



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

Appeal Number: EA/04411/2017

THE IMMIGRATION ACTS

**Heard at Field House
On 18 December 2018**

**Decision & Reasons
Promulgated
On 28 January 2019**

Before

UPPER TRIBUNAL JUDGE ALLEN

Between

**FATIMA VAFAIE
(ANONYMITY DIRECTION NOT MADE)**

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms K McCarthy instructed by Kent Immigration and Visa Advice

For the Respondent: Mr S Whitwell, Senior Home Office Presenting Officer

DETERMINATION AND REASONS

1. This is the appeal of Mrs Vafaie against the decision of the First-tier Tribunal which dismissed her appeal against the decision of the respondent refusing her a residence card as a family member of an EEA national exercising treaty rights in the United Kingdom, that refusal being dated 25 April 2017.
2. It was common ground that the judge's decision requires to be set aside and remade. He accepted that the appellant's sponsor, her husband,

moved to the Republic of Ireland in January 2015 to exercise his treaty rights as a worker or self-employed, that he registered for work and that he found employment as a painter and decorator. The judge accepted his evidence that there was insufficient work to support him and that that employment came to an end in March 2016. After a search for work he and the appellant moved back to the United Kingdom in May 2016 where he resumed employment with a taxi company for which he had previously worked. The judge found therefore that he had lived in the Republic of Ireland and exercised treaty rights for just over a year, well in excess of the minimum requirement of three months contained in the Citizen's Directive. The judge found that to have been genuine residence during which time the sponsor was joined by the appellant, to whom he was married, and they developed family life together. The judge also found that the appellant met the definition of a family member of a qualified person and accepted that she was issued with a residence card by the Irish authorities.

3. The judge however dismissed the appeal on the basis of his finding in respect of Regulation 9(4) of the Immigration (European Economic Area) Regulations 2016, on the basis as he found of admissions made by the sponsor and the appellant that the move to Ireland was in substantial part intended by the sponsor and the appellant to circumvent UK Immigration Rules. Accordingly the provisions of Regulation 9(1) to (3) did not apply to the Appellant.
4. The basis upon which it was common ground between the representatives that the judge had erred was with regard to his interpretation of Regulation 9(4).
5. Mr Whitwell produced a copy of the respondent's guidance in respect of applications for residence cards made by family members of British citizens. At page 17 one sees the following:

"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 (see stage 3) then the intention to avoid the requirements of the Immigration Rules is not in itself sufficient to refuse to issue a residence card."
6. I agree with the joint submission and therefore find an error of law in the judge's decision as a consequence of which the decision requires to be remade.
7. On behalf of the appellant it is argued that what is required in interpreting Regulation 9(4) and in line with what was said by the Supreme Court in Sadovska [2017] UKSC 54 is that in a case where abuse of rights is in issue, that needs to be a sole or predominant purpose of the move and even so there is a requirement that removal as it was in that case must be a proportionate response.

8. In line with the judge's findings, and bearing in mind the guidance from the European authorities including O and B [2014] EUECJ C-456-12, to which I was taken by Ms McCarthy, it is I think clear that circumvention of the Immigration Rules would require to be the sole or predominant purpose behind the move back to the United Kingdom from Ireland in this case. This must be seen in the context of the judge's findings about the exercise of treaty rights by the sponsor in Ireland and the duration of that exercise, that there was genuine residence in Ireland and that the appellant met the definition of a family member of a qualified person and was issued with a residence card by the Irish government. It is clear that one of the reasons for moving to Ireland was to avoid the requirements of the Immigration Rules, but I am satisfied, in line with the respondent's guidance, that the residence in Ireland was in any case genuine, in line with the unchallenged findings of the judge in that regard.
9. It may be unnecessary to say much if anything about proportionality in light of my findings of the judge's findings in that regard, but for what it is worth I would not consider it to be proportionate to refuse a residence card in the particular circumstances of this case.
10. Bringing these matters together, I am satisfied that in the circumstances of this case and in light of the authorities and the guidance, the appeal against the refusal of a residence card is allowed.

No anonymity direction is made.



Signed

Date 10 January 2018

Upper Tribunal Judge Allen