



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

Appeal Number: EA/02743/2018

THE IMMIGRATION ACTS

**Heard at Field House
On 19th October 2018**

**Decision promulgated
On 23rd October 2018**

Before

UPPER TRIBUNAL JUDGE HANSON

Between

**BRYAN [B]
(anonymity direction not made)**

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: In Person.

For the Respondent: Mr S Walker Senior Home Office Presenting Officer.

ERROR OF LAW FINDING AND REASONS

1. The appellant, a citizen of Brazil born on 6 February 2004, appeals with permission a decision of First-Tier Tribunal Judge McLaren promulgated on 31 May 2018 in which the Judge dismissed the appellant's appeal against the refusal to issue a residence card as a family member of an EEA national exercising treaty rights in the United Kingdom.

Error of law

2. The Judge noted the appeal was to be dealt with on the papers but claimed to have been provided with the refusal letter and grounds of appeal only. The Judge noted the application was refused as the decision maker concluded the appellant had failed to provide any evidence to support his application showing he was in the United Kingdom. At [12] the Judge states the appellant's case consisted of a statement on the appeal form that he was in the UK in full-time education and the address of that establishment, but that no evidence was provided. Accordingly the Judge found the appellant had not discharged the burden of proof upon him to the required standard and dismissed the appeal.
3. The appellant sought permission to appeal asserting that the deadline for paper submissions was 17 May 2018, the day before the matter was considered by the Judge on the papers, and that a 24-page bundle including letters from the appellant's school were faxed to Hatton Cross on 16 May 2018 with hard copies being posted by special delivery. The appellant states the bundle arrived at Hatton Cross within the deadline providing proof of delivery with the application to appeal.
4. Permission to appeal was granted as it is said an arguable unfairness has arisen and can be seen to have arisen.
5. In his Rule 24 response dated 25 September 2018 the respondent confirms he does not oppose the application for permission and invites the Tribunal to determine the appeal with a fresh oral hearing to consider whether the appellant meets the requirements of the Regulations as a family member.
6. On the basis of that concession and clear evidence that the appellant's bundle had been filed within the time limit provided, even if not before the Judge on 18 May 2018, I find the claim to procedural unfairness sufficient to amount to an arguable error of law made out and accordingly set the decision aside.

Discussion

7. The Upper Tribunal is in a position to remake the decision today.
8. A reading of the refusal letter shows that the sole basis for the refusal of the residence card application was an allegation the appellant had failed to prove that he is present in the United Kingdom. The evidence provided in support of this matter shows that the appellant was in fact born in the United Kingdom on 6 February 2004 in Basingstoke. It also shows that the respondent sent a request to the appellant to file his biometric documents on 28 December 2017, providing a 15 working day deadline to do so, which the appellant complied with. A point made by the applicant is that it is impossible for him to have provided his biometrics, taken at a nominated centre in the United Kingdom, if he was not in fact present in the UK.

9. No other issues are raised in the refusal letter to oppose the application for a residence card.
10. Evidence has been provided by the appellant's father, an Italian national, of employment as a company director in the United Kingdom. There is therefore evidence of the exercise of treaty rights by the EEA national.
11. It was accepted by Mr Walker that as the appellant was physically before the Upper Tribunal today this is clear evidence he is in the United Kingdom.
12. Accordingly I find no merit in the sole ground relied upon by the decision-maker to refuse the application for a residence card, namely that there was no evidence the appellant is in the United Kingdom and allow the appeal on this basis.

Decision

13. **The First-tier Tribunal Judge materially erred in law. I set aside the decision of the original Judge. I remake the decision as follows. This appeal is allowed.**

Anonymity.

14. The First-tier Tribunal did not make an order pursuant to rule 45(4)(i) of the Asylum and Immigration Tribunal (Procedure) Rules 2005.

I make no such order pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008.

Signed.....
Upper Tribunal Judge Hanson

Dated the 19 October 2018