



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: EA/05951/2019

THE IMMIGRATION ACTS

Decided without a hearing
under rule 34

Decision & Reasons Promulgated
On 9 June 2021

Before

UPPER TRIBUNAL JUDGE CANAVAN

Between

REOLAND MARIN

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

DECISION AND REASONS

1. The appellant appealed the respondent's decision dated 11 September 2019 to refuse to issue a residence card recognising a right of residence as the family member of an EEA national.
2. The appeal is brought under regulation 36 of The Immigration (European Economic Area) Regulations 2016 ('the EEA Regulations 2016'). The only ground of appeal is whether the decision appealed against breaches the appellant's right under the EU Treaties in respect of entry into or residence in the United Kingdom (paragraph 2(4) Schedule 2).
3. The recent history of the case is outlined the Upper Tribunal's error of law decision at [2-3] (annexed), which was promulgated on 16 April 2021. The Upper Tribunal set aside that part of First-tier Tribunal Bartlett's decision relating to the question of whether the EEA sponsor is a 'qualified person' for the purpose of regulation 6 of the EEA Regulations 2016.
4. The Upper Tribunal gave the provisional view that the decision could be remade without a hearing based on up to date documentary evidence. It made directions

giving the parties the opportunity to object to this mode of determination within 7 days of the date the decision was sent. If there was no objection to the decision being remade without a hearing the appellant was to file and serve any up to date evidence and written submissions within 14 days of the date the decision was sent and the respondent was directed to reply within 28 days.

5. The appellant complied with the direction by email on 20 April 2021 confirming that he had no objection to the decision being remade on the papers without a hearing. Up to date evidence was filed at the same time. The email appeared to have been copied to respondent's 'UT directions' address and directly to the Senior Presenting Officer who appeared at the error of law hearing.
6. The Upper Tribunal has no record of a response to directions from the respondent. I am satisfied that the error of law decision was sent to the respondent and that she appears to have been served with the appellant's response to the directions. She has not objected to the decision being remade without a hearing and has not made any further submissions in response to the up to date evidence produced by the appellant. I am satisfied that the respondent has been given a fair opportunity to make further submissions on the mode of hearing and the up to date evidence if she wanted and that I can proceed to determine the appeal in the absence of a response to directions.
7. The appellant produced a letter from his employer, Yusuf Cagin, of Vakkas Limited dated 16 April 2021. The letter gives his telephone number and email address as well as the business address. He confirmed that the appellant and his wife had been employed by the company since 01 July 2020 and that they were both contracted to work 156 hours per month on the minimum wage. There is no evidence of an employment contract for the appellant or the EEA sponsor. A print out from the Companies House website confirms that Mr Cagin is a director of Vakkas Limited. The appellant has also provided copies of payslips covering a period from July 2020 to March 2021. The payslips contain information relating to the hours and rate of pay that is broadly consistent with Mr Cagin's letter. They are also consistent with the appellant's previous evidence that they are paid in cash.
8. A copy of the EEA sponsor's bank statement has also been produced. If she is paid in cash I would not expect to see direct payments from Vakkas Limited. However, there are three cash deposits labelled 'Vakkas Limited' on 15 September 2020, 05 October 2020 and 09 November 2020 for similar amounts to her salary. This may have been an attempt by the EEA sponsor to demonstrate that she received the cash income she claimed for the First-tier Tribunal hearing on 01 October 2020, but the statement was not produced at the time and it seems that she stopped making cash deposits thereafter.
9. The final pieces of evidence are P60 certificates for the tax year 2020-2021. The P60s indicate that the appellant and his wife both earned a gross income of £12,242.88 from their employment at Vakkas Limited in the period from 01 July 2020 to 05 April

2021. The level of income exceeds the Minimum Earnings Threshold for Class 1 National Insurance contributions and cannot be described as marginal or ancillary.

10. The respondent has not made any submissions in response to this evidence. No challenge is made to the authenticity of the documents. Although there is little evidence of direct receipt of income, I do not have to be certain. I only need to be satisfied that it is more likely than not that the EEA sponsor is working in the UK and that her income is 'genuine and effective' and not 'marginal or ancillary': see *Levin v Staatssecretaris van Justitie Case 53/81* [1982] ECR 1035. On the face of it, the evidence is sufficient to meet that standard. I find that the EEA sponsor is a 'qualified person' with reference to regulation 6. For these reasons I conclude that the appeal under the EEA Regulations 2016 must be allowed.
11. It is a matter for the respondent to consider what course of action to take following this decision given that the UK has now exited from the European Union and the EEA sponsor was granted pre-settled status under the EU Settlement Scheme on 11 December 2019. The respondent will also need to consider the fact that the appellant entered the UK in breach of an extant deportation order made under UK law.

DECISION

The appeal is ALLOWED under the EEA Regulations 2016

Signed *M. Canavan* Date 27 May 2021
Upper Tribunal Judge Canavan

NOTIFICATION OF APPEAL RIGHTS

1. A person seeking permission to appeal against this decision must make a written application to the Upper Tribunal. Any such application must be **received** by the Upper Tribunal within the **appropriate period** after this decision was **sent** to the person making the application. The appropriate period varies, as follows, according to the location of the individual and the way in which the Upper Tribunal's decision was sent:
2. Where the person who appealed to the First-tier Tribunal is **in the United Kingdom** at the time that the application for permission to appeal is made, and is not in detention under the Immigration Acts, the appropriate period is **12 working days (10 working days, if the notice of decision is sent electronically)**.
3. Where the person making the application is in detention under the Immigration Acts, **the appropriate period is 7 working days (5 working days, if the notice of decision is sent electronically)**.
4. Where the person who appealed to the First-tier Tribunal is **outside the United Kingdom** at the time that the application for permission to appeal is made, the appropriate period is **38 days (10 working days, if the notice of decision is sent electronically)**.
5. A "working day" means any day except a Saturday or a Sunday, Christmas Day, Good Friday or a bank holiday.
6. The date when the decision is "sent" is that appearing on the covering letter or covering email

Annex



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: EA/05951/2019

THE IMMIGRATION ACTS

Heard at Field House by video
conference on 11 February 2021 (V)

Decision Promulgated

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Before

UPPER TRIBUNAL JUDGE CANAVAN

Between

REOLAND MARIN

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the appellant: Mr T. Nawaz of ACS Visas

For the respondent: Mr D. Clarke, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellant is an Albanian national who appealed the respondent's decision dated 11 September 2019 to refuse to issue a residence card recognising a right of residence as the family of an EEA national.
2. The respondent's summary of the appellant's immigration history indicates that he claimed to have entered the UK illegally in October 2013. He was served with illegal entry papers on 30 July 2017. On 25 January 2018 he was convicted of criminal

offences relating to drugs and false identify documents and sentenced to three years' imprisonment under the name of Reoland Poshnjari. The appellant was deported from the UK under the Early Release Scheme on 24 May 2018. The respondent states that there is a record of the appellant landing at Dublin airport with his EEA national sponsor on 05 February 2019. The exact date when he re-entered the UK is unclear from the evidence before me. When he did so, he re-entered in breach of the deportation order. On 24 April 2019 he made an application for a residence card as the spouse of an EEA national sponsor.

3. The respondent refused the application because she was not satisfied that there was sufficient evidence to show that the EEA sponsor was a 'qualified person' exercising Treaty Rights in the UK. The respondent also refused the application on the ground that it was thought to be a marriage of convenience entered into for the purpose of circumventing the immigration rules. Perhaps because the respondent had concluded that it was a marriage of convenience, and she considered that the appellant's circumstances did not engage rights under European law, she did not make a relevant decision to remove him from the UK on grounds of public policy under regulation 27 in light of his criminal convictions and the fact that he was remaining in the UK in breach of a deportation order. The appellant's skeleton argument before the First-tier Tribunal stated that he also made an application to revoke the deportation order, which had not been decided.
4. First-tier Tribunal Judge J. Bartlett ("the judge") dismissed the appeal in a decision promulgated on 02 October 2020. She heard evidence from the appellant and his wife. She was satisfied that the marriage was not one of convenience and gave reasons for her decision. This aspect of the decision has not been challenged.
5. The judge went on to find that there was insufficient evidence to show that the EEA sponsor was a 'qualified person' exercising rights of free movement in the UK. She noted the reasons given by the respondent in the decision letter. She went on to consider further evidence produced by the appellant and made the following findings:
 - "9. After the CMR the appellant submitted further documents in support of his assertion that the sponsor is a qualified person. These documents included two employers' letters, two companies house screenshots relating to those employers, payslips and a HMRC letter.
 10. This HMRC letter sets out a record of the sponsors (sic) earnings from the tax year 2016/2017 onwards. The earnings in 2016/17 were minimal. However those in 2017/18 were in excess of £12,00 (sic). The earnings in tax year 2018/19 were again minimal under £1,300. The earnings in tax year 2019/20 were just under £8500 which are de minimis. However the HMRC record indicates that one of the employers was Bakur Limited which correspondence with the name given by the sponsor in the application.
 11. An accountant's letter states that the sponsor commenced employment at Vakkas Limited on 01 July 2020 and she works 36 hours per week earning a gross income of £1360.32.

12. Included with the appellant's application were 2 payslips, bank statements which largely predate the sponsor's departure from the country in 2018 and so far as they relate to 2019 show substantial deposits from non-earnings related sources and only 1 deposit relating to her employment in March 2019.
 13. For completeness I record that it is unclear from the evidence whether the sponsor's employment with Samsunlu Ltd is continuing but in any event as the letter sets out that her gross monthly earnings were £355.74 I find that this is de minimis and insufficient to establish that she is a qualifying person.
 14. I am required to consider the situation at the time of the appeal. I find that there is insufficient evidence to establish that at the date of the appeal the sponsor is a qualifying person. This is because there is only an accountant's letter to support the oral evidence of the sponsor and the appellant, there are no payslips and there are no bank statements. I recognise that there is a letter from the accountant of Vakkas Limited and the accountant of Samsunlu Ltd. However, given that this issue was specifically raised by the respondent I find that the appellant has failed to establish that the sponsor is a qualifying person."
6. The appellant appealed the First-tier Tribunal decision on the following grounds:
- (i) The judge failed to take into account the respondent's guidance when assessing whether the sponsor was a 'qualified person' (ground 1);
 - (ii) The judge failed to take into account the fact that the sponsor was granted 'Pre-settled Status' under the EU Settlement Scheme. This was said to be "highly relevant since it now no longer requires the Sponsor to be a QP" (ground 4).
 - (iii) The judge failed to take into account relevant facts and evidence and failed to apply the correct legal test to the sponsor's earnings (grounds 2, 3 & 5);

Decision and reasons

7. The first ground, as drafted, fails to identify the name of the relevant policy that is said to be at the heart of the argument Mr Nawaz was attempting to make. The ground contains a web address, but this only places the burden on the Upper Tribunal to seek out the policy when it should be referred to clearly in the pleadings. The skeleton arguments filed before the First-tier Tribunal referred variously to "the HO guidance at Item 26" and "Item 28" but the index to the bundle only provides further web addresses (in a paper copy so it is not possible to follow a hyperlink). No paper copies of the relevant policies were included in the bundle before the First-tier Tribunal. An earlier skeleton argument before the First-tier Tribunal contained a one page annex, which Mr Nawaz referred to as the relevant policy. However, it is not possible to identify from that single page what policy it is drawn from. All it says at the bottom is "Page 13 of 65 Published for Home Office staff on 21 February 2020". The relevant section that Mr Nawaz relied on stated:

"Workers

This page tells you how to assess if a European Economic Area (EEA) national is a qualified person in the worker category under the Immigration (European Economic Area) Regulations (“the 2016 Regulations”).

A worker is an EEA national who is exercising their free movement rights in the UK by working in paid employment on a full-time or part-time basis.

Evidence of this may include:

- payslips dated no more than 6 weeks before the application was made
- a letter from the employer confirming employment
- a contract of employment”

8. First, the ground is so vague and the reference to the guidance made so difficult that the appellant’s representative has not even identified the relevant policy with any clarity. Second, the policy only gives guidance to Home Office caseworkers about the kind of evidence that might show that an EEA national is exercising rights of free movement in the UK. It does not purport to be a set of rules whereby a residence card will be issued on the basis of specified evidence. Whether EU law is engaged will depend on the facts and evidence in each case. Third, even then the guidance is only couched in general terms giving examples of evidence that “may” demonstrate that a person is exercising rights of free movement. Nothing in the policy, whatever it may be, would make any difference to the task the First-tier Tribunal judge was asked to carry out, which was to evaluate the evidence before her and to decide for herself whether the evidence showed on the balance of probabilities that the EEA sponsor was a ‘qualified person’ at the date of the hearing.
9. The point about Pre-Settled Status (PSS) is even more poorly pleaded and is wholly misconceived. The ground makes a bare assertion that the grant of PSS was “highly relevant since it now no longer requires the Sponsor to be a QP” without even attempting to develop a legally justifiable argument. I can see no reference to this point in the skeleton argument before the First-tier Tribunal. The judge does not refer to the argument being put forward by Mr Nawaz at the hearing. In any event, this ground discloses a fundamental misunderstanding of the nature of the appeal before the First-tier Tribunal and the distinction between European law and UK immigration law.
10. The appeal is brought under regulation 36 of The Immigration (European Economic Area) Regulations 2016. The only ground of appeal is whether the decision appealed against breaches the appellant’s right under the EU Treaties in respect of entry into or residence in the United Kingdom (paragraph 2(4) Schedule 2). The appeal is only concerned with rights under EU law.
11. The EU Settlement Scheme was introduced as a mechanism to grant those with EU rights of residence leave to remain after the UK exited from the EU. It is contained in the immigration rules and is therefore a mechanism of UK law. Many EU citizens exercising rights of free movement in the UK may have been granted leave to remain under UK law before the exit date but would still have rights of residence under EU law until that date. The EU Settlement Scheme did not replace or extinguish EU

rights of residence while the UK was still a member of the EU. Under EU law, an EEA national must show that they are a 'qualified person' who is exercising rights of free movement. The only time when an EEA national does not need to demonstrate that they are continuing to exercise treaty rights is when they have acquired a right of permanent residence after having exercised rights of free movement for a continuous period of five years.

12. I have already found that this ground does nothing more than make a bare and unsubstantiated statement. At the hearing, Mr Nawaz repeated the assertion, adding that an EEA national just needed to be resident here and that there is no requirement to show a particular income. If those are the requirements of the EU Settlement Scheme, that is a matter of UK law. The First-tier Tribunal was required to consider whether the appellant met the requirements of EU law. The appellant's wife had not acquired a right of permanent residence and was therefore required to demonstrate that she was a 'qualified person' for the purpose of regulation 6 of the EEA Regulations 2016. The fact that the appellant's wife was granted limited leave to remain under UK law in preparation for the UK's exit from the EU was immaterial to the assessment. The fact that the judge did not refer to the grant of leave to remain could not possibly amount to an error of law.
13. However, there is merit to the final points made in the grounds about the way in which the judge assessed the evidence relating to the sponsor's income. ACS Visas prepared a bundle for the initial hearing before the First-tier Tribunal listed in March 2020. The hearing was adjourned, but despite the fact that they should have known that the evidence would need to be assessed at the date of the hearing in October 2020, the evidence in the supplementary bundle was very limited. Mr Nawaz treated the hearing before the Upper Tribunal as a further opportunity to make good the gaps in the evidence identified by the First-tier Tribunal by attempting to file a further large unindexed and unpaginated bundle of documents on the morning of the hearing. In assessing whether the First-tier Tribunal involved the making of an error of law, the Upper Tribunal will only consider the evidence as it stood at the date of the First-tier Tribunal hearing. Documents such as the sponsor's bank statements and payslips for her work at Vakkas Limited from July to September 2020 could and should have been produced for the First-tier Tribunal hearing.
14. Nevertheless, it is apparent that the judge conducted her assessment without applying the correct test. While noting that the evidence showed that the sponsor earned a low level of income in some years, she twice dismissed her income as "*de minimis*". The judge failed to consider the fact that part-time work can still engage rights of free movement. The sponsor's income of around £8,500 for the last tax year before the date of the appeal (2019/2020) could not properly be described as *de minimus* when it exceeded the respondent's Minimum Earnings Threshold for Class 1 National Insurance contributions (£149pw/£7,748pa). The correct test is whether the work is 'genuine and effective' and not 'marginal or ancillary': see *Levin v Staatssecretaris van Justitie Case 53/81* [1982] ECR 1035.

15. As I have already noted, the evidence produced for the First-tier Tribunal hearing of the sponsor's employment with Vakkas Limited omitted documents that should have been available. There was evidence from HMRC of ongoing earnings sufficient to show that the sponsor was exercising rights of free movement during the tax year 2019/2020. However, the appellant was required to show that his wife continued to be a 'qualified person' at the date of the hearing six months later. The sponsor's oral evidence was that she was working for a company called Vakkas Limited. There was some evidence from a company called Payroll As You Go, which purported to be the accountants for her employer, confirming that she started employment on 01 July 2020. There was no evidence directly from Vakkas Ltd. Although the evidence was thin, it cannot be said that the judge was bound to come to the same conclusion if she had applied the correct test.
16. I conclude that the First-tier Tribunal decision involved the making of an error on a point of law. The decision is set aside. The findings relating to the appellant's marriage are preserved. Those relating to the assessment of the sponsor's status as a 'qualified person' will need to be remade.

DIRECTIONS

17. The normal course of action is for the Upper Tribunal to remake the decision. My provisional view is that the decision relating to the sponsor's status as a 'qualified person' could be remade without a hearing on the basis of any up to date documentary evidence and written submissions put forward by the parties.
18. **If there is an objection** to the decision being remade without a hearing, the parties must file and serve written representations within 7 days of the date this decision is sent, giving reasons as to why it is thought necessary to have a hearing, and if it is necessary, whether it can be done by way of a remote video hearing or needs to be a face to face hearing.

NB: Bearing in mind the continued need to take precautions to prevent the spread of Covid-19 the Upper Tribunal will generally expect a hearing to be conducted remotely if witnesses do not need the assistance of an interpreter, but may list a case for a face to face hearing if an interpreter is required.

19. On receipt of any representations relating to mode of hearing the Upper Tribunal will review the file and make any case management decisions it deems appropriate.
20. **If there is no objection** to the decision being remade without a hearing, the parties must comply with the following directions:
 - (i) **The appellant** shall file and serve any up to date evidence and written submissions relating to remaking within 14 days of the date this decision is sent.
 - (ii) **The respondent** shall file and serve any up to date evidence and written submissions relating to remaking within 28 days of the date this decision is sent.

- (iii) **The appellant** shall file and serve any response within 35 days of the date this decision is sent.
21. On receipt of further written submissions from both parties the Upper Tribunal will remake the decision and determine the appeal.
 22. The parties are at liberty to apply to amend these directions, giving reasons, if they face significant practical difficulties in complying.
 23. Documents or submissions filed in response to these directions may be sent by, or attached to, an email to FieldHouseCorrespondence@Justice.gov.uk using the Tribunal's reference number (found at the top of these directions) as the subject line. Attachments must not exceed 15 MB.
 24. Service on the Secretary of State may be to UTdirections@homeoffice.gov.uk and to the original appellant, in the absence of any contrary instruction, by use of any address apparent from the service of these directions.

DECISION

The First-tier Tribunal decision involved the making of an error on a point of law

The decision will be remade by the Upper Tribunal in due course

Signed *M. Canavan* Date 31 March 2021
Upper Tribunal Judge Canavan