Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: EA/08102/2017

THE IMMIGRATION ACTS

At: Manchester Civil Justice Centre	**Decision & Reasons Promulgated**
On: 20th November 2018	**On: 6th March 2019**

Before

UPPER TRIBUNAL JUDGE BRUCE

Between

KHABBAT KHORSHEED HASAN HASAN
(NO ANONYMITY DIRECTION MADE)

Appellant

And

ENTRY CLEARANCE OFFICER, WARSAW

Respondent

For the Appellant: **Mr Noor, Counsel instructed by Prestige Solicitors**
For the Respondent: **Mr McVeety, Senior Home Office Presenting Officer**

DECISION AND REASONS

1. The Appellant is a national of Iraq who seeks leave to enter the United Kingdom under Regulation 9 of the Immigration (European Economic Area) Regulations 2016, i.e. the '*Surinder Singh*' route.

Background and Decision of the First-tier Tribunal

2. It is the Appellant's case that she and her British husband resided in Romania, and established treaty rights there prior to her husband's return to the United Kingdom.

3. The ECO had assessed the Appellant's application with reference to Regulation 9 of the Regulations. Insofar as this is relevant it reads:

'**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

…'

4. The First-tier Tribunal accepted that the couple had spent four months living in Romania together, with the sponsor having spent a further eight months in that country. It accepted that the sponsor had worked there in a self-employed capacity, running a business offering guided spear-fishing tours. He had a total of ten clients who between them had paid him the equivalent of five months of the average Romanian salary. It accepted that there was clearly sufficient evidence that he had been exercising treaty rights, since the Romanian authorities had granted him a residence card. The First-tier

Tribunal was not however satisfied that this constituted a "genuine" period of residence in Romania for the following reasons:

i) The Sponsor has never earned enough in the United Kingdom to sponsor the Appellant's entry through the standard immigration rules (a reference to the 'minimum income requirement' of £18,600 in Appendix FM);

ii) The application for a family permit is free whereas it would have cost the appellant a considerable amount of money to apply for settlement under the Rules;

iii) There were "implausibilities" in the sponsor's explanation as to how he ran those tours, including his own limited Romanian, the fact that his brother was his assistant but knew nothing about spear fishing himself and his brother had no business experience;

iv) The Appellant and her sponsor appear to have done little research into life in Romania before deciding to move there. It is not clear why they decided to move there given that the Sponsor's brother (who had been there many years prior to their arrival and was married to a Romanian) faced a "precarious" job situation;

v) The Judge did not find it plausible that the couple would decide to return to the United Kingdom because the Appellant found living in Romania "uncomfortable", for instance when she wore her headscarf during Ramadhan;

vi) There was little evidence of integration: "the exercise of treaty rights may have technically occurred, but it was never something which was done with full gusto as a new start in Romania".

5. The appeal was thereby dismissed, the Tribunal concluding that that the couple had artificially created the necessary conditions to comply with Regulation 9 without ever genuinely trying to settle in Romania.

Error of Law: Discussion and Findings

6. Mr Noor advanced two interrelated grounds of appeal.

7. The first concerns the approach to the facts taken by the Tribunal. Mr Noor contrasts the Tribunal's doubts, expressed at 10-11 of the determination, about the Sponsor's employment in Romania, with its own findings that he had in fact been running his own business. Insofar as those paragraphs could be read as contributing to the overall negative conclusion they were irrational at worse and otiose at best. I entirely agree. The First-tier Tribunal had heard unchallenged oral evidence from one of the sponsor's clients; it had seen official registration documents, bank deposits and invoices. Having done so it expressly accepted, at paragraph 9, that the business was operating and that between the 5th November 2016 and May 2017 the Sponsor had earned the approximate equivalent of five months of the average salary in Romania. Whilst he may have earned below the average, I am satisfied that

this clearly amounted to economic activity for the purpose of the Directive, and so, apparently, did the Romanians, who had granted him a residence permit. There was therefore absolutely no point to the paragraphs which follow, wherein the Tribunal attempts to question how the Sponsor's brother – whom, it is accepted, is a long term resident of Romania – might have contributed towards the spear-fishing business.

8. The second, main ground, is that the First-tier Tribunal impermissibly imposed what is in effect a 'primary purpose' rule. Insofar as that approach may have been encouraged by Regulation 9(3) & (4) Mr Noor invites me to find the wording therein to be incompatible with the Directive and jurisprudence of direct effect.

9. The Qualification Directive (2004/38/EC) draws a distinction between the rights of union citizens who are spending three months or less in another member state, and those who wish to remain in that state for longer than three months and there exercise treaty rights. Article 6 (1) provides that the former may enter and remain in the host state without hindrance or requirements, whereas Article 7 provides that the latter may remain in the host state as long as certain conditions are met, namely that they are a qualified person:

> *Article 6*
>
> **Right of residence for up to three months**
>
> 1. Union citizens shall have the right of residence on the territory of another Member State for a period of up to three months without any conditions or any formalities other than the requirement to hold a valid identity card or passport.
>
> 2. The provisions of paragraph 1 shall also apply to family members in possession of a valid passport who are not nationals of a Member State, accompanying or joining the Union citizen.
>
> *Article 7*
>
> **Right of residence for more than three months**
>
> 1. All Union citizens shall have the right of residence on the territory of another Member State for a period of longer than three months if they:
>
> (a) are workers or self-employed persons in the host Member State; or
>
> (b) have sufficient resources for themselves and their family members not to become a burden on the social assistance system of the host Member State during their period of residence and have comprehensive sickness insurance cover in the host Member State; or

(c) — are enrolled at a private or public establishment, accredited or financed by the host Member State on the basis of its legislation or administrative practice, for the principal purpose of following a course of study, including vocational training; and

— have comprehensive sickness insurance cover in the host Member State and assure the relevant national authority, by means of a declaration or by such equivalent means as they may choose, that they have sufficient resources for themselves and their family members not to become a burden on the social assistance system of the host Member State during their period of residence; or

(d) are family members accompanying or joining a Union citizen who satisfies the conditions referred to in points (a), (b) or (c).

10. In O & B v Minister voor Immigratie, Integratie en Asiel (C-456/12) the Grand Chamber of the ECJ found these distinctions to be relevant to the interpretation of what is meant at Article 3(1) by the words "move to":

Article 3

Beneficiaries

1. This Directive shall apply to all Union citizens who move to or reside in a Member State other than that of which they are a national, and to their family members as defined in point 2 of Article 2 who accompany or join them.

11. The cases before the court concerned two families who had "moved to" other member states but had arguably not "resided" there together. Mr O, for instance, was a Nigerian national living in Spain whose Dutch wife was compelled to return to the Netherlands in order to find work. She had however regularly travelled to Spain to spend time with her husband. The referring court asked of the ECJ a series of questions about this case, the second of which was whether, in a *Surinder Singh* scenario, there is a requirement of joint residence in a host state of a "certain minimum duration".

12. In answering that question the court reminds itself that a third-country (i.e. non EEA) national can only establish a right of residence as a family member where his or her EEA spouse has exercised his right of freedom of movement by becoming "established" in another member state [at §38]. It is in its analysis of what might constitute "established" residence that the court focuses on the difference between the free movement right conferred by Article 6, and the right of residence in another member state conferred by Article 7:

"50. So far as concerns the conditions for granting, when a Union citizen returns to the Member State of which he is a national, a derived right of residence, based on Article 21(1) TFEU, to a third-country national who is a family member of that Union citizen with whom that citizen has resided, solely by virtue of his being a Union citizen, in the host Member State, **those conditions should not, in principle, be more strict than those provided for by Directive 2004/38 for the grant of such a right of residence to a third-country national who is a family member of a Union citizen in a case where that citizen has exercised his right of freedom of movement by becoming established in a Member State other than the Member State of which he is a national**. Even though Directive 2004/38 does not cover such a return, it should be applied by analogy to the conditions for the residence of a Union citizen in a Member State other than that of which he is a national, given that in both cases it is the Union citizen who is the sponsor for the grant of a derived right of residence to a third-country national who is a member of his family.

51. An obstacle such as that referred to in paragraph 47 above will arise only where the residence of the Union citizen in the host Member State has been sufficiently genuine so as to enable that citizen to create or strengthen family life in that Member State. Article 21(1) TFEU does not therefore require that every residence in the host Member State by a Union citizen accompanied by a family member who is a third-country national necessarily confers a derived right of residence on that family member in the Member State of which that citizen is a national upon the citizen's return to that Member State.

52. In that regard, it should be observed that **a Union citizen who exercises his rights under Article 6(1) of Directive 2004/38 does not intend to settle in the host Member State in a way which would be such as to create or strengthen family life in that Member State**. Accordingly, the refusal to confer, when that citizen returns to his Member State of origin, a derived right of residence on members of his family who are third-country nationals will not deter such a citizen from exercising his rights under Article 6.

53. On the other hand, an obstacle such as that referred to in paragraph 47 above may be created where the Union citizen intends to exercise his rights under Article 7(1) of Directive 2004/38. **Residence in the host Member State pursuant to and in conformity with the conditions set out in Article 7(1) of that directive is, in principle, evidence of settling there and therefore of the Union citizen's genuine residence in the host Member State and goes hand in hand with creating and strengthening family life in that Member State**.

54. **Where, during the genuine residence of the Union citizen in the host Member State, pursuant to and in conformity with the conditions set out in Article 7(1) and (2) of Directive 2004/38, family life is created or strengthened in that Member State, the effectiveness of the rights conferred on the Union citizen by Article 21(1) TFEU requires that the citizen's family life in the host Member State may continue on returning to the Member of State of which he is a national**, through the

> grant of a derived right of residence to the family member who is a third-country national. If no such derived right of residence were granted, that Union citizen could be discouraged from leaving the Member State of which he is a national in order to exercise his right of residence under Article 21(1) TFEU in another Member State because he is uncertain whether he will be able to continue in his Member State of origin a family life with his immediate family members which has been created or strengthened in the host Member State (see, to that effect, *Eind*, paragraphs 35 and 36, and *Iida*, paragraph 70).
>
> 55. *A fortiori*, the effectiveness of Article 21(1) TFEU requires that the Union citizen may continue, on returning to the Member State of which he is a national, the family life which he led in the host Member State, if he and the family member concerned who is a third-country national have been granted a permanent right of residence in the host Member State pursuant to Article 16(1) and (2) of Directive 2004/38 respectively.
>
> 56. Accordingly, it is genuine residence in the host Member State of the Union citizen and of the family member who is a third-country national, pursuant to and in conformity with the conditions set out in Article 7(1) and (2) and Article 16(1) and (2) of Directive 2004/38 respectively, which creates, on the Union citizen's return to his Member State of origin, a derived right of residence, on the basis of Article 21(1) TFEU, for the third-country national with whom that citizen lived as a family in the host Member State."

13. Mr Noor relies on these passages from O & B to submit that the exercise of treaty rights under Article 7 is in principle evidence of genuine residence in the host member state [§53]. He further submits that the true test of whether such residence is "genuine" is that set out at §51: has there been residence sufficiently genuine "so as to enable that citizen to create or strengthen family life in that Member State". Nowhere, he submits, is there any support for the ratio adopted by the First-tier Tribunal in this case.

14. Mr Noor further placed reliance on the decision in Akrich v United Kingdom (C-109-01). In Akrich a Moroccan national, previously deported from the United Kingdom, had taken up residence in the Republic of Ireland with his British spouse. The couple had then sought to return to the United Kingdom pursuant to the *Surinder Singh* principles. The referring court (this Tribunal) had asked the court to consider whether the United Kingdom was obliged to recognise his right of entry in circumstances where it believed the residence in EIRE to have been deliberately undertaken with a view to returning to the United Kingdom. The question made specific reference to §24 of the decision in Surinder Singh (C-370/90):

> "24. As regards the risk of fraud referred to by the United Kingdom, it is sufficient to note that, as the Court has consistently held (see in particular the judgments in Case 115/78 Knoors v Secretary of State for Economic Affairs [1979] ECR 399, paragraph 25, and Case C-61/89 Bouchoucha [1990] ECR I-3551, paragraph 14), the facilities created by the Treaty cannot have the effect of allowing the persons who benefit from them to evade the application of national legislation and of

> prohibiting Member States from taking the measures necessary to prevent such abuse."

And asked in what circumstances matters of fraud or abuse might prevent a third country national from taking the *Surinder Singh* route.

15. The court confirmed that whilst a third-country national could not for instance rely on a marriage of convenience, the motives for taking up residence in the host state were irrelevant, as long as the EEA national there intended to take up an effective and genuine activity:

> "55. As regards the question of abuse mentioned at paragraph 24 of the *Singh* judgment, cited above, it should be mentioned that **the motives which may have prompted a worker of a Member State to seek employment in another Member State are of no account as regards his right to enter and reside in the territory of the latter State provided that he there pursues or wishes to pursue an effective and genuine activity** (Case 53/81 Levin [1982] ECR 1035, paragraph 23).
>
> 56. Nor are such motives relevant in assessing the legal situation of the couple at the time of their return to the Member State of which the worker is a national. Such conduct cannot constitute an abuse within the meaning of paragraph 24 of the *Singh* judgment even if the spouse did not, at the time when the couple installed itself in another Member State, have a right to remain in the Member State of which the worker is a national."

16. Mr Noor submitted that the First-tier Tribunal was bound by these authorities, and in its repeated reference to the intention of the parties in choosing to establish themselves in Romania, it had misdirected itself in law.

17. Mr McVeety accepted that Regulation 9(3) had to be read in line with ECJ jurisprudence. He submitted that each of the matters there identified were a relevant consideration to the question of whether the residence in the host state was "genuine". The three-month period that is the focus of the decision in O&B was not, for instance, inconsistent with the factor at Regulation 9(3)(b): "the length of F and BC's joint residence in the EEA State". He further pointed out that the fact that the Romanians had issued a residence permit was not, according to O&B, determinative; the court had only held that it would *in principle* establish genuine residence. Mr McVeety submitted that the First-tier Tribunal had properly considered whether the centre of the couple's life had in fact transferred to Romania, and that this was equivalent to the expression used by the court in O&B, whether their family life had strengthened there.

18. I am satisfied that the Appellant has made out her grounds.

19. The finding of the First-tier Tribunal is, in accordance with the decision of the Respondent, that the couple all along intended in the long run to come and live in the United Kingdom. The Tribunal concluded from this that their residence in Romania merely tokenistic and not therefore "genuine". At paragraph 11, for instance, the determination comments, in the context of a

discussion about the Romanian job market, "it does not give a stable bedrock to starting a new future there". There was of course no requirement, in either the Directive or Regulations, that the couple intended to spend the rest of their lives in Romania. It is perfectly possible for a couple, or indeed an individual, to intend to live in place A for a certain amount of time with a view, in the longer term, to moving to place B. That does not mean that the residence in place A is illusory, cynical or "not genuine". To give a domestic example, a student from Manchester may take up a place at university in Aberdeen without the intention of remaining in that city for ever; the fact that he is only there for the duration of his studies does not mean that he has not "genuinely" lived there.

20. The Tribunal further identified three facts indicating that the Appellant could not qualify for entry under the Immigration Rules: the Sponsor could not meet the minimum income requirement, she had not passed her English language test and she had not paid the fee for a settlement visa. Those facts are then relied upon to reach the conclusion that the residence in Romania was entirely manufactured for the purpose of circumventing those Rules. Setting aside the somewhat dubious nexus between facts and the conclusion, I agree with Mr Noor that the Tribunal has here apparently ignored the clear dictum in Akrich to the effect that the intention is not relevant. The only question is whether the individuals in question have genuinely established themselves in the host country.

21. In this case the Tribunal itself had accepted that the Sponsor had lived in Romania for approximately one year, four months of which were with the Appellant. It had accepted that he had run his own business, and made a living out of it. It appeared to accept (at least no adverse conclusion is reached) that the couple had a home together there. It accepted that when they lived in Romania they did so alongside other family members who had an established long residence, and indeed citizenship there. All of these factors point strongly towards the residence being "genuine". The EEA Sponsor was exercising treaty rights. Both he and his wife lived together in that country. To use the language of O&B, they strengthened their family life together there. Applying O&B and Akrich these factors are in themselves sufficient to discharge the burden of proof.

Decision

22. The appeal is allowed.

23. There is no order for anonymity.

Upper Tribunal Judge Bruce
5th March 2019