



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

Appeal Numbers: EA/05616/2017  
EA/05617/2017  
EA/05619/2017  
EA/05620/2017

**THE IMMIGRATION ACTS**

**Heard at: Field House  
On 21<sup>st</sup> January 2019**

**Decision & Reasons Promulgated  
On 31<sup>st</sup> January 2019**

**Before**

**UPPER TRIBUNAL JUDGE BRUCE**

**Between**

**Bibi [K]  
[H K]  
[F K]  
[A K]**

**(no anonymity direction made)**

Appellant

**And**

**Secretary of State for the Home Department**

Respondent

**For the Appellant: Mr S. Knight, Counsel instructed by Rahman and  
Company Solicitors**

**For the Respondent: Mr Diwnycz, Senior Home Office Presenting  
Officer**

**DECISION AND REASONS**

1. The Appellants are all nationals of Afghanistan who assert a *Surinder Singh* right of residence under the Citizenship Directive

(2004/38) and Regulation 9 of the Immigration (European Economic Area) Regulations 2016 ('the Regulations'). They are respectively a mother and her three minor children.

2. By its decision dated the 29<sup>th</sup> January 2018 the First-tier Tribunal (Judge Obhi) dismissed their linked appeals. Permission to appeal to this Tribunal was granted by Judge Nightingale on the 22<sup>nd</sup> May 2018.
3. The accepted facts are as follows. The Sponsor of these applications, Mr [K], is the husband of the first Appellant, and father to the remaining three. At some point he travelled from Afghanistan to the United Kingdom and was subsequently granted British citizenship. In 2015 he travelled from the United Kingdom to the Republic of Ireland, where he took up employment, found accommodation and registered with a doctor. The Appellants were all granted a right of entry to Ireland under the Regulations: they were at that point family members of an EEA national exercising free movement rights. Their date of entry to Ireland is recorded as the 9<sup>th</sup> August 2015. They were subsequently granted a right of residence valid until the 11<sup>th</sup> January 2020. On the 22<sup>nd</sup> November 2016 the Appellants made applications for residence cards in the United Kingdom, citing Regulation 9 and relying on their period of residence in Ireland with Mr [K].
4. The matter in issue before the First-tier Tribunal was whether the family's residence in Ireland was "genuine". The Tribunal found that it was not, and dismissed the appeal.
5. Mr Knight has produced a carefully drafted skeleton argument identifying what he submits to be a fundamental error in approach by the First-tier Tribunal. At paragraph 28 of its determination the Tribunal said this:

*"The sole issue in this case is whether the appellant's spouse's residence in Ireland was genuine, or whether it was a means for him to evade the Immigration Rules which require him to meet certain financial, language and relationship requirements"* (emphasis added)

It is the submission of the Appellants that the question of whether the residence was "genuine" had to be applied in light of the Directive and caselaw including O v Minister voor Immigratie, Integratie en Asiel (C-456/12); as to the italicised words, these constituted a material misdirection, appearing to import as they do a 'primary purpose' style test.

6. Mr Diwnycz did not disagree. He accepted that no burden lay on the Appellants to establish *why* they moved to Ireland. The only question was whether they had in fact in substance done so. That

this is so is reflected in Home Office policy, which expressly excludes 'primary purpose' considerations from decision-makers' minds:

"However, if one of the reasons for moving to another Member State was to avoid the requirements of the Immigration Rules but the residence in that Member State was in any case genuine, then the intention to avoid the requirements of the Immigration Rules it not in itself sufficient to refuse to issue a residence card"

7. The second ground was that in making its assessment the Tribunal had failed to have regard to material evidence. This ground too was conceded by the Respondent, who accepted that the Judge does not appear to have positively weighed in the balance evidence that the family were all registered with the local doctor, or that the three children were all enrolled, and attended school, in Ireland for a year. I would add that in making its finding that the family's accommodation in Ireland was only "temporary" the Tribunal appears to have overlooked the fact that Mr Kadarkhail lived in largely similar circumstances in the United Kingdom. The fact that a home is rented does not stop it being a home. Similarly the type of low-skilled work that Mr Kadarkhail undertook - working in a shop, taxi driving - may well be 'temporary' in the sense that it could be insecure, or the worker might move on to better things, but that does not stop it being a job. Mr Diwnycz accepted that where a family reside in another Member State for a period of a year, take up lawful employment, create a home there, send their children to school and avail themselves of local services, there is in substance a level of integration necessary to qualify as "genuine" residence.
8. I therefore set the decision of the First-tier Tribunal aside and substitute it with a decision allowing the appeals. The only matter in issue was whether the residence in Ireland was "genuine". Applying the guidance in O & B to the facts in this case the Respondent accepts that test to be made out.

### **Decisions**

9. The determination of the First-tier Tribunal contains errors of law and it is set aside. The appeals are allowed.
10. There is no order for anonymity.

Upper Tribunal Judge Bruce  
21<sup>st</sup> January 2019