Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: EA/08250/2017

THE IMMIGRATION ACTS

Heard at Royal Courts of Justice, Belfast	**Decision & Reasons Promulgated**
On 7 August 2019	**On 29 August 2019**

Before

UPPER TRIBUNAL JUDGE DAWSON

Between

SHANTEL PRYCE
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: In person
For the Respondent: Mr Diwnycz, Senior Presenting Officer

DECISION AND REASONS

1. This is an appeal by a citizen of Jamaica against the decision of First-tier Tribunal Judge Gillespie. For reasons given in his decision dated 14 April 2018, the judge dismissed her appeal against the Secretary of State's decision dated 22 September 2017 refusing her application for a residence card. This had been made as a family member of a British citizen [WP], who has exercised his treaty rights in the Republic of Ireland.

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2. Three reasons were given for the refusal. The first was that the appellant had not demonstrated that the centre of her partner's life had been transferred to the Republic of Ireland. The second was that she had not provided sufficient evidence of her integration in the Republic of Ireland and the third was that her first lawful residence with her partner was in order to circumvent immigration laws.

3. Home Office records show that on 27 April 2011 and 7 October 2013 the appellant had applied for spouse visas to enter the United Kingdom which had been refused. They had been sponsored by her partner Mr [P], who at that time was residing in the United Kingdom. Whilst the Irish authorities had issued the appellant and her family with a residence card the bank statements submitted did not show that her partner generated a significant income from her self-employment there. No explanation had been provided why her partner had chosen to go to Ireland in the first instance.

4. The judge heard evidence from the appellant and her partner and he considered that the evidence by the appellant and her partner was clear that they had only moved to Ireland because she had failed to obtain leave to remain under the Immigration Rules. He went on to explain his reasons as follows:-

> "34. The amount of income generated as a TV repairer was wholly inadequate to support them given that they were paying rent of about €500 per month, running a motor vehicle and paying for all the other necessary expenses of living there.
>
> 35. The length of their residence is relevant in assessing the genuineness of their residence in the EEA State and when the shortness of their sojourn is put into the balance I am not persuaded her husband was genuinely exercising Treaty rights.
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> 36. I am unable to reconcile the amounts raised on the invoices to Mr White with the business account and the parties were in conflict in their evidence on the issue. The appellant made no mention of any difficulty in obtaining payment and said that amounts were aggregated by Mr White and paid. Most of the invoices are indeed receipted as having been paid.
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> 37. All the invoices raised to Mr White with addresses, show that the alleged work was carried out in Northern Ireland and that does not encourage me to believe that he was in reality carrying out any work for him in the Republic of Ireland.
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> 38. No significant withdrawals have been made on the business account consistent with his TV repair enterprise being a real and substantive source of income.
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> 39. The evidence is unclear as to what monies Mr [P] earned from his agency work as an employee in Northern Ireland while he was living in the Republic of Ireland. No bank account has been furnished to prove what the scale of these earnings was relative to what he says he got from Mr White.
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> 40. In considering the genuineness of residence in the EEA State regulation 9(3)(c) requires a consideration of the British national's accommodation in

the EEA State, and whether it is or was his principal residence. The oral evidence showed that Mr [P] retained his property in Shropshire and rented it out. That would suggest that the centre of his life had not in reality transferred to Ireland (regulation 9(3)(a)).

41. The appellant produced a letter from Donegal Volunteer Centre recording that she was an active member of the community in 2016 and details various activities she engaged upon of a social or sporting nature. I have taken that into account but am not persuaded that it addresses the issue of her integration into the Irish community in such a way as to affect my decision when everything else is taken into account.

42. Whilst I have noted Mr [P]'s claim that his TV repair business was embarked upon hopefully and failed through a lack of work I am not persuaded I can accept that assertion. The very modest amount apparently obtained, suggests no more than a token enterprise. Furthermore, there is no rational reason why he would leave his paid employment in England; with no previous association with Ireland; with no apparent experience of self-employment and go to Donegal for that purpose, other than to assist his wife in circumventing the Immigration Rules."

5. The judge declined to deal with Article 8 grounds with reference to the decision of the Court of Appeal in *Amirteymour v SSHD* [2017] EWCA Civ 353 and dismissed the appeal.

6. The appellant sought permission to appeal on the basis that the judge had misdirected himself as to the application of the Citizens Rights Directive. She relied also on her Article 8 rights and contended the court should have followed the authorities on this basis.

7. Permission on a renewed application was granted by Deputy Upper Tribunal Judge Jordan. He considered the issue was whether the presence of the appellant and her partner in Ireland was a means of circumventing UK immigration law and arguably the judge had not grappled this. Judge Jordan contrasted evasion with avoidance by analogy.

8. The appellant appeared before me with her husband without legal representation. I explained to her that a number of the points raised in the grounds of challenge related to the proportionality of the Secretary of State's decision under Article 8 of the Human Rights Convention which the judge correctly declined to deal with with reference to the Court of Appeal authority on the point. In particular this related to paragraphs [1], [2], [5], [6], [7], [8] and [9] of the grounds.

9. Paragraphs [2] and [10] were in broad terms, the first raising issues of irrationality, illogicality and unreasonableness and [10] raising issues of incorrectness and perversity with reference to the Magna Carta and natural justice. I explained to Ms Pryce that these grounds were in general terms and did not identify with any particularity why it was considered that the judge had erred.

10. Paragraph [3] however was one which I considered appropriate for me to consider and on which I invited Ms Pryce to make her arguments. That paragraph is in the following terms:

> "3. Furthermore, the court misdirected itself in not applying the EU regulations of the free movement of EU citizens as per 2004/38EC as my husband is an EU citizen and exercising his treaty rights in the UK."

11. Paragraph [4] came within the same category as paragraphs [2] and [10], being a general assertion that the court had been "hoodwinked and mesmerised by the wrong assertions put forward by the Home Office".

12. Ms Pryce explained that the application to the Home Office had been submitted on the basis that the business was based in Dublin and that even though the repairs had been undertaken in Northern Ireland she and her husband had taken that the Dublin base would be taken into account. She accepted that the work had been done in Northern Ireland as observed by the judge in [4] of the decision. Ms Pryce was unable to explain what factual matters the judge had not taken into account in the evidence that was before him. Extensive material had been provided by Ms Pryce in lever arch files and she stated that the judge had observed that he had only ten minutes to look at the documents. She explained that these had been lodged at the court prior to the hearing some weeks before.

13. By way of response Mr Diwnycz contended that the crux of the matter was where the money was earned and where the appellant and husband had spent their nights. The money had been earned in Northern Ireland and that they had resided in Ireland. The judge had dealt with that issue in his detailed decision.

14. By way of response Ms Pryce explained that even though her husband was working in Northern Ireland he had also been contracted to work in Donegal and had been paid in Euros.

15. I reserved my decision.

16. I begin my conclusions with observations on the grant of permission. With respect to the judge whilst he was correct that these is no minimum level of earnings, nevertheless the exercise of work pursuant to free movement must be effective and genuine. Deputy Upper Tribunal Judge Jordan identified the issue as whether the circumstances were a means of circumventing UK immigration law and drew on the difference in tax law between evading and avoiding as something analogous. He considered that the judge had not grappled with this point.

17. The case that the appellant had to meet was summarised by the judge at [7] to [10] of his decision as follows:

> "7. The Secretary of State concluded that the appellant had not provided adequate evidence to show that her residence in the Republic of Ireland was genuine for the following reasons.

- She had not demonstrated that the centre of her British husband's life had transferred to the Republic of Ireland.
- She had provided insufficient evidence of her integration in the Republic of Ireland.
- It was suspected that her first lawful residence with her husband was in order to circumvent immigration law.

8. The bank statements submitted did not confirm that her husband generated significant income from his alleged self-employment in Ireland. A Bank of Ireland current account operated in Donegal during their period there showed the highest amount to be €2739.25 on 15 October 2015. Had her husband been sponsoring an application for her from the United Kingdom under the Immigration Rules while performing a similar role here he would have had insufficient funds to enable her to qualify for entry to the United Kingdom.

9. Furthermore, no explanation has been provided as to why her husband chose to go to Ireland in the first instance. He was a British citizen, who originally lived in the United Kingdom. There was no evidence that he had any social, family or cultural ties in Ireland and no explanation had been given as to why she left Ireland to come to the United Kingdom shortly after she and her husband had been granted permission to live in Ireland until 2021. Whilst recognising that she had submitted some documentation in the form of bank statement and tenancy agreements, to confirm that she may have spent time in Ireland the decision maker stated that she would expect to see further documentation to confirm that she had genuinely integrated into the Irish community.

10. In view of these findings and taking into account her previous unsuccessful attempts to enter the United Kingdom it was apparent to the decision maker that it was always her intention to live in the United Kingdom and her stay in Ireland was merely to enable her to enter the United Kingdom under the EEA regulations, when she would otherwise not have qualified for entry under the Immigration Rules."

18. The judge then directed himself in relation to the law and provided the following extract from the Immigration (European Economic Area) Regulations 2016 as follows:

"11. The 2016 Regulations introduced changes to the provisions of the earlier 2006 Regulations with regard to the application of the ruling in the Surinder Singh case as it affects British citizens who were residing with the non-EEA family members (i.e. spouses) in another EEA state and who, upon returning to the UK, seek to benefit from EU law instead of the more rigorous requirements of the UK Immigration Rules. They are contained in regulation 9:

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)."

19. In his survey of the evidence over a number of paragraphs between [12] and [31], the judge noted the history of the relationship and attempts to obtain permission to remain in the United Kingdom and specifically in relation to the move to Letterkenny, the judge noted at [14]:

> "14. When he moved to Letterkenny he became self-employed with David White TV Repairs, Ballycoolin, Dublin. Mr White would send him a TV repair job to be done and he would carry this out while she worked in the home. Twelve invoices to Mr White have been produced totalling

> €1868.34. He operated a Bank of Ireland business account at their Letterkenny branch. The invoices begin in December 2015 and end in November 2016. The total amount he generated in what he says was a self-employed capacity is reflected in these 12 invoices. Because income was limited he also went to train with a Mr David Crumlish in Letterkenny in the repair and maintenance of white goods. He operated a business in the sale and repair of such. The period with Mr Crumlish overlapped with the work he was doing for Mr White."

20. In his continuing survey, the judge observed the basis of the couple coming to Ireland so that they could be together which had been denied in the United Kingdom. Ms Pryce had not been permitted to work so she had undertaken voluntary work. Her husband had worked as a TV repairer and engineer in the United Kingdom which he had left in September 2015 and that his three bedroomed house in Shropshire had been rented out. The judge also noted the evidence that Ms Pryce's husband had obtained agency work through a company called MPA and worked in support services at Altnagelvin Hospital, Londonderry for four nights a week. The repair work had been during the day. No documentary evidence from MPA or bank statements vouching payments could be provided. In respect of her husband's account with the Bank of Ireland, the judge noted at [19]:

> "19. The first credit to the Bank of Ireland business account was 4 March 2016 when the account was opened. The first invoice to Mr White is dated 1 December 2015. She was asked how in those circumstances they survived financially and she said they came to Letterkenny with €2000 and that is what they survived on. They also got help from his family and he had the rental income from his property and in Shropshire. The €2000 came from monies she earned in Jamaica and he had also been earning."

And as to credits in the bank account, the judge noted at [20]:

> "20. She was cross-examined regarding credits to the business bank account and she said White invoices were aggregated together. She was asked why the credits on the bank account could not be traced to Mr White and she said the bank did not [allow] for that service."

21. The judge also noted that the monthly rent on the first Letterkenny property was €470 and €500 on the second. As an aside this entailed an annual rental approaching €6000 in contrast with the evidence of earnings generated.

22. As to Mr [P]'s evidence, the judge noted that he had no intention of circumventing the Immigration Rules and had made a lot of effort to get work in Letterkenny without any success. He had obtained the work in Ireland from Mr White, having sent him his CV in Dublin. Everyone working for Mr White did so on a self-employed basis. He had done a lot of jobs in Derry, Ballymena and other locations. Activities on the bank card were explained and Mr [P] also gave evidence that in order to advertise his business he had obtained some cards and posters. He had also worked for Mr David Crumlish doing repairs to cookers, fridge freezers and the like, for which he was paid cash in hand in the summer of 2016. At [30] the judge records his answers as to his work with the MPA agency:

> "30. He said he began to work through the agency MPA but he had no documentary evidence that spoke to this. It would be at home. MPA insisted upon paying any monies he received into a sterling account. The work was sporadic. He worked a few nights and then went to the ICU unit in the hospital. He started in April 2016. He was able to do the MPA work and Mr White's work during the day."

23. In response to questions from the judge Mr [P] explained that he had chosen to go to Donegal and no other part of Ireland as the rents were more affordable there. The judge then asked why very few debits had been made to the account with the Bank of Ireland and Mr [P] responded that "they had €2700 in their current account. They had also been given money by their family".

24. In order to qualify under Regulation 9 an appellant and in this case her British national spouse (or durable partner) must:

    (i) have resided in another Member State; and

    (ii) that residence must have been genuine.

25. An analysis of the relevant case law must begin with *Surinder Singh* [1992] EUECJ C-370/90 in which the Court of Justice explained at [25]:

> "25. The answer to the question referred for a preliminary ruling must therefore be that Article 52 of the Treaty and Directive 73/148, properly construed, require a Member State to grant leave to enter and reside in its territory to the spouse, of what- ever nationality, of a national of that State who has gone, with that spouse, to another Member State in order to work there as an employed person as envisaged by Article 48 of the Treaty and returns to establish himself or herself as envisaged by Article 52 of the Treaty in the territory of the State of which he or she is a national. The spouse must enjoy at least the same rights as would be granted to him or her under Community law if his or her spouse entered and resided in the territory of another Member State."

26. In *O & B v the Netherlands (Case C-456/12)* the Court of Justice was asked by the Netherlands Court in two linked cases questions regarding the conditions governing the right of residence of persons of third country nationality who have resided with an EU national in another Member State. Those questions are as set out by the court in its decision at [32]:

> "32. In those circumstances the Raad van State decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling, the first three of which are formulated in the same terms in the cases of Mr O. and Mr B., with only the fourth question specific to the case of Mr B.:
>
> '(1) Should Directive 2004/38 …, as regards the conditions governing the right of residence of members of the family of a Union citizen who have third-country nationality, be applied by analogy, as in the judgments of the Court of Justice of the European Communities in [*Singh* and in *Eind*], where a Union citizen returns to the Member

State of which he is a national after having resided in another Member State in the context of Article 21(1) [TFEU], and as the recipient of services within the meaning of Article 56 [TFEU]?

(2) [If the first question is answered in the affirmative], is there a requirement that the residence of the Union citizen in another Member State must have been of a certain minimum duration if, after the return of the Union citizen to the Member State of which he is a national, the member of his family who is a third-country national wishes to gain a right of residence in that Member State?

(3) [If the second question is answered in the affirmative], can that requirement then also be met if there was no question of continuous residence, but rather of a certain frequency of residence, such as during weekly residence at weekends or during regular visits?

(4) As a result of the time which elapsed between the return of the Union citizen to the Member State of which he is a national and the arrival of the family member from a third country in that Member State, in circumstances such as those of the … case [concerning Mr B.], has there been a lapse of possible entitlement of the family member with third-country nationality to a right of residence derived from Union law?'

27. The court explained in respect of the first, second and third questions that the Directive 2004/38 did not establish a derived right of residence for third country nationals who are family members of a Union citizen in a Member State of which that citizen is a national. The Directive establishes a derived right of residence for third country nationals who are family members "… only where that citizen has exercised his right of free movement by becoming established in a Member State other than the Member State of which he is a national". Having decided that third country nationals such as the applicants were not entitled on the basis of Directive 2004/38 to a derived right of residence in the Member State of which their sponsors were nationals, the court examined whether a derived right of residence may in some circumstances be based on Article 21(1) TFEU. The court explained its decision at [48] to [50]:

"48. It is therefore necessary to determine whether the case-law resulting from *Singh* and *Eind* is capable of being applied generally to family members of Union citizens who, having availed themselves of the rights conferred on them by Article 21(1) TFEU, resided in a Member State other than that of which they are nationals, before returning to the Member State of origin.

49. That is indeed the case. The grant, when a Union citizen returns to the Member State of which he is a national, of a derived right of residence to a third-country national who is a family member of that Union citizen and with whom that citizen has resided, solely by virtue of his being a Union citizen, pursuant to and in conformity with Union law in the host Member State, seeks to remove the same type of obstacle on leaving the Member State of origin as that referred to in paragraph 47 above, by guaranteeing that that citizen will be able, in his Member State of origin, to continue the family life which he created or strengthened in the host Member State.

> 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."

28. Relevant to the appeal before me the Court observed in [51] and [52]:

> "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.
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> 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."

29. Specifically in relation to abuse the Court explained at [58]:

> "58. It should be added that the scope of Union law cannot be extended to cover abuses (see, to that effect, Case C-110/99 *Emsland-Stärke* [2000] ECR I-11569, paragraph 51, and Case C-303/08 *Bozkurt* [2010] ECR I-13445, paragraph 47). Proof of such an abuse requires, first, a combination of objective circumstances in which, despite formal observance of the conditions laid down by the European Union rules, the purpose of those rules has not been achieved, and, secondly, a subjective element consisting in the intention to obtain an advantage from the European Union rules by artificially creating the conditions laid down for obtaining it (Case C-364/10 *Hungary* v *Slovakia* [2012] ECR, paragraph 58)."

30. Thus, in order for considerations of abuse to arise, the person concerned must meet the conditions for the enjoyment of the right in question (see the analysis by Laing J in *R on the application Gunars Gureeckis v SSHD and another* [2017] EWHC 3298 (Admin) in particular [75*ff*]).

31. In my judgment, the findings by the judge as to the nature of the work undertaken by Mr [P] leads to only one answer; his wife had not established that her husband had demonstrated or met the conditions for the enjoyment of the right of free movement and there had been no genuine and effective exercise by her husband of such rights during their stay in Donegal. The services that he had provided were principally for work undertaken in Northern Ireland where he also worked in the evenings and in any event the income generated was only marginal in the light of his commitments. That being so, the issues of circumvention of the Immigration Rules and abuse did not arise for consideration. It was incumbent upon the judge to address this aspect first before considering abuse and although he erred in not doing so, I am not satisfied based on the findings reached that such error was material. Accordingly this appeal is dismissed.

NOTICE OF DECISION

The appeal is dismissed on grounds under the Immigration (EEA) Regulations 2016.

Signed Date 21 August 2019

UTJ Dawson
Upper Tribunal Judge Dawson