Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: EA/07581/2017

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 12th March 2019	**On 29th April 2019**

Before

UPPER TRIBUNAL JUDGE COKER

Between

BUSOLA [O]

Appellant

And

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr J Norman, instructed by Milestone solicitors
For the Respondent: Mr D Clarke, Senior Home Office Presenting Officer

DETERMINATION AND REASONS

1. The appellant sought and was, on 25th August 2017, refused a residence card under regulation 9 Immigration (European Economic Area) Regulations 2016. By a decision promulgated on 29th June 2018, his appeal was dismissed by First-tier Tribunal Judge Housego. He sought and was granted permission to appeal; hence the appeal came before me.

Background

2. The appellant has used a number of names, but nothing turns on this. His wife and sponsor [RA] has also used a number of names; again, nothing turns on this.

3. Mr [O] is a Nigerian citizen, born in January 1988. His wife is a British Citizen born in the UK April 1990 and has lived all her life in Dagenham until she went to Nigeria. Mr [O] first came to the UK in October 2009 as a student. He returned to Nigeria on completion of his studies in October 2014. He and his wife commenced their relationship in 2014. In October 2015, his wife went to Nigeria and they were married there. They remained in Nigeria; Mr [O] set up a business in Nigeria.

4. On 18th January 2016, the couple travelled to Eire. Ms [A] was, at that time pregnant. Their son was born in Eire in September 2016.

5. On 3rd October 2016 the appellant was issued with an EEA Family Permit by the Irish authorities, valid until 3rd April 2017. 15th October 2016, the couple were issued with certificates of registration. On 25th October 2016 Ms [A] and their son came to the UK; on 31st October 2016 the appellant came to the UK. Ms [A] commenced employment in the UK in February 2017.

6. Ms [A] was employed in Eire from 15th February 2016 until 14th August 2016 when she went on paid maternity leave; she resigned from her job (with Tarak International) on 25th December 2016.

Error of law

7. The application was considered under regulation 9 of the EEA Regulations and was refused for reasons set out in a decision letter dated 30th August 2017. The decision does not state which particular sections of regulation 9 were considered by the respondent to be applicable. The respondent concluded:

> "… The reasons for leaving the Republic of Ireland are not credible and indicate that it was always your intention to reside in the UK and that your residence in the Republic of Ireland was for the purposes of this application.
>
> In view of the above findings it is apparent that it was always your intention to come and live in the UK and that your relatively short stay in the Republic of Ireland was merely to enable you to enter the UK under the EEA regulations, when you would otherwise not have qualified for entry under the immigration rules.
>
> As such it is deemed that you moved to the Republic of Ireland was for the sole purpose of gaining entry to the UK under the Surinder Singh ruling and your first residence with your sponsor in the Republic of Ireland was in order to circumvent immigration law.
>
> …
>
> Having considered all of the evidence and information provided in support of your application, and applying the civil law standard of the balance of probabilities, it is not accepted that you and your British Citizen sponsor's residence in the EEA host country was genuine and it is considered that

the purpose of your residence in the EEA host country was as a means for circumventing the UK's domestic Immigration Rules or other immigration law."

8. Regulation 9 of the 2016 EEA Regulations reads as follows:

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)t o 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).

(5) Where these Regulations apply to F, BC is to be treated as holding a valid passport issued by an EEA State for the purposes of the application of these Regulations to F.

> (6) In paragraph (2)(a)(ii), BC is only to be treated as having acquired the right of permanent residence in the EEA State if such residence would have led to the acquisition of that right under regulation 15, had it taken place in the United Kingdom.
>
> (7) For the purposes of determining whether, when treating the BC as an EEA national under these Regulations in accordance with paragraph (1), BC would be a qualified person—
>
> > (a) any requirement to have comprehensive sickness insurance cover in the United Kingdom still applies, save that it does not require the cover to extend to BC;
> >
> > (b) in assessing whether BC can continue to be treated as a worker under regulation 6(2)(b) or (c), BC is not required to satisfy condition A;
> >
> > (c) in assessing whether BC can be treated as a jobseeker as defined in regulation 6(1), BC is not required to satisfy conditions A and, where it would otherwise be relevant, condition C.

9. The First-tier Tribunal judge set out the evidence and made findings:

> "17. This does not mean that they did not centre their lives there. However this was only ever going to be an intermediate step…They needed the permit to get the appellant into the UK, and as soon as they got it they came to the UK.
>
> …
>
> 22. Accordingly all the reasons given are not genuine. Ireland was only ever a staging post so that the appellant could return to the UK with the sponsor even though she did not earn enough money to bring him into Nigeria [sic].
>
> …
>
> 26. The residence in Ireland was not genuine. The steps taken were to get Irish residency in order to leave for the UK. I have considered the factors in 9(3) in so concluding. This was not the first state in which they cohabited. The residence was short and ended as soon as the necessary permit was obtained. The evidence of integration is largely of pragmatics such as a bank account and medical treatment required by reason of the pregnancy of the sponsor.
>
> 27. …The reason the appellant and his sponsor went to Eire was because the appellant could not be sponsored by his British citizen wife to come to the UK as she was not earning £18,600, and is still not doing so. It was always intended to be a stepping stone to the UK. Accordingly the provisions of regulation 9 are not met …"

10. The appellant sought permission, and was granted permission, to appeal on the grounds[1]:

> (i) 5. Wrong burden of proof

[1] The grounds are slightly confusing; there are some unfinished sentences and quotes that do not identify where they are from. The grounds were clarified in the skeleton argument relied upon before me.

"in considering this appeal the Judge should bear in mind that it is for the appellant to show on a balance of probabilities that he satisfied the requirements of the immigration rules …"

6. it is contended that where a decision to refuse a residence card is premised upon the conclusion that the purpose of the British Citizen and non-EEA family member's residence in an EEA state was "…as a means of circumventing any immigration laws…(paragraph 9(4) EEA Regs), the burden of proving that intention lies with the respondent. As such the FTT Judge has adopted a legally erroneous approach.

…

(ii) 11. Irrational consideration regs 9(1)(c) and 9(4) EEA regs

12. "The question this appeal raises is whether the purpose of their residence in the EEA state was to circumvent the requirements of the Immigration [Rules] to which the applicant would otherwise have been subject

13. It is contended that the FTT's findings are flawed:

Paragraph 10(3)

14. The findings are however materially erroneous since:

15. The FTT judge has, irrationally and unlawfully, given no weight to the factors supporting the extent of the Appellant's family's integration in Ireland, by failing to treat them as supporting the Appellant's case, the judge

16. The Judge failed to properly apply Reg 9(3) EEA regs….

…"

11. The skeleton argument and oral submissions clarified the grounds relied upon, essentially submitting that the First-tier Tribunal judge had applied the incorrect burden and standard of proof and as a result of that had approached the evidence incorrectly. The respondent submitted that the issue of burden of proof was misconceived because there had been no allegation of fraud; the issue had been whether the residence in Ireland had been genuine. He submitted that the judge's findings were open to him and were conclusions it was open to him to draw from the evidence.

12. The respondent does not, in the reasons for refusal, set out whether the decision was taken under regulation 9(3) or 9(4). It is therefore necessary to look at the language used by the respondent in formulating the refusal. It cannot be otherwise than that he reached the conclusion that the appellant and his wife had perpetrated a fraud contrary to regulation 9(4). Although there are references to the evidence in the context of the criteria in regulation 9(3), the overwhelming conclusion by the respondent was that the move to Ireland was for the sole purpose of circumventing UK immigration control – see extract from the decision letter in paragraph 7 above.

13. The First-tier Tribunal judge does not address that assertion by the respondent as an allegation of fraud. There is no attempt by the judge to consider the burden of proof of such an allegation but rather the judge considers the evidence and reaches findings that go to support that assertion in the context of the burden of proof being upon the appellant – see paragraph 7 of the First-tier Tribunal decision. Furthermore, the judge incorrectly considered the motivation of the couple as oppose to whether there was a genuine (effective) exercise of Treaty rights.

14. The First-tier Tribunal judge erred in law such that the decision is set aside to be remade, no findings preserved.

15. The substance of the First-tier Tribunal decision is such that none of the findings can be relied upon; all are infected by the lack of proper approach to the burden of proof. The scheme of the Tribunals Court and Enforcement Act 2007 does not assign the function of primary fact finding to the Upper Tribunal. I conclude that it is appropriate for this appeal to be remitted to the First-tier Tribunal for a full hearing, applying the proper burden and standard of proof, to enable adequate reasoned findings to be made.

Conclusions:

The making of the decision of the First-tier Tribunal did involve the making of an error on a point of law.

I set aside the decision and remit the appeal to the First-tier Tribunal to be heard afresh.

Date 25th April 2019

Upper Tribunal Judge Coker