Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number**
IA/19695/2014

THE IMMIGRATION ACTS

Heard at Field House	**Decision and Reasons Promulgated**
On 25th September 2015	**On 14th October 2015**

Before

DEPUTY UPPER TRIBUNAL JUDGE PARKES

Between

SHOMAILA RAMZAN
(ANONYMITY DIRECTION NOT MADE)

Appellant

And

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr P Richardson (Counsel, instructed by Nasim & Co, Solicitors)
For the Respondent: Mr Whitwell (Home Office Presenting Officer)

DETERMINATION AND REASONS

1. The Appellant, a national of Pakistan, came to the UK from Ireland with her husband, the Sponsor, in February 2014. She applied for a residence card as a family member of an EEA national on the basis that her husband had been exercising treaty rights in Ireland and that she qualified under the terms of Directive 2004/38/EC and regulation 9 of the EEA Regulations.

2. The application was refused for the reasons given in the Refusal Letter of the 16th of April 2014. It was accepted that the Sponsor had been living and working in Ireland but he had only started work in the September and there was no evidence he had been received wages and he had not had sufficient time to immerse himself in the local community. It was not accepted that the Sponsor had shown he was worker within the meaning of regulation 9(2)(C) of the EEA Regulations. The letter went on to require a separate paid application if the Appellant wished to rely on the provisions of Appendix FM or paragraph 276ADE of the Immigration Rules.

3. The Appellant's appeal was heard by Judge Bart-Stewart at Victory House on the 22nd of December 2014. The appeal was dismissed for the reasons given in the decision promulgated on the 3rd of February 2014. The evidence and submissions are set out at paragraphs 7 to 13 the findings and reasons are at paragraphs 14 to 20.

4. The Judge found that there was little reliable evidence that the Sponsor was in living in Ireland and exercising treaty rights. Having considered the documents submitted she found that there were discrepancies in the documents and that the Sponsor had not been shown to be exercising treaty rights in Ireland. In paragraph 18 the case of O [2014] EUECJ C-456/12 was considered and focussed on the question of the genuineness of the residence and family life created. It was not accepted that the evidence showed genuine residence and the test in regulation 9(2)(c) that there should be a transfer of the centre of a person's life was consistent with the test of genuine residence.

5. Paragraphs 51 of the case of O it was observed that the residence of the Union Citizen in the hose member State would have to be sufficiently genuine so as to enable the citizen to create or strengthen family life there.

6. The grounds to the Upper Tribunal complain that the Judge effectively went behind the position of the Secretary of State as set out in the Refusal Letter and that it was unfair that findings had been made against the Appellant and Sponsor without their having been given the opportunity to address the departure from the Secretary of State's position in the Refusal Letter. The Secretary of State had not questioned the validity or genuineness of the documents that had been submitted. It was also submitted that the Appellant would only have to show that family life with the Sponsor had been created or strengthened while the Sponsor was exercising treaty rights.

7. In granting permission to appeal Judge Rintoul indicated that it was arguable that the Judge had erred in relation to the length of time the spouse needed to reside in another EEA state with the EEA national spouse and it was also arguable that she had erred in considering the genuine residence test is predicated on a transfer of the centre of a person's life. All the grounds were arguable.

8. The representatives made submissions in line with their respective positions. The Secretary of State also relied on the case of Maheshwaran [2002] EWCA Civ 173 and the observations that adjudicators could not be expected to be alive to all the issues before a case was heard and the relative importance of issues may change following the hearing and that adjudicators ought to be cautious about jumping into the arena. Failure to put a point can be grossly unfair especially if conceded by one party, if the Judge is minded to go against a concession he should say so.

9. The extent to which a Judge should be willing to enter the fray is not easy and depends entirely on the facts of the case and the manner of its presentation by the representatives. Clearly a Judge can ask questions if a particular point appears to be overlooked but that may be a deliberate tactic by the questioner. There is a danger of appearing to have prejudged an issue by asking questions or in not raising the issue risking the complaint that the Appellant was not able to deal with a concern which was considered in the decision.

10. The note of evidence recorded in the decision and confirmed by the Record of Proceedings show that the Sponsor was asked questions about his work in Ireland and the documents he had provided, when he had worked and how he was paid. It cannot be said that these had not been raised as issues before the Judge by the Home Office Presenting Officer.

11. Following the observations in paragraph 57 of Q it was for the Judge to determine whether the Sponsor genuinely resided in Ireland and whether on account of living as a family during that period of genuine residence they enjoyed a right of residence there. The questions asked of the Appellant and Sponsor went to that issue which was squarely before the Judge arising out of the hearing and the Judge cannot be criticised for that. She did not enter the questioning of the witnesses and decided the case on the evidence that had been presented.

12. It was properly accepted by Mr Richardson that if there was no error in respect of the fact finding exercise by the Judge then the challenge to the compatibility of the regulations with the directive would not arise. Although I do not need to decide the point it appears to me that the use of the term "centre of life" is compatible with the genuine residence test.

13. In paragraph 18 of the decision the Judge found that the time that the Appellant and Sponsor had lived together in Ireland was evidence of the creation or strengthening of family life and that the evidence fell short of showing genuine residence. On that basis the appeal was dismissed. That was a conclusion that was open to the Judge on the evidence that had been presented by the Appellant and Sponsor and elicited in examination-in-chief and cross-examination.

14. Accordingly I find that the decision of the First-tier Tribunal does not contain an error of law and so the decision stands as the disposal of the Appellant's appeal in this case.

CONCLUSIONS

The making of the decision of the First-tier Tribunal did not involve the making of an error on a point of law.

I do not set aside the decision.

Anonymity

The First-tier Tribunal did not make an order pursuant to rule 45(4)(i) of the Asylum and Immigration Tribunal (Procedure) Rules 2005 and I make no order.

Fee Award

In dismissing this appeal I make no fee award.

Signed:

Deputy Judge of the Upper Tribunal (IAC)

Dated: 14th October 2015