidence was that of the party's legal advisers provides no excuse: see *Al-Mehdawi v Home Secretary* [1990] 1AC 876.

28. There was no explanation before me, whether in the Appellant's application or subsequently, for why the Appellant did not seek to obtain and adduce the opinion of Mr Colombino, or a similar expert, before the Judge in the FtT. Considering the opinion of Mr Colombino seeks to address the only issue in dispute between the parties raised in this appeal, as I have already stated above, there is no reason why this could not have been obtained and been made available to the Judge in the FtT.

29. Secondly, I do not find that the evidence would have had an important influence on the result. Whilst some aspects of Mr Colombino's opinion appear to assist the Appellant in her claim to have always been since birth an Italian citizen, other aspects of his letter do not assist the Appellant. For instance, Mr Colombino refers to the Appellant as using a 'right' and applying for Italian citizenship on 9th September 2021 being eligible to do so due to her paternal Italian ancestry. On a simple reading of this paragraph, it would appear that the Appellant would not otherwise have secured Italian citizenship had she not applied. Mr Colombino, as I have summarised above, also distinguishes between the group of children under the age of 18 years old who are automatically Italian if their parent is an Italian citizen and the child's birth certificate is registered with the Italian authorities prior to their 18th birthday and the group of children over the age of 18 years old whose birth certificates were not so registered and who *"wish to become Italian citizens"*. The latter group *"will have to submit an application for recognition of Italian citizenship iure sanguinis".*

30. I do not accept Ms Jones' submission that the use of the term 'recognition' by Mr Colombino implies that such adult children are citizens in law already. I do not have the primary source of the relevant Italian citizenship laws and Mr Colombino clearly sets out by implication that those adult children are not automatically Italian. It is correct that the principle *iure sanguinis* or *jure sanguinis* means 'by descent' but Mr Colombino does not opine on the Appellant's nationality status, as far as the Italian authorities are concerned, prior to her having made the application that she did in September 2021.

31. Furthermore, Mr Colombino did confirm in his conclusion section that the Appellant has had the right to have her Italian citizenship granted since birth. This does appear to imply that the recognition of her status as an Italian citizen is granted upon an application being made and Mr Colombino does not assist with whether this has retrospective effect. By way of analogy, there are numerous grants of British citizenship by way of registration that recognise an

applicant's entitlement to that citizenship, including by descent, but that only operate from the time of the registration certificate being issued.

32. In light of there being no explanation as to why the Appellant did not seek to submit and rely on expert evidence before the Judge in the FtT and because Mr Colombino's letter does not fully support the Appellant's contention, I refuse to admit the new evidence within these proceedings. For the same reasons as considered at §28-31 above, had I decided otherwise and granted the Appellant's application under Rule 15(2A), I would still have found that Mr Colombino's letter does not assist the Appellant in demonstrating that the Judge has materially erred in law.

33. For all of the reasons above, I find that the Judge's assessment that there was a lack of evidence before her supporting the Appellant's claim to be correct. In the circumstances, I dismiss the Appellant's appeal and order that the decision of the Judge shall stand.

Notice of Decision

34. The Appellant's appeal is dismissed. The Judge's decision to dismiss the Appellant's appeal stands.

Sarah Pinder

Judge of the Upper Tribunal
Immigration and Asylum Chamber

11 November 2024