Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Numbers: EA/02326/2018
EA/02329/2018
& EA/02330/2018

THE IMMIGRATION ACTS

Heard at Royal Courts of Justice in Belfast	**Decision & Reasons Promulgated**
On 6 June 2019	**On 23 July 2019**

Before

UPPER TRIBUNAL JUDGE RINTOUL

Between

NOORIA [Z] (FIRST APPELLANT)
SAYED [Z] (SECOND APPELLANT)
[S Z] (THIRD APPELLANT
(ANONYMITY DIRECTION NOT MADE)

Appellants

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellants: Mr S Barr, Simon Barr Immigration Law
For the Respondent: Ms S Cunha, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellants appeal with permission against a decision of Designated Judge Murray promulgated on 8 October 2018, dismissing their appeal against the decision the respondent made on 27 February 2018 to refuse them residence cards as the direct family members of Syed [Z], a British citizen, who had previously exercised

treaty rights in Ireland. The appeals against those decisions were under the Immigration (European Economic Area) Regulations 2016 ("the EEA Regulations").

2. The appellants' case is that Mr Syed [Z] ("the sponsor"), husband of the first appellant and father of the second and third appellants had been living in Belfast since 2013 working as a taxi driver. He sought to move to County Donegal and his family joined him in the Republic of Ireland. He worked in Letterkenny for around twenty hours a week. The family applied for a residence card under EU law applicable in Ireland and these were issued. Mr Syed [Z] continued to work as a taxi driver, travelling across the land border to Ireland, but this caused difficulties. The Irish authorities interpreted his rights as a cross-border worker such that they required him to register, insure and tax his vehicle in Ireland but, if he did this, he could no longer operate lawfully as a taxi driver in Northern Ireland. He was told he could not drive a car in Ireland in future. This, and difficulties with respect to child benefit and disability payments in respect of his son, the third appellant, caused difficulties such that they decided to return to Northern Ireland.

3. The respondent's case is that the appellants had failed to provide sufficient evidence to show that he had been employed with the Halal Meat Centre from July 2015 to May 2016 noting the information submitted payslips contradicted information given on the application form, casting doubt as to whether they were genuine; and, that there was no evidence that the husband was exercising treaty rights in Ireland before returning to the United Kingdom, the last payslip being dated 26 August 2016. The respondent considered also that the appellants had not provided adequate evidence to show that they had resided in Ireland together and that the residence was genuine, noting an absence of evidence to show why they had moved there and absence of social, family and cultural ties the sponsor had to Ireland nor that the British citizen sponsor's life had transferred to Ireland noting that he had been resident and financially active in the United Kingdom, being self-employed and in receipt of State benefits there. It is noted also that the tenancy agreement was for only six months and there is no evidence of the integration of the family into life in Ireland such as attendance at school.

4. The respondent suspected that the residence in Ireland was in order to circumvent the United Kingdom's immigration laws.

5. The judge heard evidence from the sponsor and submissions from both representatives. She also had before her bundle of material provided by both parties.

6. The judge noted [21] that there were payslips from the Halal Meat Centre on file showing that the appellant worked twenty hours a week from 3 June 2016 until 26 August 2016. She noted also evidence working as a taxi driver in Belfast as well as bank statements from the bank in Dublin but that there appeared to be no payslips from pizza places in Ireland where he said that he had worked. She noted also [22] a letter from Social Welfare Services in Letterkenny stating that because the sponsor works as a self-employed taxi driver in Belfast under the EU Regulations he has to

pay national insurance in the UK and so the United Kingdom is the competent authority to pay family benefits for the children.

7. The judge found that: -

   (i) the sponsor's main earnings from working in the United Kingdom take on that she was not satisfied with the reasons he had given for going to live in the Irish Republic and not bringing his family to the United Kingdom, the only reason which made sense was his intention to circumvent the United Kingdom's domestic immigration controls.

   (ii) documentation from HMRC questioned by the sponsor and does not tally with what he says his earnings were and she was not satisfied with his evidence that he worked for Halal meat Centre from July 2015 to May 2016, the payslips not tallying with information on the application form; and, that there are no payslips to show that he worked in Southern Ireland until 22 May 2007 when the family came to the United Kingdom.

   (iii) the family were not integrated into Ireland noting that their accommodation in Ireland appeared to be short term only, there being insufficient evidence that the children attended school in Ireland and no sign of integration in the Irish community as a whole.

   (iv) the sponsor's residence in Ireland was not genuine; and, that it was a means of circumventing the United Kingdom's domestic immigration policy.

8. The judge then went on to make conclusions with regard to the Immigration Rules and Article 8, dismissing the appeal both under the Immigration Regulations and human rights.

9. The appellant sought permission to appeal on the grounds that the judge had erred:-

   (i) In applying the "centre of life" test which has no place in a lawful assessment of a Surinder Singh case as, although it arose in the opinion of Advocate General Sharpston in O and B v Netherlands [2014] EUECJ C-456/12 it is not adopted by the final judgment of the Court and, acquiring the appellant to satisfy a notional transfer of Life Test is not compliant with free movement law, would be unfair and an error of law.

   (ii) in making findings with regard to proportionality in relation to Article 8 which were irrelevant rather than dealing with O and B which sets out what should and should not be for matters of consideration with regard to free movement.

   (iii) The judge had failed to appreciate the appellants in the United Kingdom the sponsor as a cross-border worker, his protected right under free movement, there had been no prohibition on reliance upon Surinder Singh rights whilst working moving between two member states.

10. On 30 October 2018 Designated Judge Shaerf granted permission noting it was arguable that the judge had not paid proper attention to O and B v Netherlands but the judge also stated:

> "I note there is no challenge to the findings of fact made by the judge and subsequent to her decision the Court of Appeal's handed down judgment in SSHD v Christy [2018] EWCA Civ 2378 which addresses matters arising on O and B."

11. I heard submissions from both representatives.

12. Regulation 9 of the EEA Regulations seeks to put into domestic law the decisions of the CJEU in Surinder Singh and O. and B.

13. In **O and B**, the Court of Justice said this:

> "Article 21(1) TFEU must be interpreted as meaning that where a Union citizen has created or strengthened a family life with a third-country national during genuine residence, pursuant to and in conformity with the conditions set out in Article 7(1) and (2) and Article 16(1) and (2) of Directive 2004/38/EC … in a Member State other than that of which he is a national, the provisions of that directive apply by analogy where that Union citizen returns, with the family member in question, to his Member State of origin. Therefore, the conditions for granting a derived right of residence to a third-country national who is a family member of that Union citizen, in the latter's Member State of origin, should not, in principle, be more strict than those provided for by that directive for the grant of a derived right of residence to a third-country national who is a family member 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."

14. The first point of note is that the sponsor must have created and strengthened a family life in conformity with articles 7(1) and (2) which provide, so far as is relevant:

> "1. All Union citizens shall have the right of residence on the territory of another Member State for a period of longer than three months if they:
>
> (a) are workers or self-employed persons in the host Member State; or
>
> (b) have sufficient resources for themselves and their family members not to become a burden on the social assistance system of the host Member State during their period of residence and have comprehensive sickness insurance cover in the host Member State; or
>
> …
>
> 2. The right of residence provided for in paragraph 1 shall extend to family members who are not nationals of a Member State, accompanying or joining the Union citizen in the host Member State, provided that such Union citizen satisfies the conditions referred to in paragraph 1(a), (b) or (c).2."

15. It is not submitted that the sponsor falls within reg 7 (3) nor is it suggested that article 16 (the right to permanent residence) is engaged.

16. In this case, there is an unchallenged finding of fact by the judge is that she was should not satisfied that the sponsor had worked between July 2015 and May 2016. He appears to accept that a relatively short period of employment from 3 June 2016 until 26 August 2016, less than three months. The judge also, and again this is unchallenged, did not accept that the appellant worked at a pizza place (see paragraphs 21 and 23), the judge did stating that "there are also no payslips to show that the sponsor worked in Southern Ireland until 22 May 2017 when the family came to the United Kingdom". In context, this is a finding that there were no payslips confirming other employment.

17. Irrespective of whether the judge erred in her approach to O. and B., given the finding about the sponsor's lack of employment, and a period of employment of less than three months, the appellants could not have succeeded.

18. While the appellants and the sponsor were issued with residence cards, those are not determinative of whether the sponsor was exercising Treaty rights for the whole or substantially the whole of the relevant period. Indeed, the evidence adduced in the form of letters from Social Welfare Services in Letterkenny regarding an application for child benefit which state:-

> "I have decided that you do not satisfy the condition of being habitually resident in this State for the following reasons:-
>
> (1) your length of residence in Ireland does not provide for approval of habitual residence condition;
>
> (2) your spouse is no longer employed in Ireland therefore you are no longer exempt from habitual residence condition;
>
> (3) your centre of interest is not in Ireland;
>
> (4) the evidence produced to date there is nothing to substantiate that you are habitually resident in the State."

19. While Mr Barr sought to persuade me that the sponsor is a frontier worker, that is not a point put to the First-tier Tribunal or as a ground of appeal. Nor does it appear that it was put to it that the issue of residence cards was determinative. The judge was aware that they had been issued, but they were issued a significantly long period before the sponsor was found to have stopped working. It cannot be said that this was in any way going behind the conclusions of the Irish government in issuing a residence card; it is not arguable that the issue of such a card is anything more than evidence that he was exercising Treaty rights as at the date of issue. Further, in this case, there was a substantial gap after the period of employment before the family relocated to Northern Ireland.

20. Accordingly, for these reasons, the appellants have failed to demonstrate that the judge's errors in her approach to the law were material given that, in light of the unchallenged findings of fact as to the sponsor not exercising Treaty rights, the appellants simply cannot show that they fell within the scope of O. and B. or were otherwise entitled to a derivative right of residence pursuant to article 21 TFEU.

Notice of Decision

1. The decision of the First-tier Tribunal did not involve the making of an error of law and I uphold it

Signed Date 16 July 2019

Upper Tribunal Judge Rintoul