IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2022-000615
UI-2022-000616
First-tier Tribunal No:
EA/05293/2020
EA/05292/2020

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On the 06 April 2023

Before

UPPER TRIBUNAL JUDGE SMITH
DEPUTY UPPER TRIBUNAL JUDGE FROOM

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

SHANDOR VIEIRA ALVES
KESSYA DE ALENCAR ALEIXO

Respondents

Representation:
For the Appellant: Ms A Ahmed, Senior Home Office Presenting Officer
For the Respondents: In person

Heard at Field House on 8 February 2023

DECISION

BACKGROUND

1. This is an appeal by the Secretary of State. For ease of reference, we refer to the parties as they were in the First-tier Tribunal. The Respondent appeals against the decision of First-tier Tribunal Judge Hendry promulgated on 15 November 2021 ("the Decision") allowing the Appellants' appeals against the Respondent's decisions dated 28 September 2020 revoking their residence cards pursuant to the Immigration (European Economic Area) Regulations 2016 ("the EEA Regulations").

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2. The First Appellant, Mr Alves, claimed to be an Italian national and was issued with a registration certificate on 18 July 2016 as a qualified person exercising Treaty rights in the UK. The Second Appellant, his partner, was issued with an EEA residence card on 13 December 2016 as his family member. They now have two children born in the UK who are aged four and six years.

3. The basis of the Respondent's decisions was that the First Appellant's identity document had been fraudulently obtained and in consequence he was not recognised as an Italian national. In her decision in the First Appellant's case, the Respondent said this about the information on which her decision was based:

> "Police investigations in Italy, which resulted in the criminal convictions of public officials, established that a large number of genuine Italian identity documents had been fraudulently obtained and used by people falsely claiming to be Italian nationals.
>
> We have now established that the Italian identity document AX5784971 presented in support of your application for a residence card which was issued on 13 December 2016 was fraudulently obtained and that you had no legitimate entitlement to benefit under the [EEA Regulations]. Consequently, the registration certificate which was issued to you falls to be revoked under Regulation 24(3)."

A decision in similar terms was issued to the Second Appellant explaining that her residence card was revoked for the same reason.

4. The appeal before Judge Hendry was dealt with on the papers at the Appellants' request. The Appellants produced a bundle of documents which are not numbered but broadly consist of the First Appellant's Italian identity document, a letter setting out briefly the circumstances in which he said he had obtained that document (which is as recorded at [21] of the Decision), and documents evidencing the family's circumstances in the UK. There were no documents from the Italian authorities controverting what the Respondent had said in her decision.

5. As we will come to, the Respondent says that she did in fact file bundles in both appeals but it appears that those were not before the Judge or at least she did not fully appreciate what was contained in those bundles. At [31] of the Decision, the Judge recorded that the Respondent had not filed a Home Office bundle and so she relied on what was said in the decision letters. She went on to say this:

> "34. I noted that the SSHD had not submitted a bundle of documents in support of the decisions made in this case. The appeal documents included some which were stated to be a respondent's bundle but these were the same as the documents submitted by the appellant and I concluded that there had been some confusion in the recording of those documents."

6. In spite of that confusion, the Judge considered it appropriate to continue with the hearing on the papers ([35] to [40] of the Decision). She then said this about the reasons given for refusal:

> "41. The refusal letter stated that the Italian identity document AX5784971 which had been presented in support of both applications '*was fraudulently obtained*'. No further details were given, and no supporting documents were produced explaining how the respondent had come by that information, and why the second appellant's Italian identity card had specifically been identified as having been fraudulently obtained. The refusal letter simply said that the appellants had '*no legitimate entitlement to benefit under the EEA Regulations*' …."

7. We observe that those comments are not entirely accurate since the decision letter did indicate that the information about the First Appellant's identity card had come to light in the context of wider police investigations in Italy. We observe that it would be quite likely that if the authorities of another European country became aware that documents purporting to come from them were being fraudulently obtained, those authorities would seek to share that information with the authorities of other countries to whom those documents might have been produced. Nonetheless, we accept that the Judge was entitled to record at [47] of the Decision that no evidence relating specifically to the First Appellant was produced if, as appears to be the case, she did not have sight of the full bundles or missed the evidence to which we come below.

8. Having set out the legal position as to which there is no challenge, she concluded as follows:

> "46. In this case, the SSHD stated that it had been established that the Italian identity document used by the second appellant, and which had been used by both appellants in support of their respective applications for a residence card and a registration certificate was *'fraudulently obtained'.* This information resulted, the refusal letter said, from police investigations in Italy *'which had resulted in criminal convictions'.* The letter implied that this had been an exercise which involved a number of different people.
>
> 47. No evidence in support of these statements was produced by the SSHD, in particular no supporting evidence was produced which showed specifically that the second appellant's identity document was not genuine. The SSHD had had 12 months from the date of the appeal in which to obtain any evidence from Italy and to produce this to the tribunal. She had not done so.
>
> 48. The second appellant [First Appellant] has explained the process he followed in establishing his eligibility for Italian citizenship, and how he had applied for that status. I noted that both appellants had been granted EU documentation verifying their right to live and work in the EU because of the second appellant's Italian identity. They had both produced the relevant

> documents required by Regulations 17 and 18, both of which stated that the SSHD '*must'* grant residence documentation if the right evidence was produced to demonstrate that the applicant was entitled to that status.
>
> 49. Clearly, if the SSHD knew when the original application was made that the documents relied on were forgeries or fraudulent or obtained through fraud, the application would not be allowed, and the applicants would have to demonstrate, if this was the case, that the documents were genuine. However, in a situation where the applicants had been granted and had held their residence documents, and the SSHD then determined that the documents produced in support of the original applications were fraudulent, it was incumbent on the SSHD to produce some information supporting that conclusion. I did not consider that it was sufficient for the SSHD to state simply that the second appellant's [First Appellant's] Italian identity document was fraudulently obtained without producing any documentary evidence showing how the conclusion that these particular appellants had used false documents had been reached.
>
> 50. Taking account of the burden of proof in a matter such as this, I did not find there was sufficient evidence for me to determine that the appellants' applications for registration certificate and residence card had been obtained by use of fraudulently obtained documents.
>
> 51. The appellants may wish to note that it is open to the SSHD to re-make the decision, producing appropriate evidence in support, and if this is done, the appellants would then need to produce their own evidence rebutting the evidence of the SSHD."

9. The Respondent appealed the Decision on the basis that the Judge had failed to give adequate reasons for her conclusion. In particular, and as we have alluded to above, she pointed out that the information from the Italian authorities emanated from a police investigation in Italy to which she had drawn attention in her decision. As she pointed out, since the identity document on which the Appellants' EU status depended had been revoked by the authorities of the country which issued it, she was bound to revoke any documents acquired in reliance on that document. She drew particular attention to Regulation 24(3) of the EEA Regulations which states that the Respondent may revoke a registration certificate or residence card "if the holder of the certificate or card has ceased to have, or never had, a right to reside under these Regulations".

10. The Respondent also asserted that the EEA Regulations do not require her to produce the evidence on which such a decision is based. We do not need to decide whether that assertion is correct as a matter of law as, on 7 February 2023, Ms Ahmed made an application to amend the grounds of appeal. The application includes the information that the Respondent had filed and served her appeal bundle in both appeals on 16 November 2020 and again on 17 October 2022. We are certainly able to confirm the latter filing

as we had the document on which reliance is placed prior to receipt of the amended grounds. In relation to the documents filed at the time of the hearing before Judge Hendry, Ms Ahmed made an application to adduce further evidence under Rule 15(2A) of the Tribunal Procedure (Upper Tribunal) Rules 2008 to show that the bundles were indeed filed and served. We deal with the substance of that evidence below.

11. Permission to appeal was initially refused by First-tier Tribunal Judge Komorowski on 14 December 2021 in the following terms:

> "...2. The application for permission to appeal is fundamentally misconceived.
>
> 3. The respondent says that if the Italian identity document was revoked, the respondent was bound to revoke any documents acquired on the basis of it. But the legal authority for that proposition has not been provided. In any event, where the respondent provided no evidence, the respondent has failed to establish that in fact the Italian identity document has been revoked and on what basis (grounds, para 3).
>
> 4. The contention that the regulations do not require the respondent to prove the condition upon which the exercise of her power is contingent is nonsensical (grounds, para 5). The tribunal cannot proceed simply on the respondent's assertion. The burden of proof on this point lay upon the respondent.
>
> 5. The grounds do not disclose any arguable error of law."

12. Permission to appeal was granted following renewal to this Tribunal by Upper Tribunal Judge Hanson on 5 January 2023 in a lengthy decision, the relevant part of which reads as follows:

> "It is settled case-law that Community law cannot be relied on for abusive or fraudulent ends – see Case C-255/02 Halifax and Others [2006] ECR I-1609, paragraph 68) and that the national courts may, case by case, take account – on the basis of objective evidence – of abuse or fraudulent conduct on the part of the persons concerned in order, where appropriate, to deny them the benefit of the provisions of Community law on which they seek to rely – see inter alia Case C-212/97 Centros [1999] ECR I-1459, paragraph 25) and regulation 24(3) of the 2016 Regulations.
>
> A bundle was filed which included the decision letters. What cannot be disputed from reading the documents is that there was available to the appellant and the Judge a clear indication of the basis on which the decision had been made. The Judge refers to how the second appellant [First Appellant] established eligibility for Italian citizenship and noted the grant of the documentation verifying the right to live and work in the UK, as a result of the second appellant's Italian identity, and the production of relevant documents stating that the respondent must grant residence documents if the right evidence was produced. The difficulty with the decision is that the Judge does not appear to engage with the

> fact that whilst on the face of the papers the residence documents had to be issued, that does not answer the key question. The Judge does not, for example, give adequate reasons in support of a finding that what ever may have happened elsewhere the evidence showed that the documentation obtained in relation to the appellants, concerning nationality and residence, was genuine.
>
> It is arguable that the Secretary of State provided adequate reasons why the Registration Card and Residence Document had ben revoked. As the Italian identity document on which the grant of those documents had been based had been revoked, which appears arguably to be the position, any documents acquired on the basis of such identity were bound to be revoked. Despite knowing the basis of the claim it does not appear there was any additional documentation before the Judge from the Italian authorities to demonstrate that the identity documents relied upon by the appellants were genuinely obtained.
>
> Whilst this assertion in the ground seeking permission to appeal is that the Regulations do not require the respondent to produce the evidence on which such a decision is based, if that decision is challenged the normal adversarial process requires a party to produce sufficient evidence to prove what they are alleging. Even though the Secretary of State may not have done so, which can be explained at the next hearing, the overriding principle is that if abuse or fraud has been employed an individual cannot rely upon community law. On that basis I grant permission to appeal."

13. The appeals came before us to determine whether the Decision contains errors of law. If we conclude that it does, we then have to decide whether to set aside the Decision in consequence of those errors. If we set aside the Decision, we then have to go on to either re-make the decision or remit the appeal to the First-tier Tribunal.

14. Having heard submissions from Ms Ahmed and having heard from the First Appellant via a Portuguese interpreter, we indicated that we found there to be an error of law in the Decision and moreover that we were satisfied that these appeals fall to be dismissed. We indicated to the Appellants that we would provide further reasons in writing in order that they could take further advice and consider their options.

DISCUSSION

Error of Law

15. The evidence produced by the Respondent with the application to amend her grounds consists of an extract from her electronic database which shows that the Respondent's bundle was sent on 16 November 2020. An email from the Assistant Director, Head of Appeals Processing Centre and Joint Head of Specialist Appeals Team dated 7 February 2023 confirms that the Respondent's bundles for the appeal were sent to the Appellants on 16 November 2020 and

re-sent on 17 October 2022. Confirmation is also provided that the bundles were served electronically to the Upper Tribunal on 18 October 2022. It is said that the writer of the email did not have "the original audit trail from 2020 to hand" but would search for this if necessary.

16. The evidence also includes the Respondent's bundles said to have been lodged and served. Those include at [A1] a document which appears to be a translated document. It is headed as being from "Casserta Police Headquarters Flying Squad" and is dated 14 December 2018 (and therefore after the date when the Appellants' registration certificate and residence card were issued). The subject heading is "Falsification of Italian citizenship by citizens of Brazil" and the document is addressed to "the NCA Liaison Office at the British Embassy". An email address in Rome is given. The body of the document reads as follows:

> "In reference to the above and following the previous exchange of information, please find below a list of the names of Brazilian citizens who have obtained identity cards from Maddaloni and Caserta local authorities on the basis of counterfeit documentation, and have not been granted Italian citizenship *'iure sanguinis'.*
>
> We wish to inform you that many of these, as flagged by your office, have submitted a request for a residency permit issued to European citizens:
>
> Identity cards issued by Maddaloni Town Hall:
>
> | No. | Holder | Identity Card | Date of Issue |
> |---|---|---|---|
> | 28 | Shandor Vieira Alves | AX5784971 | 19.02.2016" |

17. It is still not entirely clear on the evidence whether the Respondent's bundles were lodged at the time of the hearing before Judge Hendry. We are however satisfied that the bundles were served on the Appellants, and it appears that Judge Hendry may have had at least part of the bundles from the Respondent. It is unclear whether she had the document to which we refer above. We have regard to the fact that, having provided a copy of the application to amend grounds and associated documents including the document at [A1], the Appellants claimed never to have seen it before. Whatever the position at that time, however, there is now evidence supporting what is said in the Respondent's decision letters and which the Respondent intended to put before the Tribunal (whether or not she actually did so).

18. Even if this document were not before Judge Hendry, we would still have concluded that the Judge had erred in law. As Judge Hanson pointed out when granting permission, there was no evidence from the Appellants to controvert what was said by the Respondents. Indeed, as we come to below, we did not understand the Appellants

to dispute that the Italian authorities had revoked the identity card. Their case appears to be that the identity card had not been fraudulently obtained and therefore should not have been revoked.

19. As we also pointed out, whilst we accept that the Respondent was acting to revoke the documents which she had issued, and therefore bore the burden of showing that she was entitled to do so, if the First Appellant were not an Italian national as the Respondent asserted was the position, neither Appellant had any rights under EU law. The Appellants did not provide any evidence other than the identity document which was the subject of the revocation to establish that they had rights under EU law.

20. The Appellants' case as set out at [21] of the Decision about how the First Appellant had come by the identity document is vague. It is somewhat at odds with what he told us (see below) but in any event, it provides no evidence confirming that he is indeed a national of Italy. There was no witness statement confirming this account and, as a paper hearing, the Judge did not hear oral evidence.

21. As we have already observed, although the Respondent's evidence about the information she received as contained in the decision letters was vague, she had provided some context. Although Judge Hendry referred to this at [46] of the Decision, she did not explain why that information could not be relied upon or why the Respondent needed to produce evidence from Italy to confirm information which she had included in her decision letters.

22. What is said at [48] of the Decision rather begs the question which the Judge was seeking to answer. The Respondent had granted the documents under the EEA Regulations because of the identity card which she now said was fraudulently obtained. That fact of the issue of the registration certificate and card therefore proved nothing.

23. The Judge does not say at [49] of the Decision why the production of the information on which the Respondent relied albeit summarised in the decision letters was not sufficient. The Judge was told that the evidence had arisen from police investigations in Italy which related to wrongdoing by public officials. The Respondent had included the number of the identity document which matched that relied upon by the First Appellant as showing that he was Italian, and which had led to the issue of the registration certificate and residence card. Whilst we accept that this (accurate) summary of what is shown in the document at [A1] might not have been sufficient to prove the Respondent case if that had been undermined by evidence from the Appellants, we fail to understand how it could not have been enough to at least meet the Respondent's evidential burden. At the very least, if that was the Judge's finding, she needed to explain why it was not enough.

24. For those reasons, we are satisfied that the Decision contains an error of law whether the document at [A1] of the Respondent's bundle was or was not before Judge Hendry.

Re-Making

25. Before reaching our decision, we permitted the First Appellant to put forward his case. He made his submissions via a Portuguese interpreter. He told us that he had instructed a person in Brazil to research his ancestry with a view to obtaining Italian citizenship. He said that "after a few months" that person said that he had found the First Appellant's ancestors, that the First Appellant had a right to Italian citizenship, and that this person could provide documents for recognition of that right in Italy. After the government in Italy had recognised the right, the First Appellant would then have to present himself at the consulate to obtain the document confirming citizenship.

26. That is somewhat at odds with the First Appellant's case as set out by Judge Hendry at [21] of the Decision which is taken from the papers. It is there suggested that the First Appellant gathered the documentation himself whilst living in Italy over two years and then hired an agent to complete the necessary formalities. The First Appellant told us that he had gone to Italy in February 2016 and had spent three days there during which he had collected his document.

27. Whatever the position in relation to the acquisition of the identity document, the First Appellant did not provide any evidence to show that the information on which the Respondent relied was inaccurate or mistaken. Quite the opposite. His evidence that the identity document was acquired in February 2016 is consistent with the document at [A1]. He has provided no evidence from the person who he now says he instructed in Brazil to research his ancestry and establish his right to Italian citizenship. He has provided no evidence about how he is entitled to that nationality via his ancestors.

28. The First Appellant accepted that after he was stopped by immigration officials on return from Dubai, detained and then released, he had a meeting with Home Office officials who explained that there were problems with his Italian documents. We asked the First Appellant whether, in light of that knowledge, he had taken any steps to challenge the information from the Italian authorities. He said that he had tried to enlist the help of an Italian lawyer but was unable to afford to pay for his services. He had gone to the Italian embassy, but they said that he would have to go to Italy to discuss the position directly with the Italian authorities.

29. The First Appellant also suggested that it was contrary to natural justice for him to be unable to challenge the Respondent's decision. As we pointed out, however, his dispute lies with the Italian

authorities. He did not dispute that the Respondent had received the information which she said she had. If he wished to challenge the revocation of the identity document, he would have to take that up with the Italian authorities.

30. The First Appellant also suggested that he had been prevented from going to Italy by the Respondent. We explored that suggestion with him. It appears that this was based on the Respondent holding his Brazilian passport. As we pointed out, it would of course be open to him to depart the UK voluntarily and the Home Office would be bound to return his passport to him for that purpose. In response, he said that he did not wish to leave and could not afford to do so.

31. The Respondent has evidence that the First Appellant is not an Italian national as he claimed to be. That evidence shows that the First Appellant has and had no rights under EU law. Whether or not the First Appellant was aware of and/or complicit in the fraud which led to the issue of his identity document, he is not an Italian national and cannot claim any rights under EU law. Had the Respondent been aware that the Italian identity document had been falsely obtained, she would not have issued the registration certificate which she did and to which the First Appellant was not entitled. It follows that the Respondent was entitled to revoke the registration certificate under Regulation 24(3) of the EEA Regulations.

32. The Second Appellant's status depends on that of the First Appellant. Accordingly, the Respondent was entitled to revoke her registration card also.

33. We recognise that both Appellants have lived in the UK for a number of years (since February 2016), have worked and paid taxes here and have two children both born here. As we pointed out to them, it may be that they have other options to apply to remain here. What they do not have on the evidence, though, is a right to remain under EU law.

34. For those reasons, we dismiss the appeals.

NOTICE OF DECISION

The Decision of First-tier Tribunal Judge Hendry promulgated on 15 November 2021 involves the making of an error of law. We set aside that decision and re-make the decision.

The Appellants' appeals are dismissed.

Signed: L K Smith Dated: 10 February 2023
Upper Tribunal Judge Smith