



**Upper Tribunal
(Immigration and Asylum Chamber)**

Appeal Number: EA/00704/2019

THE IMMIGRATION ACTS

**Heard at Manchester CJC
On 16 August 2019**

**Decision & Reasons Promulgated
On 30 August 2019**

Before

UPPER TRIBUNAL JUDGE PLIMMER

Between

KAWSAR SULAIMAN

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr Holmes, Counsel

For the Respondent: Mr Bates, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellant is a citizen of Iraq who is married to a British citizen ('the sponsor'). The appellant has appealed against a decision of the First-tier Tribunal (FTT) sent on 16 April 2019, in which it dismissed her appeal on EEA grounds.

FTT decision

2. At the beginning of the hearing before the FTT there was an agreement reached regarding the disputed issues. The FTT records that agreement in the following way at [3]:

“The main issue in this case is whether the appellant is entitled to a UK residence card and meets the requirements of paragraph 9 of the Immigration (European Economic Area) Regulations 2016 hereinafter the Regulations. At the outset of the hearing Mr Hogg on behalf of the respondent stated that he was not relying upon Regulation 26 which is misuse of a right to reside. It was agreed that my primary focus should be in relation to Regulation 9. However in considering Regulation 9 I have to take into account the immigration history and background to this case which will inevitably involve some consideration of the alleged fraudulent activity. Those instructing Mr Holmes have written a letter to the Presenting Officers’ Unit setting out further evidence required which in the circumstances it was agreed is not necessary to obtain given the main focus of the appeal.”

3. The FTT then heard evidence from the appellant and the sponsor before setting out its findings. The FTT found that there was no evidence that the centre of the sponsor’s life transferred to Ireland. The FTT then went on to find that it could not be said that when the sponsor was unable to work as a result of illness when he was in Ireland that that was on a temporary basis. The FTT then concluded having taken into account the appellant’s immigration history and the fact that the family moved from Iraq straight to Ireland, in all the circumstances the purpose of the family’s residence in Ireland, was as a means of circumventing any immigration laws applying to non-EEA nationals in relation to leave to enter or remain in the UK - see Regulation 9(4)(a) of the Immigration (EEA) Regulations 2016 (‘the 2016 Regulations’). The FTT dismissed the appeal for those reasons.

Grounds of appeal

4. In comprehensive and carefully drafted grounds of appeal the appellant relied upon six grounds labelled E to F. Ground A asserted that the FTT failed to apply the correct legal test when determining whether or not Treaty rights were exercised in Ireland and referred to the case of Q v Minister Voor Immigratie Case C-456/12. Ground B submitted that in determining that the sponsor could not be said to be temporarily unable to work when in Ireland, the FTT failed to take into account the guidance set out in FMB (EEA Reg 6(2)(a) - ‘temporarily unable to work’) Uganda [2010] UKUT 447 (IAC). Ground C submits that the FTT failed to identify and apply the correct burden of proof in abuse of rights cases. Ground D submits that the FTT failed to apply the correct authorities relating to abuse of rights in particular that of Akrich C-109/01 in which it is said that the motives that a worker may have in seeking employment in another Member

State are of no account, provided that he pursues or wishes to pursue an effective and genuine activity. Ground E submits that there was procedural unfairness at the hearing. It says this:

“19. The appellant respectfully submits that the judge below has erred in going behind the agreed position adopted at the hearing. That the allegations of deception all similar made by the respondent were not relevant to the consideration of the appellant’s case under the Surinder Singh route. It was on this basis that the appellant did not pursue the request for information and evidence set out in a letter to the respondent as recorded in paragraph 3 of the judge’s decision.

20. Having agreed that this was not relevant to the questions to be determined as part of the appeal it is respectfully submitted that it was unfair of the judge to move away from that position without notice as it prevented the appellant from seeking material to challenge those assertions and testing the evidence against it.”

5. Ground F finally submits that the FTT failed to provide adequate reasons for its finding that the appellant and the sponsor were involved in any fraudulent or deception activity.

6. In a decision dated 16 May 2019 FTT Judge Adio granted permission to appeal and made the following observation:

“The judge appears to have considered issues of fraud and dishonesty and it is quite clear that the judge had set out at paragraph 3 of the decision the concession made by the Presenting Officer that there was no reliance upon Regulation 26 which is the misuse of a right to reside. It is therefore arguable that the judge went behind an agreement which had been made at the hearing. There are also arguable grounds put forward with regard to the application of some of the authorities in this area as set out by the representative in the application for grounds to appeal namely the correct legal test and the binding authority on the interpretation of Regulation 6(2). Cumulatively these issues raise arguable errors of law and for those reasons leave to appeal is granted.”

7. The respondent has not provided a Rule 24 notice.

Hearing

8. At the beginning of the hearing I asked Mr Holmes to identify what was contained in the letter referred to at paragraph 19 of his ground E. He clarified that this contained a request for information and evidence regarding the contention in the decision letter that the appellant and her husband had been involved in fraudulent or deceptive activity during the course of the appellant’s immigration history and had been abusive in residing in Ireland.

9. I then turned to Mr Bates and asked him whether there was any reason to go behind the assertions set out within ground E at [19] and

[20] of the grounds of appeal, bearing in mind the absence of any Rule 24 notice. Mr Bates considered the Presenting Officer's minute and confirmed that it appeared that the focus on behalf of the respondent before the FTT was in relation to the exercise of Treaty rights in Ireland and whether or not the husband could be said to have only temporarily ceased work. Mr Bates therefore confirmed that there was no reason to dispute what was set out at paragraph 19. He however submitted that one had to consider whether or not that was a material error because the FTT went on to find at [15] that it was unlikely that the husband could be said to have only been temporarily unable to work when he was unable to work for a period of eighteen months.

10. Mr Bates acknowledged that the FTT said that there was no definition of the word "temporarily" in Regulation 6(2) and that was inconsistent with the definition that the Upper Tribunal have provided in the case of FMB (supra).
11. Having heard from Mr Bates I indicated to the parties that I was satisfied that the FTT had acted procedurally unfairly and there was a material error in relation to the FTT's approach to the sponsor's exercise of Treaty rights in Ireland.

Error of law discussion

12. The FTT appears to have recorded an agreement that the focus of the appeal should be on Regulation 9 of the 2016 Regulations and to have interpreted that as including Regulation 9(4). Regulation 9(4) says this:

"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);

..."
13. There are clear links between Regulation 9(4) and Regulation 26 of the 2016 Regulations, which addresses the misuse of a right to reside. The agreement between the parties appears to have been misinterpreted by the FTT. The parties agreed that that the focus should be on Regulation 9(3), that is whether or not there was a genuine use of Treaty rights in Ireland and whether or not the husband could be said to have been temporarily unable to work or not. In going behind that agreement without given the appellant a clear opportunity to address it, the FTT acted procedurally unfairly. Had the appellant been aware that the FTT remained concerned regarding the appellant's immigration history then her Counsel may

have approached the appeal differently and may have pursued the request that was made in the letter to the Presenting Officer.

14. I agree with Mr Bates that that may not have been a material error if the FTT was entitled to reach the conclusion that the sponsor could not be said to be temporarily unable to work as a result of his illness. However, the FTT erred in law in saying at [15] that there is no definition of the word “temporarily” when the guidance in FMB says this:

“A state of affairs is ‘temporary’ if it is not permanent. Accordingly, for the purposes of Regulation 6(2)(a) of the Immigration (European Economic Area) Regulations 2006, a person whose inability to work as a result of illness or accident is not permanent is temporarily unable to work.”

15. Had the FTT applied that guidance to its factual findings, its decision may well have been different. Although the sponsor was unable to work for eighteen months in Ireland, the FTT noted that on returning to the UK he found work in a pizza business for twenty hours a week.
16. That is sufficient to dispose of the appeal and I need not go on to deal with the remaining grounds of appeal. I have found that there has been procedural unfairness and there is a material error of law in the assessment of the exercise of Treaty rights. The decision will therefore have to be remade entirely.

Disposal

17. As there has been procedural unfairness before the FTT and there will have to be completely new findings of fact, I am satisfied that this is an appropriate case bearing in mind the relevant Practice Direction, to remit to the FTT.

Notice of decision

18. The FTT decision contains a material error of law and is set aside. The decision will be remade by the FTT by a judge other than Judge Taylor.

Signed: *UTJ Plimmer*

Date: 23 August 2019

Upper Tribunal Judge Plimmer