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

Appeal Numbers: EA/07634/2017
EA/07636/2017
EA/07638/2017

**THE IMMIGRATION ACTS**

| **Heard at Royal Courts of Justice** | **Decision & Reasons Promulgated** |
|---|---|
| **On 28th January 2019** | **On 20th February 2019** |

**Before**

**UPPER TRIBUNAL JUDGE KING TD**

**Between**

**LAILA [S]**
**[O S]**
**[M S]**

Appellants

**and**

**THE SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Respondent

**Representation:**

For the Appellants: Mr S Khan of Counsel on behalf of Malik & Malik Solicitors
For the Respondent: Mr T Melvin, Home Office Presenting Officer

**DECISION AND REASONS**

1. The appellants are Afghan nationals, a mother, son and daughter, all of whom seek to appeal against the decision of the respondent dated 21 July 2017 refusing them residence cards under Regulation 9 of the Immigration (EEA) Regulations 2006.

© CROWN COPYRIGHT 2019

2. In essence the immigration decision contends that the appellants were not genuinely exercising treaty rights in Ireland and that the move to Ireland was simply a device to secure immigration to the United Kingdom.

3. The appellants sought to appeal against the decision, which appeal came before First-tier Tribunal Judge Greasley on 27 July 2018.

4. Having considered the evidence in some detail as presented, it was the clear finding of the Judge that the purpose of the residence in the EEA state was the means of circumventing any immigration laws applying to non-EEA nationals to which the sponsor would otherwise be subject.

5. In those circumstances the appeal was dismissed.

6. Challenge is made to that decision on behalf of the appellant. It is contended that the Judge had failed to direct himself to the substantial body of case law and of the principles of **Surinder Singh**, and had confused in particular the requirement of genuineness with motivation. Further by failing to recognise that in terms of abuse the burden falls upon the respondent to prove that allegation.

7. The relevant Regulation is that of Regulation 9, in particular 9(2)(c), (3), (4)(a). It was indicated in the decision of **Oksuzoglu (EEA appeal – "new matter") [2018] UKUT 00385 (IAC)** and paragraph 22 in particular, that Regulation 9 derives its genesis not from the relevant directive but from **Surinder Singh** C-**370/90 (1992] ECR 1-04265**. The relevant principles established by **Surinder Singh** as applied in **O and B v Minister von Migratie [2014] 3 WLR 799** have been transposed into Regulation 9.

8. **Surinder Singh** was a case which involved a return to the UK of the spouse of a British national who had exercised the right of free movement by working and living in Germany, with her husband, for a period of almost three years.

9. Generally speaking, therefore, a British sponsor with family may not exercise EEA treaty rights in the United Kingdom unless such rights have been exercised by the sponsor and family elsewhere. In order therefore to preserve the principle of free movement, it has been held that upon return to the United Kingdom such rights may continue to be exercised.

10. It is a requirement for such rights to be exercised that the residence in the EEA state was genuine.

11. Regulations 9(3) provides as follows: factors relevant to whether residents 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 an EEA state.

12. Regulation 9(4) provides as follows. 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 and to have leave to enter or remain in the United Kingdom).

13. The word "a genuine one" has the potential for causing confusion because it would seem from the generality of the European jurisprudence that it should be interpreted as meaning "real", "substantive" or "effective". As such it should not involve the consideration of the motives of the persons except in a limited sense of being a factor to consider whether residence has in fact been established. As has been submitted in the grounds of appeal, the correct approach to genuineness is whether the sponsor had pursued effective employment or self-employment in Ireland or whether family life had been created or fortified there. This must be considered within the community aspect the establishment of community contacts rather than simply finding work and establishing the family in the home.

14. In the case of **Swaddling [1999] EUECJ C-90/97** at paragraph 100 the court held that the definition of residence in Article 1(h) Regulation No.1408/71 meant "habitual residence" and suggested it therefore had an EU wide meaning. The court interpreted the phrase that "the membership state in which they reside" as being the place "where the habitual sense of the interest is to be found". This should be determined taking into account "the employed person's family situation; the reasons which have led him to move; the length and continuity of his residence; the fact (where it is the case) that is in stable employment; and his intentions as it appears from all the circumstances." In so saying, the court indicated that a proper understanding of whether a person is resident or not must be based, not on a single factor, but on a collection of elements that together enable the individual situation to be assessed and categorised as residents or non-residents. Such was summarised in the refusal letter of 21st July 2017, with the contention was that the appellants had not demonstrated that the centre of a British citizen's life had been transferred to Ireland.

15. The sponsor moved to Ireland in June 2015. In August 2015 the appellants arrived on a visa valid until September 2015. The first appellant fell pregnant in October of that year and they then moved back to the United Kingdom in September 2016. The passports did not show any entry clearance stamps.

16. The sponsor gave the reason for moving to Ireland as being to develop a potential business with Asian Arabic foods. The Judge at paragraph 38 noted a significant inconsistency in the evidence concerning that matter. In evidence the Sponsor stated that the enterprise failed because he was unable to give the work commitment required but in the witness statement he said that the business did not go through

because of disagreement regarding terms and conditions. The Judge found that the business venture never in reality started.

17. In paragraph 39 of the determination the Judge effectively did not accept the credibility of that explanation. It is found that the evidence that had been presented on that matter was based upon false claims and intentions to deceive and mislead the respondent.

18. It was accepted that the sponsor did in fact undertake some work in Ireland being work for Ennis Top Pizza on a short term working contract.

19. The Judge noted in paragraph 10 of the determination that although the appellants claimed to have resided in Ireland with the sponsor from August 2015 to September 2016 the only evidence that the sponsor exercised treaty rights when in Ireland was for a two month period between January and February 2016 when employed in Ennis Top. There was no evidence of the exercise of treaty rights prior to that and no evidence of any exercise of treaty rights in terms of working from February 2016 to September 2016.

20. Although the sponsor claimed that he worked for Ennis Top Pizza for six months the only pay slips that were provided as noted by the Judge were for January, February. The Judge noted at paragraph 24 of the determination that the appeal bundle contained a cessation certificate in relation to the first start and finish at Ennis Top Pizza and terms and conditions in relation to that outlet together with payslips for the month of January and February 2016. The Judge also found there to be inconsistent evidence in relation to the circumstances of the first assured shorthold tenancy. The first appellant had stated that it was only for a limited six month period as this was only a two bedroom property which was not sufficiently large enough for the family as a whole. As the Judge noted, that failed to explain why a second assured shorthold tenancy was signed for a fixed period but at the same address and clearly had the same limited sized accommodation. The sponsor stated in his oral evidence that the reason the first tenancy agreement was signed for a maximum of six months was simply because that was the maximum period available at the time and that the property was up for sale. The Judge did not find that that had been truthful nor that credible evidence supplied in relation to those matters.

21. It is accepted that the appellants and sponsor may have been registered with a doctor in Ireland and two of the children enrolled in school that would have been a requirement in any event. Other than the above the Judge found little evidence of integration in Ireland. The essential issue being whether in reality the centre of life had been transferred to Ireland.

22. Mr Khan invites my attention to the decision of **O and B,** in particular to paragraph 51 thereof. He submits that the residence of the Union citizen had been sufficiently genuine so as to enable that citizen to create or strengthen family life in the member state. He emphasised the fact that the appellants were able to join the sponsor and conduct a family life for nearly a year. Thus the strengthening of family life in those

circumstances was a material consideration. Such factor is nuanced with the consideration in terms of genuine residence, as to whether that was somewhere that they really wanted to be and to grow family life. The finding of the Judge, set out in paragraph 44, was to the contrary namely that it was only a temporary move to facilitate re-entry into the United Kingdom. He specifically found that the centre of the sponsor's life was not transferred to Ireland and the nature of the accommodation they rented undermined any such claims. The Judge found that there was no evidence of integration other than school and medical registration.

23. It seems to me that those findings are properly open to be made in the assessment of Regulation 9(3).

24. It is also apparent from the determination that the Judge went on to consider in some detail Regulation 9(4). Motivation and purpose is very much put into issue by the Regulation. The Judge noted that the sponsor, had he remained in the United Kingdom, would not have been in a position to have sponsored the appellants to join him.

25. A relevant matter was that set out in paragraph 37 of the determination, that the Presenting Officer produced at the appeal hearing a letter from the first appellant dated 3rd July 2017 specifically referred to in the refusal decision and addressed to the respondent providing information requested from the Home Office. The first appellant stated at page 8 that her British citizen sponsor always wanted her and the children to join in the United Kingdom as soon as he received his settled status. But they could not do so due to his financial circumstances. The sponsor had initially been on a very limited earnings due to his inability to speak proper English and lack of education. His earnings fell short to sponsor a large family as the British citizen Sponsor he needed almost £30,000 earnings to sponsor everyone in the family. The letter went on to say that despite the sponsor's best efforts he could not reach the requisite level of earning. The Judge found this to be significant evidence pointing to the fact that the appellants and the sponsor always intended to use Ireland as effectively a staging post so that they could then leave Ireland and proceed to seek settlement in the United Kingdom under the 2016 Regulations and thus avoid the more stringent settlement requirements under the UK immigration laws.

26. At the appeal hearing itself the Judge heard evidence from the first appellant who adopted her witness statement of 27 July 2018. She said that she had entered Ireland in August 2015 with a visa to join her husband who had recently migrated there from the UK on a potential business opportunity from her friend. The four children also travelled to Ireland so that they could live together as a family having been separated for fifteen years.

27. It is significant in that connection that the Judge did not accept the credibility of the potential business opportunity that was claimed.

28. Also the explanation for returning to the United Kingdom because there was insufficient work, was to be considered in the light of the only accepted evidence that the sponsor only worked for two months in that period.

29. In the overall assessment the Judge noted the lack of work and short term tenancies and the lack of credibility for the explanations offered as to why the sponsor had gone to Ireland and concluded the purpose of the residence was as a means to circumvent the immigration laws. Those findings were properly open to be made in all the circumstances.

30. Challenge is made to the burden of proof and that needs a little consideration. In paragraph 2 the Judge states that the burden of proof is upon the appellants to demonstrate on the balance of probabilities that the refusal decisions are not in accordance with the above mentioned Regulations. That perhaps in reality is to telescope or conjoin two matters that require to be considered separately.

31. The burden of proof is upon the appellants to show that residence was genuine, namely a desire to be established in a particular community. For the reasons are set out in the determination the Judge has found that the appellants have failed to satisfy that requirement. That finding it seems to me would be sufficient to dispose of the appeal.

32. The Judge went on however to consider the application of Regulation 9(4)(a). It would seem that the burden would rest upon the respondent rather than the appellant. However, given the clear and unequivocal findings made by the Judge on that aspect, it would seem that even had the Judge properly reminded himself of that burden, he would have found it to have been discharged.

33. Given the findings as to residence and intention I do not find that any error as to the burden of proof in respect of purpose is material to the outcome of this appeal.

34. In all the circumstances the appellants' appeal to the Upper Tribunal is dismissed. The decision of First-tier Tribunal Judge shall stand namely that the appeals are dismissed under the Immigration (EEA) Regulations.

No anonymity direction is made.

Signed Date 18 Feb 2019

Upper Tribunal Judge King TD