Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: EA/03777/2018**
EA/03779/2018

THE IMMIGRATION ACTS

Heard at Field House
On 4th June 2019

Decision & Reasons Promulgated
On 10th June 2019

Before

UPPER TRIBUNAL JUDGE REEDS

Between

MR RAJA NASEER AHMED
MRS KHATOON BEGUM
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr Waheed, Counsel instructed on behalf of the Appellants.
For the Respondent: Mr Clarke, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The Appellants, with permission, appeal against the decision of the First-tier Tribunal who, in a determination promulgated on 25th March 2019 dismissed the Appellants' appeal against the decisions of the Respondent to refuse their applications for residence cards as confirmation of their right to reside in the United Kingdom as a family member of a British

Citizen pursuant to Regulation 9 under the Immigration (European Economic Area) Regulations 2016 ("hereinafter referred to as the 2016 Regulations").

2. The history of the application is set out in the decision of the First-tier Tribunal. The Appellants are nationals of Pakistan. Their son, (hereinafter referred to as "sponsor") became a naturalised British citizen on 5 January 2012 as a result of his marriage but that marriage broke down, he separated from his wife in 2012. They were later divorced in December 2015.

3. The Appellants have been visiting their family relatives residing in the UK since 2003 and it is common ground that on the expiry of each visa they returned to Pakistan. The last visit made was on the 16th May 2015 and they left the UK on the 4th October 2015.

4. It is also asserted on behalf of the appellants that their son has provided money to them for their support by way of money transfers and had been supporting his parents since 2015. They had previously been supported by his brother between the years 2013-2015.

5. It is said that following finalisation of his divorce, the sponsor made a decision to make a fresh start and live and work in Italy (see witness statement at paragraph 6). It was also suggested that as he had been unable to find employment in the UK and having had contacts in Italy, he thought he would have better job prospects. He had previously visited Italy in 2015.

6. The sponsor entered Italy in February 2016 began employment on 1 March 2016 until July 2017. He continued to financially support his parents (see money transfer receipts from April 2016 – October 2016).

7. The appellants arrived in Italy on 1 December 2016 and began living with their son until 21 June 2017. It is said that in May 2017 the applicants became "very unwell and were unable to look after themselves" and thus their son had to take a week off work to care for his parents. In his witness statement he sets out that there were no close family members Italy to offer such support. As a result of this, it is asserted that the sponsor was sacked from his employment on 30 May 2017. As he was unable to obtain any further work and as he was supporting his parents, he returned to the UK on 21 June 2017 along with his parents.

8. The appellants were granted Italian residency for a period of 10 years from 21 June 2017 until 12 April 2028.

9. On the 10th November 2017 the appellants made an application for residence cards as a confirmation of their right to reside in the United Kingdom.

10. In a decision dated the 10th May 2018 the Respondent refused that application. The FtTJ set out the reasons briefly at paragraph 7 of his

decision. In summary, the Respondent took into account that he was a naturalised British citizen and formed the view that the United Kingdom was his country of choice and thus his staying Italy was only intended to be temporary. His claim that he chose to go live in Italy for a fresh start after his divorce was not credible when the marriage had broken up four years before he went to Italy. It was also not deemed credible that the sponsor would be more likely to find work in Italy rather than remaining in the United Kingdom. This was also evidenced by the fact he could find work within less than one month of returning to the United Kingdom. Furthermore, had the sponsor genuinely transferred the centre of his life to Italy, he would have been expected to have stayed in Italy to find employment rather than returning to the United Kingdom. Thus, it was concluded that the stay in Italy was to enable the appellants to enter the United Kingdom under the EEA Regulations and therefore circumventing the Immigration Rules.

11. The Appellant issued grounds of appeal and the appeal came before FtT on the 19th February 2019.

12. In a decision promulgated on the 25th March 2019, the FtTJ dismissed their appeals. The judge's findings and assessment of the legal issues are set out at paragraphs 20 (a) and (b). He accepted, as did the respondent, the sponsor had worked in Italy and lived there but found that he had no family contacts in Italy and it only visited Italy two weeks before deciding to move there in 2016. The judge considered that he had not demonstrated connections in Italy, nor that he had researched jobs in the labour market in Italy or that he had made any attempt to integrate. The judge found that his marriage had broken down in 2012 and that he continued to live and work in the UK after that for a period of four years. Whilst the decree was issued in December 2015 he had been living separately from his wife and family for several years before that. He also found that the appellants' and sponsor's entire family are in the UK and there was no family connection to Italy. He did not expressly say so at paragraph 20 (a), but the findings appear to indicate that he did not consider that the centre of the British citizens life are transferred to the EEA State. Paragraph 20 (b) considered whether the purpose of residence in the EEA State was a means of circumventing the immigration rules. The judge accepted that the appellants had a good immigration history. He also took into account that all the appellants' children were settled in the UK and were British citizens. He reached the conclusion that as the sponsor returned to the same property after a "relatively short period away", the fact that it had obtained a job immediately upon return, the lack of links to Italy and no reasonable explanation as to why he would choose to go to Italy when his daughter and family are in the UK, demonstrated that the respondent had shown that "the real motivation to move to Italy was to attempt to bring his ageing parents permanently into the UK and to circumvent the Immigration Rules."

13. The Appellant sought permission to appeal that decision and permission was granted by FtTJ Pooler on all grounds.

14. Before the Upper Tribunal Mr Waheed relied upon the grounds in part as set out in the papers. He supplemented those written grounds with oral submissions. Insofar as it was argued by Mr Clarke that those oral submissions went beyond the grounds, I reached the conclusion at the hearing that the submissions made were consistent in broad terms with the grounds, in particular ground 2 (c) and (d) and paragraph 3 at page 5 of the grounds which expressly challenged paragraph 20.

15. I should also record that Mr Waheed did not seek to rely on paragraph 2 of the grounds which made reference to the issue of whether there was a concession made on behalf of the appellants as set out at paragraph 4. As he stated, the issues under consideration with those set out under the Regulations. Furthermore, as Mr Clarke submitted, where it was recorded that the representative for the appellant conceded that the appellant would not be to benefit from the EEA Regulations if the judge found there was to be an abuse of free movement rights, this was in fact a proper interpretation of the Regulations.

16. There was no Rule 24 response on behalf of the respondent however Mr Clarke made oral submissions and also provided a copy of the decision in O and B in support of those submissions. In essence, he submitted that was no material error of law in the decision of the FtTJ who had regard to the evidence. I shall incorporate the advocates submissions in my analysis of the issues relevant to this appeal.

Discussion:

17. The core issue in this case is correct interpretation of Regulation 9 of the 2016 Regulations which provides as follows: -

‘9. - (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).'

18. The origin of rights for family members of British Citizens on re-entry to the United Kingdom having exercised treaty rights in another Member State comes not from Directive 2004/38/EC but from the case of C-370/90, Surinder Singh.

19. The Court of Justice said this: -

"19 A national of a Member State might be deterred from leaving his country of origin in order to pursue an activity as an employed or self-employed person as envisaged by the Treaty in the territory of another Member State if, on returning to the Member State of which he is a national in order to pursue an activity there as an employed or self-employed person, the conditions of his entry and residence were not at least equivalent to those which he would enjoy under the Treaty or secondary law in the territory of another Member State.

20 He would in particular be deterred from so doing if his spouse and children were not also permitted to enter and reside in the territory of his Member State of origin under conditions at least equivalent to those granted them by Community law in the territory of another Member State.

21 It follows that a national of a Member State who has gone to another Member State in order to work there as an employed person pursuant to Article 48 of the Treaty and returns to establish himself in order to pursue an activity as a self-employed person in the territory of the Member State of which he is a national has the right, under Article 52 of the Treaty, to be accompanied in the territory of the latter State by his spouse, a national of a non-member country, under the same conditions as are laid down by Regulation No 1612/68, Directive 68/360 or Directive 73/148, cited above.

22 Admittedly, as the United Kingdom submits, a national of a Member State enters and resides in the territory of that State by virtue of the rights attendant upon his nationality and not by virtue of those conferred on him by Community law. In particular, as is provided, moreover, by Article 3 of the Fourth Protocol to the European Convention on Human Rights, a State may not expel one of its own nationals or deny him entry to its territory.

23 However, this case is concerned not with a right under national law but with the rights of movement and establishment granted to a

> Community national by Articles 48 and 52 of the Treaty. These rights cannot be fully effective if such a person may be deterred from exercising them by obstacles raised in his or her country of origin to the entry and residence of his or her spouse. Accordingly, when a Community national who has availed himself or herself of those rights returns to his or her country of origin, his or her spouse must enjoy at least the same rights of entry and residence as would be granted to him or her under Community law if his or her spouse chose to enter and reside in another Member State. Nevertheless, Articles 48 and 52 of the Treaty do not prevent Member States from applying to foreign spouses of their own nationals' rules on entry and residence more favourable than those provided for by Community law.
>
> 24 As regards the risk of fraud referred to by the United Kingdom, it is sufficient to note that, as the Court has consistently held (see in particular the judgments in Case 115/78 Knoors v Secretary of State for Economic Affairs [1979] ECR 399, paragraph 25, and Case C-61/89 Bouchoucha [1990] ECR I-3551, paragraph 14), the facilities created by the Treaty cannot have the effect of allowing the persons who benefit from them to evade the application of national legislation and of prohibiting Member States from taking the measures necessary to prevent such abuse."

20. I have been referred to the decision of O and B v Minister voor Immigratie, Intergratie en Asiel [2014] QB 1163 by Mr Clarke (hereinafter referred to as "O and B").

21. The general conclusion of the Court in O and B is as follows:

> "Article 21(1) TFEU must be interpreted as meaning 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/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC, 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. Therefore, the conditions for granting a derived right of residence to a third-country national who is a family member of that Union citizen, in the latter's Member State of origin, should not, in principle, be more strict than those provided for by that directive for the grant of a derived right of residence to a third-country national who is a family member of a Union citizen who has exercised his right of freedom of movement by becoming established in a Member State other than the Member State of which he is a national."

22. In Surinder Singh, the European Court of Justice confirmed that the rights for family members did not include situations of an abuse of rights, stating in paragraph 24 as follows:

> "As regards the risk of fraud referred to by the United Kingdom, it is sufficient to note that, as the Court has consistently held (see in particular the judgements in Case 155/78 Knoors v Secretary of State for Economic Affairs [1979] ECR 399, paragraph 25, and Case C-61/89 Bouchoucha [1990] ECR I-3551, paragraph 14), the facilities created by the Treaty cannot have the effect of allowing the persons who benefit from them to evade the application of national legislation and of prohibiting Member States from taking the measures necessary to prevent such abuse."

23. Similarly, the Court stated in O and B in paragraph 22:

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

24. Therefore, in order to qualify under Regulation 9, an applicant and his or her family member must have resided in another member state; and secondly, that residence must have been genuine. The approach of the CJEU is whether the EU national would be discouraged from leaving his state of nationality to exercise his right of residence under the Treaty owing to an uncertainty over whether he can continue a family life which has been created or strengthened during a genuine residence.

25. The FtTJ was satisfied that the sponsor had resided in Italy as a worker (see paragraph 11 and 20 (a)) and thus the judge was therefore required to consider whether the parties had genuinely established themselves in Italy.

26. In his analysis, it appears that the FtTJ did not accept that the centre of the sponsor's life transferred to the EEA State for the reasons set out at paragraph 20(a). He did not make reference to Regulation 9(3) at either that paragraph or earlier in the decision when making reference to the EEA Regulations. The only reference made was to Regulation 9(4) (see paragraphs 12 – 13).

27. Mr Clarke submits that whilst the judge made no reference to the relevant case law of the CJEU he applied the substance of the decision in O and B. In his submissions he directed the Tribunal's attention to specific paragraphs within that decision notably paragraphs 50 -58. He submitted that the decision in O and B was distinct from the decision in Akrich and that what was of relevance was evidence of settling in the host state (paragraph 53) and that only genuine residence would qualify (paragraph 54 – 56). He further submitted that at paragraph 58 the decision set out

the test for an abuse of rights by way of artificially creating the conditions and even if the appellants had resided with the sponsor this can still be sufficient to support a test of abuse of rights.

28. Mr Clarke therefore submitted that the judge found that the sponsor complied with Regulation 7 but that that did not disclose an intention to "settle". When it was highlighted to him that the FtTJ had made no reference to the length of residence in the host state by the sponsor, Mr Clarke submitted that it was implicit in his general findings that he had lived there in compliance with Regulation 7 although he accepted that had not been part of his reasoning. He further submitted that the judge found no evidence of integration and dealt with the issue of the lapse of time between the sponsor and his wife separating and him leaving the UK to live in Italy and that there was no explanation as to why he chose Italy when his other family members lived in the United Kingdom. They were not perverse findings and that this is consistent with the reasoning set out in O and B at paragraph 51.

29. The factors set out in Regulation 9(3) of the EEA Regulations 2016 state that they are relevant to whether residence in the EEA State is or was genuine. However, it becomes clear from the summary of the relevant case law that the test of whether the British citizens centre of life had transferred to the EEA state and the other factors identified in Regulation 9(3) were drawn from the opinion of Advocate General Sharpston in the case of *O*. When the Grand Chamber went on to decide the case in O and B it did not follow or approve the test recommended by Advocate General Sharpston. The Grand Chamber emphasised that failure to confirm a derived right of residence on a family member on return to the Member State of nationality may create an obstacle to the exercise of rights of free movement. At [51] the only test laid out by the CJEU was that residence in the host Member State has been "sufficiently genuine to as to enable that citizen to create or strengthen family life in that Member State." In O and B, the CJEU did not seek to lay down a strict set of criteria required to show that residence in the host Member State was 'genuine and effective'. Some of the factors outlined in Regulation 9(3) might be relevant to that assessment, but they cannot be taken as strict requirements for the issue of a derivative residence card if the evidence shows that residence in the host Member State was a genuine.

30. As I have set out, the judge did not direct himself or make any reference to Regulation 9(3) and only made reference to Regulation 9 (4) (see paragraphs 12 – 13). At paragraph 13 he made his self-direction in terms that Regulation 9(4) required him to "consider. The quality of the residence, degree of integration and the length of residence … . This is arguably a wrong self-direction; however, it would only be material if his analysis thereafter at paragraph 20 was in error.

31. In this context I accept the submission made by Mr Waheed relevant to ground 3, that when considering the evidence which had been advanced to demonstrate a genuine establishment of residence, that the FtTJ did not

engage with all of that evidence. In particular, there was evidence from the Appellants and the sponsor as to the establishment of family life in Italy and why that family life had come to an end. There was evidence before the FtTJ in the form of a letter dated 9 November 2017 which set out the factual basis of the chronology and expressly provided an account as to why the sponsor returned to the UK and the circumstances of his parents. This was referred to in part in the decision letter and in the witness statements albeit in brief terms.

32. There was some discussion at the hearing before the Upper Tribunal as to whether there had been documentary evidence before the FtTJ dealing with the medical problems. It was plain that it had formed part of the evidence submitted to the respondent. At the conclusion of the submissions it was agreed by both advocates that the evidence had been before the FtTJ. However, when considering the relevant issues under Regulation that did not form part of the assessment. It is not possible to see what evidence was elicited in this respect as the resume of the evidence at paragraph 19 makes no reference to it nor in the findings of fact and analysis at paragraph 20.

33. The judge did not consider the evidence of the parties in the context of the nature of the family life in which it was asserted that family life was not only created in the EEA State but was also strengthened. Whilst it was not expressly raised by Mr Waheed, there was no consideration of the issue of the dependency by the appellants on their son and the evidence of the money transfers which was set out in the bundle. There was reference within the documents (principally the letter of 9 November 2017 and the witness statements from the sponsor) that he had been financially supporting his parents from 2015 and did so prior to the appellants joining him in Italy, whilst he resided in Italy and thereafter. The Italian authorities also granted the appellants a residence permit which must presumably have been based on their acceptance that they were dependent upon the sponsor. That was a further issue which required some consideration within the analysis.

34. Whilst Mr Clarke submitted that it had been open to the judge to find that there was no evidence of integration, as Mr Waheed submitted this did not take into account other evidence provided relating to friendships that he had in Italy prior to his residence there, the number of jobs that he had obtained and the length of residence. Again, those were matters that required further analysis.

35. Regulation 9(3) requires a quantitative evaluation of the residence and those evidential matters had not been taken into account when undertaking such an assessment and whether it was “genuine”.

36. The CJEU did not seek to lay down criteria for assessing what factors should be taken into account in assessing the quality of the residence over and above noting that the initial three-month period permitted by the directive would not be sufficient. 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. However, the decision of O and B at paragraph 54 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)."

37. The grounds make reference to the issue of the motivation of the Appellants and Sponsor for making use of free movement rights which is stated to be 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."

38. Whilst Mr Clarke submits that the issue of motivation is not relevant, a reading of the jurisprudence of the Court of Justice refers to residence being “genuine”, it does not import with it a consideration of the motives behind that residence in the abuse of rights sense. It is, in my judgment, a qualitative assessment or evaluation of the residence which needs to be undertaken. It is in that context that intentions are relevant -what was it they intended to do? Could it be said that the sponsor was properly exercising treaty rights or was it an extended holiday or was it fixed term employment (see decision of Knoch) or were the sponsor and the appellants visiting the residence in the host state and thus artificially creating the conditions laid down for obtaining an advantage form the European Union Rules (see facts in O and B). The focus on cases should be on what actually occurs in the host member state and for example, if what occurs is a device such as maintaining an address and only visiting infrequently, then the abuse identified by Mr Clarke at paragraph [58] of O and B may be made out.

39. I agree with the submission made by Mr Waheed that there were matters of evidence raised in the papers that were relevant in the qualitative assessment as to what had occurred in Italy; not only why the sponsor left

Italy but the evidence as to the provision of medical treatment and installation in the host country which was relevant to the issue of integration and genuineness of the residence. The judge expressly found that there was no attempts to integrate into Italy (see paragraph 20(a)) but there was evidence that he had friends in Italy which had helped him obtain employment and that he had taken on a number of jobs (as specified in the letter 9/1//17 and supported by documentary evidence). It would have been open to the judge to find that the evidence was insufficient or lacking in some respect but what was required was an analysis of that evidence. The same could be said as to the medical evidence as set out above.

40. Furthermore, it is also not clear as to whether the judge applied the right test -that in order to establish an abuse of rights the action taken must be at least the primary reason for undertaking the changes, which in this case would mean that taking the job in Italy was not genuine and moving and establishing himself there for the long period from February 2016 to July 2017 was also not genuine (see the decision in Sadovska [2017] UKSC 54 and O and B at [58-59].

41. In light of the identified errors, I am satisfied that the decision of the First-tier Tribunal involved the making of an error on a point of law and that the decision should be set aside. Due to the nature of the errors of law identified, Mr Waheed submitted that it will be necessary for a fresh hearing and for findings of fact be made. I agree with that submission. I have therefore determined that the appeal should be reheard by the FtT in accordance with the practice statement.

42. For the avoidance of doubt, any legal arguments to be advanced before the FtT upon remittal should be fully set out in a skeleton argument and served on the Tribunal and the other party prior to the hearing. It will not be necessary to re-serve and file the large bundle of documents already with the Tribunal. Any further evidence relied upon shall form part of a supplementary bundle.

43. I also note that the judge at paragraph 21 made the observation that there were “puzzling matters in the documents supplied by the sponsor”. That was a reference to the documents set out at paragraphs 17 and 18. At the next hearing any inconsistencies relating to documents must be clarified.

Notice of Decision

The decision of the First-tier Tribunal involved the making of an error on a point of law; the decision is set aside and is remitted for a fresh hearing before the First-tier Tribunal on a date to be fixed and in accordance with the directions given.

No anonymity direction is made.

Signed: Upper Tribunal Judge Reeds Date: 5/6/19

Upper Tribunal Judge Reeds