Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: EA/02471/2019
EA/02472/2019
EA/02475/2019
EA/02476/2019

THE IMMIGRATION ACTS

Heard at Manchester CJC via Skype	**Decision & Reasons Promulgated**
On 12 October 2020	**On 21 October 2020**

Before

UPPER TRIBUNAL JUDGE HANSON

Between

SHAMSUL ALOM
EMRAN ALOM
RUMENA KHATUN
LUBNA KHATUN
(Anonymity direction not made)

Appellants

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr Shah of Taj Solicitors.
For the Respondent: Mr Tan Senior Home Office Presenting Officer.

ERROR OF LAW FINDING AND REASONS

1. The appellants appeal with permission a decision of First-tier Tribunal Judge NMK Lawrence ('the Judge') promulgated on the 29 October 2019 in which the Judge dismissed the appeals of the first appellant, who was born on 1 January 1965 and who is married to her British national sponsor, and of the remaining appellants who are said to be their biological children, who were born on the 12 March 1997, 11 August 1999 and 18 April 2000 respectively.
2. Permission was granted by another judge of the First-tier Tribunal on the basis it was said to be arguable that the Judge had erred in law by applying a 'centre of life test' which was not permitted following the decision of the Upper Tribunal reported as ZA (Reg 9. EEA Regs; abuse of rights) Afghanistan [2019] UKUT 00281 (IAC).

Error of law

3. In ZA, handed down on 17 September 2019, it was held that the requirement to have transferred the centre of one's life to the host member state is not a requirement of EU law, neither is it endorsed by the CJEU. It is for the appellant to show that there has been a genuine exercise of Treaty rights in the host state in the sense that the exercise of Treaty rights was real, substantive, or effective. The question of whether family life was established and/or strengthened and whether there has been a genuine exercise of Treaty rights requires a qualitative assessment which will need to be fact specific bearing in mind that any work/self-employment must have been "genuine and effective" and not marginal or ancillary; the assessment of whether the stay was genuine does not involve an assessment of the intentions of the parties over and above a consideration of whether what they intended to do was to exercise Treaty rights; there is no requirement for the EU national or his family to have integrated into the host state nor for it to be their sole place of residence; there is no requirement to have severed ties with the home member state; albeit that these factors may, to a limited degree, be relevant to the qualitative assessment of whether the exercise of Treaty rights was genuine. If it is alleged that the stay in the host state was such that reg 9(4) applies, the burden is on the SSHD to show that there was an abuse of rights.
4. Despite the hearing before the Judge not having taken place until 7 October 2019 and the decision being promulgated on 29 October 2019 there is no reference in the determination to ZA by the Judge or any indication of how the guidance provided in that case has been applied to this appeal. The reference by the Judge to a "centre of life test" indicates the Judge was either unaware of the Upper Tribunal's guidance or failed to apply it.
5. Mr Tan also observed a further fundamental error in the decision in that the Judge at [7] specifically states "*The appellants bare the legal burden of proof from start to finish and the standard of proof is on the balance of probability*" yet decides that Regulation 9(4) applies in this appeal; in

relation to which the burden was upon the Secretary of State not the appellants.

6. It was not disputed before the Upper Tribunal by Mr Tan that the Judge had erred in law in a manner material to the decision to dismiss the appeal for the reasons set out in the grounds and the specific points referred to above. It was accepted that the failure to apply the correct burden of proof and the failure to consider the merits in accordance with ZA means the appellants' have not received a fair hearing of their repeal.
7. In light of the fact the appeal will have to be considered afresh in relation to which substantial findings of fact will be required by reference to the correct legal framework, it is a case which when considering the Presidential Guidance on the remittal of appeals is suitable to be remitted to the First-tier Tribunal sitting at Birmingham to be heard by a judge other than Judge NMK Lawrence. There shall be no preserved findings.

Decision

8. **The First-tier Judge materially erred in law. I set aside the decision of the original Judge. This appeal shall be remitted to the First-tier Tribunal sitting at Birmingham to be heard afresh by a judge other than Judge NMK Lawrence.**

Anonymity.

9. The First-tier Tribunal did not make an order pursuant to rule 45(4)(i) of the Asylum and Immigration Tribunal (Procedure) Rules 2005.

   I make no such order pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008.

Signed…….
Upper Tribunal Judge Hanson

Dated the 13 October 2020