



**Upper Tribunal
(Immigration and Asylum Chamber)**

Appeal Number: UI-2023-005137
First-tier Case Number: EA/50009/2023

THE IMMIGRATION ACTS

Decision & Reasons Promulgated

On 3rd of October 2024

Before

**UPPER TRIBUNAL JUDGE NORTON-TAYLOR
DEPUTY UPPER TRIBUNAL JUDGE WOODCRAFT**

Between

**MRS NIRMALABAHEN PATEL
(Anonymity order not made)**

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr K Jegede of SAJ Solicitors

For the Respondent: Ms Nwachuku, Home Office Presenting Officer

DECISION AND REASONS

Heard at Field House on 24 September 2024

The Appellant

1. The appellant is a citizen of India born on 1 June 1963. She appeals against a decision of the respondent dated 30 April 2021 to refuse her application for a family permit under the EU Settlement Scheme as the family member of her son Mr. Ganpatbhai Patel, a British citizen born on 24 June 1986 (“the sponsor”). The appellant appealed under the Immigration (Citizens' Rights Appeals) (EU Exit) Regulations 2020 (“the 2020 Regulations”). Her appeal was dismissed by the First-tier in a

decision dated 7 October 2023 but the appellant was subsequently given permission to appeal that dismissal. In our decision dated 25 April 2024, attached to this determination, we found a material error of law in the First-tier's decision and set it aside. We directed that the appellant's appeal should remain in the Upper Tribunal to be reheard.

2. The appellant arrived in the United Kingdom on 19 December 2020 on a flight from Bulgaria and in possession of a visitor's visa. She made her application under the EUSS scheme on 7 January 2021.
3. The Respondent refused the application on 30 April 2021 on the basis that the appellant had not demonstrated that she met the eligibility criteria for settled or pre-settled status as set out in Appendix EU (Family Permit) ('Appendix EU(FP)') of the Immigration Rules. Further the respondent in her review did not accept that the sponsor had exercised treaty rights or lived in Bulgaria pointing (inter alia) to numerous entries on the sponsor's bank statements showing cash withdrawals taking place in the United Kingdom.

The Appellant's Case

4. The appellant argued that by the relevant date, 31 December 2020, she met the requirements of residing with a United Kingdom citizen (the sponsor, her son) who had successfully exercised treaty rights by working in Bulgaria before returning to the United Kingdom. The Sponsor resided in Bulgaria exercising treaty rights there between 29 January 2020 and 19 December 2020, working for an IT company in Plovdiv. The Appellant was present in Bulgaria for approximately one month prior to the relevant date of 31 December 2020. She produced an Article 50 TEU Long term residence card issued by the Bulgarian authorities to her to establish this. The sponsor had also been issued with such a card. The Appellant was not required to show that she had lived in Bulgaria for three months prior to the application as was claimed by the respondent in the refusal notice. The appellant also argues that the respondent's decision breaches this country's obligations under Article 8 of the Human Rights Convention (right to respect for private and family life).

The Relevant Law

5. The burden of proof of establishing a breach of the 2020 Regulations rests upon the appellant. The standard of proof is the usual civil standard of the balance of probabilities. Article 10(1)(e) of the Withdrawal Agreement confirms that beneficiaries of the Agreement (as the appellant claims to be) are those who were residing in accordance with EU law as of 31 December 2020 (the specified date).
6. Appendix EU 14 to the immigration rules sets out the eligibility requirements for limited leave to enter or remain under the EU Settlement Scheme. There are two conditions to these requirements the second of which (which is relevant for the purposes of this determination) is that the

applicant must be a family member of a qualified British citizen and must be lawfully resident in the United Kingdom by virtue of regulation 9(1) to (6) of the EEA regulations 2016.

7. **ZA (Reg 9. EEA Regs; abuse of rights) Afghanistan [2019] UKUT 281 (IAC)**, to which we referred in our error of law decision (at [21]), was an appeal under Regulation 9 of the EEA Regulations 2016. Guidance was given by the Upper Tribunal as to what constituted: (a) genuine residence in a host state of the European Union and (ii) what employment would indicate the exercise of treaty rights. At paragraph 75 (v) the Upper Tribunal summarising the jurisprudence of the CJEU on the point stated:

“There must in fact have been an exercise of Treaty rights; any work or self-employment must have been “genuine and effective” and not marginal or ancillary; (vi) The assessment of whether a stay in the host state was genuine does not involve an assessment of the intentions of the parties over and above a consideration of whether what they intended to do was in fact to exercise Treaty rights; (vii) There is no requirement for the EU national or his family to have integrated into the host member state, nor for the sole place of residence to be in the host state; there is no requirement to have severed ties with the home member state; albeit that these factors may, to a limited degree, be relevant to the qualitative assessment of whether the exercise of Treaty rights was genuine;”

The Hearing Before Us

8. We heard oral testimony from both the appellant and the sponsor, the appellant giving her evidence through a Gujarati interpreter. She adopted her witness statement in which she said:

“My son has provided a number of documents that show that he had been present in Bulgaria for the period relied upon as stated earlier. My son has provided confirmation of cash receipts to show his work in Bulgaria, confirmation from his UK employer to confirm that he is permitted to take employment in Bulgaria while he was residing there, tenancy agreement from the landlord in Bulgaria and further insurance documents to show that he is right in stating he was present in Bulgaria between periods January 2020 to December 2020. Home Office have tried to undermine this by saying he had bank statements addressed to him but they should be more than aware that the statements provided are from internet banking and my son residing in Bulgaria does not mean he was required to change the UK bank account address which is an account registered in the UK and statements are still generated automatically to him. He had never indicated that he had closed his account.”

9. In cross examination she said she came to Bulgaria in November 2020 but did not remember much about the dates. She had travelled direct to London from India with her visit visa and had arrived in the United Kingdom in the same month. She could not remember the exact date that she lived with her son at the property in Bulgaria he rented save to say she did not like Bulgaria and returned to the United Kingdom. This was during the Covid time. She could not remember her son doing a job in

Bulgaria save that he did things on his computer and he went out. She did not remember how long she had spent in Bulgaria.

10. She was shown some photographs in the composite bundle taken in Bulgaria but she could not remember where that was. It was not true that she had stopped off in Sofia on her way to the United Kingdom. She could not remember how many days she had spent in Sofia the capital of Bulgaria other than that it was not a full month.
11. We next heard evidence from the sponsor who gave his evidence in English. He adopted his witness statement in which he confirmed the information given in the appellant's statement. He applied for his article 50 residence card in January 2020 but somewhat confusingly referred to applying for his mother's card in 2021. He had to produce to the Bulgarian authorities evidence of the tenancy agreement, job offer letter and medical insurance covering the year together with evidence of relationship. Describing the work he did in Bulgaria, he said he would work sometimes six hours a day earning somewhere between 180 to 270 Bulgarian Lev (approximately £77 to £116. The difference in payment depended on how many hours he worked.
12. There was some confusion in the sponsor's evidence when he was shown photographs of himself in Bulgaria. He said they were taken in 2021 and therefore he was in Bulgaria at that time notwithstanding that his evidence had been that he had lived in Bulgaria in 2020 and was back in the United Kingdom by 2021. On at least three occasions he said that his mother had lived in Bulgaria in 2021. He did not know why his witness statement had not mentioned about him living in Bulgaria in 2021. He had been back in Bulgaria in 2023. He returned to Bulgaria to replace his residence card. He produced a letter dated 5 June 2024 from the owner of the property in Plovdiv where he the sponsor lived confirming that the appellant could reside at those premises as well. It was put to the sponsor in cross examination that the landlord's letter did not specify how long the appellant had lived at that address in Bulgaria. He replied that that was the letter he had been given by the owner of the property.
13. There were no photographs from 2020 because he had not taken any pictures in that year. His mother did not go out she just stayed in the house. What the Bulgarian authorities wanted to see before giving him the long residence card was an employment letter, tenancy agreement and insurance. The reason why he had gone to Bulgaria was because he liked to work in IT as he could work from home. He wanted to live in another country. He produced a letter dated 5 June 2024 from Origin Bulgaria his employer. The letter indicated that the appellant's sponsor had assisted Origin Bulgaria with various IT issues. Sometimes they needed to call him again but sometimes they said he could just go home if there was no work for him.
14. He was an employee of the company even though he had not received a contract of employment. He was content with that as long as he was paid

a salary at the end of the month. In January for example he had offered his services for around 10 to 12 days. It was put to him that that was implausible given that he had arrived in Bulgaria on 29 January 2020 so there would not have been enough time for him to have worked 10 to 12 days in January. He said he had worked on a computer [that is remotely].

15. The company paid him for work he did whilst he was in the United Kingdom albeit it was a very low payment. Between October and November 2020 he worked 25 full days each month. The petty cash slips provided showed what he had been paid. He worked in the company's office. There was no re-examination. We asked the sponsor about some photographs taken in Plovdiv. He replied that they were taken around November as one could see from the Christmas lighting. The owner of the company Origin Bulgaria had helped him with the application for a long-term residence card.

Closing Submissions

16. For the respondent reliance was placed on the refusal letter and the respondent's review which said that it was unclear how long the appellant was said to have lived in Bulgaria. The appellant and sponsor travelled to Bulgaria on 16 December 2020 and returned to the United Kingdom approximately four days later on 19 December 2020. That the appellant and the sponsor had been issued with residence cards by the Bulgarian authorities did not in themselves prove that the appellant and her sponsor had lived in Bulgaria. The appellant's argument in the case was that the issue of the residence card was the end of the argument but the respondent did not accept that.
17. The respondent also took issue with whether the sponsor had been exercising treaty rights by working, relying on paragraph 75 of the authority of **ZA**. There must be real or effective and not marginal work. The appellant's work in Bulgaria was at best only marginal. The letter from the employer was couched in terms that the appellant had helped the firm which meant that his work was ancillary for them and thus not sufficient. The appellant's main employment was in the United Kingdom where he worked for a company called Millennium Group based in Barking. There was a difference between visiting a country and residing there. The sponsor claimed to be resident in Bulgaria from January to December 2020. The photographs in the bundle could have been taken on a visit they did not show residence.
18. There was more evidence to show that the sponsor was in the United Kingdom for most of 2020. That point had been made in the review where the respondent had pointed out that cash withdrawals were noted on the sponsor's bank statement. This indicated that the sponsor must have been in the United Kingdom at those times to withdraw money. The appellant was unable to say when she was in Bulgaria or for how long. She did not like Bulgaria and did not stay for a month. She travelled from India to the United Kingdom and had not undertaken any other international travel. It

was clear from the photographs she had been in Bulgaria for a period of time but it was not clear she was living there.

19. If the appellant had been given permission by the owner of the property in Bulgaria to live there, that did not mean that she had actually lived there. If the landlord had known that the appellant was living there it was a simple matter to put that into the landlord's letter yet that had not been done. The evidence put the appellant in Bulgaria on one occasion only. The appellant did not know what work her son was doing in Bulgaria. It was reasonable to expect her to know that if she was living with her son.
20. We indicated to the presenting officer during submissions that the genuineness test was about what the sponsor was doing in Bulgaria but the appellant did not have to show that her address in Bulgaria was her sole place of residence or that she had transferred the centre of her life to Bulgaria (see **ZA**).
21. For the appellant reliance was placed on the appellant's skeleton argument which had recently been filed and served. The skeleton stated that there were two issues before the Upper Tribunal: (i) Whether the Appellant and Sponsor met the Regulations on the basis that they have been issued with residence cards by an EU Member State; (ii) Whether the Appellant needed to and could demonstrate relevant residence in Bulgaria. The Respondent's position was based on Appendix EU 14 but the application of this requirement still relied on the application of Regulation 9 (1) to (6) of the EEA Regulations 2016. **ZA** confirmed that there was no basis for the centre of life test to be applied in EU Law.
22. The appellant was a beneficiary of the withdrawal agreement by virtue of the fact that her British son had acquired residency in Bulgaria prior to 31 December 2020. The Appellant was not required to demonstrate relevant residency in Bulgaria in light of the fact that the Republic of Bulgaria had accepted her residency by virtue of issuing an Article 50 long residency card. Whether family life was established was evidenced by the fact that the Appellant was able to acquire a residence visa in Bulgaria and could have only been able to do so based on her relationship with the Sponsor. Once she could do this the burden was on the Respondent to raise grounds under Regulation 9 (4) that there was an abuse of rights.
23. The appellant only had to establish she was present in Bulgaria within the timeframe set out even if she was there for less than a month. It was necessary to consider whether article 8 family life was strengthened. The work undertaken by the sponsor for the Bulgarian company was both genuine and effective. The tribunal was only concerned with the appellant's residence in 2020. It was important to appreciate that the sponsor had a letter confirming his employment and had a tenancy agreement. We reminded the parties that whether work amounted to more than being marginal or ancillary was fact specific. We queried the absence of evidence such as passport stamps showing the appellant travelling in and out of Bulgaria. The only document confirming travel was

a boarding card dated 19 December 2020 showing the appellant's travel from Sofia to London. There was no copy of the appellant's passport in the composite bundle.

24. Continuing with his submissions the appellant's solicitor said that it was apparent from paragraph 75 of **ZA** that there was no requirement for either the appellant or sponsor to have integrated into Bulgaria. The photographs showing the appellant in Bulgaria were not in dispute. The respondent bore the burden of showing abuse of rights. We pause to note here that the respondent has not argued in this case that there has been abuse of rights by the appellant or sponsor. The respondent's position appeared to the appellant today to be that the respondent accepted the appellant was in Bulgaria but was arguing that the appellant had not been there long enough. Even so, she had obtained her long-term residence card based on her relationship to the sponsor. She did not have to show residency. Her appeal should be allowed.

Discussion and Findings

25. The appellant argues that her son, the sponsor in this case, was exercising treaty rights by working in Bulgaria during the course of 2020. He was issued with a long-term residence card by the Bulgarian authorities as was the appellant as a family member in the ascending line. The respondent does not accept that the issue of the cards in themselves demonstrates that the sponsor was exercising treaty rights and that the appellant was resident in Bulgaria. In effect the respondent seeks to go behind the issue of the cards by the Bulgarian authorities.
26. Part of the reason why the respondent refused the application and refused to accept that the residence card was evidence of residence was because the appellant could not produce evidence to show that she had lived in Bulgaria during 2020 for at least three months. That requirement is not one within the rules (and Ms Nwachuku had indicated that that was so) but it may have influenced the respondent in her consideration of the appellant's application for pre-settled status.
27. The long-term residence card issued to the appellant by the Bulgarian authorities was issued on 18 December 2020 the day before the appellant flew from Sofia to the United Kingdom on 19 December 2020. In accordance with the authority of **ZA** the motive behind the appellant's residence in Bulgaria is irrelevant. She was either resident there or she was not. Whether she thought or hoped that a period of residence in Bulgaria might strengthen her claim is not relevant according to CJEU jurisprudence. The question is: was the appellant genuinely resident in Bulgaria?
28. The period of the appellant's residence was certainly short, it was less than a month but it was not a fiction. It is correct that the appellant's own evidence was that she did not go out of the house in Plovdiv much at all and that she disliked the cold weather at that time of year (December).

Given the prevalence still of Covid and the appellant's advanced years her reluctance to go out is not surprising. Nevertheless, she and the sponsor were living in the premises according to the documentation and their evidence. The respondent has not sought to argue that the appellant has committed an abuse of rights in making this application. What the motive of the Bulgarian authorities was in issuing the residence card is unknown but again irrelevant.

29. We accept the respondent's argument that the issue of the cards is not conclusive of the appeal but the Tribunal still has to look at all the facts to decide whether the sponsor was in genuine employment in Bulgaria and whether the appellant was genuinely residing there with him. The respondent does not accept that the sponsor was genuinely working in Bulgaria. We apply the test as summarised in **ZA** to the evidence before us to determine whether the sponsor's work in Bulgaria was meaningful.
30. The respondent points to a number of factors that the respondent says show the work was not meaningful. The respondent submits that the sponsor was not in fact living in Bulgaria during 2020 but living in the United Kingdom as evidenced by bank transactions on the sponsors account in the United Kingdom. The sponsor's explanation for this is that he had given his card to his wife whilst he was working in Bulgaria so that she could take money out of the account to live on. The sponsor did not produce copies of his passport but since at that time the Bulgarian authorities may or may not have been stamping passports of travellers from the United Kingdom we do not regard this as a significant point.
31. The sponsor has produced correspondence from his employer in Plovdiv, Bulgaria to indicate that the sponsor was assisting the company with their IT work. In our view given the potential complexity of the work this is not insignificant work but is meaningful and therefore we find that the sponsor can demonstrate that he was exercising treaty rights by working in Bulgaria during the course of 2020. The relatively low sums compared to possible earnings in the United Kingdom are irrelevant, the sponsor wished to work abroad it was a matter for him how much money he sought for his work.
32. The respondent also points to the fact that the appellant made an application for a visit visa from India and put down the sponsor's United Kingdom address on her application. Again, we do not consider this to be particularly significant. It would have been very unusual for the appellant to put down the sponsors Bulgarian address if she was applying for a visit visa to come to the United Kingdom.
33. The appellant's oral evidence to us was not impressive, for example she was vague about the period(s) that she had been in Bulgaria. However, as we accept that the period that she was living in Bulgaria with her sponsor constitutes genuine residence the inability of the appellant to say that she was living at other times in Bulgaria (beyond November/December 2020) is irrelevant.

34. One of the reasons given by the respondent for refusing the application was that the appellant was required to demonstrate that she was residing with the sponsor prior to their return to the United Kingdom. The respondent said the appellant had failed to do that but in the light of our finding that the appellant was residing in Bulgaria we find that she was able to demonstrate residence with the sponsor prior to their return to the United Kingdom. The evidence of the sponsor's residence in Bulgaria in addition to the evidence from his employment is the evidence of the tenancy agreement. This indicates that the appellant was permitted by the landlord to reside at the premises. The respondent is correct to say that that does not of itself mean that the appellant was residing at the premises but if the sponsor had not obtained such permission it would have been held against the appellant that she could not have been living in Bulgaria because she was not authorised to live in the particular property where the sponsor was living.
35. For all these reasons we come to the view that the sponsor was exercising treaty rights in Bulgaria and the appellant was resident with her sponsor for a sufficient amount of time to constitute genuine residence. The appellant meets the requirements of regulation 9 of the 2016 EEA regulations and is entitled to succeed under the immigration rules. As this is an appeal under the Withdrawal Agreement and the 2016 EEA Regulations there is no issue under Article 8 of the ECHR before us.

Notice of Decision

We allow the appellant's appeal against refusal to grant leave to remain under the EUSS scheme.

We make no anonymity direction as there is no public policy reason for so doing.

Signed this 30th day of September 2024

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Judge Woodcraft
Deputy Upper Tribunal Judge



**Upper Tribunal
(Immigration and Asylum Chamber)**

Appeal Number: UI-2023-005137
First-tier Case Number: EA/50009/2023

THE IMMIGRATION ACTS

Decision & Reasons Promulgated

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Before

**UPPER TRIBUNAL JUDGE NORTON-TAYLOR
DEPUTY UPPER TRIBUNAL JUDGE WOODCRAFT**

Between

**MRS NIRMALABAHEN PATEL
(Anonymity order not made)**

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms Alvares, Counsel, instructed by SAJ Legal Solicitors
For the Respondent: Mr E Tufan, Home Office Presenting Officer

DECISION AND REASONS

Heard at Field House on 8 April 2024

The Appellant

1. The appellant is a citizen of India born on 1 June 1963. She appeals against the decision of Judge of the First-tier Tribunal Suffield-Thompson dated 7 October 2023 which dismissed her appeal against the respondent's decision dated 30 April 2021. That decision in turn was to refuse to issue the appellant with a family permit under the EU Settlement Scheme as the family member of her son Mr. Ganpatbhai Patel, a British

citizen born on 24 June 1986 (“the sponsor”). The appellant appealed under the Immigration (Citizens' Rights Appeals) (EU Exit) Regulations 2020 (‘the 2020 Regulations’).

2. The Respondent refused the application on the basis that the appellant had not demonstrated that she met the eligibility criteria for settled or pre-settled status as set out in Appendix EU (Family Permit) (‘Appendix EU(FP)’)

The Appellant’s Case

3. The appellant argued that by the relevant date, 31 December 2020, she met the requirements of residing with a United Kingdom citizen who had successfully exercised treaty rights (by working) in Bulgaria before returning to the UK. The Sponsor resided in Bulgaria exercising treaty rights there between 29 January 2020 and 19 December 2020. The Appellant was present in Bulgaria prior to the relevant date of 31 December 2020 and provided her Bulgarian residence card to establish this. The Appellant was not required to show that she had lived in Bulgaria for three months prior to the application as was claimed by the respondent in the refusal notice.

The Decision at First Instance

4. The judge noted at [21] of her determination that the sponsor had submitted his lease of a property in Bulgaria which was valid from 29 January 2020 until 29 January 2021 but there was no supporting evidence to show that the appellant was a joint resident in Bulgaria. Neither the sponsor nor the appellant were credible witnesses and the judge did not accept that the appellant had ever lived in Bulgaria. There were no photos of the appellant standing in front of any buildings that were recognisable as being in Bulgaria. There was no evidence to show that the appellant had transferred her life to Bulgaria. When the appellant applied in October 2020 for a visa to visit the sponsor in the UK she was still resident in India and she had made no mention of living in Bulgaria. The appeal was dismissed.

The Onward Appeal

5. The appellant appealed against this decision arguing that both she and her sponsor had been issued with Article 50 TEU long term residence cards by the Bulgarian authorities indicating long residence in that country. The judge had paid insufficient attention to the documentation provided by the sponsor (including a tenancy agreement and payment slips) which showed he was living and working in Bulgaria. Permission to appeal was granted on 3 January 2024 by Upper Tribunal Judge Sheridan who found it arguable that the judge erred by overlooking that the appellant (and not just the

sponsor) had Bulgarian Article 50 residence cards. Arguably, the existence of the appellant's Article 50 card was inconsistent with the finding, at [26] of the determination, that there was no evidence before the judge that the appellant had lived in Bulgaria.

The Hearing Before Us

6. In consequence of the grant of permission the matter came before us to determine in the first place where there was a material error of law in the decision of the First-tier Tribunal such that it fell to be set aside. If there was then we would make directions on the rehearing of the appeal. If there was not the decision at first instance would stand.
7. At the outset of the hearing we noted that there were photographs in the bundle which had been before the judge at first instance showing contrary to the judge's determination, the appellant and sponsor in Sofia the capital of Bulgaria.
8. For the appellant, counsel argued that the main point the judge had taken against the residence card issued by the Bulgarian authorities to the appellant was that it was issued the day before the appellant travelled to the United Kingdom. That however was not a matter of concern which the judge needed to take into account. We put to counsel that the implication of what the judge was saying was that the appellant might only have been in Bulgaria for a single day. Counsel replied that the residence card was a genuine document and the appellant would have had to have met requirements which included being in Bulgaria, to be issued with the card.
9. Counsel submitted that the sponsor was present in Bulgaria during the relevant time as could be seen from his Article 50 residence card. There was sufficient evidence to show he was living in Bulgaria and exercising treaty rights, for example the lease agreement which was in the bundle. Petty cash vouchers showed payments to the sponsor for work done for an IT company in Plovdiv. There was no mention in the regulations of the need for a three month period of residence by the appellant as the respondent had suggested there was.
10. In reply for the respondent, the senior presenting officer said that there was no suggestion when the appellant applied for her visitors visa to come to the United Kingdom that she had ever lived in Bulgaria. The landlord's declaration on the lease document merely showed that the appellant could stay there, not that she was living there. Cash withdrawn (from the sponsor's bank account) from ATMs in the United Kingdom might, it was conceded, have been made by someone else using the sponsor's debit card. (The sponsor had said it was his wife). The colour photographs of the appellant and sponsor in Sofia were taken on the same day as one could see from the clothes worn by the sponsor. The appellant had gone to Sofia en route to the United Kingdom and could have just stopped off in Sofia for the day. Although the judge had said there were no photographs of the

appellant in Bulgaria, that error would not have made a material difference in this case.

11. Counsel indicated that if an error of law was found the case should be remitted back to the First-tier. The respondent was neutral on this point.

Discussion and Findings

12. If the respondent's contention was correct that three-month's residence in an EU member state (in this case Bulgaria) had to be demonstrated by the appellant, there might have been fairly substantial evidential obstacles in the appellant's path and the judge might have been justified in finding against her. We were not however referred to any authority to indicate that a three-month residence period prior to application for a family member of a British citizen exercising treaty rights was required.
13. What the judge was shown at first instance was that both the appellant and the sponsor had long term residence cards issued to them by the Bulgarian authorities. The appellant argues that that of itself implies she had resided for a period in Bulgaria. It was a crucial point and the judge in an otherwise carefully written determination did not adequately deal with the issue of the residence card issued to the appellant (or indeed to the sponsor). There was no suggestion as far as we were able to verify that either or both of the residence cards issued to the sponsor and the appellant were irregular.
14. It would be a matter for the Bulgarian authorities to decide whether they had sufficient information before them to take a decision on whether to issue a foreign national with a residence card. They evidently felt they did have such information. That point needed to be addressed in the determination. The judge does not appear to have accepted the sponsor's Bulgarian residence card (see [29]), but does not make clear why she does not accept it. The judge relied in part on her finding that the appellant had not lived in Bulgaria, stating that there were no photographs of the appellant in front of a building which was recognisably in Bulgaria. That unfortunately was a mistake of fact because the photographs clearly showed the appellant and sponsor together in Sofia, the capital. The respondent may be correct in asserting that the photographs are all taken on the same day, but that does not appear to have been an issue explored in the First-tier. Instead the judge appeared to be suggesting that there were no photographs. We do not accept that the judge's dismissal of the photographs was an immaterial error. Potentially, it was material since it went to the issue of the appellant's residence.
15. For the reasons set out above, we conclude that the judge materially erred in law and that her decision should be set aside.
16. In our view what is required now is an assessment of (a) whether the appellant and sponsor meet the regulations on the basis that they have been issued with residence cards by an EU member state and (b) whether

the appellant needs to and can demonstrate relevant residence in Bulgaria.

17. We considered whether to remit this appeal back to the First-tier to be heard again, but the issues in the case are fairly narrow, centring on, amongst other matters, the effect of the issue by the Bulgarian authorities of residence cards to the sponsor and appellant. Is the issue of a card probative of the question of whether the sponsor and appellant in particular had resided in Bulgaria? We are of the provisional view that the decision in ZA (Reg 9; abuse of rights) Afghanistan [2019] UKUT 281 (IAC) is relevant to the consideration of that, and other, questions arising in this case. Further evidence, including potentially oral evidence, can be provided in due course.
18. In all the circumstances, we have concluded that the appeal should be retained in the Upper Tribunal and reheard on the first available date with a time estimate of one hour 30 minutes. The judge's findings of fact will not be preserved insofar as they concern the issue of the sponsor and appellant's residence and/or exercise of treaty rights.

Anonymity

19. Although the First-tier Tribunal made an anonymity direction, we cannot see any justification for why this was done. When we raised this matter at the hearing, neither representative suggested that the direction should be maintained. We do not maintain that direction.

Notice of Decision

The decision of the First-tier Tribunal involved the making of an error of law and we set it aside. We direct that the appeal be retained in the Upper Tribunal and reheard on the first available date, with a time estimate of 1 hour 30 minutes.

The appellant's appeal is allowed to that extent.

We make no anonymity direction.

Directions to the parties

- (1) No later than 21 days after this decision is sent out, the appellant shall file and serve any additional evidence relied on. Any such evidence must be contained in a properly indexed and paginated electronic bundle, containing bookmarks;**
- (2) At the same time, the appellant must confirm with the Tribunal whether live evidence is intended to be called and, if it is, whether an interpreter will be required;**

- (3) Any further evidence relied on by the respondent must be filed and served no later than 35 days after this decision is sent out. Again, any such evidence must be contained in a properly indexed and paginated electronic bundle, containing bookmarks;**
- (4) No later than 10 days before the resumed hearing, the appellant shall file and serve a skeleton argument;**
- (5) No later than 5 days before the resumed hearing, the respondent shall file and serve a skeleton argument;**
- (6) The parties can apply to vary these directions, copying in the other side if any such application is made.**

Signed this 25th day of April 2024

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Judge Woodcraft
Deputy Upper Tribunal Judge

TO THE RESPONDENT
FEE AWARD

We reserve the question of a fee order to the rehearing of the appeal.

Signed this 25th day of April 2024

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Judge Woodcraft
Deputy Upper Tribunal Judge