Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: EA/05957/2017**

THE IMMIGRATION ACTS

Heard at Bradford	**Decision and Reasons promulgated**
on 11 April 2018	**on 16 April 2018**

Before

UPPER TRIBUNAL JUDGE HANSON

Between

AMMINI ST. AUGUSTINE ANDERSON
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr Q Ghafoor of Ghafoor Immigration Services.
For the Respondent: Mrs Petterson Senior Home Office Presenting Officer.

ERROR OF LAW FINDING AND REASONS

1. The appellant appeals with permission against a decision of First-tier Tribunal Judge Manchester, promulgated on 5 October 2017 following a hearing at North Shields, in which the Judge dismissed the appellant's appeal against the refusal of the respondent to issue a Residence Card in recognition of a right to reside in the United Kingdom as a family member.

Background

2. The appellant is a Jamaican national born on 24 January 1988. The reasons for refusal are dated 13 June 2017 in which it was found, when considering regulation 9 of the Immigration (EEA) Regulations 2016, that the appellant had not provided

adequate evidence to support his application to show he is the direct family member of a British citizen who was exercising treaty rights in another EU member state. The decision-maker was not satisfied the appellant had provided adequate evidence to show that his residence in Ireland with the British citizen sponsor was genuine as he had not demonstrated that the centre of the British citizen's life transferred to Ireland. He had resided with the British citizen sponsor in Ireland for a total period of only five months and the accommodation in Ireland was only on a temporary basis. It was suspected that the appellant's first lawful residence with the sponsor was in Ireland rather than the UK in order to circumvent immigration law. The decision-maker then sets out reasoning in support of these conclusions.

3. The Judge having considered the evidence sets out findings of fact from [37] of the decision under challenge which may be summarised in the following terms:

    a. The success or otherwise of the appeal primarily depends on the question of whether the appellant can establish on the balance of probabilities that the conditions set out in regulation 9(2) of the 2016 Regulations are satisfied [38].

    b. The conditions require the appellant to establish (a) that his spouse is (i) 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) he and his spouse resided together in the EEA state; and (c) their residence in the EEA State was genuine. The Judge noted the issue in the case was whether the appellant has established that regulation 9(2)(c) was met in relation to the residence in the Republic of Ireland [39].

    c. Regulation 9(3) sets out the factors relevant to whether residence in an EEA state is or was genuine [40]. Regulation 9(4) states the regulations do not apply where the purpose of residence was as a means to circumvent in any immigration laws applying to the non-EEA national to which the appellant would otherwise be subject [41].

    d. The Judge considered the background history of the application [42]. The Judge noted the appellant applied to enter the Republic of Ireland, where his wife and children had moved, on 22 July 2014. The appellant entered the Republic of Ireland on 23 July 2014 with a Visa granting leave until 23 November 2014 but later extended to 7 April 2015 [43].

    e. The Judge found there was no evidence of any prior connection the appellant or his spouse had to the Republic of Ireland and the appellant did not explain why his spouse could not have worked in the UK on a self-employed basis as she did in the Republic of Ireland, together with other concerns [44].

    f. The Judge expresses concern about the claim there was an alleged prearranged interview for the appellant's wife with an organisation in Ireland [45] leading to a finding it was more likely that the move to the

Republic of Ireland was motivated not by employment or economic prospects but the fact it was a way by which the family could be reunited which would not be possible if the spouse and children remained in the UK. The Judge noted the fact residence in the Republic of Ireland only lasted for some five months was a relevant factor [46].

g. The Judge noted evidence regarding schooling of the eldest and middle child in the Republic of Ireland and other documents; but concluded if that material was provided as cogent evidence of integration in the Republic of Ireland and the transfer of the centre of life it was surprising it was of such short duration [47].

h. There was no attempt to provide specific details of corroborative evidence of the claim the family were victims of racial discrimination and micro-aggression which was found to be inconsistent with the evidence produced to show the integration of the family. The Judge noted that if the spouse had transferred the centre of her life to the Republic of Ireland no attempt was made to move elsewhere if conditions that they experienced were unacceptable in that part of Donegal [48].

i. The Judge found contradictory evidence having been put forward in relation to the manner in which residence in the Republic of Ireland came to an end. The appellant claimed his spouse came to the UK on 26 December 2014 and that he followed shortly thereafter for a visit to see his spouse's mother which was said to be not consistent with the family having to re-transfer the centre of life back to the UK because of racial discrimination [49].

j. The Judge found the stated intention to be totally inconsistent with the further evidence of the appellant that they had sold some of their furniture and belongings and given the rest away before coming over, together with the fact that other items have been moved to the UK [50].

k. The Judge concludes it is not just the shortness of the appellant and his spouses stay in the Republic of Ireland that was concerning but also the circumstances surrounding it and ending of it that raise serious concerns about the genuineness of their residence including whether the centre of the spouse's life was transferred there [51].

l. The Judge also noted, when considering the regulation 9(3) factors that the accommodation in the Republic of Ireland was of a six-month residential tenancy which they were allegedly asked to quit a few weeks later before the tenancy period had ended to be replaced by tenancy of a property which the appellant alleged was unsuitable and mouldy [52].

m. Considering the evidence in the round, the Judge concludes that the appellant failed to establish that he and his spouse's residence in the Republic of Ireland was genuine and that he had not established that the conditions set out in regulation 9(2) had been met or that he was entitled to the issue of the Residence Card.

4. The appellant sought permission to appeal asserting primarily that the motivation for making use of free movement rights was irrelevant where a person had done so specifically to make use of such rights and that the circumvention test applied by the Judge was clearly and directly contrary to EU law.

5. Permission to appeal was granted by another judge of the First-tier Tribunal, the operative part of the grant being in the following terms:

> "The grounds allege that the Judge failed to have proper regard to EU Directives and established principles of EU law, in particular, Article 21(1) TFEU; Directive 2004/38; O and B v The Netherlands (12 March 2014); Metock (C-127/08); Akrich (C-109/01) and Emsland-Starke (C-110/99). I have carefully considered the Judges decision which contains a careful consideration of the evidence and findings by reference to UK caselaw (Surinder Singh) and Regulations. The appellant's representative maintains that this approach led to a different outcome to that which may have been reached had EU provisions and caselaw been applied. I find that there is an arguable error in the decision. Permission to appeal is granted."

Error of law

6. The right of entry to an EEA nationals home country of third country family members from another EU state is now included at regulation 9 of the 2016 EEA Regulations, as identified by the Judge.

7. In the earlier decision of *Minitsre Voor Vreemdelingenzaken v Eind ECJ (Case C 291/05)*, the Court found that a third country national family member of an EU citizen was not entitled to a residence permit in the home country of that citizen just because she had had one in another Member State where she had lived with the citizen: but was entitled to live with the citizen in his home country where she was travelling from another Member State where she had lived with the citizen and where the citizen had been gainfully employed. The ECHR (Grand Chamber) ruled that (i) In the event of a Community worker returning to the Member State of which he is a national, Community law does not require the authorities of that State to grant a right of entry and residence to a third-country national who is a member of that worker's family because of the mere fact that, in the host Member State where that worker was gainfully employed, that third-country national held a valid residence permit issued on the basis of Article 10 of Regulation (EEC) No 1612/68; but (ii) When a worker returns to the Member State of which he is a national, after being gainfully employed in another Member State, a third-country national who is a member of his family has a right under Article 10(1)(a) of Regulation No 1612/68 as amended by Regulation No 2434/92, which applies by analogy, to reside in the Member State of which the worker is a national, even where that worker does not carry on any effective and genuine economic activities. The fact that a third-country national who is a member of a Community worker's family did not, before residing in the Member State where the worker was employed, have a right under national law to reside in the Member State of which the worker is a national has no bearing on the determination of that national's right to reside in the latter State.

8. Regulation 9 of the 2016 Regulations provides:

Family members of British citizens

9.— (1) If the conditions in paragraph (2) are satisfied, these Regulations apply to a person who is the family member ("F") of a British citizen ("BC") as though the BC were an EEA national.

(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).

(5) Where these Regulations apply to F, BC is to be treated as holding a valid passport issued by an EEA State for the purposes of the application of these Regulations to F.

(6) In paragraph (2)(a)(ii), BC is only to be treated as having acquired the right of permanent residence in the EEA State if such residence would have led to the acquisition of that right under regulation 15, had it taken place in the United Kingdom.

(7) For the purposes of determining whether, when treating the BC as an EEA national under these Regulations in accordance with paragraph (1), BC would be a qualified person—

(a) any requirement to have comprehensive sickness insurance cover in the United Kingdom still applies, save that it does not require the cover to extend to BC;

(b) in assessing whether BC can continue to be treated as a worker under regulation 6(2)(b) or (c), BC is not required to satisfy condition A;

(c) in assessing whether BC can be treated as a jobseeker as defined in regulation 6(1), BC is not required to satisfy conditions A and, where it would otherwise be relevant, condition C.

9. The Judge refers to the decision in *Surinder Singh* which was decided by the Court of Justice of the European Union (CJEU) on 7 July 1992. The CJEU, in answering the question referred to it by the High Court for a preliminary ruling, found:

> "Article 52 of the Treaty and Council Directive 73/148/EEC of 21 May 1973 on the abolition of restrictions on movement and residence within the Community for nationals of Member States with regard to establishment and the provision of services, properly construed, require a Member State to grant leave to enter and reside in its territory to the spouse, of whatever nationality, of a national of that State who has gone, with that spouse, to another Member State in order to work there as an employed person as envisaged by Article 48 of the Treaty and returns to establish himself or herself as envisaged by Article 52 of the Treaty in the State of which he or she is a national. A spouse must enjoy at least the same rights as would be granted to him or her under Community law if his or her spouse entered and resided in another Member State."

10. The judgment enabled EU citizens to rely upon principles of EU law to enable family members to live with them in their home state, rather than in another Member State. The Court recognised that the movement of family members was particularly important for ensuring that Member State nationals are not deterred from exercising free movement rights.

11. In *O and B v The Netherlands (12 March 2014)*, referred to in the Upper Tribunal's grant of permission to appeal, the Court extended the derivative rights for family members upon return to follow the exercise of all Treaty rights in another Member State, rather than just to the family members of migrant workers or self-employed persons. The CJEU in *O and B* found 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 … 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."

12. Article 7 of Directive 2004/38 confers a right of residence for more than three months on Union citizens exercising Treaty rights to work, be self-employed, self-sufficient, or study. This means that UK citizens who have exercised Treaty rights in another Member State for a minimum of three months may be able to rely upon EU law to increase their options to be joined by a third-country national family

member in the UK, where their family life has been 'created or strengthened' within the EEA state.

13. Following *O and B*, the UK national exercising Treaty rights in another Member state before returning home need not necessarily be economically active as they just need to be able to demonstrate a genuine exercise of Treaty rights.

14. Whilst the Judge focuses upon the question of motivation, the CJEU has shown on many occasions that the motivation for a genuine exercise of Treaty rights is irrelevant: where there is a genuine exercise of Treaty rights by a UK national in another EEA state, their family members may be entitled to rely upon the *Surinder Singh* principle following the return of a UK national to the UK.

15. The evidence before the Judge of the EEA national, the UK citizen, exercising treaty rights in the Republic of Ireland included a letter from the Irish Revenue Authorities dated 9 September 2014 confirming registration by the appellant's spouse for tax purposes with effect from 28 August 2014, registration for Value Added Tax with effect from 25 August 2014, a letter from a business in County Donegal dated 25 November 2014 confirming the appellants spouse, the UK/EEA national, has been a customer of that business for several months, a letter from a named individual confirming that she is a customer of the appellants spouse who is a Kleeneze Distributor, documents relating to cost of goods to be provided and deposits received, copy bank statements showing payments made in relation to the business and the payment of utility bills in relation to occupied property, a copy confirmation of processing payment relating to the business, together with invoices issued by Kleeneze Limited detailing items purchased, together with a letter from the organisation dated 3 October 2014 upon the appellant's spouse joining as a distributor. There is also a copy of the UK/EEA national's letter from the company providing a photo identity card in connection with her work. Statements of accounts due to the company by the appellant's spouse are also included in addition to orders and documents relating to ribbons; said to relate to another aspect of the UK/EEA national's business activities.

16. The appellant's representative asserted the Judge's findings with regard to residence and employment were not sustainable.

17. The case law makes it clear that the key issue in appeals of this nature is whether the appellant has demonstrated there has been a genuine exercise of treaty rights by the EEA national.

18. It was accepted at the hearing that the documents before the Judge supported the assertion the UK/EEA national was genuinely exercising treaty rights in the Republic of Ireland as a self-employed person.

19. The period of residence, although the accommodation was temporary by virtue of it being taken as an assured shorthold tenancy, was in excess of the three-month period provided for an initial right to remain in a Member State by an EEA national.

20. It is not disputed that a person demonstrating an ability to satisfy the requirements detailed in *Surinder Singh* and *O and B* is able to make use of an alternative route to entry clearance for family members to join the EEA national within the UK which escapes the requirement to demonstrate the minimum level of earnings or savings required to bring the applicant within the provisions of the Immigration Rules. Even though this may be so, if a person has demonstrated a right to enter under EU law that right cannot be taken away by domestic legislation or other provisions which create a situation incompatible with an individual's EU rights.

21. The starting point in the decision should have been to ascertain whether the appellant had demonstrated a genuine exercise of Treaty rights. It was accepted by the advocates that the evidence before the Judge supported a finding in the appellant's favour on this point.

22. Whilst the Judge analyses specific provisions of regulation 9 it is clear that the key question was not properly analysed and the finding at [46] that it was found more likely that the move to the Republic of Ireland was motivated not by employment or economic prospects but by the fact that it was a way which the family could be reunited which would have been unlikely to be possible if the appellant and spouse and children have remained in the United Kingdom, fails to properly analyse the evidence before the Judge and related EU case law.

23. It is accepted the Judge refers to *Surinder Singh* and *O and B* but does not arguably consider the impact of those decisions and the impact of European law upon the merits of this appeal.

24. I find the Judge has erred in law in the manner made out in the application for permission to appeal and grant of permission to appeal to the Upper Tribunal. I set the decision of the First-tier Tribunal Judge aside.

Discussion

25. The Upper Tribunal is in a position to remake the decision as no further evidence is required. In light of the evidence establishing the UK/EEA national, the appellant's spouse, was exercising treaty rights as a self-employed person in the Republic of Ireland and in light of the fact the evidence relating to accommodation and the family's ties to Donegal where they lived follow from the UK/EEA national's move to Ireland to exercise such treaty rights, I find the appellant has discharged the burden of proof upon him to the required standard to show he is entitled to the grant of a Residence Card in recognition of a right to reside in the United Kingdom as a family member of his spouse.

26. I therefore substitute a decision allowing the appeal.

Decision

27. **The First-tier Tribunal Judge materially erred in law. I set aside the decision of the original Judge. I remake the decision as follows. This appeal is allowed.**

Anonymity.

The First-tier Tribunal did not make an order pursuant to rule 45(4)(i) of the Asylum and Immigration Tribunal (Procedure) Rules 2005.

I make no such order pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008.

Signed…….
Upper Tribunal Judge Hanson

Dated the 11 April 2018