Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: EA/02708/2020 (P)**

THE IMMIGRATION ACTS

Determined on the papers	**Decision & Reasons Promulgated**
On 24 February 2022	**On 09 March 2022**

Before

UPPER TRIBUNAL JUDGE SMITH
UPPER TRIBUNAL JUDGE KEITH

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

ALFONS ZHUPA

Respondent

ERROR OF LAW DECISION

BACKGROUND

1. Although this is an appeal by the Secretary of State, we refer to the parties as they were in the First-tier Tribunal. The Respondent challenges the decision of First-tier Tribunal Judge Bunting promulgated on 8 June 2021 ("the Decision"). By the Decision, the Judge allowed the Appellant's appeal against the Respondent's decision dated 10 March 2020 refusing him a residence card as the extended family member (same-sex partner) of a person exercising Treaty rights in the UK. The appeal proceeds under the Immigration (European Economic Area) Regulations 2016 ("the EEA Regulations").

2. The matter came before us at a hearing on 26 January 2022. We adjourned the hearing due to a lack of evidence about what had occurred at the hearing before Judge Bunting but noting also that the Appellant's partner (hereafter "the Sponsor") was now in the UK (and physically present at the hearing before us) and that the issue raised in the Respondent's first ground regarding his status as a "qualified person" might fall away. We had in mind therefore that it might be possible for the parties to resolve the appeal by agreement.

3. Our adjournment decision and directions is annexed to this decision for ease of reference. In accordance with the directions given, the Appellant filed further evidence in relation to the Sponsor's employment and presence in the UK, to which the Respondent replied on 7 February 2022. The Appellant filed a response to the Respondent's submissions on 18 February 2022. Although the parties have not reached any agreement about either the error of law or disposal of this appeal, both parties have indicated that they are content for the Tribunal to resolve those issues on the papers. We have considered whether that is appropriate having regard to the overriding objective and the issue of what fairness provides. We are satisfied that it is appropriate to reach a decision on the papers. Both parties have consented to that course and we have received full submissions on the issues which we need to resolve. It is therefore difficult to see what oral submissions at a hearing could add. We therefore turn to make our decision as requested.

DISCUSSION

4. It is appropriate to take the Respondent's grounds in reverse order. The second ground was not argued at the hearing on 26 January but the Respondent has not abandoned it. The issue on which we required further evidence relates to the Sponsor's exercise of Treaty rights. If Judge Bunting was not entitled to reach the conclusion he did about the genuineness of the relationship between the Appellant and Sponsor, one does not reach the issue whether the Sponsor is a qualified person.

Ground 2: genuineness of relationship

5. Although the Respondent has not dealt with the second ground in her submissions of 7 February 2022, Mr Whitwell had indicated at the hearing that he did not abandon that ground. The submissions which we sought related to the issue raised by the first ground and we therefore do not accept the Appellant's submission that the Respondent's silence on this issue is any indication that she no longer pursues this ground.

6. We have regard to the Respondent's skeleton argument prepared for the hearing on 26 January 2022. It is there said that the Judge failed to give adequate reasons for his conclusions, particularly in light of the Sponsor's continued absence from the UK. We have also taken into account the Appellant's skeleton argument on this point.

7. The Judge set out the factual background to the claimed relationship at [3] to [7] of the Decision. He was very evidently aware that the Sponsor was still in Albania at time of the hearing, some six months after he had returned there in order "to resolve matters with his children". The Sponsor's return to Albania in November 2020 was of course during the pandemic and, in May 2021, the UK remained in some form of lockdown (although the Judge noted at [57] of the Decision that, to his credit the Sponsor did not rely on this as reason why he remained outside the UK). The Sponsor therefore gave evidence remotely from Albania (with the permission of the authorities there).

8. The Judge considered the points taken by the Respondent against the credibility of the evidence of the Appellant and Sponsor at [40] to [48] of the Decision. The Judge there dealt with each of the points and provided his view on them, noting also the consistency of some answers given by the Appellant and Sponsor and that there was some supporting evidence of a friend.

9. The Judge then set out his views on credibility of the evidence he had heard and his conclusion about the genuineness of the relationship at [49] onwards of the Decision. He found the evidence of the Appellant and Sponsor to be credible. He accepted that the Respondent was entitled to have concerns about credibility but noted that "[t]he evidence of cohabitation is much stronger from 2019". Consistently with that comment, the Judge accepted at [58] of the Decision that the Appellant and Sponsor were "definitely co-habiting from June 2019" whilst accepting that "[t]he period prior to then is less clear". In conclusion of that part of the Decision, the Judge said this:

> "59. It appears to me that the key point is that I accept that the evidence shows that they are in a committed relationship and intend it to be a permanent one, and this is the position since early 2019 (at the latest)."

10. The Judge was clearly alive to the point that the absence of the Sponsor from the UK might change that position and cast doubt on the permanence of the relationship. He referred to this expressly at [62] to [63] of the Decision before concluding at [64] as follows:

> "64. In this case, I am satisfied on the balance of probabilities that it is the current intention of the appellant and sponsor to resume living together when circumstances allow, presumably in the next few months. For that reason, whilst there is currently a physical separation, that does not mean that the relationship is not a durable one.
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> 65. An analogy may be with a situation where a couple have been married for a number of years, but where one spouse works abroad for extended periods of time. They may spend very little time actually physically living together, but an observer would have little hesitation in saying that they were in a durable relationship (or, for that matter, that they were co-habiting).

> 66. It is clear that the previous relationships of both appellant and sponsor have ended and will not be resumed, even if the sponsor and his wife have not formally divorced.
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> 67. Taking into account the oral and written evidence, I find that the appellant and sponsor are in a committed, genuine and subsisting relationship that they both intend to be a permanent one. When circumstances allow, they will resume living together. Their relationship is therefore properly categorised as a durable one."

11. We can discern no error in the Judge's reasoning. He considered the evidence and in particular addressed the concerns of the Respondent. He took into account the family relationships of the Appellant and Sponsor which might undermine their claim to be in a relationship together. He expressly considered the evidence that the Sponsor had returned to Albania to see his children in order, on his evidence, to resolve matters with them. The Judge was entitled to reach the conclusion that, notwithstanding those issues and the Sponsor's continued absence from the UK at the time of the hearing, the relationship between the Appellant and the Sponsor was a genuine one and a durable one.

12. When granting permission, First-tier Tribunal Judge Bulpitt observed that "[t]his ground appears to have little merit with the Judge's decision being clear and full". We concur with that analysis. The Judge was entitled to reach the conclusion he did for the reasons he gave. Those reasons were entirely adequate.

Ground 1: Sponsor's status as a "qualified person"

13. We move on then to the issue which was the focus of the adjourned hearing on 26 January 2022. The background to this issue begins with [38] of the Decision where the Judge stated that "[i]t was not disputed that the sponsor is an EEA citizen who is exercising treaty rights in the UK".

14. We have set out at [6] of our adjournment decision, the evidence of counsel who represented the Respondent at the hearing before Judge Bunting. As we there observe, the fact that no concessions were made on behalf of the Respondent is not determinative either way. The Respondent had not raised the issue whether the Sponsor was a qualified person in her decision. Although we accept what Mr Whitwell said about that as recorded at [7] of our adjournment decision, that explanation does not take us any further in relation to whether this was a point put in issue. We did not hear from Ms Popal who had represented the Appellant because, as we record at [9] of our adjournment decision, she could not give evidence, being the advocate for the Appellant before us.

15. We are prepared for current purposes to assume that the position is as the Respondent says it is, namely that this point was in issue and that the Judge was wrong to say otherwise. Even if the Judge was right to say

that the Respondent did not raise this, we accept, as Mr Whitwell submitted, that the Judge had to decide whether the Appellant meets the EEA Regulations which itself requires a determination of that issue as at date of hearing. The Respondent could not of course have known at the date of her decision that the Sponsor would be in Albania at the date of the hearing.

16. As we have recorded at [11] of our adjournment decision, neither party was able to take us to any authority relating to the question whether a person is exercising Treaty rights if working abroad remotely but being paid and taxed in the UK, particularly where, as here, the Judge found that to be only a temporary position.

17. Again, though, we are prepared to accept the Respondent's point as there noted that the EEA Regulations at least require a person to be "in the UK". We also note that the Sponsor's job at the present time is as a "support worker" which, according to his most recent statement is based not only at his employer's offices but "mainly in other locations such as care homes or houses". That would suggest that it is very difficult to carry out work remotely.

18. For reasons which follow, however, we do not need to determine this point as we are satisfied on the evidence now before us that, whatever the position previously, the Sponsor is now in the UK and is exercising Treaty rights.

19. The evidence filed by the Appellant consists of the following:

    (1) A letter from the Sponsor's current employer (Carebri Ltd) dated 29 January 2022;

    (2) A payslip from that employer for January 2022;

    (3) A contract of employment with that employer signed 3 January 2022;

    (4) A Natwest bank statement for the month of January 2022.

20. The Respondent has taken issue in her submissions with the credibility of that evidence. That led to the filing of more evidence with the Appellant's reply submissions as follows:

    (1) A statement from the Sponsor signed by email and dated 10 February 2022;

    (2) A Companies House printout in relation to Carebri Ltd.

21. We deal with the points made by the Respondent in her submissions regarding the credibility of this evidence.

22. We place no weight on the fact that the Sponsor's employer has changed. The Sponsor explains in his evidence that his previous employer stopped trading and that he therefore works for another company in the same building. The address given is indeed a serviced office building and therefore the address being the same as the previous employer does not give rise to any issues of credibility.

23. We place no weight on the fact that the Sponsor's new employment began on the day before the contract was signed. The Sponsor has explained that his manager was not in the office on 2 January (which we note was the day after New Year's Day and also a Sunday). That is plausible. The day on which the contract was signed was in fact a public holiday (New Year's Day being on a Saturday) but we do not regard as implausible that a company particularly one which apparently supplies health care workers, might be working on a public holiday.

24. We have a little more difficulty with the Sponsor's evidence in relation to the bank statement. He says that his adult daughter has his bank card and uses this to withdraw money to support herself and the Sponsor's other children. He says that he uses his smartphone or cash for payments himself. The statement does show that a payment was made to TFL Travel (ie in the UK) on 27 January 2022. However, that is not inconsistent with payment being made by phone rather than by card. We note that the other entries in Albania are all of a similar nature and are not inconsistent with cash withdrawal being made by card (at an ATM), consistently with the Sponsor's explanation.

25. Given that explanation and that the Sponsor signed his contract of employment with his new employer on 3 January 2022, we accept that he has been in the UK since then and, as the Respondent notes, has worked for what appears to be a full month at end of January 2022 (consistently with what is said in the employer's letter to be his annual salary).

26. At the date of this decision, therefore, we accept that the Sponsor is exercising Treaty rights in the UK. We accept that the evidence shows only that the Sponsor has been exercising Treaty rights from the start of this year. However, we have to consider the issue at the date of our decision. We accept taking the evidence in the round that the Appellant has discharged his burden of showing that the Sponsor is a qualified person as at today's date.

27. Even if we accept as we do that Judge Bunting was wrong not to consider whether the Sponsor was a qualified person at the date of the hearing before him, we have evidence which we accept, that he is now working in the UK.

28. Taking the Respondent's case at its highest, we find that there is an error of law established by the Respondent's ground one. However, accepting the evidence about the position now, we resolve the issue which Judge Bunting should have considered in the Appellant's favour. There would

be little point in setting aside the Decision only to re-make it in the same way.

29. The Tribunal, Courts and Enforcement Act 2007 provides us with a discretion whether to set aside the Decision, having found an error of law. In this case, we exercise our discretion by declining to set aside the Decision. For that reason, the Appellant's appeal is allowed.

DECISION

There is an error of law disclosed by the Respondent's ground one but not ground two. In the exercise of our discretion, we decline to set aside the decision of Judge Bunting promulgated on 8 June 2021 as we would reach the same conclusion now. The Appellant's appeal is therefore allowed.

Signed L K Smith Dated: 24 February 2022

Upper Tribunal Judge Smith

ANNEX: ADJOURNMENT DECISION

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: EA/02708/2020

THE IMMIGRATION ACTS

Heard at Field House, London **Decision sent**
On Wednesday 26 January 2022

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Before

UPPER TRIBUNAL JUDGE SMITH
UPPER TRIBUNAL JUDGE KEITH

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

ALFONS ZHUPA

Respondent

Representation:
For the Appellant: Mr S Whitwell, Senior Home Office Presenting Officer
For the Respondent: Ms R Popal, Counsel instructed by Turpin & Miller LLP

ADJOURNMENT DECISION AND DIRECTIONS

1. Although this is an appeal by the Secretary of State, we refer to the parties as they were in the First-tier Tribunal. The Respondent challenges the decision of First-tier Tribunal Judge Bunting promulgated on 8 June 2021 ("the Decision"). By the Decision, the Judge allowed the Appellant's appeal against the Respondent's decision dated 10 March 2020 refusing him a residence card as the extended family member (same-sex partner) of a person exercising Treaty rights in the UK. The appeal proceeds under

the Immigration (European Economic Area) Regulations 2016 ("the EEA Regulations").

2. The Respondent had refused the Appellant's application on the basis that she was not satisfied that he was in a genuine, durable relationship with his partner ("the Sponsor"). No issue was taken whether the Sponsor was a qualified person. Judge Bunting noted at [38] of the Decision that this was not disputed by the Respondent. The Judge went on to consider the issues set out at [39] of the Decision which concerned the genuineness and durability of the relationship and whether it could be said to be durable in circumstances where the Sponsor was, at the time of the hearing, back in Albania. Having considered those issues, the Judge determined them in the Appellant's favour.

3. The Respondent appeals the Decision on two grounds. The first concerns the Judge's finding that the status of the Sponsor as a qualified person was not at issue. The second concerns the Judge's findings in relation to the genuineness and durability of the relationship.

4. Permission to appeal was granted by First-tier Tribunal Bulpitt on 5 July 2021 in the following terms so far as relevant:

> "… 2. The first ground asserts that the Judge erred in law in finding that the appellant is the extended family member of a qualified person. Although the Judge's decision records at [38] that it was not disputed that the sponsor was a qualified person, it is arguable that this conclusion is irrational given the accepted fact that the sponsor had not lived or exercised treaty rights in the United Kingdom for at least six months by the time of the hearing.
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> 3. The second ground is a complaint of an inadequacy of reasons. This ground appears to have little merit with the Judge's decision being clear and full, nevertheless all grounds may be argued."

5. Since the grant of permission, both parties have filed skeleton arguments. The Respondent relies on the grounds as pleaded. The Appellant takes issue on a point of fact. He says that the Respondent had effectively conceded that the Sponsor was a qualified person and is not now entitled to withdraw that concession. The skeleton also makes reference to a supplementary bundle which was before Judge Bunting and which included a letter from the Sponsor's employer, indicating that he was being permitted to work from home and would be back at work in the office "as soon as restrictions were lifted", a payslip from that company for the month of March 2021 and a P60 for the tax year to 5 April 2021, both confirming the receipt of pay from the company during the year 2020/21 and leading up to the hearing.

6. Also prior to the hearing, Mr Whitwell filed an attendance note from Mr A Badar, Counsel who represented the Secretary of State before Judge Bunting. Attention is drawn to the word "none" against the question "Concessions/undertakings given for Home Office". We have read that

note with care but, other than that reference, there is nothing to indicate one way or another whether an issue was taken regarding the status of the Sponsor at the date of the hearing.

7. Mr Whitwell accepted in discussions with us that the Respondent has not taken issue with the status of the Sponsor in the decision letter but said that was because she did not accept the relationship as durable so did not have to consider the point. Whether that is right or wrong, we note also the point made in the grounds of appeal that the situation had changed by the date of the hearing as the Sponsor was not in the UK but in Albania with his family but still, it appears, working remotely. As such, we have no doubt that the Respondent could have taken the point that he was not still a "qualified person".

8. The first question though is whether that matter was put in issue at the hearing before Judge Bunting. The Decision suggests it was not. Based on the attendance note, the point is unclear. Ms Popal told us that there had been a prior hearing before First-tier Tribunal Judge Lucas who it appears had adjourned the appeal because the Sponsor was not present in the UK but we do not consider that takes us any further.

9. Ms Popal quite properly accepted that she could not give evidence about what happened before Judge Bunting as she was acting as advocate. She said that if she had appreciated the way the case was put on this first ground, she would have passed over the conduct of the hearing to another advocate and put in a witness statement. As we understood her position, the issue of the status of the Sponsor was not canvassed but, as we say, we could not receive evidence from her.

10. It is highly unsatisfactory to have to deal with the question of what was or was not at issue before a First-tier Tribunal Judge on incomplete evidence. We intend no criticism of either representative before us. The way in which the case is put and the evidence has developed immediately prior to the hearing. Both parties very fairly accepted the limitation of the evidence we did have.

11. Mr Whitwell did suggest that the Judge should have considered the status of the Sponsor whether or not this was put at issue. The Appellant had to show that he met the EEA Regulations. The requirement for exercise of Treaty rights by the Sponsor was part of those regulations. There was also some discussion about whether the Sponsor could be a qualified person if he were working from somewhere outside the UK, even if for a UK based company and being paid and taxed in the UK. Ms Popal had been unable to find any authority. Mr Whitwell directed our attention to regulation 6 of the EEA Regulations which we accept suggests that the qualified person must be "in the UK". We would not have wished to determine that issue (or rather at this stage to determine whether Judge Bunting should have considered it) without hearing very full argument.

12. It occurred to us however that this issue may be moot if in fact the Sponsor is now back in the UK and working here. We enquired of Ms Popal as to the position. She confirmed that he is and was in court. We could not hear evidence from him as he would require an interpreter.

13. Whilst not conceding the error of law or the materiality of it, Mr Whitwell accepted that if the Sponsor is now in the UK and can prove that he is still exercising Treaty rights, then that issue would fall away on re-making.

14. We therefore indicated that we would give the Appellant time to provide evidence of his continued exercise of Treaty rights and the Respondent to set out her position in writing in response. We gave directions at the hearing which we confirm below.

15. We record that Mr Whitwell did not abandon the second of the Respondent's grounds. Once the evidence is filed and served by the Appellant, it will be for the Respondent to decide whether to pursue that ground having regard to what is said in the grant of permission about the merits of it. We indicated that we would be prepared to determine that ground in writing without a hearing if the Respondent wished to pursue it (depending on the position in ground one). If the Respondent requires a further hearing in relation to that ground or indeed in relation to the first ground, she may request one. Ms Popal indicated that she will be out of the UK for some weeks and asked that any further hearing be remote. It may be, subject to what emerges from the further evidence that this appeal can be determined either on the papers or disposed of by agreement.

DECISION

The error of law hearing is hereby adjourned with the following directions.

1. **By 4pm on Friday 4 February 2022, the Appellant shall file with the Tribunal and serve on the Respondent further evidence of the Sponsor's continued exercise of Treaty rights (to include a letter from his employer, payslip for January 2022 and corresponding bank statement showing payment).**

2. **By 4pm on Friday 11 February 2022, the Respondent shall file with the Tribunal and serve on the Appellant her written submissions in response to the evidence and suggestions for the disposal of the appeal.**

3. **Either party may request a further hearing. If a further hearing is not requested by 4pm on Friday 18 February 2022 and if the appeal is pursued, the Tribunal will proceed to determine the error of law issue on the papers.**

4. **Both parties have liberty to apply for further directions if necessary.**

Signed L K Smith Dated: 26 January 2022
Upper Tribunal Judge Smith