



IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM
CHAMBER

Case No: UI-2023-004729

First-tier Tribunal No:

EA/50947/2023

LE/00954/2

023

THE IMMIGRATION ACTS

Decision & Reasons Issued:

On 24 January 2024

Before

UPPER TRIBUNAL JUDGE NORTON-TAYLOR

Between

EMIN HASAN MUSTAFA

(NO ANONYMITY ORDER MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the appellant: Mr A Joseph, Counsel

For the Respondent: Ms E Rushworth, Senior Presenting Officer

Heard at Cardiff Civil Justice Centre on 19 January 2024

DECISION AND REASONS

Introduction

1. The appellant, a citizen of Bulgaria, appeals against the decision of First-tier Tribunal Judge Borsada (“the judge”), made without a hearing and promulgated on 20 September 2023. By that decision, the judge dismissed the appellant’s appeal against the respondent’s refusal of his EUSS application made under Appendix EU to the Immigration Rules.
2. On 10 October 2022, the appellant had applied for pre-settled status in this country (the respondent considered the issue of settled status in his reasons for refusal letter, but this was not in fact what had been sought and is therefore irrelevant). In the reasons for refusal letter, dated 2 February 2023, the respondent concluded that the appellant had failed to provide evidence to show that he was completing a continuous qualifying period of residence. It was said that the most recent documentary evidence provided dated back to April 2016. As this was more than 6 months before the application was made, the respondent concluded that any qualifying residence had been broken and not resumed.
3. The appellant appealed under the Immigration (Citizens' Rights Appeals) (EU Exit) Regulations 2020. He was not legally represented at the time and elected to have his appeal decided without a hearing.
4. The respondent provided a review following the lodging of the appeal and the provision of further evidence by the appellant. The respondent noted that the appellant had been in Germany for periods of time in order to undertake vocational training. It was unclear when he had returned to the United Kingdom. A letter from an employer did not provide details of the periods during which the appellant worked in this country. Overall, the respondent concluded that the appellant had failed to demonstrate that he had been in the United Kingdom between June and December 2020, as apparently required.

The judge’s decision

5. The crucial passage in the judge's relatively brief decision is [6]. The judge stated that he agreed with the respondent's analysis of the issues and evidence and that he himself was not satisfied that the appellant could satisfy the requirements of EU14 of Appendix EU. The judge stated that the appellant had not shown that he had been "permanently resident" in the United Kingdom and that there was "insufficient evidence of continuous residence for the necessary period".

Grounds of appeal

6. The grounds of appeal were drafted by Counsel. In summary, they assert following. First, the judge had failed to identify the relevant requirements under EU14 and Annex 1 as to the necessary continuous qualifying period. Secondly, the judge had failed to analyse or the appellant's evidence, which included bank statements covering 2018-2019, or had failed to provide reasons in respect of that evidence. Thirdly, the judge failed to consider whether the appellant's absences from the United Kingdom had not broken the continuity of residence.
7. Permission to appeal was initially refused by the First-tier Tribunal, but was granted by Upper Tribunal Judge Blundell who regarded it to be arguable that the judge had failed to properly address the question of whether the appellant's evidence had established a continuous qualifying period of 12 months in the United Kingdom without it having been broken.

The hearing

8. Mr Joseph relied on the grounds of appeal. He submitted that the clear errors were material given the high threshold required to demonstrate that they were not. In saying this, he relied on the recent judgment of the Court of Appeal in Abdi v ECO [2023] EWCA Civ 1455, at [38].
9. Ms Rushworth submitted that, on the evidence before the judge, the outcome would inevitably have been a dismissal of the appellant's appeal

even if any errors had not been committed. The appellant had been required to prove that he had been in the United Kingdom for a continuous period of 6 months leading up to 31 December 2020. Although the judge's decision was less than entirely clear, he had in essence agreed with the respondent's analysis, which itself had identified the correct test. Any errors were therefore immaterial.

10. At the end of the hearing I reserved my decision.

Conclusions

11. I remind myself has ever that appropriate restraint should be ensured before interfering with a decision of, whose task assess all of the evidence and make relevant findings. It is not for me to simply substitute my own view of the case for that of the judge below. I am certainly not looking for perfection, nor for the provision of reasons for reasons.

12. To my mind, a number of the requirements under Appendix EU, with particular reference to the definitions in Annex 1, are close to be impenetrable. It can make the task of own decision-makers, EUSS applicants, legal representatives, and judges, very difficult indeed. In the present case, the fact that the appellant was not legally represented and that he had elected to have his case decided without the hearing compounded the difficulties.

13. Notwithstanding the necessary judicial restraint, I am satisfied that the judge erred in law, essentially as contended for in the grounds of appeal. What he said at [6] did not set out the residence requirement that he was purporting to consider. He referred to the seemingly undisputed fact that the appellant had not been "permanently resident" in the United Kingdom, but that was not the relevant test. The "necessary period" referred to was left undefined. In addition, the evidence provided by the appellant was not specifically engaged with. In summary, the losing party (i.e. the appellant) was left unable to properly understand why his appeal had been dismissed.

14. I turn then to the issue of materiality. As submitted by Mr Joseph, threshold is high. In light of Abdi, the essential question is whether, leaving aside the errors, the appellant's appeal would inevitably have been dismissed.
15. Having regard to the evidence as a whole (which the parties are clearly aware of and need not be set out here), I am not satisfied that the appellant's appeal was, to put it bluntly, bound to fail. There was evidence capable of showing that he had been in the United Kingdom for significant periods prior to 31 December 2020 and that he continued to be resident as at the date of his EUSS application. As to the question of absences, I fully appreciate that the position was less than clear. However, it is not all but certain that the appellant had been absent for more than 6 months during any 12-month period. Alternatively, and again acknowledging that the position was not particularly clear, the reasons put forward for absences, namely the undertaking of vocational training in Germany, might have been capable of showing that an exception applied by reference to the definition of "continuous qualifying period" under Annex 1.
16. In light of the above, I conclude that the judge's errors were material and that his decision must be set aside.

Disposal

17. The presumption is that this case should be retained in the Upper Tribunal for the decision to be re-made. However, there needs to be a complete reassessment of the evidence and the relevant requirements under Appendix EU. I conclude that remittal to the First-tier Tribunal is appropriate. There will be no preserved findings arising from the judge's decision.
18. It is of course a matter for the appellant, but it may be that he gives careful consideration to whether, on remittal, he seeks to have his case decided following a hearing.

Anonymity

19. There is clearly no basis for making an anonymity direction in this case and I do not do so.

Notice of Decision

The making of the decision of the First-tier Tribunal did involve the making of an error on a point of law.

I exercise my discretion under section 12(2)(a) of the Tribunals, Courts and Enforcement Act 2007 and set aside the decision of the First-tier Tribunal.

I remit the case to the First-tier Tribunal.

Directions to the First-tier Tribunal

1. The remitted hearing shall be conducted at the Newport hearing centre;
2. That hearing shall not be conducted by First-tier Tribunal Judge Borsada;
3. The First-tier Tribunal will issue its own case management directions in due course.

H Norton-Taylor

Judge of the Upper Tribunal

Immigration and Asylum Chamber

Dated: 21 January 2024