Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: EA/02915/2017

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 24 September 2018	**On 2 October 2018**

Before

UPPER TRIBUNAL JUDGE McWILLIAM

Between

SYED ASIM HUSSAIN
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: In person
For the Respondent: Mr D Mills, Senior HOPO of the Specialist Appeals Team

DECISION AND REASONS

1. The Appellant is a citizen of Pakistan. His date of birth is 1 July 1985. He made an application for a residence card as confirmation of a right of residence as the family member of a British citizen who is previously working in another member state under Regulation 9 of the Immigration (European Economic Area) Regulations 2016 (the "EEA Regulations"). His application was refused by the Secretary of State on 28 February 2017. The Appellant appealed against the decision. His appeal was dismissed by First-tier Tribunal Judge N J Bennett in a decision that was promulgated on

7 June 2018, following a hearing at Hatton Cross on 11 May 2018. The Appellant was granted permission to appeal against that decision by First-tier Tribunal Judge P J M Hollingworth of 1 August 2018. Thus, the matter came before me on 24 September to decide whether the Judge NJ Bennett had erred.

2. The Appellant came to the UK as a visitor on 5 February 2013. Before the expiry of his leave he made an application for leave to remain on human rights grounds. This was refused on 27 August 2013. On 18 July 2016, he made an application for a residence card as a dependant on his father, a British citizen (the "Sponsor"). The Respondent refused his application.

The decision of the FtT

3. The judge heard evidence from the Appellant and the Sponsor. The judge found that it was probable that the Sponsor moved to Ireland in or about February 2015 and that he lived there until June 2016. He found that the Sponsor had a job there for part of this time and that the Appellant probably lived with the Sponsor in Ireland between March 2015 and June 2016. He took into account the evidence which showed that the Sponsor had opened a bank account into which his salary was paid until October 2015. It was the Sponsor's evidence that he then became self-employed registering a business as a Koran teacher on 27 January 2016 and the judge found varying amounts were paid into his bank account which would relate to the business between 12 February 2016 and 13 May 2016.

4. The judge went on to consider whether residence in Ireland was genuine. He engaged with the submission made by the Appellant's representative at the hearing, Mrs Ali based on *O v Minister Vorr Immigratis C-456/12* and the opinion of the Advocate General. It was argued that the centre of the Sponsor and the Appellant's lives moved to Ireland between May 2015 and June 2016. After setting out the ruling of the Advocate General at paragraph 53, the judge made the following findings at paragraphs 54, 55, 56, 57, 58, 59, 60:

> "54. **O** therefore establishes that the residence must be genuine and does not advance matters further. In my view, residence for a period of about 16 months cannot be said to be residence for a particularly long period and, depending on the explanation, may be an indication that the residence was not genuine. In my view, there are a number of other factors which, taken together, lead to the conclusion that the Appellant's residence in Ireland with the Sponsor was probably not genuine and that the purpose of the residence was probably to circumvent the Immigration Rules.
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> 55. First, the Sponsor and the Appellant moved to Ireland after the Appellant had made three unsuccessful applications for leave to remain in the United Kingdom in circumstances where he all too clearly had no wish to return to Pakistan. RB1 shows that the application made in 2013 was made with the assistance of solicitors, Malik Law Chambers. It is not therefore unreasonable

to conclude that the Appellant was probably advised about the very stringent requirements that must be met by an adult child seeking leave to remain under the Immigration Rules. This consideration does not, of itself, establish that the residence in Ireland was probably not genuine because it is also consistent with the Appellant and the Sponsor deciding that, having failed in the United Kingdom, they had no option but to move to Ireland permanently but it is the background against which the move must be viewed.

56. Second, the Sponsor's plans about the move were vague and the evidence was not consistent. The Sponsor told me that they moved to Ireland so that they could establish a business but he was unable to tell me what type of business they proposed to open. The Sponsor also told me that they were unable to establish a business because they subsequently discovered that the Appellant was unable to work in Ireland, even after he obtained his Irish residence card (AB57). This explanation lacks credibility. I am unable to see any such restriction on the Appellant's residence card. I was not referred to any provision of Irish law which prevents a family member of a Union citizen from engaging in business. The Appellant did not mention any plan to open a business or any difficulties with his residence card but told me that he obtained employment for a week with a takeaway restaurant, which was not satisfactory because it was too far from his home, and that he was unable to obtain other suitable employment.

57. Third, the Appellant and the Sponsor say that they returned to the United Kingdom partly because of the Sponsor's health but the evidence about this did not fit with this explanation when it was explored in detail. The evidence was that the Sponsor was given a stent in 2008, that the Sponsor had another operation in 2012, when he was found to be unsuitable for another stent, and that the Sponsor retired early in 2015 for health reasons. There is no medical evidence showing that the Sponsor's health deteriorated while he was in Ireland or that anything occurred while he was there which necessitated medical treatment immediately after he returned here. They both said that the Sponsor did not have any treatment from any medical practitioner in Ireland. It is difficult to see why, if the Sponsor was in poor health in Ireland, the Sponsor would have rented a house about three months before he returned here from which it was difficult to use the health facilities.

58. Fourth, they also say that they returned here because of the Appellant's brother's problems with his back but, once again, the evidence about this did not fit with this explanation. The evidence was that his brother had an operation in 2012 and that his brother gradually improved after this so that he could walk and drive. The Appellant originally said that his brother gradually got better after the operation and that his brother suddenly started to suffer from chronic pain in February 2017, which resulted in his brother being hospitalised for three and a half months. He only said that his brother's condition was worsening when they came back in 2016 after being asked whether his

brother's condition was worsening when they came back. As this was plainly a leading question, I place little weight on this reply. It is also very difficult to understand why they returned to Bradford if they came back because of the Appellant's brother's health because the Appellant's brother lived in Hounslow at the time. There is no medical evidence to support the Sponsor's explanation that he was well enough to travel between Bradford and Hounslow but not well enough to travel between Ireland and Hounslow. There is also no medical evidence showing that the Appellant's brother's health deteriorated significantly while the Appellant and the Sponsor lived in Ireland.

59. Fifth, the Sponsor's intention to settle in Ireland is called into serious question by the fact that he never told his GP in England that he had moved to Ireland and by the fact that he continued to receive medication from England while he was in Ireland. There is also very little evidence that they integrated themselves into the community in Ireland beyond the work that the Sponsor did as an employed person and as a self-employed person.

60. In such circumstances, I am not satisfied that I was probably given a truthful account of why the Appellant and the Sponsor moved to Ireland or why they returned to this country. I am also not satisfied that their residence in Ireland was probably genuine residence. There is no evidence that they moved to Ireland knowing that it would be far easier for the Appellant to settle here under the EEA Regulations than under the Immigration Rules but I am driven to the conclusion that they had probably discovered this before they moved because I cannot conceive of any other sensible reason for what they did. I am therefore satisfied that they probably moved to Ireland to enable the Appellant to apply under the EEA Regulations and thereby circumvent the immigration law and the Immigration Rules."

The grounds of appeal

5. The grounds of appeal claim that the judge did not give weight to the evidence provided by the Appellant and his Sponsor. It is asserted in the grounds that the Sponsor returned back to the UK "solely due to the fact that his other son was critically ill who later died. The judge wrongly assumed that the Sponsor returned back due to his own ill health. Therefore, the appeal ought to be reconsidered". I gave the Appellant the opportunity to comment further on the grounds. He stated that there was no-one to take care of his brother in the UK and that his back pain started again in 2016. He said that maybe they had overlooked the issue in their witness statements. I asked the Appellant what he and the Sponsor told the Tribunal in relation to his brother. He said that they described the condition of his brother and that it was getting worse.

6. Mr Mills submitted that the judgement of the Grand Chamber in O and B v The Netherlands [2014] Case C-456/12 were in his view expressing the same test as that in Regulation 9; however, differently it was worded. The issue is genuine residence. The judge was entitled on the evidence before

him to conclude that residence was not genuine. Neither the Appellant nor the Sponsor referred to the brother's health in their witness statements. There was no mention of it in the skeleton argument. It was an issue raised in oral evidence and the judge engaged with the evidence and made lawful and sustainable findings.

Conclusions

7. There is no error of law. The judge made findings on the evidence before him. The Appellant's brother's health was not an issue that was raised in the Appellant or Sponsor's witness statements. It was not raised in the Appellant's skeleton argument relied on by his representative Mrs Ali at the hearing before the judge. I accept that it was an issue that was raised at the hearing in oral evidence; however, I conclude that the judge made lawful and sustainable findings. The grounds misrepresent the way that the appeal was advanced and argued before Judge Lawrence.

8. The Appellant was unrepresented. The grounds do not challenge the judge's decision as to the legality of the Regulation and any issue involving tension between *O and B* and the 2016 Regulations. However, I raised the issue of Regulation 9 and compatibility with what the court said in *O and B* and Article 21(1) of the Treaty on the Functioning of the European Union (TFEU). The judge did not make reference to the decision of the Grand Chamber. The Grand Chamber's decision 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. It could be argued that Regulation 9 is more restrictive than the Directive to which it is intended to give force and certainly more restrictive than the judgment of the court in *O and B*. I agree with Mr Mills, who submitted that Regulation 9 and *O and B* are both in effect concerned with the genuineness of the residence in the host member state. In *O and B* at paragraph 54, the court 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)."

9. It was not the intention of the court in *O and B* to extend union law to cover abuses. I considered whether the judge dealt only with the terms of

Regulation 9 to the exclusion of issues raised in *O and B*. I have considered whether the judge's analysis of Regulation 9 is consistent with *O and B.*

10. 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."

11. On a proper reading of Judge Lawrence's decision, I find that the judge has concluded that notwithstanding formal observance of the Rules the Appellant and the Sponsor never genuinely intended to remain permanently in Ireland. The judge was entitled to attach weight to the unsatisfactory evidence given about the reasons why the Appellant and the Sponsor returned to England. The judge's core findings are in effect that the Appellant and the Sponsor have not told the truth about the reasons for their return from Ireland to the United Kingdom.

12. The decision of the judge to dismiss the appeal was lawful and sustainable and the decision to dismiss the Appellant's appeal under the 2016 Regulations is maintained.

Signed Joanna McWilliam Date 27 September 2018

Upper Tribunal Judge McWilliam