



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Numbers: EA/03943/2017
EA/03941/2017, EA/03939/2017
EA/03937/2017, EA/03927/2017
EA/03931/2017, EA/03933/2017

THE IMMIGRATION ACTS

Heard at Field House
On 4 March 2019

Decision & Reasons Promulgated
On 27 March 2019

Before

UPPER TRIBUNAL JUDGE GLEESON

Between

SHAMIM [A]
MASOOD [M]
SHAHBAZ [M]
NOREEN [T]
FAZAL [M]
NAZAR [M]
[A M]

(NO ANONYMITY ORDER MADE)

Appellants

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellants: Mr A Eaton instructed by Middlesex Law Chambers
For the Respondent: Mr J McGirr, a Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellants are the wife and children of the sponsor, who is a British citizen of Pakistani origin. They appeal with permission against the dismissal by the First-tier Tribunal of their appeal against the respondent's decision to refuse them EEA residence cards pursuant to Regulation 9 of the Immigration (European Economic Area) Regulations 2016, as the spouse and family members of the sponsor, the father of the first appellant and the father of the other six appellants.

Background

2. The sponsor became a British citizen in 2013 and his family members all made what now appear to have been two visit visa applications on 14 May 2013 and 2 October 2013 to come and visit him from Pakistan. Both applications were refused with no right of appeal; there was no judicial review challenge to those decisions. In November 2013, the sponsor bought a three-bedroom house in Derby which he furnished.
3. The sponsor was unable to make an application for his family members to come and live with him in the United Kingdom as his spouse and children, because he was only earning £12,000 from his employment here and that was not enough to meet the requirements of the Immigration Rules.
4. In February 2014, the sponsor gave notice to his employer in Derby, and signed a two-year tenancy for that house, with the tenant due to move out in February 2016. He left the property with all of his furniture, and moved to Ireland. It is clear at [10] in the sponsor's witness statement that he received legal advice surrounding the move to Ireland.
5. On 5 February 2014, the sponsor travelled to Ireland, where with the help of a cousin, [TS], who is an Irish citizen and lives in Ireland, he rented an apartment, without even viewing it, and according to his witness statement and oral evidence, he set about seeking employment. The apartment he rented was much smaller than the 3-bedroom house he had just bought in Derby. The sponsor asserted in his statement and his evidence that he had every intention of settling in Ireland, and that his wife and his children were happy to be living with him again.
6. I note that at [9] in his witness statement the sponsor said that he was in and out of employment in Derby during 2013, and could not find a long term permanent job, but in his oral evidence in the First-tier Tribunal, he said that he had given notice from his job in Derby in order to travel to Ireland and that "I was open to the idea of moving back to the UK if I could not find any job opportunities in Ireland".
7. The sponsor worked in Ireland for part of the year 2014/2015 but he only earned about £2,000. The sponsor's family joined him gradually there and all, including his wife, entered education and received EEA residence cards from the Irish authorities.

8. In November 2015, the sponsor had his property in Derby valued by an estate agent. There is no mention in that valuation of the two-year tenancy from February 2014, nor of the fact that the property presumably had a sitting tenant and that is a matter which is not explained anywhere in the sponsor's witness statement.
9. The Irish tenancy agreement is in the bundle. It is a curious document: the signatures are incomplete and the names of quite a number of parties to the tenancy seem to have been added in a different handwriting. The tenancy was taken from 1 February 2015 to 1 February 2016, with its expiry coinciding with the end of the 2-year tenancy for the house in Derby. It appears from a letter at page 304 in the bundle that the sponsor did not formally vacate the Irish apartment until 4 August 2016.
10. On 24 June 2016, the United Kingdom in a referendum decided to leave the EU. The sponsor's cousin, Mr [S], in his witness statement said that a lot of people were worried: Mr [S] decided to stay in Ireland, but he says that the sponsor and his family decided to return to the United Kingdom.
11. The sponsor returned to the United Kingdom with his family members on 6 July 2014, less than a fortnight after the referendum result. At [14] in his witness statement, the sponsor said "... at this point [i.e. after the EU referendum] I decided that I move back to the UK and my family also joined me in the UK. I had taken legal advice and was aware that my family could accompany me to the UK under the EU law of free movement".

Refusal letter

12. The respondent by a letter dated 20 March 2017 asked a series of questions to obtain the information required by Regulation 9, and by his own guidance on its application. He concluded that the conditions in Regulation 9 were not made out and that the family's residence in Ireland was not 'genuine' but was an attempt to circumvent the requirements of entry clearance, in particular because of the sponsor's low income.
13. The respondent appears to have accepted that the adult children fell to be treated as family members, or at least it is not suggested that he did not. But he was not satisfied that the family had genuinely intended to move its centre of activity to Ireland, noting that they had rented a relatively small flat while leaving behind a recently purchased house in Derby with a tenant in it for only two years. He refused the family leave to remain on EEA grounds under Article 9.
14. The appellants appealed to the First-tier Tribunal.

First-tier Tribunal decision

15. The First-tier Judge heard oral evidence from the sponsor and the principal appellant his wife and dealt with it adequately but robustly from paragraph 12 to paragraph 21 of the First-tier decision. He held that the actions of the sponsor and these 7 appellants was an attempt to circumvent the Immigration Rules, the financial requirements of which were out of reach for the sponsor, but that it had always been the sponsor's intention to return to the United Kingdom in 2016.
16. The First-tier Tribunal dismissed the appeals. The appellants appealed to the Upper Tribunal.

Permission to appeal

17. Permission to appeal was granted on the basis that the First-tier Tribunal had arguably erred in failing to consider the respondent's policy entitled *Free Movement Rights: family members of British citizens* (25 October 2017), had failed to take into account relevant matters and taken into account irrelevant matters, and had erred in fact and law in concluding that the purpose of the family's residence in Ireland was to circumvent the Immigration Rules. Permission to appeal was granted on all grounds.

Rule 24 Reply

18. On 9 October 2018, the respondent served a Rule 24 Reply. He argued that on the basis of the evidence before him, the First-tier Judge had been entitled to conclude that the sponsor's residence in Ireland was not genuine and was done solely as a means of circumventing the United Kingdom immigration laws; and that the First-tier Judge's findings at [16]-[21] were adequate to support his Regulation 9 conclusions.
19. That is the basis on which these appeals came before me.

Upper Tribunal hearing

20. I heard submissions from both representatives, which I have taken into account, which dealt mainly with the facts, and also the failure of the Judge to set out the contents of the witness statement of the appellant's Irish cousin, or that of the sponsor himself. The background set out above includes the contents of those statements, so far as relevant to whether the family's residence in Ireland was 'genuine' under the Regulations.

Immigration (European Economic Area) Regulations 2016, Regulation 9

21. Regulation 9 of the 2016 Regulations makes provision for family members to be granted a residence card in the United Kingdom, on the same basis as though their British citizen sponsor were an EEA citizen exercising Treaty rights in the United Kingdom, provided that they have resided together in another EEA state, with the British citizen so residing as a worker, self-employed person, self-sufficient person or student, immediately before their return to the United Kingdom, that they lived together in the EEA state, and that such residence was 'genuine'. 'Genuine' is to be assessed under Regulation 9(3):

"9... (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 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."

22. Regulation 9(4) contains exclusions:

"9... (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); ..."

UKBA guidance: *Free Movement Rights: family members of British citizens* [Version 3.0, published 25 October 2017]

23. For the appellant, Mr Eaton relied on the respondent's 24 October 2017 guidance on the application of Regulation 9, which so far as relevant is as follows:

"Ordinarily non-EEA family members who wish to reside in the UK with British citizen sponsors must meet the requirements of the Immigration Rules. If the motivation behind the joint residence in the EEA host country was for the purpose of bringing the family member to the UK under European Union EU law instead of those Rules such that the residence in the EEA host country was not genuine, the applicant will not be eligible to enjoy a right to reside in the UK as the family member of a British citizen under the Immigration (EEA) Regulations

2016, the 2016 Regulations and the residence card application will be refused. *However if one of the reasons for moving to another Member State was to avoid the requirements of the Immigration Rules but the residence in that Member State was in any case genuine ... then the intention to avoid the requirements of the Immigration Rules is not in itself self-sufficient to refuse to issue a residence card.*

Consideration of the 'purpose' test should include, but may not be limited to:

- the family member's immigration history – including previous applications for leave to enter or remain in the UK and whether they previously resided lawfully in the UK with the British citizen
- if the family has never made an application, the reason the family member did not to apply to join the British citizen in the UK before the British citizen moved to the EEA host country
- the timing and reason for the British citizen moving to the EEA host country
- the timing and reason for the family member moving to the EEA host country
- the timing and reason for the family unit returning to the United Kingdom."

[Emphasis added]

24. At page 157 an example is given as follows:

"Contrast this with a non-EEA national who marries a British citizen while living in the UK unlawfully then makes an application for leave to remain as the spouse of a British citizen. This application is refused under Appendix FM to the Immigration Rules because the immigration status minimum income threshold and the English language requirements are not met, and they do not qualify for leave to remain outside the Rules because there are no exceptional circumstances relating to family or private life. The couple moves to Ireland together a month after the non-EEA national is refused, they rent a flat on a short term basis, the British citizen finds temporary work, there is minimal evidence of any integration and they return to the UK after six months. In this scenario the British citizen is technically exercising free movement rights in the EEA host country, but it is likely that they have artificially created the necessary conditions to obtain an advantage from EU law so that the family member can reside in the UK without having to meet the requirements of the Immigration Rules."

That is not precisely the factual matrix in these appeals but there are strong parallels.

Analysis

25. The finding by the First-tier Tribunal that the family's residence in Ireland was not 'genuine' as Regulation 9 defines that concept is a finding of fact by the First-tier Tribunal with which I may interfere only on the basis set out by the Court of Appeal

in *R (Iran) v Secretary of State for the Home Department* [2005] EWCA Civ 982 at [90] in the judgment of Lord Justice Brooke. A First-tier Tribunal finding of fact may be overturned as an error of law only where such finding is perverse, irrational or *Wednesbury* unreasonable, wholly unsupported by the evidence, or 'the [Judge] failed to identify and record the matters that were critical to his decision on material issues, in such a way that [the Tribunal] was unable to understand why he reached that decision'.

26. In this case, the facts found by the First-tier Judge are supported by the evidence before him. A more detailed examination of the evidence of Mr [S] and the sponsor's witness statement would not have led him to any different conclusion. It was open to the First-tier Judge to find on the evidence that this was an arrangement designed to create conditions in which the sponsor's family could join him in the United Kingdom even though he could not meet the requirements of the Immigration Rules. In particular, given the evidence of the two matching end dates for the tenancies in Derby and in Ireland, it was open to the Judge to conclude that the appellants and the sponsor always planned to return to the United Kingdom in 2016, and also that it was incredible that all eight of them could have decided to return, closed down their Irish lives, interrupted their studies, and returned to the United Kingdom, less than a fortnight after the referendum outcome, if that were the reason for the change.
27. The First-tier Judge's conclusions were unarguably open to him on the evidence and there is no material error of law in his decision.
28. This appeal therefore falls to be dismissed and I uphold the decision of the First-tier Tribunal.

DECISION

29. For the foregoing reasons, my decision is as follows:

The making of the previous decision involved the making of no error on a point of law I do not set aside the decision but order that it shall stand.

Signed *Judith AJC Gleeson*
Upper Tribunal Judge Gleeson

Date: 25 March 2019