



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

Appeal Number: EA/00954/2018

**THE IMMIGRATION ACTS**

**Heard at Manchester CJC**

**Decision & Reasons**

**On 23 October 2018**

**Promulgated**

**On 31 October 2018**

**Before**

**UPPER TRIBUNAL JUDGE PLIMMER**

**Between**

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

Appellant

**and**

**SYED ALI HAIDER SHAH**

Respondent

**Representation:**

For the appellant: Mr Tan, Senior Home Office Presenting Officer

For the respondent: Mr Lucky, R & A Solicitors

**DECISION AND REASONS**

**Introduction**

1. The SSHD has appealed against a First-tier Tribunal ('FTT') decision dated 30 May 2018 in which it allowed Mr Shah's appeal, against a decision dated 4 January 2018 refusing his application for a residence card on the basis that he was a family member of a British citizen who has exercised his Treaty rights by genuinely living in Ireland, an EEA state, in accordance with the principles established in R v IAT and Surinder Singh (C-370/90) [1992] ECR I-04265.

## **Background**

2. Mr Shah is a citizen of Pakistan who is married to a British citizen ('the sponsor'). Mr Shah entered the United Kingdom ('UK') as a student in 2009 and remained as such until his leave was curtailed to 10 May 2015. He moved from the UK to Ireland on 18 March 2015. He met the sponsor in Ireland and they got married there on 21 May 2016.
3. The sponsor worked in Ireland but they both returned to reside in the UK from 15 May 2017. This followed the Irish authorities granting him a residence card based upon his marriage to the sponsor on 15 March 2017 and the UK granting him a family permit for a period of six months when he returned to the UK for a visit on 26 April 2017.
4. Upon his return to the UK, Mr Shah applied for a residence card but this was refused in a decision dated 4 January 2018. In summary, the SSHD accepted that the sponsor exercised Treaty rights in Ireland but did not accept that residence in the UK was genuine and concluded it was done as a means of circumventing immigration law.

## **The appeal to the FTT**

5. The FTT heard and recorded detailed evidence provided by Mr Shah and the sponsor in the decision at [7] to [30], before making the following findings of fact from [35]:
  - (i) The sponsor was exercising Treaty rights in Ireland [35].
  - (ii) After their one day visit to the UK on 26 April 2017 the couple returned to Ireland [36].
  - (iii) Notwithstanding his contrary claim, Mr Shah was not granted any lawful status in Ireland until he was granted a residence card in February 2017 (there are different dates provided for this, elsewhere it is said the residence card was provided on 15 March 2017 but nothing turns on this difference), which was based upon his marriage [37].
  - (iv) Mr Shah and the sponsor gave contradictory, implausible and incredible evidence regarding the sponsor's siblings [38], the intention to return to live in the UK [39] and the reasons for returning to the UK [40].
  - (v) Mr Shah and the sponsor returned to live in the UK when his passport was stamped with a six-month family permit at Manchester airport on 26 April 2017 [40].
6. Having made those factual findings the FTT said this at [41]:

"Yet, the issue in this appeal is whether the appellant's EEA sponsor's wife moved the centre of her life to Ireland...Whilst I find the appellant has not provided an accurate account in some areas of his evidence and reject his explanation that the move back to the UK was due to Brexit, given the time his wife lived and worked after her marriage to

the appellant, on balance, I find she did move the centre of her life to Ireland. Consequently, I allow the appeal.”

### **The appeal to the Upper Tribunal**

7. The SSHD sought permission to appeal to the Upper Tribunal on the basis that the FTT:
  - (i) failed to consider all the relevant factors set out in Regulation 9(3) of the Immigration (European Economic Area) Regulations 2016 ('the 2016 Regs') and unlawfully restricted its analysis to regulation 9(3)(a) alone;
  - (ii) failed to consider all the relevant evidence in relation to those factors.
8. On 29 June 2018, the FTT (Judge Landes) granted the SSHD permission to appeal observing it to be arguable that the FTT failed to make sufficient findings as the issue of whether the centre of the sponsor's life transferred to Ireland was only one factor in the determination of the genuineness of the residence. Judge Landes also observed that whilst the finding that the centre of the sponsor's life has transferred was a strong indication that residence in Ireland was transferred, it remained arguable that had all the relevant factors been considered, a different conclusion might have been reached.
9. At the hearing before me Mr Tan relied upon the grounds of appeal. Mr Lucky invited me to find that when the decision is read as a whole, all the relevant factors in regulation 9(3) were taken into account, such that the FTT decision was adequately reasoned and contains no error of law.
10. After hearing from both representatives, I indicated that the FTT decision contains an error of law but that the appropriate course was to remit to the same FTT judge and to preserve the findings of fact made. Both Mr Tan and Mr Lucky did not oppose my suggestion that given the particular features of this case, any remittal should be to the same FTT. I now provide my reasons.

### **Legal framework**

11. Regulation 9 of the 2016 Regs states as follows:
  - “(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).
- (5) Where these Regulations apply to F, BC is to be treated as holding a valid passport issued by an EEA State for the purposes of the application of these Regulations to F.
- (6) In paragraph (2)(a)(ii), BC is only to be treated as having acquired the right of permanent residence in the EEA State if such residence would have led to the acquisition of that right under regulation 15, had it taken place in the United Kingdom.
- (7) For the purposes of determining whether, when treating the BC as an EEA national under these Regulations in accordance with paragraph (1), BC would be a qualified person—
  - (a) any requirement to have comprehensive sickness insurance cover in the United Kingdom still applies, save that it does not require the cover to extend to BC;
  - (b) in assessing whether BC can continue to be treated as a worker under regulation 6(2)(b) or (c), BC is not required to satisfy condition A;
  - (c) in assessing whether BC can be treated as a jobseeker as defined in regulation 6(1), BC is not required to satisfy conditions A and, where it would otherwise be relevant, condition C."

12. [Regulation 9](#) finds its genesis not from the relevant Directive but in [Surinder Singh](#), a case which involved the return to the UK with her third country spouse of a British national who had exercised her right of free movement by working and living in Germany, with her husband, for a period of almost three years. In other words, in order to make the right of free movement effective, such ancillary rights are required to be implied on return to the national's country of origin, whereby the national retained the right to be accompanied by his or her spouse. The relevant principles established by [Surinder Singh](#) as applied in [O and B v Minister von Immigratie](#) [2014] 3 WLR 799 have therefore been transposed into regulation 9.

### **Discussion**

13. I accept that the FTT made a clear finding that the centre of the sponsor's life transferred to Ireland for the period of time she resided there between May 2016 and May 2017. The question for the FTT was not merely whether the centre of the sponsor's life transferred to Ireland but whether Mr Shah's and the sponsor's residence in Ireland was genuine. That this is so is clear from the wording of regulation 9 as well as the authorities cited above. To use the language of regulation 9:
- It was not disputed that the sponsor was exercising Treaty rights and acquired the right of permanent residence in accordance with regulation 9(2)(a);
  - Although there was no clear finding to this effect, the FTT appears to have accepted that the couple resided in Ireland for the purposes of regulation 9(2)(b);
  - That meant that the FTT was obliged to address whether both parties' residence in Ireland was genuine for the purposes of regulation 9(2)(c).
14. The FTT erred in law in allowing the appeal without fully and properly resolving the genuineness of both parties residence in Ireland. The factors in regulation 9(3) are a helpful checklist in this regard. I agree with Judge Landes that whilst the finding that the centre of the sponsor's life has transferred was a strong indication that residence in Ireland was genuine, it was not necessarily determinative of the issue. The FTT ought to have considered in particular the nature and quality of their accommodation in Ireland, the degree of their integration in Ireland and any evidence suggesting that residence in Ireland was used as a means of circumventing immigration control. Had all the relevant factors been considered, a different conclusion might have been reached.

### **Remedy**

15. I have had regard to para 7.2 of the relevant *Senior President's Practice Statement* and I have decided that this is an appropriate case to remit to the same FTT Judge. I have taken this unusual step because the FTT heard detailed oral evidence and made findings of fact, both positive and

negative, that have not been the subject of any challenge. The FTT failed to make findings on certain relevant issues and it would be proportionate for her to remake her decision in light of her past fact findings and the further findings that are necessary in order to properly reason whether the residence of each of the parties in Ireland was genuine.

**Decision**

16. The decision of the FTT to allow the appellant's appeal involved the making of an error of law. I set it aside and direct that it shall be remade by the same FTT (Judge Malik).

Signed  
*M. Plimmer*

Dated  
23 October 2018

Melanie Plimmer  
Judge of the Upper Tribunal