Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: EA/04716/2017

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 29th January 2019	**On 06 March 2019**

Before

UPPER TRIBUNAL JUDGE REEDS

Between

RASHMIBEN PANKAJBHAI DESAI
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr M. Symes, Counsel instructed on behalf of the Appellant.
For the Respondent: Mr Kandola, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The Appellant, with permission, appeals against the decision of the First-tier Tribunal (Judge Monson) who, in a determination promulgated on 7th June 2018 dismissed the Appellant's appeal against the decision of the Respondent to refuse her application for a residence card as confirmation of her right to reside in the United Kingdom as a family member of a British Citizen pursuant to Regulation 9 under the Immigration (European Economic Area) Regulations 2016 ("hereinafter referred to as the 2016 Regulations").

2. The history of the application is set out in the decision of the First-tier Tribunal. The Appellant is a national of India. Her son, (hereinafter referred to as "sponsor") arrived in the UK to settle with his British citizen spouse in June 2008. In 2012 he obtained British citizenship.

3. In June 2011 the Appellant applied for entry clearance as a visitor and was granted a multi-entry visit Visa valid for a period of five years. The purpose of the Visa was to visit her son and daughter-in-law. Between 2011 and 2015, the Appellant entered the United Kingdom as a visitor.

4. The Appellant's sponsor had employment in the UK until February 2015. He and his family went to live in India for a period of four months before returning to the UK. In July 2015 he began employment in Ireland. The Appellant went to Ireland to visit him in August 2015. According to the Appellant and the sponsor this was for a short visit but as a result of her illness she remained in Ireland for a longer period. In October 2015 he rented a property in Ireland.

5. In November 2015 the Appellant made an application for an EEA residence card in Ireland. Following this, in December 2015, the Appellant was admitted to hospital and remained there until her discharge in January 2016. She remained in Ireland living with her son.

6. On 8 August 2016 she was granted a residence card (under Regulation 7) from the Irish Naturalisation and Immigration Service.

7. It is said that the sponsor's wife did not want to move to Ireland and therefore the sponsor considered obtaining employment back in United Kingdom. Later in August 2016 the Appellant returned to United Kingdom and the sponsor followed shortly thereafter on 6 September 2016. He obtained employment in the UK, but this was not started till January 2017 and in the interim continued to assist his former employers working remotely.

8. On the 19th September 2016 the Appellant made an application for a residence card as a confirmation of right to reside in the United Kingdom.

9. On 28 April 2017 the Respondent refused that application. The FtTJ set out the reasons at paragraphs 16-24 of his decision. In summary, the Respondent was not satisfied that she had provided adequate evidence to show that the residence in Ireland was genuine. She had not demonstrated that the centre of the British citizen's life transferred to Ireland. She had resided there for a total period of only 12 months and had returned to the UK ahead of him on 20 August 2016. Her accommodation in Ireland was on a short-term basis and she had left nearly 7 weeks before the 12-month lease expired. Her British citizen sponsor had retained a principal residence in the UK during their period of joint residence in Ireland. The Secretary of State considered that she provided insufficient evidence of integration into Ireland and that there was little evidence of integration on the part of her sponsor.

10. Consideration had also been to the purpose of her and her sponsor's residence in the EEA host country. She had gone on holiday to Ireland before being admitted to hospital. There was no explanation as to why she could not return to the UK after

discharge form hospital. It was further noted that she had been given periods of permission to remain in Ireland and thus it was not necessary to apply for residence when she could have lawfully remained there. She was issued with a residence card in August 2016 and left Ireland 12 days later. The Respondent considered that her actions indicated that she remained in Ireland to obtain residence documentation which was believed would support her UK residence card application.

11. It was concluded that residence in Ireland had been provided purely to meet the requirements of the application and that she was not genuinely dependent upon her sponsor. Therefore, it was not accepted that she and her British citizen sponsor's residence in the EEA host country was genuine, and it was considered that the purpose of the resident in the EEA host country was as a means of circumventing the U.K.'s domestic immigration rules.

12. The Appellant issued grounds of appeal and the appeal came before FtT on the 16th May 2018.

13. In a decision promulgated on the 7th June 2018, the FtT dismissed her appeal. The judge did not consider that of the sponsor's life transferred to the EEA State but that the sponsor undertook work in Ireland on a temporary basis. He found that the sponsor was not prepared to give up her life in the UK to live in Ireland. The judge found that there was no significant economic incentive for the family to be resident in Ireland and that there was no firm plan of resettlement and to the contrary, the UK property remained the sponsor's principal place of residence and the family continued to habitually reside there.

14. At paragraphs 45-46 of the decision, the judge gave reasons as to why he did not believe that the Appellant had integrated in Ireland and at paragraph 47 he rejected her account that she had become involuntarily resident in Ireland as a result of a deterioration in her health.

15. Therefore, the judge concluded that the residence of the Appellant and the sponsor was not genuine having regard to the criteria set out in Regulation 9(3). He further found that the Appellant's continued residence in Ireland was contrived for the purpose of circumventing the Immigration Rules.

16. At paragraph 51, he rejected the alternative case advanced under Regulation 45 of the TFEU.

17. The Appellant sought permission to appeal that decision and permission was granted by FtTJ Page on grounds one and four and on further application to the Upper Tribunal permission was granted by UTJ Canavan on all grounds.

18. Before the Upper Tribunal Mr Symes relied upon the grounds as set out in the papers. He supplemented those written grounds with the following oral submissions.

19. As to Ground 1, he submitted that the judge had applied the wrong test and failed to have regard to Article 21 as interpreted in O and B, that is, whether the sponsor's free movement rights would be discouraged if his mother was not granted a residence

permit. He made reference to the evidence of the closeness of the bond between mother and son and increasing dependency (see paragraphs 22-24 of the grounds). In the alternative he submitted that the formulation of the test found in the EEA Regulations was narrower in scope than the provision of the Treaty itself and that those Regulations must be read down in the light of the Treaty's fundamental status (see Van Gen e Loos and Marleasing).

20. In any event, he submitted that there was evidence before the Tribunal which the judge not taken account of when making an assessment of whether residence was "genuine". In particular there were factual matters set out in the Appellant's own witness statement and in supporting evidence in the Appellant's bundle which had not been taken into account. He acknowledged that the judge made reference to one of the letters in the bundle however, the letters were to demonstrate the effect on the sponsor's wife which in turn supported the Appellant's account that there was a genuine movement abroad.

21. He further submitted that at paragraph 43, the FtTJ attempted to compare the earnings in the UK and in Ireland. However, the judge had used the wrong figures by reference to the P60 at p111 of the bundle. Therefore, he was in error in reaching his conclusion that there was an economic disincentive to move to Ireland.

22. As set out at Ground 2, he submitted that the judge unduly focused on the Appellant's immigration status, both in the UK and in Ireland at paragraphs 46,47 and 50 and that in the light of the decision of the Court of Appeal in in The Secretary of State for the Home Department and Christy [2018] EWCA Civ 2378 (which was not heard until after the FtT decision) that was the wrong approach. The Appellant's domestic immigration status was an irrelevant consideration relying on paragraph 36 of that decision.

23. As to Ground 3, the FtTJ did not lawfully assess the question of abuse of rights and that the factual evidence was relevant when assessing whether this was legitimate advantage seeking rather than an abuse of rights.

24. Ground 4 related to the alternative argument under Regulation 45 of the TFEU. He submitted that the judge gave this very little consideration at paragraph 51 and that he had misunderstood or misapplied the decision of S and G and that there was a viable argument that the sponsor's ability to work in Ireland was assisted by his mother providing emotional support.

25. Mr Kandola on behalf of the Respondent relied upon the Rule 24 response dated 21st October 2018. He submitted that was no material error of law in the decision of the FtTJ who had regard to the evidence at paragraph 45. As to the earnings in Ireland, the judge had referred to the contract terms and he was entitled to look at this because the initial claim made was that it was the salary which had encouraged the sponsor to go to Ireland.

26. He further submitted that it was open to the FtTJ take into account Appellant's immigration status by reference to Regulation 9(3) (c) which made reference to the relevant factors.

27. As to Article 45 of the Treaty, he submitted that the judge was correct to conclude that factual matrix in the present appeal was significantly to that referred to in the of S and G. Looking at the chronology of events, the sponsor decided to work in Ireland before his mother joined him. Furthermore, the sponsor returned to his principal residence to work in the country of which he was a national. Thus, it could not be demonstrated that the refusal to grant a right of residence to his mother had the effect of discouraging him from exercising his rights under Article 45 of the TFEU. He submitted that while the judge dispensed with the argument in a short paragraph (paragraph 51), the conclusion reached was open to him.

28. At the conclusion of the hearing I reserved my decision.

Discussion:

29. The core issue in this case is correct interpretation of Regulation 9 of the 2016 Regulations which provides as follows: -

'9.— (2) The conditions are that—

(a) BC—

(i) is residing in an EEA State as a worker, self-employed person, self-sufficient person or a student, or so resided immediately before returning to the United Kingdom; or

(ii) has acquired the right of permanent residence in an EEA State;

(b) F and BC resided together in the EEA State; and

(c) F and BC's residence in the EEA State was genuine.

(3) Factors relevant to whether residence in the EEA State is or was genuine include—

(a) whether the centre of BC's life transferred to the EEA State;

(b) the length of F and BC's joint residence in the EEA State;

(c) the nature and quality of the F and BC's accommodation in the EEA State, and whether it is or was BC's principal residence;

(d) the degree of F and BC's integration in the EEA State;

(e) whether F's first lawful residence in the EU with BC was in the EEA State.

(4) This Regulation does not apply—

(a) where the purpose of the residence in the EEA State was as a means for circumventing any immigration laws applying to non-EEA nationals to which F would otherwise be subject (such as any applicable requirement under the 1971 Act to have leave to enter or remain in the United Kingdom); or

(b) to a person who is only eligible to be treated as a family member as a result of Regulation 7(3) (extended family members treated as family members)."

30. The origin of rights for family members of British Citizens on re-entry to the United Kingdom having exercised treaty rights in another Member State comes not from Directive 2004/38/EC but from the case of C-370/90, Surinder Singh.

31. The Court of Justice said this: -

> "19 A national of a Member State might be deterred from leaving his country of origin in order to pursue an activity as an employed or self-employed person as envisaged by the Treaty in the territory of another Member State if, on returning to the Member State of which he is a national in order to pursue an activity there as an employed or self-employed person, the conditions of his entry and residence were not at least equivalent to those which he would enjoy under the Treaty or secondary law in the territory of another Member State.
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> 20 He would in particular be deterred from so doing if his spouse and children were not also permitted to enter and reside in the territory of his Member State of origin under conditions at least equivalent to those granted them by Community law in the territory of another Member State.
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> 21 It follows that a national of a Member State who has gone to another Member State in order to work there as an employed person pursuant to Article 48 of the Treaty and returns to establish himself in order to pursue an activity as a self-employed person in the territory of the Member State of which he is a national has the right, under Article 52 of the Treaty, to be accompanied in the territory of the latter State by his spouse, a national of a non-member country, under the same conditions as are laid down by Regulation No 1612/68, Directive 68/360 or Directive 73/148, cited above.
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> 22 Admittedly, as the United Kingdom submits, a national of a Member State enters and resides in the territory of that State by virtue of the rights attendant upon his nationality and not by virtue of those conferred on him by Community law. In particular, as is provided, moreover, by Article 3 of the Fourth Protocol to the European Convention on Human Rights, a State may not expel one of its own nationals or deny him entry to its territory.
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> 23 However, this case is concerned not with a right under national law but with the rights of movement and establishment granted to a Community national by Articles 48 and 52 of the Treaty. These rights cannot be fully effective if such a person may be deterred from exercising them by obstacles raised in his or her country of origin to the entry and residence of his or her spouse. Accordingly, when a Community national who has availed himself or herself of those rights returns to his or her country of origin, his or her spouse must enjoy at least the same rights of entry and residence as would be granted to him or her under Community law if his or her spouse chose to enter and reside in another Member State. Nevertheless, Articles 48 and 52 of the Treaty do not prevent Member States from applying to foreign spouses of their own nationals' rules on entry and residence more favourable than those provided for by Community law.
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> 24 As regards the risk of fraud referred to by the United Kingdom, it is sufficient to note that, as the Court has consistently held (see in particular the judgments in Case 115/78 Knoors v Secretary of State for Economic Affairs [1979] ECR 399, paragraph 25, and Case C-61/89 Bouchoucha [1990] ECR I-3551, paragraph 14), the facilities created by the Treaty cannot have the effect of allowing the persons who benefit from them to evade the application of national

> legislation and of prohibiting Member States from taking the measures necessary to prevent such abuse."

32. I have been referred to the decision of O and B v Minister voor Immigratie, Intergratie en Asiel [2014] QB 1163 by Mr Symes.

33. The general conclusion of the Court in O and B is as follows:

> "Article 21(1) TFEU must be interpreted as meaning that where a Union citizen has created or strengthened a family life with a third-country national during genuine residence, pursuant to and in conformity with the conditions set out in Article 7(1) and (2) and Article 16(1) and (2) of Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC, in a Member State other than that of which he is a national, the provisions of that directive apply by analogy where that Union citizen returns, with the family member in question, to his Member State of origin. Therefore, the conditions for granting a derived right of residence to a third-country national who is a family member of that Union citizen, in the latter's Member State of origin, should not, in principle, be more strict than those provided for by that directive for the grant of a derived right of residence to a third-country national who is a family member of a Union citizen who has exercised his right of freedom of movement by becoming established in a Member State other than the Member State of which he is a national."

34. In Surinder Singh, the European Court of Justice confirmed that the rights for family members did not include situations of an abuse of rights, stating in paragraph 24 as follows:

> "As regards the risk of fraud referred to by the United Kingdom, it is sufficient to note that, as the Court has consistently held (see in particular the judgements in Case 155/78 Knoors v Secretary of State for Economic Affairs [1979] ECR 399, paragraph 25, and Case C-61/89 Bouchoucha [1990] ECR I-3551, paragraph 14), the facilities created by the Treaty cannot have the effect of allowing the persons who benefit from them to evade the application of national legislation and of prohibiting Member States from taking the measures necessary to prevent such abuse."

35. Similarly, the Court stated in O and B in paragraph 22:

> "It should be added that the scope of Union law cannot be extended to cover abuses (see, to that effect, C-110/99 Emsland-Starke [2000] ECR I-11569, paragraph 51, and Case C-303/08 Bozkurt [2010] ECR I-13445, paragraph 47). Proof of such an abuse requires, first, a combination of objective circumstances in which, despite formal observance of the conditions laid down by the European Union rules, the purpose of those rules has not been achieved, and, secondly, a subjective element consisting in the intention to obtain an advantage from the European Union rules by artificially creating the conditions laid down for obtaining it (Case C-364/10) Hungary v Slovakia [2012] ECR, paragraph 58).

36. Therefore, in order to qualify under Regulation 9, an applicant and his or her family member (or durable partner, following Banger) must have resided in another member state; and secondly, that residence must have been genuine. The approach of the CJEU is whether the EU national would be discouraged from leaving his state of nationality to exercise his right of residence under the Treaty owing to an uncertainty over whether he can continue a family life which has been created or strengthened during a genuine residence.

37. The FtTJ was satisfied that the sponsor had genuinely resided in Ireland as an employee (see paragraph 41) and thus judge was therefore required to consider whether the parties had genuinely established themselves in Ireland.

38. In his analysis, the FtTJ did not accept that the centre of the sponsor's life transferred to the EEA State for the reasons set out at paragraph 42 – 50. However, I accept the submission made by Mr Symes that when considering the evidence which had been advanced to demonstrate a genuine establishment of residence, that the FtTJ did not engage with all of that evidence. In particular, there was evidence from the Appellant as to her level of integration in Ireland. Her witness statement made reference to attending English lessons, taking part in community activities and making friendships in the EEA State. That did not form part of the assessment.

39. The judge did make reference to letters exhibited in the bundle at paragraph 45 of the decision but considered that the letters did not come from people who habitually resided in Ireland. However, he did not consider the evidence of the parties in the context of the nature of the family life in which it was asserted that family life was not only created in the EEA State but was also strengthened. There was evidence before the Tribunal which refers to support given to the sponsor's wife (see page 28 of the bundle). This was arguably relevant to the circumstances of the genuineness of the residence in Ireland. The nature of the evidence purported to demonstrate the effect on the sponsor's wife who stayed alone in United Kingdom and to support the genuineness of the move made to Ireland.

40. Whilst the judge considered the medical evidence at paragraph 46, the emphasis was on the period prior to December 2015. The judge considered that the referral to hospital that was made in December 2015 was via a private GP and there was no evidence as to what had happened in the months prior to this date. This led to his finding at paragraph 47, that the Appellant did not become involuntarily resident in Ireland because of significant deterioration in her health so that she was unable to travel back to the UK or to India. However, the judge did not consider the evidence which post dated December 2015 as set out in the witness statement at paragraph 9. The evidence recorded that she had been treated with specialised treatment and thereafter, the Appellant's wife and children came to Ireland to assist in her care and stayed for a period of 3 ½ weeks and after discharge from hospital, the sponsor worked from home to care for her. At paragraph 10, there is further reference as to the continuation and/or strengthening of family life in Dublin. Regulation 9(3) requires a quantitative evaluation of the residence and those evidential matters had not been taken into account when undertaking such an assessment and whether it was "genuine".

41. It was also submitted by Mr Symes that the judge focused unduly on the immigration status of the Appellant when assessing whether there was a genuine exercise of treaty rights. He relies upon the most recent decision of the Court of Appeal in The Secretary of State for the Home Department and Christy [2018] EWCA Civ 2378 at paragraphs 35 onwards. In his decision, the judge made reference to the Appellant having originally entered Ireland as a visitor and then obtained permission for a further stay. He also made reference to her applying for a residence card in Ireland relatively soon after her arrival there (see paragraph 46).

42. In my judgement, the Appellant's immigration status is not wholly irrelevant and may, in appropriate cases, be a relevant factor to consider but in the right context. The CJEU did not seek to lay down criteria for assessing what factors should be taken into account in assessing the quality of the residence over and above noting that the initial three-month period permitted by the directive would not be sufficient. The Grand Chamber's decision in O and B, unlike Regulation 9, makes no reference to any "centre of life" test, the nature and quality of accommodation, the question of principal residence and integration. However, the decision of O and B at paragraph 54 stated:

> "Where, during the genuine residence of the union citizen in the host member state, pursuant to and in conformity with the conditions set out in Article 7(1) and (2) of Directive 2004/38, family life is created or strengthened in that member state, the effectiveness of the rights conferred on the union citizens by Article 21(1) TFEU requires that the citizen's family in the host member state may continue on returning to the member state of which he is a national, through the grant of a derived right of residence to the family member who is a third-country national. If no such derived right of residence were granted, that union citizen could be discouraged from leaving the member state of which he is a national in order to exercise his right of residence under Article 21(1) TFEU in another member state because he is uncertain whether he will be able to continue in his member state of origin a family life with his immediate family members which has been created or strengthened in the host member state (see, to that effect, paragraphs 35 and 36)."

43. The motivation of the Appellant and Sponsor for making use of free movement rights is irrelevant. The court determined in Akrich C-109/01:

> "Where the marriage between a national of a member state and a national of a non-member state is genuine, the fact that the spouses install themselves in another member state in order, on their return to the member state of which the former is a national, to obtain the benefit of rights conferred by community law is not relevant to an assessment of their legal situation by the competent authorities of the latter state."

44. In his decision, the judge concluded that the exercise of Treaty Rights was not genuine and was therefore an abuse. However, it does not appear from the analysis of the evidence that he addressed the question of whether this was a case of "legitimate advantage seeking" rather than "an abuse of rights" as set out in the grounds. In this context the immigration status of the Appellant was relevant.

45. Furthermore, it is also not clear as to whether the judge applied the right test -that in order to establish an abuse of rights the action taken must be at least the primary reason for undertaking the changes, which in this case would mean that taking the job in Ireland was not genuine and moving and establishing himself there for the period of one year was also not genuine (see the decision in Sadovska [2017] UKSC 54 and O and B at [58-59].

46. In light of the identified errors, it is not necessary to consider the freestanding grounds relating to Article 45 of the TFEU. In his submissions, Mr Symes set out the factual matrix relied on in respect of Article 45 which was that the sponsor's ability to work in Ireland was assisted by his mother by providing emotional support. However, there were no findings made by the judge concerning this as set out in the earlier part of this decision which was an error when considering whether there was genuine residence and the creation and strengthening of family life.

47. For those reasons I am satisfied that the decision of the First-tier Tribunal involved the making of an error on a point of law and that the decision should be set aside. Due to the nature of the errors of law identified, it will be necessary for a fresh hearing and for findings of fact be made. I have therefore determined that the appeal should be reheard by the FtT in accordance with the practice statement.

48. It is not clear whether any argument was advanced on the basis set out at paragraph 26 of the amended grounds (namely that the test in the EEA Regulations is narrower in scope than the Treaty). However, there is reference to this in the amended grounds of appeal. For the avoidance of doubt, any legal arguments to be advanced before the FtT upon remittal should be fully set out in a skeleton argument and served on the Tribunal and the other party prior to the hearing.

Notice of Decision

The decision of the First-tier Tribunal involved the making of an error on a point of law; the decision is set aside and is remitted for a fresh hearing before the First-tier Tribunal on a date to be fixed and in accordance with the direction given.

No anonymity direction is made.

Signed: Upper Tribunal Judge Reeds Date: 28/2/19

Upper Tribunal Judge Reeds