



IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2023-004790
First-tier Tribunal Nos: EA/50096/2022

THE IMMIGRATION ACTS

Decision & Reasons Issued:

24th January 2024

Before

UPPER TRIBUNAL JUDGE MANDALIA
DEPUTY UPPER TRIBUNAL JUDGE SHEPHERD

Between

FARUK ISSAH
(NO ANONYMITY ORDER MADE)

Appellant

And

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr M Al-Rashid, counsel, instructed by Carlton Law Chambers
For the Respondents: Mr P Lawson, Senior Home Office Presenting Officer

Heard at Birmingham Civil Justice Centre on 16 January 2024

DECISION AND REASONS

Background

1. This matter concerns an appeal against the Respondent's decision letter of 13 October 2022, refusing the Appellant's application made on 30 July 2022.
2. The Appellant is a national of Ghana. His claim is made on the basis that he is the spouse of an EEA national whom he married on 8 August 2020 and has lived with in the UK ever since; as such he says he meets the requirements of the EU settlement scheme (EUSS) in the immigration rules for pre-settled status.
3. The Respondent refused the Appellant's claim by letter dated 13 October 2022 ("the Refusal Letter"). This stated that the Appellant had not proved, pursuant to rules EU11 and EU14 of the EUSS, that he had completed a continuous qualifying

period of residence in the UK; he therefore did not meet the eligibility requirements of the relevant rules.

4. The Appellant appealed the refusal decision.
5. The Respondent undertook a review of the matter on 6 June 2023 and maintained the refusal decision, acknowledging the documents provided by the Appellant but stating that (i) there was insufficient evidence that the marital relationship was ongoing and (ii) the Appellant needed to demonstrate he had been living in the UK for at least 6 months in any 12-month period and was living in the UK prior to 31 December 2020. It said he had not done so.
6. His appeal was heard by First-tier Tribunal Judge Ficklin (“the Judge”) at Coventry on 31 August 2023. The Judge subsequently dismissed the appeal in his decision promulgated on 23 September 2023.
7. The Appellant applied for permission to appeal to this Tribunal on grounds which alleged that the Judge erred by failing to make findings on factual evidence and failing to consider material evidence because:
 - (a) On the totality of the documentary evidence, the Appellant had shown 7 months of residence in the 12-month qualifying period which was enough to meet the rules. The Judge only finds residence in relation to December 2020, January 2021, March 2021, July 2021 and September 2021 [8]. He misdirects himself by excluding May 2021, which was not a month which the Respondent disputed given the wording of the Review. The Judge also ignores the Appellant’s bank statement for July 2021 which showed the Appellant’s salary for June 2021.
 - (b) The Judge fails to make a finding as to whether he accepts or rejects the Appellant’s oral evidence, recorded in [8] of the decision, that he had not left the UK during the material time. If the evidence was rejected, the Judge has not explained why it was rejected.
8. The Appellant sought to adduce further evidence by way of a rule 152A notice, comprised of payslips for July, August, September and October 2021.
9. Permission to appeal was granted by First-tier Tribunal Judge G. Clarke on 6 November 2023, stating:
 - “1. The application is in time.
 2. The Grounds of Appeal argue that the Judge materially erred in their assessment of whether the Appellant meets the continuous qualifying person for pre-settled status under the EUSS.
 3. At Paragraph 8 the Judge accepted that the Appellant has provided evidence of residence in the United Kingdom for 5 months in the 12 month qualifying period (December 2020, January 2021, March 2021, July 2021 and September 2021).
 4. It is arguable that the Judge has materially erred in failing to accept that the Appellant had provided evidence of residence in the United Kingdom for May 2021. The Respondent’s Review does not dispute that evidence has been provided of the Appellant’s residence for May 2021 (see Respondent’s Review

Paragraph 5(x) which refers to no evidence for March 2021 but does not list May 2021 as a month where there is no evidence of residence).

5. Permission to appeal is GRANTED.

6. I emphasise that this Grant has not taken into account the additional evidence that has been served with the PTA -the Appellant's representatives ought to be aware that the PTA stage is not for the submission of new evidence."

10. The Respondent did not file a response to the appeal.

The Hearing

11. The matter came before us for hearing on 16 January 2024 in Birmingham.

12. We addressed, as a preliminary issue, the Appellant's rule 152A notice. As the notice sought to adduce better/further evidence of the Appellant's claim, rather than going to the question of whether the Judge's decision contained an error of law, we did not permit the additional evidence to be adduced.

13. Mr Al-Rashid took us to Annex 1 of Appendix EU which contains the definition of 'continuous qualifying period' and states that an absence of more than 6 months in any 12 month period would break continuity. He proceeded to take us through the grounds of appeal.

14. He said that the recent Upper Tribunal case of Lata (FtT: principal controversial issues) India [2023] UKUT 163 (IAC) confirmed that the purpose of documents such as the Respondent's review is to focus the issues; para 10 of the review states the months in dispute and May 2021 is not included. This means that May 2021 was not a month in dispute such that it was accepted that the Appellant was resident during this month and the Judge erred in failing to take this into account. I asked whether evidence for May 2021 had been provided by the Appellant; Mr Al-Rashid was unable to confirm either way, saying the Appellant made the application himself and the papers are disorganised.

15. Mr Al-Rashid clarified that the Appellant no longer sought to rely on paragraph 10 of the grounds of appeal as a mistake had been made as to the date of the Appellant's bank statement; the statement was actually from July 2022 which fell outside the relevant period.

16. Mr Lawson replied to submit that:

- (a) Of the 8 months discussed in the review as missing, the Judge deals with 3 of them in [8], which leaves the Appellant 1 month short. He said there is no evidence of the missing month of May 2021 and the Judge is silent on it. The review being silent on it did not mean that residence during this month was conceded, it was simply left out for reasons unknown.
- (b) He agreed that the bank statement referred to by Mr Al Rashid could not be relied on as it fell outside the relevant period under scrutiny.
- (c) As regards the Appellant's oral evidence that he had not left the UK, the Judge refers at [8] to there being no confirmatory evidence from the Appellant's wife. Mr Lawson submitted this was sufficient to show the Judge rejects the oral evidence.

- (d) Overall, whilst the decision is brief, the Judge's findings and reasoning are sound.
17. Mr Al-Rashid replied to say that the Judge finds 5 months of presence, being December 2020 and January, March, July and September 2021; had he accepted May 2021 as he ought to have done, this would have made up the 6 months and the Appellant would have succeeded. The parties agree there is no need for continuous presence in the UK and the Appellant is permitted to be outside the UK for a total period of 6 months in the 12-month period.
18. We rose for a short while to consider the matter; on return Judge Mandalia gave a short extempore judgement to the effect that we are satisfied that the decision of the Judge is vitiated by a material error of law and must be set aside.
19. We then heard submissions as to the appropriate forum for remaking the decision. After some discussion with the representatives, Mr Al-Rashid submitted that the Appellant would want to adduce further documentary and oral evidence. Because of the nature of the error of law and the need for further evidence, in our judgement, the appropriate course is for the appeal to be remitted to the First-tier Tribunal for hearing afresh.
20. We said we would provide full reasons for our decision in writing, which we now do.

Discussion and Findings

21. We remind ourselves of the important guidance handed down by the Court of Appeal that an appellate court must not interfere in a decision of a judge below without good reason. The power of the Upper Tribunal to set aside a decision of the First-tier Tribunal and to proceed to remake the decision only arises in law if it is found that the tribunal below has made a genuine error of law that is material to the outcome of the appeal.
22. The Judge's decision is very brief, amounting to a mere 10 paragraphs. Whilst brevity is often to be lauded, it must not be at the expense of sufficient explanation and reasoning (see, for example, the headnote of MK (duty to give reasons) Pakistan [2013] UKUT 00641 (IAC), including as to the origin of the point or evidence on which findings are based so as to avoid both confusion and further dispute in any onward appeal.
23. The Judge's findings are contained in [6]-[10] and appear to be as follows:
- (a) The relevant requirement is that the Appellant can show at least 6 months residence in total per year, as well as not having any individual gaps of more than 6 months [9].
- (b) According to the Refusal Letter, the required year during which 6 months needs to be shown is 2021 [7].
- (c) The Appellant was present in the UK in December 2020, and January, March, July and September 2021 [8].
- (d) The Appellant has not shown to the balance of probabilities that he was present in the UK for at least 6 months of 2021. He does not have a

continuous qualifying period of residence that began on or before the specified date (i.e. 31 December 2020) [10].

24. The parties agreed before us that the Judge's finding in [9] at the Appellant needed to show at least 6 months residence in total per year, as well as not having any individual gaps of more than 6 months, was correct. We note this arises from the definition of 'continuous qualifying period' in Annex 1 of Appendix EU which requires:

"a period of residence in the UK and Islands...

(a) which ... began before the specified date; and

(b) during which none of the following occurred:

(i) absence(s) from the UK and Islands which exceeded a total of six months in any 12-month period..."

25. As above, the Judge finds that residence for 6 months during 2021 needed to be shown. The Refusal Letter does not specify a relevant period. The Respondent's review dated 6 June 2023 stated that the sole issue was:

"Whether the Appellant is entitled to pre-settled status on the basis of his marriage in August 2020 to an EEA citizen with ILR, and his continuous residence in the UK thereafter."

26. Paragraph [x] of the review states that:

"The R accepts the A has demonstrated they were resident in the UK in 2020. However, for the 12-month period December 2020 to November 2021, the A has provided no evidence for Feb, April, March, June, Aug, Sept, Oct, Nov – a gap of 8 months during that particular 12-month period which exceeds the allowed 6 months with no explanations as to why."

27. The relevant period in dispute was therefore between December 2020 and November 2021.

28. We accept the submission that the Judge makes no finding as to whether he accepted or rejected the Appellant's oral evidence. Oral evidence that is material to the issue under consideration is evidence that a Judge is bound to consider. If the oral evidence is rejected, it is incumbent on a Judge to explain, even briefly, why that evidence is rejected. As the Judge dismisses the appeal despite recording in [8] that the Appellant said he had not left the UK at all, it can be inferred that the Judge did not accept the Appellant's oral evidence. The Judge simply makes a statement in [8] that "The Appellant's wife did not provide evidence of his residence". He does not go on to say, for example, that this resulted in the Appellant's oral evidence being rejected for lack of corroboration. We therefore do not know why the oral evidence was found to be wanting.

29. We are satisfied that the Judge's failure to consider the Appellant's evidence is such that the Appellant has established that there is a material error of law in the decision of the Judge. We do not therefore need to address the other ground of appeal relied upon by the Appellant. It is sufficient for us to note that the Respondent's review is silent as to whether evidence showing residence during May 2021 had been provided. We do not accept Mr Al-Rashid's submission that this silence amounts to a concession. A concession needs to be sufficiently

explicit and unambiguous in order to be such. It is for the Appellant to establish that the relevant eligibility requirement is met. The issue was whether the Appellant had shown at least 6 months' residence during between December 2020 and November 2021. In the absence of an express concession, we do not consider that the Respondent simply omitting to mention whether a piece of evidence had or had not been provided going to part of an overall issue, was sufficient to be a concession. Overall, we consider there is a failure to give reasons or any adequate reasons for findings on material matters, which is an error of law pursuant to R (Iran) v. SSHD [2005] EWCA Civ 982. It is simply not possible to understand why the Judge came to the decision that he did.

30. We find the errors found infect the decision as a whole such that it cannot stand.
31. We bear in mind the guidance provided in Begum (Remaking or remittal) Bangladesh [2023] UKUT 00046 (IAC). Whilst there is only a single issue to be determined, considering (i) the amount of fact finding needed as no findings can be preserved, and (ii) the loss of the two-tier decision making process if the decision is retained in the Upper Tribunal, we find the appropriate course of action is for the matter to be remitted to the First-tier Tribunal for hearing afresh.
32. For the sake of completeness, we note (v) of the review asserted that no documentary evidence of the Appellant's relationship with his wife beyond the marriage certificate had been provided. We cannot see that the Judge makes any findings in relation to this, but this is not something that has been raised in the grounds of appeal. We simply note the absence of findings for the benefit of whomsoever comes to determine the remitted appeal.

Notice of Decision

1. The decision of the First-tier Tribunal involved the making of an error of law and we set it aside.
2. We remit the appeal to the First-tier Tribunal for a fresh decision on all issues. No findings of fact are preserved.
3. No anonymity order is made.

L. Shepherd
Deputy Judge of the Upper Tribunal
Immigration and Asylum Chamber
23 January 2024