IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case Nos: UI-2023-001563
UI-2023-001562
Original Nos: EA/06036/2022
EA/06018/2022

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On 4 August 2023

Before

DEPUTY UPPER TRIBUNAL JUDGE JUSS

Between

Bushra Imam (1)
Ishrat Jabeen Akhtar (2)
(NO ANONYMITY ORDER MADE)

Appellants

and

Entry Clearance Officer

Respondent

Representation:
For the Appellant: Mr P Georget (Counsel)
For the Respondent: Mrs A Nolan (Senior Home Office Presenting Officer)

Heard at Field House on 3 July 2023

Order Regarding Anonymity

Pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008, [the appellant] (*and/or any member of his family, expert, witness or other person the Tribunal considers should not be identified*) is granted anonymity.

No-one shall publish or reveal any information, including the name or address of the appellant, likely to lead members of the public to identify the appellant (*and/or other person*). Failure to comply with this order could amount to a contempt of court.

DECISION AND REASONS

1. This is an appeal against the determination of First-tier Tribunal Judge Fox, promulgated on 22nd February 2023, following a hearing at Taylor House via Cloud Virtual Platform, on 23rd January 2023. In the determination, the judge dismissed the appeal of the Appellants, whereupon the Appellants subsequently applied for, and were granted, permission to appeal to the Upper Tribunal, and thus the matter comes before me.

The Appellants

2. The Appellants are a daughter and her mother. Both are citizens of Pakistan. They were born on 26th October 1993 and 30th December 1960 respectively. They appealed against the decision of the Respondent made on 9th June 2022 refusing their applications as family members of Mr Ali Imran, a British citizen, and the sponsoring father of the first Appellant, and the sponsoring husband of the second Appellant.

The Appellants' Claim

3. On 18th December 2020, the Appellants relocated from Pakistan to join their Sponsor, Mr Imran Ali, who had already been living and working in Portugal since October 2019. Subsequently, the Sponsor was offered a job in the UK and decided to relocate back to this country in order to take it up. Both Appellants, however, continued to live in Lisbon with the Sponsor and wish to come to the UK as his family member. Both claim that they satisfy the eligibility requirements for the grant of entry clearance under Appendix EU (family permit). The Appellants' claim that in refusing their applications the Respondent had wrongly applied the Rules in Appendix EU (family permit) by reading in a strict requirement that the Appellants must have resided in the EEA state for at least three months because this was not a condition that could be applied to Appellants who were joining a Sponsor who had exercised his free movement rights to relocate to a European country such as Portugal.

The Judge's Findings

4. At the hearing on 23rd January 2023, the judge, who was not assisted with the presence of a Home Office Presenting Officer, referred to the "relevant date" of the EU Regulations as being 31st December 2020, and the Respondent's contention that given that they had entered Portugal on 18th December 2020, they could not have resided there for three months. The judge did, on the other hand, find that the Sponsor had registered with the Portuguese authorities on 17th October 2019 and that, "he had established a domestic residence in Portugal from the same date" (paragraph 14). Thereafter, as the judge recorded (at paragraph 17), in 2020 the Sponsor generated a declared income of approximately 16,000 euros and in 2021 this was reduced to just under 10,000 euros and that "the sponsor relies upon economic activity as a marketing consultant in Lisbon". The judge also went on to observe how the Appellants relied upon the Sponsor's bank statements, which, as the judge held, "demonstrate numerous minor transactions", although "there is no dispute that the appellants were present in Portugal at the time of these transactions" (at paragraph 18). There were some documents which were of poor quality upon which the judge could not place any particular reliance (see paragraphs 19 to 20 and 25). The judge also found the letters of support to be of limited probative value when taken in the round (paragraph 27 and paragraphs 28 to 30). In the end the judge concluded that, "for all the reasons stated above the appellants

have failed to demonstrate that they were resident in Portugal for three months or more at the relevant date" (paragraph 31). Finally, the judge gave consideration to Article 10(1)(b) of the Withdrawal Agreement. It was recognised that, "the available evidence demonstrates that the sponsor exercised his right to reside in Portugal before the end of the transition period and he was issued with documentation accordingly". However, the judge went on to add, on the basis of the documentation upon which reliance could not be placed as identified earlier, that "his residence was not continuous on the balance of probabilities", and nor was he able to show that "he continues to reside there for the purpose of Withdrawal Agreement" (paragraph 34). The appeals were dismissed.

Grounds of Application

5. The grounds of application state that the only issue before the judge was whether the Appellants had resided in Portugal for a period of three months, but that the judge wrongly went on to consider other matters that had not been raised by the Respondent, without giving the Appellants the opportunity to address them. Moreover, the judge had accepted (at paragraph 12) that the only issue raised was one of three months' residence in Portugal in the Respondent's refusal letter with respect to the Appellants. Permission to appeal was granted on 21st April 2023 by the First-tier Tribunal on the basis that there may have been a procedural irregularity in this respect

Submissions

6. At the hearing before me on 3rd July 2023, Mr Georget, appearing on behalf of the Appellants, submitted that this was a "**Surinder Singh**" type of application, whereby the Sponsor had relocated to Portugal in 2019 and then had his wife and daughter join him there on 18th December 2020. Whereas it is a case that a British citizen relocating to a European country has to have been there for a minimum of three months, there was no such requirement with respect to his family members subsequently joining him there. In the absence of a Presenting Officer, being in a position to assist the judge in this respect, the judge had wrongly imported the requirement that applied to the Sponsor, as being equally applicable to his family members when they joined him from Pakistan to a European country where he had relocated by virtue of the exercise of his treaty rights. This had coloured the judge's approach to the rest of the questions before him, none of which had actually been put in issue by the Respondent, and with respect to which the Appellants had been given no opportunity to address the judge. In fact, all that the Appellants needed to demonstrate was that their residence with their Sponsor was a genuine one in Portugal. The Sponsor himself had been in Portugal for over a year and it was only after that that his family had joined him in Portugal. A great deal of evidence had been submitted before the Tribunal which was not referred to by the judge.

7. Secondly, it was not clear what the judge meant, when considering the application of Article 10(1)(b) of the Withdrawal Agreement, by the statement that, "I do not accept that he continues to reside there or that he was continuously resident there", in relation to the Sponsor himself (at paragraph 34). There had never been an allegation of this being a scam by the Sponsor and his *bona fides* had never been questioned because all that the Respondent had suggested was that the Appellants themselves had not resided in Portugal for a three month period by the "relevant date". Such a conclusion was simply unsustainable once the judge had accepted that the Appellant had been working

in Portugal for a period of some three years (see paragraphs 16 to 17 of the determination) and had generated a significant amount of income during that time.

8. For her part, Mrs Nolan submitted that the refusal letter had raised issues about the genuineness of the residence. The Tribunal was in any event empowered to look at everything before it. It was the judge's view that, "the respondent failed to consider any other conditions associated with the applications", but that, "I remind myself that I must consider the appeal in the context of the relevant application in its entirety" (paragraph 13). This, the Tribunal was entitled to do. Moreover, the judge was concerned that although the Appellant had registered himself with the Portuguese authorities from 17th October 2019, he proceeded to have issued to him another residence permit on 11th October 2022 so that "it is unclear why the Sponsor needed to obtain a new residence permit" (paragraph 14). In addition, the Sponsor had also "declared his marital status as unmarried/separated with their tax documents issued by the Portuguese authorities" (paragraph 16), although the judge did also observe that, "I consider the possibility that the sponsor may have interpreted the first appellant's presence in a third country as a separation". Therefore, submitted Mrs Nolan, there was sufficient here for the judge to have been concerned about.

9. In his reply, Mr Georget submitted that it has been clear since the longstanding decision of **Akrich [2003] EWECJ C-109/01** (at paragraphs 17 to 18) that it does not matter that the exercise of community rights is a device. In that case, the court further held that:

> "Where the marriage between a national of a Member State and a national of a non-Member State is genuine, the fact that the spouses installed themselves in another Member State in order, on their return to the Member State of which the former is a national, to obtain the benefit of rights conferred by Community law is not relevant to an assessment of their legal situation by the competent authorities of the latter State" (at paragraph 18).

10. Mr Georget went on to say that the Respondent had never alleged that the Sponsor was not genuinely living in Portugal, but that the judge had taken it upon himself to make this claim, and additionally also added a three month residence requirement for the Appellants, which could not in law be defended.

Error of Law

11. I am satisfied that the making of the decision by the judge involved the making of an error on a point of law. My reasons are as follows. First, there is no requirement that the Appellants be resident in Portugal for three months by the "relevant date". Second, the judge had accepted that the Sponsor, having registered with the Portuguese authorities from 17th October 2019, now "had established a domestic residence in Portugal from the same date" (paragraph 14). In the circumstances, it did not make sense to conclude that "I do not accept that he continues to reside there or that he was continuously resident there" (paragraph 34) without any evidence to the contrary. Fourth, there was clear evidence before the judge that the Appellants and the Sponsor had all been residing together from the time of the Appellants' arrival in Portugal. The Sponsor himself had been resident in Portugal before 31st December 2020 and had a business there, from which he made a respectable living throughout the period of 2019 to 2021. There was considerable documentary evidence

corroborating the existence of his business, his home, and his moving to Portugal, where he still continues to reside, from the period 2021 to 2022.

Remaking the Decision

12. I have remade the decision on the basis of the findings of the original judge, the evidence before him, and the submissions that I have heard today. I am allowing this appeal for the following reasons. First, the Home Office guidance for people entering the United Kingdom as the holder of an Article 10 residence card makes it quite clear in the first section that an Article 10 residence card is a document that is issued under EU law to a non-EEA family member of an EEA national who has been exercising free movement rights in another state other than that of their own nationality. This means that non-EEA family members of a British national such as the Sponsor, who is living and working in Portugal, may be issued with an Article 10 residence card by the Portuguese authorities. A valid, genuine Article 10 residence card then allows the non-EEA national family member of an EEA national to travel to the UK without the requirement to obtain an EEA family permit. That is precisely what the Appellants are seeking to do.

13. Second, if, as is the case here, the Appellants have been issued with residence cards by the Portuguese authorities, then that is a recognition of the Sponsor having exercised community rights in Portugal and the decision in **Akrich [2003] EWECJ C-109/01** (at paragraphs 17 to 18) makes it quite clear that it does not matter if subsequently the Sponsor returns with his family back to the United Kingdom. If they were to come to the United Kingdom with their lawfully issued residence cards they would be satisfying the requirements in **Akrich** as well as satisfying the requirements of the Home Office policy for people entering the United Kingdom as holders of an Article 10 residence card. This being so, there is no point in having a further hearing in this case. The Appellant satisfied the requirements of the law with regard to residence cards and therefore the decision refusing the residence cards was unlawful and the appeal against the refusal to issue the residence cards is allowed.

Notice of Decision

14. The decision of the First-tier Tribunal involved the making of an error of law such that it falls to be set aside. I set aside the decision of the original judge. I remake the decision as follows. This appeal is allowed.

Satvinder S. Juss

Judge of the Upper Tribunal
Immigration and Asylum Chamber

24th July 2023