Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: EA/07700/2017

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 4 October 2018	**On 14 November 2018**

Before

UPPER TRIBUNAL JUDGE RINTOUL
UPPER TRIBUNAL JUDGE BLUM

Between

A S
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Ms Najwa, instructed by UK Immigration Advisers
For the Respondent: Mr S Whitwell, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellant appeals with permission against the decision of First-tier Tribunal Judge S P J Buchanan promulgated on 6 March 2018 dismissing her appeal against the decision of the respondent made on 1 September 2017 to refuse to issue a residence card confirming a right of residence.

2. The facts of the case are straightforward. The appellant and her husband met in Canada, were married and came to the United Kingdom. They then transferred to

Ireland where the appellant's husband worked for approximately a year before returning to the United Kingdom and seeking a residence permit on the basis that the appellant's husband was a returning resident pursuant to Regulation 9 of the Immigration (European Economic Area) Regulations 2016.

3. So far as is relevant Regulation 9 provides:-

> 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.
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> (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
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> (ii) has acquired the right of permanent residence in an EEA State;
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> (b) F and BC resided together in the EEA State; and
>
> (c) F and BC's residence in the EEA State was genuine.
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> (3) Factors relevant to whether residence in the EEA State is or was genuine include—
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> (a) whether the centre of BC's life transferred to the EEA State;
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> (b) the length of F and BC's joint residence in the EEA State;
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> (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;
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> (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.
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> (4) This regulation does not apply—
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> (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
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> (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).

4. There are two elements to be shown there. Effectively it has to be shown that there is a genuine residence in the country in which the couple lived including a consideration of whether there has been a transfer of the centre of the British citizen's life to the country in which there has been residence, and second, following Regulation 9(4), this must not have been as a means of circumventing immigration laws.

5. The judge set out the evidence from paragraph [5.1] onwards. What the judge then did was to address first at paragraph 5.17 whether the purpose of living and residing in Ireland was with a view to circumventing immigration laws which otherwise would have been applicable, and then went on to make a number of findings about the circumstances in which they ceased to live in Dublin which, in summary, was that there were difficulties about extending the lease in the property in which they were living. The judge concluded at paragraph 5.29 that he was not satisfied that the reasons for leaving Dublin had been truly established and he concluded that, as the appellant and her spouse were fully aware that the financial requirements which would otherwise apply to an EEA spouse were not met, he was persuaded by the respondent that the period of time was with the intention of circumventing the Immigration Rules applying to non-EEA nationals to which the appellant would otherwise be subject.

6. The appellant then sought permission to appeal on the grounds that the judge had misdirected himself:

> (i) in placing a burden of proof on the appellant to show that there had been an abuse of rights contrary to the decision of the Court of Justice in Emsland-Starke [2000] EUECJ C-109/99;
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> (ii) in failing to make proper findings as to whether there had been a transfer of the centre of the partner's life; and
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> (iii) in reaching his conclusions about the intentions of the parties to the marriage, had concerned himself only with one aspect of the case, that being the issues regarding the intentions derived from the findings about the ending of the tenancy agreement; and, had failed properly to take into account the other factors set out in Regulation 9(3).

7. Many of the issues in this case have been helpfully addressed by the Inner House of Court of Session in AA v Secretary of State [2017] CSIH 38. It makes the point that as the Regulations in this case are designed to give effect in domestic law to the decisions of the CJEU particularly in the case of Surinder Singh and O and B [2014] EUECJ C-456/12, and that interpreting the Regulations must be done in the light of the relevant jurisprudence.

8. The judge does not appear to have directed himself properly as to the fact that he should consider first whether the appellant and her husband had established themselves in Ireland and then gone on to consider whether the Secretary of State had shown that notwithstanding that all the relevant requirements have been met there had been an abuse of rights.

9. We conclude that this was an error and that this may then have led the judge to reach findings which were not open to him. There are a number of factors set out in this case, not least of which is the length of time spent in the Irish Republic, the fact that the appellant's husband was employed, the fact that the Irish state had in fact issued a residence document indicating that the appellant's partner had been exercising treaty rights, that there was no proper assessment as to whether there had in fact

been an establishment of the parties in Ireland and in this case we make particular reference to what was said in **AA Nigeria** at [47] and [48]:

> [47] The appellant relied on these paragraphs to argue that as long as the residence in question lasted for at least three months, the terms of the article had been met and were sufficient for the purposes of Regulation 9. However, that argument fails to recognise the context in which the discussion takes place. It is central to the decision in *O and B* that for "residence in" the host state it is a "genuine residence" which requires to be established, not a residence of any specific duration. Of course, duration may be a relevant factor, but it is only one factor. As the Court went on to say in *O and B*
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> > "57. It is for the referring court to determine whether [the sponsors], who are both Union citizens, settled and, therefore, genuinely resided in the host member state and whether, on account of living as a family during that period of genuine residence [the spouses] enjoyed a derived right of residence in the host member state.
> >
> > "59. In that regard, short periods of residence such as weekends or holidays spent in a member state other than that of which the citizen in question is a national, even when considered together, fall within the scope of article 6 of Directive 2004/38 and do not satisfy those conditions."
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> Elsewhere the Court stated that on return, the conditions which apply should not be any more strict than those which apply when the citizen has exercised his right of movement by "becoming established" in a host state (para 61).
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> [48] The reference to "becoming established" echoes the approach taken in *Metock* v *Minister for Justice, Equality and Law Reform* [2009] QB 318. In that case, the Court rejected an argument that the spouse's derivative right to reside in the host state depended on that spouse having previously been lawfully resident within a member state. Faced with an argument that this would have serious immigration consequences for member states, the Court went on to say (para 73):
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> > "On this point, the answer must be, first, that it is not all nationals of non-member countries who derive rights of entry into and residence in a member state from Directive 2004/38, but only those who are family members, within the meaning of article 2(2) of that Directive, of a Union citizen who 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."

10. Further because of the confusion in making findings in what is a two-stage process, we cannot discern how the judge considered that the abuse of rights points was made out. It is also not clear whether the judge was aware that in order to establish an abuse of rights the actions taken must be at least the primary reason for undertaking the change, which in this case would mean moving to Ireland for a year – see Sadovska[2017] UKSC 54 and O. and B at [58]-[59].

11. Further, and in any event, the assessment of the facts is flawed in that the judge has failed properly to take account of any factors over and above the ending of the tenancy agreement from which all the issues about motive appear to have been derived, other than the apparent and last minute reference to the fact that the

appellant and partner may not have met the financial requirements set out in the Immigration Rules.

12. We do not consider that this was a sufficient basis for the judge to conclude that there had been no genuine establishment, and we find there had been no proper evaluation of all the facts as a whole. For these reasons we conclude that the decision of the First-tier Tribunal involved the making of an error of law and we set it aside.

13. We heard evidence from the appellant and her husband. The appellant adopted her witness statement, and in cross-examination, said that they had been to Ireland for 1 week in the past, and it was recalling that later that they had liked it. She said she had not applied to be a supply teacher in Ireland as she had not been able to find the right job. She denied not applying as it was not part of the long-term plan.

14. The appellant said that she had twice returned to the United Kingdom during the year they had spent in Ireland, and that her husband had looked for a job in the United Kingdom after the problems with their lease had arisen.

15. The appellant's husband adopted his witness statement, adding in cross-examination that he had first worked for Sky in a sales position, but had then moved to the retention team, and had progressed through the company to new customer sales and was now mentoring new employees. He said he had been aware of the income limits on immigration in 2013. He said that the ease of movement to Ireland had been a factor.

16. In response to our questions the appellant's husband said that his current earnings were now in excess of £20,000 per annum including his bonus.

17. In assessing whether the appellant meets the requirement of the EEA Regulations, we have approached the requirements of considered Reg. 9 sequentially. We are satisfied on the evidence that the appellant's husband is a British Citizen and that he and the appellant resided in Ireland for approximately a year.

18. Was the stay in Ireland genuine? The respondent submits it was not, given the relatively brief time spent there, if they had intended to settle, the nature of the accommodation, the lower pay and the lack of family or other ties to Ireland. It was submitted that it was unusual for a young couple to have a live-in landlady, and that it had been accepted that they were aware of the income requirement in the United Kingdom. It was submitted that looked at holistically, there was no genuine stay in the sense of strengthening roots or family life, and that it had not been shown to be genuine establishment. It was also submitted that inferences could be drawn from the fact that this was the first EEA state in which the couple had lived, and that they had lived in Ireland to circumvent immigration control.

19. Ms Najwa submitted that the witnesses were credible and had shown that they had genuinely established themselves in Ireland. The appellant had not worked, but it was not a requirement that she do so, nor was having family or ties in Ireland. There

was no intention to circumvent immigration control, and it was evident that family life had been strengthened in Ireland.

20. As noted above, the Regulations must be interpreted in the light of the case law on which it is based and we consider that the issue of whether there has been genuine establishment in Ireland must be approached holistically.

21. We consider that, as the appellant's husband said, they had lived in rented accommodation in the United Kingdom and had not retained that, or any other accommodation in this country when they went to Ireland. We accept that the husband obtained a job, and, notably, paid tax and was issued with a registration certificate in Ireland. These are, we consider, strong indicators that the centre of the couple's life had moved to Ireland. The contract of employment was not of a fixed term and they retained no residence in the United Kingdom or elsewhere.

22. We accept that the accommodation was of a temporary nature, and not on a long lease but we do not consider that adverse inferences can be drawn from that. Nor is it clear that the landlady was resident in the property as Mr Whitwell submitted, but equally the appellant and her husband do not as a couple, have a large income. Their choices as to accommodation are thus limited.

23. Contrary to the First-tier Tribunals observations, we find nothing unusual in the circumstances in which the couple found themselves; the property was in disrepair and the landlady, perhaps understandably, decided not to renew the lease. Viewing all of the evidence on this issue, we do not consider any adverse inferences can be drawn. What is recorded by the judge at [5.25] to [5.29] is mostly speculative and fails to take into account that as tenants not on a long lease they were not in a good bargaining position. No thought seems to have been given to how putative rights could have been enforced in practice. Having heard the appellant and her partner give evidence, we conclude, considering the evidence as a whole, that that have told the truth about how and why the lease came to an end, and that they were not able to secure accommodation at short notice, and that they then decided to return to the United Kingdom as their costs would be lower.

24. We conclude also, viewing the evidence as a whole, that the couple had initially decided to move to Ireland for an indefinite period as opposed to a fixed period. We draw no inferences from the fact that they had only been there once for a week and had not lived in any other EEA State. In the context of the Citizenship Directive facilitating free movement of workers, that is not anything which is surprising or from which adverse inferences could be drawn. We draw no inferences from the fact that the appellant and her partner were aware of the income threshold for the appellant to obtain entry clearance to the United Kingdom. We note that the partner has been promoted within Sky and now earns more than the threshold.

25. We accept that the appellant was not employed in Ireland but there was no requirement for her to take a job. We accept that she concentrated on her art. We do,

however, accept that the family life between the couple was strengthened by their living together in Ireland.

26. Taking all of these factors into account, and viewing the evidence as a whole, we are satisfied that the appellant and her husband's residence in Ireland was genuine, and that therefore the requirements of reg 9(3) are met.

27. Further, we are satisfied that, on the proper construction of reg 9(4) in the light of the case law above referred to, that the purpose of the couple was to establish themselves in Ireland, and that their purpose was not a means to circumvent the immigration laws.

28. For these reasons, we are satisfied that the appeal is to be allowed under the EEA Regulations.

SUMMARY OF CONCLUSIONS

1. The decision of the First-tier Tribunal involved the making of an error of law and we set it aside.

2. We remake the decision by allowing the appeal on the basis that the decision was contrary to EU law

Direction Regarding Anonymity – Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008

Unless and until a Tribunal or court directs otherwise, the appellant is granted anonymity. No report of these proceedings shall directly or indirectly identify him or any member of their family. This direction applies both to the appellant and to the respondent. Failure to comply with this direction could lead to contempt of court proceedings.

Signed Date 8 November 2018

Upper Tribunal Judge Rintoul