



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: EA/05767/2018

THE IMMIGRATION ACTS

At: Manchester Civil Justice Centre
On: 19th November 2019

Decision & Reasons Promulgated
On: 22nd November 2019

Before

UPPER TRIBUNAL JUDGE BRUCE

Between

Rizwana Abdul Qadir
(no anonymity direction made)

Appellant

And

The Secretary of State for the Home Department

Respondent

For the Appellant: Mr Raza, Counsel instructed by FMB Solicitors
For the Respondent: Mr McVeety, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The Appellant is a national of Pakistan born on the 26th July 1972. She asserts a *Surinder Singh* right of residence under Regulation 9 of the Immigration (European Economic Area) Regulations 2016 as the family member of her British husband.
2. The facts were never in issue. It is expressly accepted by the Respondent that between August 2016 and February 2018 the Sponsor husband resided in the Republic of Ireland. The Appellant was given leave to enter EIRE as the family member of an EEA national exercising treaty rights in February 2017. The couple lived there together and, it is accepted, the Sponsor exercised treaty rights: that he

did so is evidenced by his bank statements showing deposit of income, his company registration (he is a self employed joiner and plumber), his tax registration details and numerous receipts he has produced showing his purchase of materials used for his work. Evidence of residence including medical records, their tenancy agreement and utility bills were produced. The Respondent accepted all of that but refused to grant the Appellant a residence card on the basis that the couple's residence in EIRE had not been "genuine".

3. The First-tier Tribunal (Judge Foudy) dismissed the Appellant's appeal on the basis of its own finding that it had been the couple's intention, in moving to EIRE, to circumvent the immigration rules of the United Kingdom. Although the Tribunal accepted that the couple had physically resided in Ireland, it held that their motivation for doing so was in order to take advantage of the *Surinder Singh* route.
4. By her decision of the 15th August 2019 Upper Tribunal Judge Plimmer set the decision of Judge Foudy aside for material misdirection in law:

"The First-tier Tribunal appears to have been under the misapprehension that at all material times the sponsor was required to have an intention to permanently relocate and did not apply the correct test as set out in *O & B* (C-456/12)"

(full citation *O and B v The Netherlands* C456/12)

5. The matter has now come before me in order that the decision in the appeal be remade. Mr Raza does no more than point to the accepted evidence of residence in EIRE, and rely on the decision of the Upper Tribunal in *ZA (Reg 9 EEA Regs, abuse of rights)* Afghanistan [2019] UKUT 281 (IAC), published shortly after Judge Plimmer made her decision. The headnote reads:

(i) 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.

(ii) 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" in the sense that it was real, substantive, or effective. It is for an appellant to show that there had been a genuine exercise of Treaty rights.

(iii) The question of whether family life was established and/or strengthened, and whether there has been a genuine exercise of Treaty rights requires a qualitative assessment which will be fact-specific and will need to bear in mind the following:

(1) Any work or self-employment must have been "genuine and effective" and not marginal or ancillary;

(2) 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;

(3) 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.

(iv) 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. Applying that guidance I find as follows. The residence of the couple in Ireland was genuine in the sense that it was real, substantive and effective. They had a home there, they worked there, they lived there. Their family life together developed during the time in Ireland, indeed that was their first marital home together after their 2016 marriage in Pakistan. The work that the sponsor undertook in Ireland was not marginal or ancillary. I not be concerned with the extent to which the couple 'integrated' into Irish society, or with their intentions beyond that they decided to live and work in Ireland. The Respondent has not demonstrated that the period that they spent in the other member state was an abuse. It follows that the appeal must be allowed.

Decisions

7. The appeal is allowed under Regulation 9 of the Immigration (European Economic Area) Regulations 2016.
8. There is no order for anonymity.



Upper Tribunal Judge Bruce
19th November 2019