



IAC-AH-KRL-V1

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

Appeal Number: EA/02405/2017

THE IMMIGRATION ACTS

**Heard at Birmingham
On 1 April 2019**

**Decision & Reasons Promulgated
On 15 May 2019**

Before

UPPER TRIBUNAL JUDGE KOPIECZEK

Between

**MRS MUSLIMA SAADAT
(ANONYMITY DIRECTION NOT MADE)**

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr M Ali, Legal Representative

For the Respondent: Mr D Mills, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellant is a citizen of Afghanistan born on 3 November 1993. On 30 June 2016 she made an application for a residence card as confirmation of a right of residence as the spouse of a British citizen exercising Treaty rights in another EEA State, in this case Ireland.
2. That application was refused in a decision dated 21 February 2017, with reference to regulations 9 and 18 of the Immigration (European Economic Area) Regulations 2016

("the EEA Regulations"). The appellant's appeal against that decision came before First-tier Tribunal Judge S C Clarke ("the FtJ") at a hearing on 26 February 2018 following which the appeal was dismissed.

3. Permission to appeal the FtJ's decision was granted on the basis that the FtJ erred in her assessment of the evidence in support of the appeal and had not taken certain evidence into account.
4. The following is a summary of the FtJ's decision.

The FtJ's decision

5. The FtJ summarised the evidence that she had before her, referring to the respondent's decision and the indexed and paginated bundles provided on behalf of the appellant. The sponsor, the appellant's husband, Fahim Ullah Saadat, a British citizen, said in evidence that he and the appellant married on 6 November 2014 in Afghanistan. The sponsor then returned alone to the UK. He visited Ireland on several occasions after his marriage and the appellant made a visa application to enter Ireland which was granted in March 2015. The sponsor subsequently travelled to Afghanistan and he and the appellant entered Ireland on 13 April 2015.
6. The appellant's account continued that he and the appellant lived with friends until August 2015 when they moved to a rented apartment. In August 2015 the sponsor began working for Farham Anwar Tasty Spice in Roscrea in County Tipperary. The FtJ noted at this point that the respondent did not accept that that employment was genuine or effective.
7. The appellant became pregnant and because of complications with the pregnancy they decided to return to the UK to live with friends in Derby so that she could access support from other members of the sponsor's family. They had a child born on 31 October 2015 and they all remained in the UK until January 2016 when they returned to Ireland. The appellant found it difficult to settle in Ireland and so they returned to the UK in March 2016.
8. In her "Conclusions and Findings" the FtJ said at [19] that she found the evidence given by the sponsor to be inconsistent with some of the documentation in the appellant's bundle. Further, she said that she did not find the reasons given by the sponsor as to why he relocated to Ireland to be credible. At [20] the FtJ noted that the appellant had said in her application that her husband had worked 20 hours a week for Tasty Spice in Roscrea from 15 August 2015 to 15 March 2016 but other documents showed that the appellant and sponsor returned to the UK on 10 March 2016. In addition, the sponsor returned to the UK between October 2015 and January 2016.
9. The FtJ concluded that there was no "cogent evidence" before her to confirm that the sponsor was employed as claimed. She said at [21] that there was no letter from the sponsor's employer to confirm the hours worked or pay received, or any documents from the Irish tax authorities. The FtJ thus concluded that she was not satisfied that

the sponsor was exercising Treaty rights as a worker in Ireland immediately before returning to the UK.

10. At [23] she said that documents in the appellant's bundle, including medical letters and a tenancy agreement for an address in Roscrea (apartment 8), confirmed that the appellant and the sponsor lived together at two addresses in Ireland from 13 April "2013" until March 2016 except for between October 2015 and January 2016 when they lived in Derby. She thus concluded that the appellant and the sponsor lived together in Ireland during "this period".
11. She next turned to consider whether the appellant and the sponsor's residence in Ireland was genuine. The FtJ noted the sponsor's oral evidence that he visited Ireland on several occasions prior to the appellant applying for a visa, in order to find out where the best place would be to set up a business. However, she concluded that there was no cogent evidence before her that the sponsor made any enquiries as to setting up a business in Ireland, either before or whilst he was living in Ireland.
12. Next, she referred at [26] to the sponsor's main residence as having been in Derby when he went to Afghanistan to take the appellant to Ireland in April 2015. Although the sponsor said that he had visited Ireland on several occasions before going there in April 2015, he had not secured employment or a property in which he and the appellant could live.
13. In her application the appellant had said that she and the sponsor had lived together at apartment 8 from 13 April 2015 to 10 March 2016 but that information was inconsistent with the sponsor's oral evidence and with the documents in the appellant's bundle. At [28] she referred to documents, including a doctor's registration letter, which confirmed that from April 2015 to August 2015 the appellant and the sponsor lived at [~] in County Cavan. The sponsor had confirmed in evidence that this was a friend's address where he and the appellant lived when they first arrived in Ireland. She further noted that in the appellant's bundle there was a tenancy agreement for apartment 8 which clearly stated that that tenancy commenced on 20 August 2015.
14. At [30] the FtJ noted that their child was born on 31 October 2015 in Derby but the appellant and the sponsor did not return to Ireland until January 2016. During that time they lived at [~ Street] in Derby and on returning to the UK in March 2016 they moved into [~ Street].
15. At [31] the FtJ concluded that having considered all the evidence she found that the centre of the sponsor's life never transferred to Ireland. The accommodations in which the appellant and the sponsor lived in Ireland were both of a temporary nature. She said that within a few weeks of taking the tenancy of apartment 8 in Roscrea, the sponsor and the appellant were living in Derby where they continued to live for a period of over three months and to an address to which they returned in March 2016.

16. She went on to conclude that there was no cogent evidence before her that the sponsor and the appellant made any steps to integrate with the local community in Ireland. They had lived together in Ireland for a period of some eight months but she found that the evidence did not persuade her that there was any intention to live permanently in Ireland.

The Grounds and Submissions

17. The grounds challenging the FtJ's decision assert that the FtJ had failed to refer to any documentation that was alleged to be inconsistent with the sponsor's oral evidence, asserting that the sponsor gave clear and truthful evidence in line with the documentary evidence. It is argued that the FtJ had provided "no justification" as to what part of the sponsor's reasons for relocating to Ireland were not credible.
18. The grounds refer to the sponsor's witness statements at [5]-[7] to the effect that in his opinion there were too many Afghani food places in the UK in comparison to Ireland and that as he had had lots of experience in the food business he believed there was a good possibility of him setting up his own business in Ireland.
19. Furthermore, the sponsor had given very clear reasons for his move to Ireland, including that he had some £44,000 in savings, long experience in the catering business and he had visited Ireland prior to moving.
20. Although the FtJ had said that there was no letter from the sponsor's employer, there was in fact such a letter before the FtJ. In addition, the "appellant" had a residence card issued by the Irish immigration authorities which would only have been issued in circumstances where the appellant could provide proof of employment and exercising Treaty rights.
21. The grounds further argue that the motive for exercising free movement rights was irrelevant so long as the substance of the "Rules" had been complied with. Merely because the couple had found it hard to settle in Ireland was not a reason to doubt that the move was genuine. The decision in *Akrich* [2003] EUECJ C-109/01 is cited. Furthermore, the grounds argue that a period of residence of at least three months was sufficient, relying on the decision in *O v Minister voor Immigratie* [2014] EUECJ C-456/12.
22. In his submissions Mr Ali relied on the grounds. He pointed out that the FtJ had made a mistake at [23] where she said that the appellant and the sponsor had lived together at two addresses in Ireland from 13 April 2013, whereas it should be 13 April 2015.
23. In relation to the employer's letter (from Tasty Spice) and the FtJ having said at [21] that there was no employer's letter, Mr Ali referred to a document at page 14 of a bundle, although Mr Mills suggested that that was not in the documents before the FtJ because it was in a bundle of documents submitted with the notice of appeal to the Upper Tribunal.

24. Mr Ali further submitted that in any event the decision letter refers to the evidence of tax that was provided in support of the application. That was further basis for concluding that the FtJ was in error at [21] in relation to the sponsor's employment with Tasty Spice because there was evidence before the respondent from the Irish tax authorities.
25. The appellant's witness statement at [5]-[7] gave reasons as to why the sponsor decided to settle in Ireland in terms of opening his own business. The FtJ had not indicated why those reasons were not credible. The application form refers to the appellant having returned to the UK on 10 March 2016. He was paid until 12 March and his employer allowed him to leave five days early. The sponsor had said at [11] of his witness statement that he was lucky enough to start making money immediately. At [9] he refers to having secured a tenancy and an offer of employment and that the employment would give him valuable first-hand experience of working in a food place in Ireland.
26. Mr Mills submitted that the FtJ was entitled to take into account the discrepancy in the evidence at [20] in terms of there being five days' difference between what was said in the application form about the duration of the sponsor's employment with Tasty Spice (to 15 March 2016) yet other documents stating that they returned to the UK on 10 March 2016. Furthermore, between October 2015 and January 2016 they lived in Derby.
27. Mr Mills acknowledged that it was accepted in the decision letter that Irish tax documents had been provided. However, the point was that the FtJ had concluded that their residence was not genuine. The sponsor had married a woman from Afghanistan but he was not earning enough to meet the financial requirements of the Immigration Rules. The residence needed to be genuine.
28. In addition, when the baby was due they returned to the UK. If they had genuinely transferred the centre of their lives to Ireland they would have had the baby there. They returned to a property that the sponsor had in the UK and in March 2016 returned to the UK never to return to Ireland.
29. The issue was not just whether the sponsor was working. His employment was not the most significant factor. Although he referred to having some savings there is no evidence of any enquiries made by the appellant in relation to setting up a business in Ireland, as the FtJ had said.
30. In relation to the employer's letter from Tasty Spice, that refers to the sponsor being an employee and not a franchisee. Even if there was a factual error in the FtJ's decision in relation to the employer's letter, it was not significant.
31. In his reply, Mr Ali submitted that the savings that the sponsor had of £44,000 was more than enough to meet the requirements of the Rules. In addition, the sponsor had clearly stated that when he moved to Ireland he lived with a friend for the first few months.

32. The appellant explained in his witness statement why they moved back to England for the birth of the child (needing female friends and family around her, and so forth).

Assessment and Conclusions

33. Mr Ali was not clear in his submissions as to what documents were before the FtJ. On the Tribunal's file there is a 25-page faxed bundle with a fax date of 22 February 2018. It is paginated and indexed although the witness statements from the appellant and the sponsor are copied in such a way that parts of one statement are mixed up with parts of the other. Nevertheless, the Tribunal's file does have separate complete copies of those witness statements which I have considered.
34. Although Mr Ali sought to rely on a letter from Tasty Spice dated 10 February 2016 in relation to employment that was referred to by the FtJ as Farhan Anwar, it seems to me that Mr Mills was correct to point out that that letter was contained in a bundle of documents submitted in support of the appeal against the FtJ's decision. It is not apparent that it was amongst the documents that was put before the FtJ and thus she was right to state at [21] that there was no letter from Farhan Anwar to support the sponsor's claim that he was employed by him at Tasty Spice. Thus, in that respect the FtJ was correct to state that there was no employer's letter to confirm the hours worked or pay received. It cannot have been an error of law for the FtJ to have failed to have regard to a document that was not put before her.
35. The FtJ also said that there were no documents from the Irish tax authorities. At [22] she concluded that the appellant had not established that her husband was exercising Treaty rights as a worker in Ireland immediately before returning to the United Kingdom.
36. However, it does seem to me that Mr Ali was correct in pointing out that the decision letter dated 21 February 2017 accepts that the sponsor was in employment in Ireland. Page 2 of the decision letter states as follows:

"It is accepted that your British citizen sponsor is a 'qualified person' in the UK in accordance with regulations 6 and 9(7). This is because tax evidence of your employment in Ireland has been supplied to suggest you worked between 29 May 2015 and 15 March 2016."

The FtJ did not refer to that part of the decision letter although that may be because the decision letter was also incomplete, at least in the copy of the respondent's bundle that was before the FtJ. There was however, a complete faxed copy on the Tribunal's file.

37. Nevertheless, although Mr Ali quite rightly points to the respondent's decision letter as accepting that there was evidence of employment in Ireland, the dates given in the decision letter (29 May 2015-15 March 2016) are inconsistent with the sponsor's evidence which the FtJ recorded at [13] as being that he started working for Tasty Spice from August 2015. The appellant did not suggest before the FtJ that there was

other employment in Ireland and the sponsor's witness statement does not mention other employment than that to which he referred in oral evidence as starting in August 2015. His witness statement does say that when he and the appellant went to Ireland in April 2015 he started making money immediately but there is no indication of how he was able to do so or what his employment was.

38. Whilst therefore, the FtJ was wrong not to take into account what is said in the decision letter about tax evidence showing the sponsor's employment between 29 May 2015 and 15 March 2016, I do not see that that error was significant in the context of the FtJ's overall findings, in particular in terms of the genuineness of the residence in Ireland apart from as regards employment. Furthermore, even if the Tasty Spice letter of 10 February 2016 was before the FtJ, which I do not accept, the FtJ's failure to have taken it into account is again not significant in circumstances where that letter also states that the sponsor was employed on a full-time and permanent basis from 15 August 2015, not 29 May 2015, as accepted by the respondent in the decision letter.
39. The error in [23] whereby the FtJ said that the appellant and the sponsor lived together at two addresses in Ireland from 13 April 2013, whereas it should be 13 April 2015, is not material. That is plainly a slip of the pen because there are repeated references to the correct date in the FtJ's decision.
40. Otherwise, I do not accept that the FtJ failed to give reasons for finding that the evidence of the sponsor was inconsistent with documentation in the appellant's bundle. I have summarised the FtJ's decision and it is clear from that summary that she did explain how the sponsor's evidence was inconsistent. Thus, at [20] the FtJ said that in her application the appellant had said that the sponsor worked 20 hours a week for Tasty Spice from 15 August 2015 to 15 March 2016. However, she pointed out that other documents state that the appellant and sponsor returned to the UK on 10 March 2016. Furthermore, the sponsor returned to the UK between October 2015 and January 2016. That was the sponsor's evidence recorded at [16], namely that their child was born on 31 October 2015 and that they remained in the UK until January 2016. In those circumstances the sponsor could not have been working in Ireland throughout the period 15 August 2015 to 15 March 2016. For two or three months of that period he and the appellant were in the UK.
41. In addition, the FtJ was entitled to find that there was no "cogent evidence" before her to show that the sponsor made any enquiries as to setting up a business in Ireland either before or whilst he was living there. He said as much in his witness statement but there was nothing to support that assertion.
42. The FtJ was further entitled to point out that the sponsor's main residence was still in Derby when he went to Afghanistan to take the appellant to Ireland in April 2015. She pointed out at [30] that between 31 October 2015 (the birth of their child) and January 2016 when they returned to Ireland, they lived at [~ Street] in Derby, the address they returned to when they again came back to the UK three months later, in March 2016.

43. At [27] the FtJ referred to the application stating that the appellant and the sponsor lived together at apartment 8 from 13 April 2015 to 10 March 2016. She said that that information was inconsistent with the sponsor's oral evidence and with documents in the appellant's bundle. Thus, at [29] she referred to the tenancy agreement for apartment 8 which clearly stated that the tenancy commenced on 20 August 2015, not 13 April 2015 as the application form had stated. In addition, at [28] the FtJ referred to documents, including a doctor's registration letter, which stated that from April 2015 to August 2015 they lived at [~], an address that the sponsor said in oral evidence was a friend's address that they stayed in when they first arrived in Ireland. Again however, that was inconsistent with what was on the application form as pointed out by the FtJ.
44. The FtJ was entitled to state at [32] that the accommodation in which they lived in Ireland (and she did accept that they lived together – see [23]) was temporary in nature. It was significant that within a few weeks of taking the tenancy of apartment 8 on 20 August 2015 they were living in Derby (from October 2015). Likewise, that they continued to live there for over three months and returned there in March 2016.
45. It cannot be said that the FtJ ignored what was advanced as to the reasons for their moving back to England, namely complications with the pregnancy and the appellant needing support from friends and members of the sponsor's family in Derby. She referred to this at [15].
46. There was a lack of evidence before the FtJ that the sponsor and the appellant made any steps to integrate with the local community in Ireland, a matter that the FtJ referred to at [33]. Similarly, whilst length of residence is not determinative, it is a factor that may plainly be relevant. The FtJ was entitled to point out at [34] that the appellant and the sponsor lived together in Ireland for a period of some eight months, and in the light of her findings was not persuaded that they had intended to live permanently in Ireland.
47. Under reg 9(2)(c) in order for the appellant to be entitled to a residence card as though the sponsor were a British citizen, their residence in the EEA State, (in this case Ireland) needed to be "genuine".
48. Reg 9(3) has a non-exhaustive list of factors that are relevant in that context. It reads as follows:
 - "9.— (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."

49. It is evident from the FtJ's decision that she was not satisfied that it was established that the centre of the sponsor's life had transferred to Ireland. She took into account, as she was entitled to do, the length of their joint residence in Ireland and the degree of their integration.
50. Although Mr Mills implied that reg 9(4) was in play here (residence in Ireland as a means of circumventing immigration laws) in terms of his stating that the sponsor was not earning enough to meet the financial requirements of the Immigration Rules, the FtJ did not express any such conclusion and it is not a matter which I need to decide in terms of whether the FtJ made any error of law requiring her decision to be set aside.
51. To summarise, whilst the FtJ ought to have taken into account what was said in the decision letter about evidence of the sponsor's employment in Ireland, I am not satisfied that her failure to have done so amounts to an error of law, or an error of law which requires her decision to be set aside. For the reasons I have explained, any such error could not have affected the outcome of the appeal. Accordingly, the decision of the FtJ is to stand.

Decision

52. The decision of the First-tier Tribunal did not involve the making of an error on a point of law. Its decision to dismiss the appeal therefore stands.

Upper Tribunal Judge Kopieczek

13/05/19