



IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2022-003535

First-tier Tribunal No: EA/10537/2021

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On 26 July 2023

Before

UPPER TRIBUNAL JUDGE JACKSON

Between

MUHAMMAD JUNAID ISHRAT
(NO ANONYMITY ORDER MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr M Karnik of counsel, instructed by Sabz Solicitors LLP
For the Respondent: Mr T Melvin, Senior Home Office Presenting Officer

Heard at Field House by remote video means on 11 July 2023

DECISION AND REASONS

1. This has been a remote hearing which has not been objected to by the parties. The form of remote hearing was by video, using Teams. There were no technical difficulties for the hearing itself and the papers were all available electronically (some being provided during the course of the hearing).
2. The Appellant appeals with permission against the decision of First-tier Tribunal Judge Herwald promulgated on 15 February 2022, in which the Appellant's appeal against the decision to refuse his application for an EU Settlement Scheme (EUSS) Family Permit dated 28 May 2021 was dismissed.
3. The Appellant is a national of Pakistan, born on 10 June 1990, who applied for an EUSS Family Permit on 27 December 2020 to join his father, an Italian national, (the Sponsor), in the United Kingdom.

4. The Respondent refused the application on the basis that to be eligible, the Appellant must demonstrate that the EEA citizen is resident in the United Kingdom but he failed to do so. The Appellant was contacted on 7 May 2021 to provide further information but nothing was received. It appears that the Appellant's representatives did seek to reply with further evidence, but sent it to the wrong email address (not the one advised by the Respondent but instead to an unmonitored inbox which was for outgoing use only). Those documents were in any event before the First-tier Tribunal.
5. Judge Herwald dismissed the appeal in a decision promulgated on 15 February 2022 on all grounds. On the basis that the Appellant's claim was that the Sponsor was resident in the United Kingdom as at the date of his application on 27 December 2020 rather than at a future date within six months; the First-tier Tribunal dismissed the appeal as there was insufficient evidence to show that the Sponsor was resident at the date of application; even though there was evidence to establish that he had been resident and working in the United Kingdom since February 2021 and to the date of hearing.

The appeal

6. The Appellant appeals on the sole ground that the First-tier Tribunal erred in law in failing to consider the alternative requirement under paragraph FP6 of Appendix EU that the EEA citizen will be travelling to the UK with the applicant within six months of the date of the application and the applicant will be accompanying the EEA citizen within six months of the date of application. The First-tier Tribunal erred in only considering whether the EEA citizen was already resident in the United Kingdom at the date of application.
7. On behalf of the Appellant, Mr Karnik relied on the ground of appeal and grant of permission. He submitted that the Appellant's case was advanced on both grounds under paragraph FP6 of Appendix EU, first that the Sponsor was already resident in the United Kingdom and in any event was so resident within six months of the date of application. This was identified in the Appellant's Skeleton Argument before the First-tier Tribunal and the two options are set out in paragraph 11 of the First-tier Tribunal decision, with agreement in paragraph 16 of the decision of the two alternatives put. On the facts, the First-tier Tribunal found that the Sponsor was resident in the United Kingdom within six months of the date of application, from February 2021. Mr Karnik submitted that even if the Appellant's alternative argument was only obliquely made, the Immigration Rules provide for a clear alternative which on the facts the Appellant could meet. The Court of Appeal have recently confirmed in Shyti v Secretary of State for the Home Department [2023] EWCA Civ 770 that where written arguments have been made, these must be addressed by the Tribunal if material.
8. The Appellant also relies on the EU Withdrawal Agreement which does not require a person such as the Sponsor to be present in the United Kingdom at all times and nor do the Immigration Rules require continuous presence. The Sponsor has been granted pre-settled status and has shown residence from at least February 2021.
9. On behalf of the Respondent, Mr Melvin relied on his skeleton argument. In essence, there was a single narrow issue before the First-tier Tribunal of whether the Sponsor was resident in the United Kingdom at the date of application by the Appellant. That sole issue was recognised and recorded by the First-tier Tribunal in its decision and as set out in paragraph 16, which included a rejection of the

submission on behalf of the Appellant in the alternative that residence at the date of hearing was sufficient and that while there may be a possibility of the Sponsor not yet living in the United Kingdom, it was not the case put on behalf of the Appellant in this appeal.

10. Whilst not directly in issue in the reasons for refusal letter or before the First-tier Tribunal, the Respondent would question whether dependency existed in this case given that the Appellant was now an adult in his 30's, but Mr Melvin accepted that this was not raised by the Respondent previously.

Findings and reasons

11. The sole issue in this appeal is whether the alternative basis of satisfying paragraph FP6, i.e within six months of the date of application rather than at the date of application itself was properly before the First-tier Tribunal to determine. Only if it was, would it be an error of law for the First-tier Tribunal to fail to make findings on it. For the reasons set out below, I do not find that it was and as such there is no error of law in the decision of the First-tier Tribunal who decided the sole issue before it which was whether the Sponsor was resident in the United Kingdom at the date of application. There is no challenge to the factual findings of the First-tier Tribunal on this point that the Sponsor was not resident until February 2021 from when there was evidence of employment and residence.

12. The Appellant's application made on 27 December 2020 was on the basis that he planned to arrive in the United Kingdom on 20 January 2021 and that the Sponsor was already in the United Kingdom having arrived on 11 October 2020. The Respondent's refusal of the application was on the basis that the Appellant had not established that the Sponsor was resident in the United Kingdom at the time of the application and that a request for further evidence that the Sponsor was resident in the United Kingdom when the application was made, was not responded to. The Respondent's decision was in response to the specific application made by the Appellant which relied on an assertion that the Sponsor was already resident in the United Kingdom at that date.

13. In the Appellant's skeleton argument before the First-tier Tribunal, the schedule of issues identified the following sole issue:

"3. Whether the Appellant provided evidence of the EEA's Sponsor's residence in the United Kingdom to prove he was living in the United Kingdom at the time of submission of his application."

14. In submissions made on behalf of the Appellant in the skeleton argument, reference was made to the requirements of paragraph FP6 of Appendix EU and to the documents sent to the Respondent in response to the request on 14 May 2021. Finally it was said:

"6. It is noted that the Appellant submitted his application on 27 December 2020. The EEA Sponsor has provided a boarding pass dated 11 October 2020 which confirmed his entry to the United Kingdom and thereafter again on 18 December (...). Further, he provided a Premier Inn invoice for residence where he lived from 27 December 2020 to 1 January 2021. It is also noted that the EEA Sponsor obtained his pre-settled status in the United Kingdom on 18 November 2020 and has provided further evidence which demonstrates that he has been residing in the United Kingdom as contained in the Appellant's bundle. It is submitted that the requirements

of Appendix EU in any event states that the Appellant could join the relevant EEA citizen within six months of entry. Further, the EEA Sponsor/EEA Relevant Citizen was residing in the United Kingdom prior to 31 December 2020. It is submitted that the Appellant had duly provided the requested proof of the EEA Sponsor's residence in the United Kingdom and the decision to refuse his application should be overturned."

15. The requirements of paragraph FP6 are as follows:

"(1) The applicant meets the eligibility requirements for an entry clearance to be granted under this Appendix in the form of an EU Settlement Scheme Family Permit, where the entry clearance officer is satisfied at the date of application:

...

(b) The applicant is a family member of a relevant EEA citizen;

(c) The relevant EEA citizen is resident in the UK or will be travelling to the UK with the applicant within six months of the date of application;

(d) The applicant will be accompanying the relevant EEA citizen to the UK (or joining them in the UK) within six months of the date of application; and ..."

16. The only reference in the Appellant's skeleton argument over and above the single issue identified, was in paragraph 6 that in any event, the Appellant could join the relevant EEA citizen within 6 months of entry (by which it is assumed date of application, not entry). That at best goes to subparagraph (d) above as to when the Appellant was required to join the Sponsor in the United Kingdom. I do not find that it goes to the point now relied on before the Upper Tribunal relevant to the requirement in subparagraph (c) as to the position of the Sponsor himself, who if not resident in the United Kingdom would be travelling with the Appellant within six months of the date of application. The Appellant has never suggested on the facts or otherwise that he would be travelling to the United Kingdom with the Sponsor and that would be directly contrary to the basis upon which he made his application, that the Sponsor was already resident here and he would be joining him on 20 January 2021.

17. I find that the Appellant's application and skeleton argument were consistently clear that the basis of claim was that the Appellant would be joining the Sponsor who was already resident in the United Kingdom at the date of application and this was identified as the sole issue for determination before the First-tier Tribunal. The issue was not put more widely, for example as to whether the Appellant met the requirements of FP6 of Appendix EU. This is clear from the Appellant's skeleton argument in particular, which is replicated in the First-tier Tribunal decision both as to identification of the substantive issue under appeal, the claim by the Appellant (including evidence from the Sponsor which was not accepted on the facts and without any evidence that the Sponsor would accompany the Appellant at a later date) and in particular in paragraph 16(b) which states:

"(b) Mr Karnik opined that it was sufficient for the Appellant to show that the Sponsor was currently resident in the United Kingdom, i.e. at the date of

hearing. But I reminded Mr Karnik of his own instructing solicitor's legal submissions, which made clear, reciting paragraph FP6 of the relevant appendix, that the Applicant must show that he is a family member of the relevant EEA citizen (which I so find) but also that the relevant EEA citizen is resident in the United Kingdom at the date of application. Mr Karnik suggested the Home Office guidance noted that it was feasible to make an application even though the Sponsor was not yet living in the United Kingdom. That may be the case, but it is not the case put forward on behalf of the Appellant here."

18. The Appellant relies on the Court of Appeal's decision in Shyti that any written arguments, if material, must be considered by the First-tier Tribunal. However, for the reasons set out above, I do not find that the Appellant's skeleton argument clearly raised a second alternative issue, that the Appellant could meet the requirements of paragraph FP6 if the Sponsor was resident in the United Kingdom within six months of the date of application. The case can also be distinguished as it concerned the assessment of the Respondent's reasons for refusal letter which had not been withdrawn and in an appeal which pre-dated the relevant practice directions applicable to the present appeal. For those latter reasons, the more recent Upper Tribunal decisions in TC (PS compliance - "issues-based" reasoning) Zimbabwe [2022] UKUT 00164 (IAC) Lata (FtT: principal controversial issues) [2023] UKUT 00163 (IAC) are more applicable (even though to some extent they refer to the 2022 Practice Statement as opposed to the 2021 Practice Statement). Those decisions emphasised the importance of the parties identifying the 'principal important controversial issues' to enable a focused decision of the First-tier Tribunal addressing only those matters identified as being in dispute, that the task of the Judge is not to consider other issues that could possibly be raised; and the need for procedural rigour in appeals. The point now relied on by the Appellant was not properly raised before the First-tier Tribunal either by identification as an issue or by the facts relied upon, which all focused on the claim that the Sponsor was already resident in the United Kingdom on the date of application. I do not find any error of law in the First-tier Tribunal's decision deciding only the sole issue raised by the Appellant before it.

Notice of Decision

The making of the decision of the First-tier Tribunal did not involve the making of a material error of law. As such it is not necessary to set aside the decision.

The decision to dismiss the appeal is therefore confirmed.

G Jackson

Judge of the Upper Tribunal
Immigration and Asylum Chamber

17th July 2023