IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2022-005952
First-tier Tribunal No:
EA/51617/2021
IA/11589/2021

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On the 19 April 2023

Before

UPPER TRIBUNAL JUDGE LESLEY SMITH
DEPUTY UPPER TRIBUNAL JUDGE HOLMES

Between

LEVAN INADZE
(NO ANONYMITY ORDER MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Ms Selvakumaran, Counsel for MA Consultants
For the Respondent: Mr T Melvin, Senior Home Office Presenting Officer

Heard at Field House on 14 March 2023

DECISION AND REASONS

1. The Appellant, a citizen of Georgia, married a German citizen on 4 February 2015, and was issued by the Respondent with a Residence Card on 16 September 2015, valid until 16 September 2020.
2. On 21 December 2020 the Appellant applied for a permanent residence card pursuant to the Immigration (EEA) Regulations 2016 relying upon his marital status, and the exercise of treaty rights by his spouse. He accepted that at the date of application the sponsor was living in Germany, having travelled there in 2019. His application was made on the basis that when she did leave the UK she did so with the intention of a return, and that the Respondent's policy allowed absences by a sponsor of up to six months as not breaking the continuity of residence he was required to demonstrate for the purposes of establishing that

he had acquired a permanent right of residence. Arithmetically at least that argument was a valid one, since it is conceded that a period of six months beyond the date of departure in 2019 would take the Appellant beyond the necessary five year anniversary of 4 February 2020.

3. That application was refused on 12 March 2021, firstly in relation to the provision of the sponsor's identity document with the application – an issue that has subsequently fallen away, and secondly because it was said the application failed to demonstrate the sponsor's exercise of treaty rights during the requisite period.
4. The Appellant appealed that refusal, and his appeal was heard and dismissed by Judge Khawar in a decision promulgated on 25 November 2022. The Appellant sought permission to appeal that decision to the Upper Tribunal and permission was granted by decision of Judge Gibbs of 3 January 2023.
5. Ms Selvakumaran accepted that properly analysed the grounds of challenge asserted procedural unfairness in the conduct of the hearing, although they were not supported by any witness statement from the advocate who appeared at that hearing to explain what did, or did not, occur at that hearing. Thus at the core of the Appellant's challenge was the argument that there was written evidence before the Judge from both the Appellant and the sponsor to explain; (i) the circumstances under which she travelled to Germany in 2019, (ii) the date and circumstances under which she subsequently decided not to return to the UK and to treat her marriage as at an end (although no divorce proceedings have yet been commenced), and, (iii) the date on which she wrote the undated letter that was submitted in support of the Appellant's application. The Appellant was not subjected to any cross-examination upon those issues on behalf of the Respondent, and the Judge did not ask him any questions either. Thus it is argued that it was procedurally unfair for the Judge to conclude as he did that the Appellant and the sponsor's written evidence was untrue on the issue of the date the undated letter was written. Happily Mr Melvin was able to provide us with sight of the presenting officer's note of the evidence taken at the hearing, which confirmed that no such questions were asked.
6. In addition the grounds assert, correctly, that the Judge fell into error in his approach to the issue of whether the sponsor was a self sufficient person during any relevant period for failure to apply the decision in VI v HM Revenue and Customs C-247/20, and thus to fail to apprehend that upon affiliation to the NHS no further private medical insurance was required of the sponsor or the Appellant.
7. The Respondent served a Rule 24 response to the grounds of appeal on 16 January 2023. This failed to engage with the reliance upon the failure to apply VI v HM Revenue and Customs, or, the assertion of procedural unfairness. Instead the draftsman simply took the point that the marriage had irretrievably broken down before the Appellant had accrued five years residence pursuant to the Regulations, with the sponsor leaving the jurisdiction without intending to return.
8. Thus the matter comes before us.

Error of Law?

9. It is now conceded that the Judge did fall into material error of law in his approach to VI v HM Revenue and Customs. The evidence before the Judge did establish that the Appellant and the sponsor met the requirement of Regulation 4(1)(c)(ii) through their affiliation to the NHS.
10. It is also conceded before us that the Appellant was asked no question in oral evidence to undermine the written evidence that he and the sponsor had provided as to the date upon which her undated letter had been written. As a result the Appellant had no opportunity to answer the points that were taken

against him by the Judge in the course of his decision concerning the letter's style and content, and which led the Judge to the conclusion "*there is no reliable evidence of an intention to return. On the contrary the appellant's claim that the sponsor intended to return with a view to reconciling their marriage is contradicted by the evidence of the sponsor's undated letter (page 8 AB) (which she later contends was written by her in September 2020) in which she states.....*" [14]. We note, simply, that in reaching his conclusion the Judge clearly intended to reject as a deliberate untruth the written evidence of both the Appellant and the sponsor on this issue [16], although he later couched this finding in terms that this was "reasonably likely" [17]. We are satisfied that in the circumstances this approach constituted a material error of law, leading to a procedurally unfair hearing, because we can identify no point at which the Respondent properly placed this evidence in issue as untrue. No such stance was adopted in the reasons given for the refusal of the application, and the Respondent chose not to cross-examine the Appellant to seek to demonstrate that this was the case.

11. It is plain that the Judge accepted that the couple cohabited as a married couple in the UK from the date of their marriage until the undisputed date that the sponsor left the UK in 2019 [18].

12. It is also now conceded before us that the Appellant had demonstrated with his application that he was in employment for the bulk of the five year period from the date of the marriage. He was issued with a Residence Card by the Respondent on 16 September 2015, so she was plainly then satisfied that the Appellant was the spouse of a qualified person. He did not need to demonstrate that the sponsor was in employment in the UK for the whole of the requisite period in order to succeed in demonstrating that she was a qualified person for that period. His application was made on the basis that the sponsor was a "self sufficient" person. Thus in questioning the failure to demonstrate whether the sponsor was employed during the whole of that period it would appear that the Judge fell into the error of focusing on a matter that was not relevant [20].

13. It is also now conceded before us that the Appellant had provided in evidence a document that was relied upon as a copy of the P60 issued to him for the tax period 2015-2017 and 2016-2017 [ApB p147-8]. The Judge found that there was no evidence of his employment status during the 2015-2017 period [21]. In doing so we can only conclude that not only was this evidence overlooked, but the Judge failed to reflect properly upon the implications of the issue of the Residence Card to the Appellant in 2015. We note that the evidence provided by the Appellant demonstrates that from 2017 onward he remained in employment with the same employer in each of the three relevant subsequent tax years.

Conclusions

14. In the circumstances we are satisfied that the Judge fell into material error of law in his approach to the evidence before him, and that his decision must be set aside and remade.

15. We are satisfied that the evidence does not establish that the Appellant and the sponsor have been untruthful about the date she wrote the undated letter that was submitted to the Respondent by the Appellant in support of his application in December 2020. In any event, that is not a point that has ever properly been taken against either of them by the Respondent.

16. We are satisfied that the evidence does establish that on the balance of probabilities the sponsor was a qualified person throughout the period from the date of the marriage to her departure from the UK in 2019. We are satisfied that the Respondent's policy permits the Appellant to rely upon the necessary period

of time post departure to show the requisite period of five years from the date of the marriage to 4 February 2020.

17. In the circumstances we remake the decision on the appeal so as to allow the appeal under the EEA Regulations 2016.

Notice of Decision

The decision promulgated on 25 October 2022 did involve the making of an error of law in the approach taken by the Judge to the evidence relied upon by the Appellant sufficient to require the decision upon the appeal to be set aside and remade. We remake that decision so that the appeal is allowed.

JM Holmes
Deputy Judge of the Upper Tribunal
Immigration and Asylum Chamber
17 March 2023