



IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2024-001964
First-tier Tribunal No:
EA/09556/2022

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On the 25 September 2024

Before

UPPER TRIBUNAL JUDGE GLEESON
UPPER TRIBUNAL JUDGE MEAH

Between

Secretary of State for Home Department

Appellant

and

Thi Minh Nguyen
(NO ANONYMITY ORDER MADE)

Respondent

Representation:

For the Appellant: Ms Arifa Ahmed, a Senior Presenting Officer
For the Respondent: No appearance or representation

Heard at Field House on 13 August 2024

DECISION AND REASONS

Introduction and Background

1. The Secretary of State challenges the decision of the First-tier Tribunal allowing the claimant's appeal on the papers against her decision made on 17 September 2022, to refuse the claimant's application to remain in the United Kingdom under the EU Settlement Scheme. The claimant is a citizen of Poland.
2. For the reasons set out in this decision, we have come to the conclusion that the decision of the First-tier Tribunal contains no error of law. The decision of Judge Cary will therefore stand.
3. The claimant's application was considered by the Secretary of State who considered that she had failed to meet the requirements of Appendix EU because she had not shown that she was resident in the United Kingdom and Islands prior to the specified date (23.00 GMT on 31 December 2020). She

therefore did not meet the requirements for settled status on the basis of a continuous qualifying period of five years.

4. The claimant also did not meet the requirements for pre-settled status as she had provided insufficient evidence to confirm that she was resident in the United Kingdom and Islands in the six months prior to the specified date.
5. The claimant appealed to the First-tier Tribunal, asking that the appeal be considered on the papers.

First-tier Tribunal Decision

6. The First-tier Judge allowed the appeal for the reasons set out at [15]-[20] of his decision. He noted the evidence before him, which was contradictory, and reached his conclusion on residence at [15]-[20] as follows:

“15. In support of her appeal the [claimant] provided a statement dated September 27 2022 in which she said that she had been resident in the United Kingdom since 2019 and exercising Treaty rights in the UK as an employed and self-employed person. She said she had previously lived in Vietnam with her daughter (Dieu Khanh Nguyen) (Ms Nguyen). I have a statement from Ms Nguyen dated June 14 2023 in which she confirms that she came to the United Kingdom with her mother in 2019. [Ms Nguyen] was granted pre-settled status on August 26 2021.

16. For some reason the [claimant] has not supplied a clear chronology of her residence either in the United Kingdom or Poland even though it appears that at some stage she had the benefit of legal advice from NR Legal Solicitors of Walthamstow. Although it is said that she arrived in the United Kingdom in 2019 I do not know the date when it is said that she arrived here. I have also not been given details of any of her visits to Poland. At the date of her application she confirmed that she was then living in Poland. ...

19. Although the [claimant's] evidence could have been clearer as to her residence in the United Kingdom I have nothing from the [Secretary of State] to suggest that any of the information provided in the [claimant's] bundle is in any way incorrect or misleading. *I am however troubled by her admission in her application that she had last been in the United Kingdom on February 26 2020, which was well over 2 years prior to her application, and that since that date she had spent more than 6 months outside the United Kingdom in any 12 month period. She also gave a Warsaw address as her address. That information appears to conflict with the documentation she has now produced. She has only produced bank statements covering a period of about 2 months from October 2020 which is surprising if she has been resident in the United Kingdom since 2019. It could be that the application form was completed incorrectly particularly if the questions asked were not understood or misinterpreted. It is also clear from the [Secretary of State's] guidance that successful applicants under the EU Settlement Scheme were only required to produce a limited amount of documentation to secure status. In those circumstances I am prepared to accept that the [claimant] did meet the residency requirements for pre-settled status at the date of her application and I therefore allow this appeal on that basis.*

20. It is also said by the [claimant] that she would, in any event, be entitled to pre-settled status as a joining family member in view of her relationship with her daughter. On the evidence before me I do not accept that as the required evidence of dependency is not there. However, that does not prevent the

[claimant] from succeeding solely on the basis of her residency.”
[Emphasis added]

7. The Judge declined to make a fee award, stating that he did so because ‘the [Secretary of State] was entitled to have doubts about the [claimant’s] application sufficient to justify a refusal’.
8. The Secretary of State appealed to the Upper Tribunal.

Permission to appeal

9. The grounds of appeal contend that the First-tier Judge erred in finding that the claimant had met the requirements for residency by showing a continuous residence of six months prior to the specified date. The burden of proof was on the claimant to prove this by providing evidence of such residence, which she had not done.
10. Also, no evidence beyond the statement from Ms Nguyen was advanced to support the contention that the claimant had resided with her daughter in the United Kingdom since 2019. The First-tier Judge relied on the claimant’s tax returns, which did not prove she had been resident for the required period, and the evidence of her daughter had not been tested in cross-examination, as the appeal was decided on the papers. This element of the Secretary of State’s challenge is otiose, as the Judge did not accept the claimed dependency: see [20] of the First-tier Tribunal decision.
11. The Secretary of State observed that the First-tier Tribunal had been concerned about ‘conflicting information’ given in the claimant’s application and argued that it was not open to the First-tier Judge to conclude that ‘only limited evidence was required’: the claimant was required to show six months’ residence, which she had not done.
12. The Secretary of State argued that the First-tier Judge had failed to explain how the claimant met the requirements of Appendix EU for pre-settled status from the evidence presented and asked us to set aside the First-tier Tribunal’s decision.
13. Permission to appeal to the Upper Tribunal was granted by First-tier Judge Chowdhury for the following reasons:

“It is arguable that the judge has erred in finding that the [claimant] had met the residency requirements for pre-settled status. Judge Cary correctly set out the requirements that the [claimant] must show continuous residence for a six month period prior to the specified date of 31st December 2020. However, there does not appear from the face of the decision evidence to show that she had been resident in the UK for a continuous six month period prior to the specified date. The [claimant]’s tax returns do not demonstrate, in themselves, that she was residing in the UK. For these reasons permission is granted.”

14. The claimant did not file a Rule 24 Reply to the grant of permission.
15. That is the basis on which this appeal came before us.

Upper Tribunal hearing

16. The oral and written submissions before us are a matter of record and need not be set out in full here. We had access to all of the documents before the First-tier Tribunal, and we recall that the decision was made on the basis of the papers alone. We are in the same position as the First-tier Judge in that respect.
17. The claimant, who is not legally represented, did not attend and no explanation was received for her absence. An interpreter had been booked for her. In the absence of any explanation for the claimant's absence, we proceeded with the hearing, pursuant to rule 38 of the Tribunal Procedure (Upper Tribunal) Rules 2008 (as amended). We were satisfied that the Secretary of State's appeal could be justly determined in the claimant's absence.
18. For the Secretary of State, Ms Ahmed relied on the original grounds, and on the grant of permission. The evidence before the First-tier Judge was not sufficient to sustain a finding of 6 months' residence before the specified date. She asked us to allow the appeal.

Discussion and conclusions

19. We shared with Ms Ahmed our preliminary observations that the Secretary of State's grounds appeared to amount to no more than a disagreement with the Judge's decision. It is important to distinguish between what appears to be a rather generous decision which may well have been decided differently by another Judge, and one which is legally flawed. Whilst another Judge may have decided the case differently, there are no material errors in the Judge's decision, whereas the Secretary of State argues that it is legally flawed. We conclude that this case falls within the first category. The findings made by the Judge were open to him, and these were neither unlawful or irrational.
20. The Judge properly directs himself on the law, guidance and the burden and standard of proof at [8]-[14], before making findings that were reasonably open to him. He notes the evidential bundle relied upon by the claimant in the First-tier Tribunal at [7], and he attached weight to the claimant's tax returns and on the daughter's evidence, the combination of which led him to find at [19] that the requisite EUSS requirements under Appendix EU were met. The findings are properly reasoned and he was entitled to take the daughter's evidence into account and there was no misdirection in law.
21. On the complaint of the daughter's evidence not being tested as the decision was made on the papers, the Secretary of State would have had an opportunity to respond to the daughter's statement by way of replying to standard First-tier Tribunal directions in paper cases that would have been served on the parties before the matter was put before a Judge to be decided on the papers. No challenges were raised against any of the evidence including that to which the Judge decided to attach weight.
22. The grounds are therefore not made out. In this case, the success of the appeal turned on whether the Judge found the claimant met the requisite residence requirements prior to the specified date, and he made clear findings of fact on this issue with sustainable reasons concluding that she satisfied the requirements for Pre-Settled Status. The Judge gave consideration to all relevant issues. He undertook a careful analysis of the evidence and applied the relevant legal provisions. He provided reasons for the findings made and he

reached a decision which was properly open to him on the basis of the evidence before him, albeit one that may have been made differently by another Judge. The grounds do not identify any material error of law in the Judge's decision.

23. An appellate Court or Tribunal may not interfere with findings unless they are 'plainly wrong' or 'rationally insupportable': see *Volpi & Anor v Volpi* [2022] EWCA Civ 464 (05 April 2022) at [65]-[66] in the judgment of Lord Justice Lewison, with whom Lord Justice Males and Lord Justice Snowden agreed. That high standard is not reached here. The Secretary of State's appeal must therefore fail.

Notice of Decision

24. For the foregoing reasons, our decision is as follows:

25. The making of the previous decision involved the making of no error on a point of law

26. We do not set aside the decision but order that it shall stand.

S Meah
Judge of the Upper Tribunal
Immigration and Asylum Chamber

25 September 2024