



**Upper Tribunal
(Immigration and Asylum Chamber)
EA/14267/2016**

Appeal Number:

THE IMMIGRATION ACTS

Heard at Field House

Decision & Reasons

On 14 February 2018

Promulgated

On 20 February 2018

Before

UPPER TRIBUNAL JUDGE CANAVAN

Between

BENITA CHARLES JOSEPH

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the appellant: Mr G. Dolan, Counsel

For the respondent: Ms A. Everett, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellant appealed against the respondent's decision dated 05 December 2016 to refuse to issue a residence card recognising a right of permanent residence as the family member of an EEA national.
2. First-tier Tribunal Judge C. Chapman ("the judge") dismissed the appeal in a decision promulgated on 19 September 2017. The judge noted the background to the appeal, including the fact that the appellant made two applications for a residence card. The first application for a residence card as a family member was refused in a decision dated 26 April 2016. The second application for a permanent residence card was refused on 05 December 2016 [6-8]. The judge went on to consider which decision was the relevant decision. The judge noted that the First-tier Tribunal records

indicated that the appeal had been lodged against the second decision dated 05 December 2016. There was no evidence to show that an appeal had been lodged against the first decision “but because there was no presenting officer available to assist the Tribunal at the hearing, I was unable to have the Respondent’s records checked.” [9]. In the absence of clarification from a Home Office Presenting Officer the judge decided to consider both matters [10]. The judge returned to the difficulty that the absence of a Home Office Presenting Officer caused when he repeated at [28] that he was “not assisted by the absence of a presenting officer in this appeal.”

3. The judge went on to summarise the events at the hearing. It seems clear that his reference in [8] to the appellant, witnesses and a representative being in attendance was an error arising from insufficient proof reading. It is clear from the rest of the decision that the judge was aware that the appellant was not in attendance and did not have a legal representative [19]. Nothing turns on the error at [18]. The judge went on to state that the appellant nor any legal representative attended the hearing although her husband attended [19]. Her husband (the EEA sponsor) said that she was unwell. The judge observed that there was no evidence to show that she was too unwell to attend a hearing [21]. He also noted that the appellant’s husband only consulted a legal representative shortly before the hearing even though the appellant had been notified of the hearing since June 2017. The firm was not on record and there was no evidence to suggest that the appellant had prepared for the appeal or intended to “engage with the appeal process” [23]. For these reasons the judge decided that he should proceed with the appeal in the absence of the appellant.
4. The judge went on to hear evidence from the EEA sponsor. He records the evidence as follows:

“24. I therefore heard evidence from the sponsor. I asked him questions to help him present his evidence, which he answered through the interpreter. He confirmed that he had not worked since 2013. He had been received ESA, because of his heart conditions, but this had been stopped. He appealed against the decision the Social Security Tribunal, but his appeal was dismissed approximately three or four months ago. Since then, he has been in receipt of jobseekers allowance. He has documents at home to prove this but he has not brought them with him. He has, with his previous application, provided documents to the Respondent, and to his legal representatives, proving his employment, receipt of ESA, and the Appellant’s residence in the United Kingdom, but has not retrieved these, or brought them with him.”

5. The judge went on to dismiss the appeal because the appellant had failed to produce any evidence to show that the EEA sponsor was a qualified person or had been a qualified person for a continuous period of five years for the appellant to acquire a right of permanent residence. He concluded that the appellant had not discharged the burden of proof [29-31].
6. The appellant appeals the First-tier Tribunal decision on the ground that it was procedural unfair of the judge to proceed to determine the appeal in

circumstances where the appellant was too unwell to attend and the respondent was also unrepresented.

Decision and reasons

7. It is clear from the notice of appeal that the appellant was seeking to appeal the decision dated 05 December 2016 to refuse to issue a permanent residence card. Section 2(f) of the appeal form asks an appellant to state the date of the Home Office decision. The form indicated that the appeal was brought against the decision dated 05 December 2016 and was lodged on 19 December 2016. This was the only appeal before the First-tier Tribunal.
8. The judge took steps to check whether the appellant's last known legal representative intended to attend the hearing. He gave unarguably sustainable reasons to explain why there was insufficient evidence to explain the appellant's absence. There was no medical evidence or detailed explanation of the appellant's medical conditions or any indication of when she might be well enough to attend a hearing. The appellant had been aware of the reasons for refusing the application since December 2016, and had been notified of the hearing in June 2017, but there was little evidence to show that there had been any preparation for the appeal. It was open to the judge to take these matters into account as part of his assessment. Given that the main issue related to whether the EEA sponsor was a qualified person for a continuous period of five years it seems unlikely that the absence of the appellant would have made any material difference to the outcome of the appeal. The relevant witness, the EEA sponsor, attended the hearing and was available to answer questions.
9. Although I have found that many of the judge's reasons for continuing with the appeal in the absence of the appellant were open to him to make in the circumstances, after having considered the First-tier Tribunal decision as a whole, I find that there are two issues of concern, which taken together, render the decision unsustainable.
10. Unfortunately, it is increasingly common for appellants before the First-tier Tribunal and the Upper Tribunal to be unrepresented at a time when the framework of UK immigration law, including European law, has become increasingly complex. Many of those who appear before the Tribunal might face other obstacles to understanding the process such as language barriers or limited literacy and education. Others may have vulnerabilities such as their age or state of health that will need to be considered. Judges at all levels must always be alert to what measures might be required to ensure a fair hearing.
11. If an appellant, or in this case a relevant witness, attends the Tribunal in person there is a duty on the judge to assist the person to provide

information that might be relevant to a proper determination of the appeal. Although it was open to the judge to take into account the fact that the appellant had failed to produce any further evidence in support of the appeal, it was not a case where there had been no appearance on behalf of the appellant. The fact that the EEA sponsor attended indicated that she wanted to pursue the appeal.

12. The first issue of concern is the fact that the sponsor told the judge that he had evidence at home that might have been relevant. If the appellant was legally represented one might expect the evidence to have been filed with the First-tier Tribunal before the hearing. In my assessment procedural fairness dictated that the judge needed to consider whether it might have been necessary to adjourn the appeal at that stage in order to give the appellant a fair opportunity to produce the evidence. Even if the judge decided not to adjourn, a fair opportunity could have been given to the sponsor to file the evidence for consideration within a short period of time after the hearing. I cannot see that this would have caused any unfairness to the respondent given that she chose not to attend the hearing.
13. Although this issue is of some concern, taken alone, it might not have been sufficient reason to conclude that the First-tier Tribunal decision involved the making of an error of law given that the appellant had been on notice of the need to provide further evidence in support of the application since December 2016. However, combined with the second issue, I have concluded that the decision is unsustainable.
14. My second concern relates to the First-tier Tribunal's failure to consider relevant matters. The judge clearly asked the EEA sponsor some questions about his work history in the last few years, but the questions appeared limited. There is nothing in the decision or the record of proceedings to suggest that the judge asked the EEA sponsor for a full history of his period of residence in the UK. It is unclear when the sponsor first arrived in the UK or whether he had completed a continuous period of five years residence as a 'qualified person' before he stopped work due to illness in 2013.
15. Because the appellant was unrepresented, and in the absence of a Home Office Presenting Officer, it was incumbent on the judge to consider all matters that might be relevant to a proper determination of the appeal. Even though the evidence before the First-tier Tribunal was limited, it appears to indicate that the EEA sponsor might have been issued with a permanent residence card before he stopped work in 2013. If that is the case it was arguable that the fact that he stopped work in 2013 due to illness was not relevant if he had already acquired permanent residence. It was not necessary for the EEA sponsor to show that he was exercising rights of free movement to continue to reside in the UK if he had acquired a right of permanent residence.
16. The respondent's bundle is poorly prepared and failed to comply with directions. It contains an incomplete application form and the wrong

decision letter dated 26 April 2016. The documents contained in the bundle do not appear to relate to the decision dated 05 December 2016. A copy of that decision was forwarded to the First-tier Tribunal separately. No doubt the lack of clarity that gave rise to some concern was caused by the failure of the respondent to compile a bundle of documents relating to the permanent residence card application.

17. The application form contained in the respondent's bundle is signed and dated 16 November 2015, which appears to indicate that it related to the earlier application for a residence card as a family member, which was refused on 26 April 2016. For the purpose of this point it may not matter whether it was the correct form or not. Section 8 of the application form contained in the respondent's bundle is entitled "Sponsor has permanent residence". Question 8.2 states that a document was issued in 2010 although other details, such as the document reference number, were not included. Section 9B at paragraph 9.2 stated that a registration certificate was issued on 07 October 2010 and gave the relevant reference number.
18. The judge had already expressed concerns about the absence of a Home Office Presenting Officer. Had he considered the evidence in the bundle it should have become apparent that there were matters that needed to be clarified with the EEA sponsor, and if necessary, with the assistance of a Home Office Presenting Officer. The limited evidence before the Tribunal did not even relate to the correct application. If there was any doubt as to whether the EEA sponsor had acquired a right of permanent residence the details could have been checked. If the appellant had been residing in the UK with an EEA national who had a right of permanent residence since 2010 it is likely that the outcome of the appeal could have been different.
19. The First-tier Tribunal's failure to assist the sponsor to give relevant evidence in support of the appeal, and the difficulties noted by the judge as a result of the absence of a Home Office Presenting Officer, were exacerbated by the failure to consider what limited evidence was before the First-tier Tribunal. Given the conflicting information contained in the earlier application form fairness dictated that the issue of whether the sponsor might have acquired a right of permanent residence at an earlier stage was material to a proper determination of the appeal. The First-tier Tribunal failed to consider a material issue and whether fairness required an adjournment to resolve the issue.
20. For these reasons I conclude that the First-tier Tribunal decision involved the making of an error of law. It was agreed that the appropriate course of action was to remit the appeal for a fresh hearing before the First-tier Tribunal.
21. As the judge was right to observe, the appellant produced no evidence in support of the appeal and only gave vague reasons for failing to attend the hearing. If the appellant is equally inactive in preparing for the next hearing she can have not expectation of success. I am conscious of the

fact that the appellant is unrepresented and may have language or other barriers to understanding what evidence she might need to produce in support of the appeal. To this end she may want to consider the following points.

- (i) The appellant will need to show that she has resided in the UK as a family member in accordance with European law for a continuous period of five years.
- (ii) A full history of her husband's residence in the UK, including a detailed schedule of when he was in work and when he was not in work due to illness or unemployment will assist the First-tier Tribunal to assess the case.
- (iii) If the appellant's husband has been issued with residence documents, it will be important to include copies of those documents. In particular, it will be important to determine whether the appellant's husband has acquired a right of permanent residence, and if so, when.
- (iv) If the appellant is unable to attend the next hearing as a result of illness medical evidence should be provided to explain why she is too unwell to attend.

22. The above points are not exhaustive and are intended to assist an unrepresented appellant to compile relevant evidence. The appellant is reminded that the burden of proof remains on her to show that she has acquired a right of permanent residence as the family member of an EEA national.

DECISION

The First-tier Tribunal involved the making of an error of law

The decision is set aside and remitted to the First-tier Tribunal for a fresh hearing

Signed  Date 15 February 2018
Upper Tribunal Judge Canavan