Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: EA/06209/2018**

THE IMMIGRATION ACTS

Heard at: Bradford	**Decision and Reasons Promulgated**
On: 20th August 2019	**On: 06th November 2019**

Before

UPPER TRIBUNAL JUDGE BRUCE

Between

TEODOR BUSHI
(NO ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms S. Najma, Riaz Khan & Co, Solicitors
For the Respondent: Mr M. Diwnycz, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The Appellant is a national of Albania whose date of birth is 9th March 1995. He appeals with permission the decision of the First-tier Tribunal (Judge Cox) to dismiss his appeal under the Immigration (European Economic Area) Regulations 2016. It is the Appellant's case that he qualifies for a residence card under the *Surinder Singh* provisions in Regulation 9 thereof.

2. The facts asserted by the Appellant are as follows. On the 18th April 2017 he was married to Ms Daniela Bushi, a British citizen. They travelled together to Belgium on the 26th May 2017 with the intention of setting up a business there. They stayed with Daniela's cousin. In June 2017 the Appellant took over the running of a café there, and in the same month he was issued with a 6-month

residence card by the Belgian authorities, a permit that was subsequently extended to 2023. In August 2017 the couple rented their own property in Brussels. It was their intention to remain there, and to continue running the café. In January 2018 Daniela's mother, who lives in Yorkshire, became unwell. This necessitated Daniela's return to the United Kingdom to care for her. The Appellant followed and made an application for permission to reside as a family member of a British national under Regulation 9.

3. 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; 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).

….

4. There were two matters in issue before the First-tier Tribunal. The first arose under Reg 9(2)(a)(i): had Daniela (the 'BC') demonstrated that she had been exercising treaty rights in Belgium? The second arose under Reg 9 (2)(c): was the couple's residence in Belgium was "genuine"? Having had regard to all of the evidence before it the Tribunal found against the Appellant in respect of the first issue. Some evidence had been provided that the couple had some connection with a café in Belgium, but it fell short of establishing that either of them owned it or had any involvement in its running. That being the case, the Tribunal made no findings on the second matter in issue, and the appeal was dismissed.

5. The grounds of appeal, and indeed the grant of permission, are almost entirely concerned with whether the First-tier Tribunal erred in its approach to whether the couple's residence in Belgium was "genuine". As I explain above, however, in fact the Tribunal made no substantive findings on the point. The appeal was dismissed because Judge Cox was not satisfied that the Appellant had demonstrated that Daniela had been exercising treaty rights in Belgium: Reg 9(2)(a)(i) refers. On this point Ms Najma submitted that the First-tier Tribunal had erred in "failing to give sufficient weight" to the fact that the Belgian government had apparently been satisfied that Daniela was self-employed. She submitted that the issue of the residence card should have been treated by Judge Cox as determinative of the matter.

Discussion and Findings

6. The Belgian authorities twice recognised the Appellant's right of residence as a family member of an EEA national exercising treaty rights. First in June 2017 when they issued him with a 6-month residence permit, and then on the 22nd August 2017 when they issued him with a five-year residency card. It was this latter event, submits Ms Najma, which was of paramount significance in this appeal. She submitted that before such a card is issued, the Belgian authorities must have been satisfied, on the evidence before them, that Daniela was a qualified person. Otherwise there is no way that the Appellant, an Albanian national, would have been given a five-year residency card. Before me Mr Diwnycz for the Secretary of State accepted that this must be right.

7. Ms Najma makes two slightly different, but connected, submissions following from that. First, she adopts the written ground that Judge Cox erred in placing insufficient weight on the issue of the residency card. Whilst it cannot be said that Judge Cox ignored the matter – it is expressly recorded at paragraph 12 of his decision – Ms Najma submitted the recognition by the Belgian authorities was plainly a factor that should have attracted significant weight in the assessment of Reg 9(2)(a)(i). Second, before me she developed this argument to its logical conclusion: the issue of the card on the 22nd August 2017 should be treated as determinative of the question posed in Reg 9(2)(a)(i). We can be certain that on that date the Belgian authorities were satisfied that Daniela was self-employed and running that café.

8. I am not satisfied that either ground is made out.

9. In respect of the first point, weight is classically a matter for the Judge, and I may only interfere with Judge Cox's decision if I consider it to be perverse. It is far from that. What Judge Cox did was to carefully consider all of the evidence before *him* concerning the café, and the couple's connection with it. He then said this:

> "The Appellant's counsel submitted that I should attach significant weight to the fact that the Belgian authorities had issued the Appellant and the Sponsor with residence cards. I acknowledge that in doing so, the Belgian authorities must have been satisfied the Sponsor was exercising treaty rights in Belgium. However, I do not know what evidence the Appellant lodged with the applications. In any event, I can only determine the appeal on the evidence before me"

10. That statement leads me to the second of Ms Najma's submissions. That is in effect that Judge Cox was incorrect to undertake his own evaluation of the evidence, and that he should have gone no further than to acknowledge the decision of the Belgian authorities. She pointed out that consistency in decision making is a desirable objective, and that member states should be able to rely on each other's evaluations. That is true. That is precisely what has happened here. Both Respondent and the First-tier Tribunal accepted that as of the 22nd August 2017 the Belgian authorities recognised that Daniela had provided evidence that she was economically active. That does not, however, assist the Appellant. Regulation 9(2)(a)(i) requires the British Citizen to demonstrate that [s]he:

> (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

11. Judge Cox was tasked with making an evaluation of whether Daniela was exercising treaty rights either at the date of the appeal before him (ie currently) or that she was doing so *immediately before she returned* to the United Kingdom. Daniela returned to the United Kingdom in December 2017. Whilst the facts in respect of August are not disputed, Judge Cox could only make a finding on the position in December on the basis of the evidence before him. That included, but was not limited to, the fact that the Belgian authorities had issued a card some four months earlier. As he sets out, at paragraphs 25-32 of his decision, on balance, and having taken *all* of that evidence into account, he could not be satisfied that the burden upon the Appellant had been discharged. I am satisfied that this was a lawful approach. The fact that the card was valid for five years itself offers no insight into whether Daniela was exercising treaty rights immediately before she returned to the United Kingdom. The terms of the Regulation, and common sense, dictates that the focus of the Judge's enquiry had to be December 2017, and the evidence before him.

12. I therefore find that the Appellant fails in his appeal. I note as a postscript that whilst Ms Najma was unable to direct me to any authority in support of her submission, I find some support for my conclusions in the Respondent's own guidance. In the Immigration Directorates' Instruction *Free Movement Rights: family members of British citizens* (Version 4.0, published 29th March 2019) its says this:

> Presenting a registration certificate issued by the EEA host country would not, without further evidence, be sufficient to demonstrate that the British citizen was the equivalent of a qualified person there. You must consider whether the evidence provided shows that the British citizen exercised free movement rights as a:
>
> - worker – for example employment contract, wage slips, letter from employer
> - self-employed person – for example contracts, invoices, or audited accounts with bank statements, and paying tax and other deductible contributions
> - self-sufficient person – for example bank statements
> - student – for example a letter from the school, college or university

Decision

13. The determination of the First-tier Tribunal is upheld and the appeal is dismissed.

14. There is no order for anonymity.

Upper Tribunal Judge Bruce
25th October 2019