



Upper Tribunal  
(Immigration and Asylum Chamber)

Appeal Number: EA/11471/2016

THE IMMIGRATION ACTS

Heard at Bradford  
On 11 June 2018

Decision & Reasons Promulgated  
On 12 July 2018

Before

UPPER TRIBUNAL JUDGE LANE

Between

NOSHEEN ZAHID  
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr Ghafoor, Ghafoors Immigration Service  
For the Respondent: Mr Mills, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellant, Nosheen Zahid, was born on 9 March 1989 and is a female citizen of Pakistan. She is married to Zahid Ayub (hereafter referred to as the sponsor). She applied for a residence card as confirmation of a right to reside in the United Kingdom. Her application was refused by a decision of the respondent dated 21 January 2016. The appellant appealed to the First-tier Tribunal (Judge Frazer) which, in a decision promulgated on 4 October 2017, dismissed the appeal. The appellant now appeals, with permission, to the Upper Tribunal.

2. The appellant and sponsor married in Pakistan on 21 May 2012. The sponsor is a British citizen. He was granted a visa by the Irish authorities from 21 October 2014 to 20 January 2015 and again from 17 February 2015 till 18 August 2015. He moved to Ireland because he claimed that there were better job opportunities in that country. The appellant and sponsor lived in Ireland from 25 November 2014 until 2 April 2015 when they returned to the United Kingdom. The Secretary of State considered that the appellant had failed to satisfy the requirements of Regulation 9 of the 2016 Regulations:

**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.

3. Judge Frazer made a number of findings. The appellant and sponsor claimed that they had moved back to the United Kingdom from Ireland because of the sponsor's mother's ill health. It was claimed that the mother was suffering from breast cancer. Judge Frazer examined the medical records of the sponsor's mother but was unable to conclude from that evidence that "the appellant and sponsor returned to the United Kingdom in order for the appellant to look after his mother subsequent to any illness that she was suffering from." The judge found that the couple did not intend to transfer the centre of their lives to Ireland from the United Kingdom. He noted that the sponsor was working in the United Kingdom but did not earn sufficient sums to enable him to bring the appellant to the United Kingdom. The judge found that the couple had used their residence in Ireland in order to circumvent the Immigration Rules. At [23] the judge concluded:-

*In the circumstances we do not find that there is sufficient evidence to indicate the appellant and sponsor had transferred the centre of their lives to Ireland. I find they were only there temporarily and were not genuinely residing there pursuant to Regulation 9 of the EEA Regulations. The appeal is therefore dismissed.*

4. This appeal to the Upper Tribunal focuses on the familiar tension between the decision in *O and B v The Netherlands* [2014] Case C-456/12 and Regulation 9. The appellant argues that Regulation 9 goes beyond what is required to give effect to Article 21(1) of the treaty on the functioning of the European Union (TFEU):

1. Every citizen of the Union shall have the right to move and reside freely within the territory of the Member States, subject to the limitations and conditions laid down in the Treaties and by the measures adopted to give them effect.

2. If action by the Union should prove necessary to attain this objective and the Treaties have not provided the necessary powers, the European Parliament and the Council, acting in accordance with the ordinary legislative procedure, may adopt provisions with a view to facilitating the exercise of the rights referred to in paragraph 1.

3. For the same purposes as those referred to in paragraph 1 and if the Treaties have not provided the necessary powers, the Council, acting in accordance with a special legislative procedure, may adopt measures concerning social security or social protection. The Council shall act unanimously after consulting the European Parliament.

5. 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. It may be arguable 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*.
6. Mr Mills, who appeared for the Secretary of State, 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 the instant case Ireland. I agree. In *O and B* at [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 citizen by Article 21(1) TFEU requires that the citizen's family life in the host Member State may continue on returning to the Member of 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, *Eind*, paragraphs 35 and 36, and *Iida*, paragraph 70).

7. It was not the intention of the court in *O and B* to extend Union law to cover abuses:

It should be added that the scope of Union law cannot be extended to cover abuses (see, to that effect, Case C-110/99 *Emsland-Stärke* [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).

8. Mr Mills has deftly side-stepped the question as to whether the Regulation is compatible with Article 21 and consistent with the judgment in *O and B*. The question in the instant appeal is whether Judge Frazer has dealt only with the terms of Regulation 9 to the exclusion of the issues raised in *O and B*. If he has, it may be necessary for the Tribunal to consider whether the Regulation is, as the appellant submits, more restrictive than Article 21 as interpreted by the court in *O and B*. If, on the other hand, Judge Frazer's analysis (whatever it may say in respect of Regulation 9) is consistent with *O and B* then I do not consider that the Upper Tribunal will need to interfere with the First-tier Tribunal's decision.

9. In determining whether Judge Frazer has addressed the question of "genuineness" correctly, it is important to note that 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 installed 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.

10. The genuine nature of the marriage between the appellant and sponsor is not in doubt. However, on my reading of Judge Frazer's decision, I find that the judge has concluded that, notwithstanding formal observance of the Rules, the appellant and sponsor never genuinely intended to remain permanently in Ireland and that, although they were resident for a period of three months in that country, they intended only to gain an advantage by artificially creating the conditions for exercising free-movement rights. The appellant and sponsor have resided in Ireland for more than three months, the minimum period in which "genuine residence may be established under the Regulations; however, residing for that minimum period does not in itself render the residence genuine. Putting to one side the judge's findings about integration, his core findings (in effect, that the appellant and sponsor have not told the truth about the reasons for their return from Ireland to the United Kingdom) and his finding at [23] that the couple was "not genuinely residing [in Ireland]" is applicable equally to Regulation 9 as it is to an application of the principles of *O and B*.

11. Finally, I note that the grounds of appeal to the Upper Tribunal do not challenge the judge's findings insofar as they apply to Regulation 9. The challenge to the judge's decision is to the legality of the Regulation itself as considered in the light of *O and B*. I have not sought to resolve any tension between *O and B* and the 2016 Regulations but, in my opinion, Judge Frazer's decision, that the residence in Ireland was not genuine, is sound and renders any further analysis unnecessary.

**Notice of Decision**

12. This appeal is dismissed.
13. No anonymity direction is made.

Signed

Date 1 JULY 2018

Upper Tribunal Judge Lane

**TO THE RESPONDENT**  
**FEE AWARD**

I have dismissed the appeal and therefore there can be no fee award.

Signed

Date 1 JULY 2018

Upper Tribunal Judge Lane