



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

Appeal Number: EA/05353/2018

THE IMMIGRATION ACTS

**Heard at Field House
On 31 October 2019**

**Decision & Reasons Promulgated
On 5 November 2019**

Before

**UPPER TRIBUNAL JUDGE COKER
UPPER TRIBUNAL JUDGE SHERIDAN**

Between

**ASIF RAZA
(ANONYMITY DIRECTION NOT MADE)**

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation

For the Appellant: Mr S Karim, Counsel, instructed by AWS Solicitors

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

DECISION AND REASONS

1. By our decision promulgated on 12 August 2019, a copy of which is attached, we set aside the decision of the First-Tier Tribunal, which had dismissed the appellant's appeal. We now remake that decision.
2. On 12 March 2018, the appellant applied for a residence card as the family member of his wife ("the sponsor"), who is a British Citizen. On 19 July 2018, the application was refused under Regulation 9 of The Immigration (European Economic Area) Regulations 2016 ("the 2016 Regulations"), on

the basis that the appellant's residence in Cyprus was not genuine and was intended to circumvent the U.K.'s domestic Immigration Rules.

3. The factual background is to a large extent agreed. The following findings of fact by the Judge in the First-tier Tribunal were not the subject of challenge by the respondent.

- (a) On 11 June 2015 the appellant married a British citizen in Pakistan. Thereafter the appellant and sponsor lived together in Pakistan in a genuine and subsisting marriage.
- (b) On 9 February 2017 the appellant and sponsor moved, together, to Cyprus, where they lived until 11 October 2017.
- (c) Whilst in Cyprus the appellant and sponsor rented a flat with a one year lease; and the sponsor opened a bank account and worked in a call centre.
- (d) On 7 April 2017 the sponsor was granted a certificate of registration in Cyprus and on 5 October 2017 the appellant was granted a Cypriot residence card valid until 5 October 2022.
- (e) On 11 October 2017 the sponsor and the appellant moved to the UK.
- (f) The sponsor suffers from health problems and has undergone a number of procedures in Pakistan and the UK. She attended two medical appointments in Cyprus.

4. Regulation 9 provides:

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;

(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).

5. Regulation 9 was recently considered by the Upper Tribunal in *ZA (Reg 9. EEA Regs; abuse of rights) Afghanistan* [2019] UKUT 00281 (IAC). In *ZA*, after noting the obligation on courts and tribunals to construe domestic legislation consistently with EU law, the Upper Tribunal stated at paragraphs [73]-[75]:

73. It follows that in the case of reg. 9(3), the factors identified need to be read in the light of the case law of the CJEU. Little or no weight need be attached to those factors which are not supported by EU law and the regulation must be read applying properly what is meant by "genuine".

74. In the case of reg. 9 (4) (a), this must be interpreted as it being for the Secretary of State to establish that there has been an abuse of rights as established under EU law. Further, and in any event, even if I am wrong on this issue, the sole ground of appeal here is that the decision of the respondent was in breach of the rights under the EU Treaties, not the 2016 Regulations.

75. To summarise the position in European law under the EU treaties:

(i) Where an EU national of one state ("the home member state") has exercised the right of freedom of movement to take up work or self-employment in another EU state ("the host state"), his or her family members have a derivative right to enter the member state if the exercise of Treaty rights in the host state was genuine;

(ii) "genuine" must be interpreted in the sense that it was real, substantive, or effective;

(iii) An analysis of "genuine" residence cannot involve the consideration of the motives of the persons who moved except in the limited sense of what they intended to do in the host member state

(iv) Whether family life was established and/or strengthened, requires a qualitative assessment which will be fact-specific; the burden of doing so lies on the appellant;

(v) There must in fact have been an exercise of Treaty rights; any work or self-employment must have been “genuine and effective” and not marginal or ancillary;

(vi) The assessment of whether a stay in the host state was genuine does not involve an assessment of the intentions of the parties over and above a consideration of whether what they intended to do was in fact to exercise Treaty rights;

(vii) There is no requirement for the EU national or his family to have integrated into the host member state, nor for the sole place of residence to be in the host state; there is no requirement to have severed ties with the home member state; albeit that these factors may, to a limited degree, be relevant to the qualitative assessment of whether the exercise of Treaty rights was genuine;

(viii) The requirement to have transferred the centre of one’s life to the host member state is not a requirement of EU law, nor is it endorsed by the CJEU;

(ix) If it is alleged that the stay in the host member state was such that reg. 9 (4) applies, the burden is on the Secretary of State to show that there was an abuse of rights.

6. With respect to abuse of rights, the Upper Tribunal in ZA stated at [70] that:

70. In summary, the doctrine of abuse of rights can apply only where it is shown by the respondent that there was no genuine (as properly construed) exercise of the Treaty right to free movement and where there was an intention to use an artificial constructed arrangement. Both elements have to be demonstrated by the respondent.

7. Mr Melvin sought an adjournment on the basis that the respondent’s position is that ZA is wrongly decided and there is a case due to be heard shortly in the Court of Appeal on the issue of genuine residence/abuse of rights under regulation 9 of the 2016 Regulations. We refused to adjourn the matter as the mere fact that a case is pending in the Court of Appeal that may address issues relevant to the appeal before us is not a good reason for an adjournment. In circumstances where the respondent believes a general stay would be appropriate, it is open to her to write to the President of the Upper Tribunal (IAC) requesting consideration be given to that course of action. Neither we nor Mr Melvin are aware of any such steps being taken.
8. Mr Melvin stated that he was prepared to proceed by way of submissions only.
9. Mr Melvin submitted that the appellant’s residence in Cyprus with the sponsor was designed to circumvent the Immigration Rules. He based this submission on the fact that (a) the appellant and sponsor moved to the UK only a few days after the appellant was granted a Cypriot residence card; (b) they only lived a short time in Cyprus; (c) there was no good reason

why the sponsor needed to return to the UK for medical treatment; and (d) the evidence did not show they had genuinely embarked on a new life in Cyprus.

10. Mr Melvin accepted that he was in difficulty if we followed ZA but submitted that ZA was wrongly decided and should not be followed.
11. Mr Karim submitted that the respondent had not submitted any evidence, or made any submissions, that could discharge the burden of showing there had been an abuse of rights. He submitted that the evidence strongly supports the contention that the move to Cyprus was genuine, noting in particular that the sponsor had visited doctors on more than one occasion in Cyprus; had put into evidence a letter from her Cypriot doctor explaining that his opinion was that she would receive the best care from a consultant in the UK who was aware of the past surgeries and had medical notes to hand; that the tenancy was for 12 months which the landlord had said was the longer of two alternative periods (6 months or 12 months); that the sponsor opened a savings account in Cyprus; and that the appellant and sponsor lived together in Pakistan for almost two years before moving to Cyprus.
12. We are not persuaded that ZA was decided incorrectly. We have not heard any argument that engages with the detailed analysis in ZA of CJEU case law, or which calls into question the approach taken to the interpretation of regulation 9 whereby little or no weight is attached to the factors in regulation 9 (3) which are not supported by EU law. Accordingly, we have no hesitation in following ZA.
13. Applying ZA, it is clear that the residence of the appellant and sponsor in Cyprus was genuine under regulation 9(3). We are satisfied that the residence was real, substantive and effective. The sponsor obtained work in Cyprus that was genuine and effective (and not marginal or ancillary). In addition, she opened a bank account, rented a flat for a year long tenancy, and engaged with medical services. These are the hallmarks of a genuine residency.
14. It is equally clear that the respondent is unable to discharge the burden of showing an abuse of rights. The only argument to support this contention is that the appellant and sponsor moved to the UK very shortly after obtaining a Cypriot residence document. This does not show an intention to utilise, or that there has been, an artificially constructed arrangement, such as might be the case if the sponsor had worked notionally for a Cypriot company but was posted to work in the UK (see paragraph [69] of ZA where this example is given). The evidence is clear that the sponsor exercised her Treaty rights by working in Cyprus in a genuine job based in Cyprus. The arguments advanced by the respondent do not come close to showing an abuse of rights under regulation 9(4).
15. If we are mistaken, and, contrary to ZA, in applying regulation 9(3) we are required to determine whether the centre of the sponsor's life had

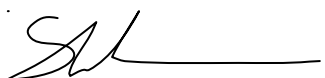
transferred to Cyprus, her ties to the UK, and her motivation, we would have reached the same conclusion. This is because, having regard to all of the evidence before us, we are satisfied that, on the balance of probabilities, the appellant and sponsor genuinely intended to build their lives in Cyprus. After marrying, they lived for almost two years together in Pakistan. They then moved together to Cyprus where they rented a flat for a 12 month period (which we accept, based on the evidence of their landlord, is a standard duration for a person intending to reside for a long-term period in rental accommodation). The sponsor obtained work; and she attended medical appointments, seeking advice from local doctors.

16. The evidence does not indicate that the centre of the sponsor's life, whilst she was in Cyprus, was anywhere other than Cyprus. This is not a case where a person moved temporarily from the UK to another member state to work but maintained core aspects (or "the centre") of her life in the UK. On the contrary, prior to moving to Cyprus the sponsor had been living in Pakistan and there is no evidence indicating that she maintained a home in the UK, engaged in employment in or connected to the UK, or undertook any action or activity that would point to the UK being the centre of her life during the time she was in Cyprus, or, indeed, whilst living in Pakistan prior to moving to Cyprus. With regard to the sponsor's motivation, the evidence before us indicates that she and the appellant made a genuine attempt to settle in Cyprus but decided to move to the UK because they believed that in the UK the sponsor would receive better medical care for her ongoing bladder and kidney problems. Accordingly, in our view, the evidence supports the conclusion that the requirements of regulation 9 are satisfied even if ZA, and the CJEU case law that underpins the decision, are disregarded.

Notice of decision

1. The decision of the First-tier Tribunal involved the making of an error of law and we set it aside.
2. We remake the decision by allowing the appeal under the Immigration (European Economic Area) Regulations 2016.

Signed



Upper Tribunal Judge Sheridan

Dated: 1 November 2019