Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: EA/05083/2017

THE IMMIGRATION ACTS

Heard at The Royal Courts of Justice, London	**Decision & Reasons Promulgated**
On 21 January 2019	**On 14 February 2019**

Before

UPPER TRIBUNAL JUDGE LANE

Between

ALLA NIKCLAIEVA FINN
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr Bonavera, instructed by Gross & Co Solicitors
For the Respondent: Mr Wilding, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellant, Alla Nikclaieva Finn, was born on 15 October 1973 and is a female citizen of Ukraine. She appealed to the First-tier Tribunal (Judge Chana) against the decision of the respondent dated 11 May 2017 to refuse to issue her with a residence card as the spouse of a British citizen (Regulation 9, Immigration (European Economic Area) Regulations 2006). The First-tier Tribunal, in a decision promulgated on 11 July 2018, dismissed the appeal. The appellant now appeals, with permission, to the Upper Tribunal.

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2. The appellant's spouse, Mr Frederick William Finn, is a British citizen. There was no dispute that the appellant and her husband are in a genuine and subsisting marital relationship. Judge Chana at [25], summarised the other agreed facts as follows:

> "There was no dispute that the appellant's British citizen spouse worked in Germany for three months. He worked as a freelance consultant for Quicket Travel Services. They both lived in Ukraine for ten years prior to driving by road from Ukraine to Berlin. There was no dispute that they rented accommodation in Berlin from 14 June until 13 September 2016. The tenancy agreement states that they can extend their tenancy for another month until 13 September 2016. There was no dispute the appellant retained his residence in Surrey, rented property, in the United Kingdom during their stay in Germany. There was no dispute the appellant was granted a residence card by the German authorities based on her relationship with her British citizen husband. There was no dispute they returned to the United Kingdom six weeks after it had been issued and three months after they went to Germany. They then returned to the appellant's sponsor's rent address in Surrey which was where he lived before he went to Germany."

3. The relevant part of the EEA Regulations is paragraph 9:

> '**Family members of British citizens**
>
> 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.
>
> (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.'

4. At [29], Judge Chana wrote:

> "I find that Regulation 9 is to prevent the mischief of applicants from the countries outside the European Union from entering the United Kingdom via other EEA states and therefore being exempt from meeting the requirements of the Immigration Rules which they otherwise would have to meet. The question I have to determine in this appeal is whether the appellant and her sponsor are one such couple who have contrived to frustrate the requirements of the Immigration Rules."

5. At [43], Judge Chana concluded that the appellant and her husband had contrived to frustrate the requirements of the Immigration Rules. She drew attention to the fact that the couple have not spent a very "long time in Germany". She did not accept as credible the fact that the couple had kept a rental property in the United Kingdom "as a contingency plan in case [Mr Finn's] health took a turn for the worst". The judge noted that there was "no background evidence that Germany does not have good medical facilities". The judge appeared to be unsatisfied [35] that the couple could maintain properties in both Germany and the United Kingdom simultaneously. At [42], the judge found that "the appellant and the sponsor are only entitled to the benefits of EU law as married partners if the move to Germany has not been done to circumvent the requirements of the Immigration Rules."

6. The judge has referred to the judgment of the CJEU in *Akrich* C-109/01 at [61]:

> "In light of all the foregoing considerations, the reply to the questions raised should be that: —
>
> In order to be able to benefit in a situation such as that at issue in the main proceedings from the rights provided for in Article 10 of Regulation No 1612/68, a national of a non-Member State married to a citizen of the Union must be lawfully resident in a Member State when he moves to another Member State to which the citizen of the Union is migrating or has migrated. —
>
> Article 10 of Regulation No 1612/68 is not applicable where the national of a Member State and the national of a non-Member State have entered into a marriage of convenience in order to circumvent the provisions relating to entry and residence of nationals of non-Member States. I - 9689 JUDGMENT OF 23. 9. 2003 — CASE C-109/01 —
>
> Where the marriage between a national of a Member State and a national of a non-Member State is genuine, the fact that the spouses installed themselves in another Member State in order, on their return to the Member State of which the former is a national, to obtain the benefit of rights conferred by Community law is not relevant to an assessment of their legal situation by the competent authorities of the latter State. —
>
> Where a national of a Member State married to a national of a non-Member State with whom she is living in another Member State returns to the Member State of which she is a national in order to work there as an employed person and, at the time of her return, her spouse does not enjoy the rights provided for in Article 10 of Regulation No 1612/68 because he has not resided lawfully on the territory of a Member State, the competent authorities of the first-mentioned Member State, in assessing the application by the spouse to enter and remain in that Member State, must none the less have regard to the right to respect for family life under Article 8 of the Convention, provided that the marriage is genuine."

Mr Bonavera, who appeared for the appellant, submitted that Judge Chana had completely ignored the authority of *Akrich* which indicated that motivation was irrelevant to application for a residence card made on *Surinder Singh* principles. Mr Wilding, for the Secretary of State, relied on the decision of the CJEU in *O and B* C-456/12 (12 March 2014). In particular at [58]:

> "It should be added that the scope of Union law cannot be extended to cover abuses (see, to that effect, Case C-110/99 Emsland-Stärke [2000] ECR I-11569, paragraph 51, and Case C-303/08 Bozkurt [2010] ECR I-13445, paragraph 47). Proof of such an abuse requires, first, a combination of objective circumstances in which, despite formal observance of the conditions laid down by the European Union rules, the purpose of those rules has not been achieved, and, secondly, a subjective element consisting in the intention to obtain an advantage from the European Union rules by artificially creating the conditions laid down for obtaining it (Case C-364/10 Hungary v Slovakia [2012] ECR, paragraph 58)."

On the face of it, there appears to be a tension between the judgment in *O and B* and *Akrich*. However, as the Court in both judgments noted, that these cases are very fact-sensitive. The underlying law is contained in Directive 2004/38:

'Article 1 of Directive 2004/38 provides:

This Directive lays down:

(a) the conditions governing the exercise of the right of free movement and residence within the territory of the Member States by Union citizens and their family members;

…'

4 Under the heading 'Definitions', Article 2 of that directive provides:

'For the purposes of this Directive:

1. "Union citizen" means any person having the nationality of a Member State;

2. "family member" means:

(a) the spouse;

…

3. "host Member State" means the Member State to which a Union citizen moves in order to exercise his/her right of free movement and residence.'

5 Article 3 of that directive, which is entitled 'Beneficiaries', provides in paragraph 1 thereof:

'This Directive shall apply to all Union citizens who move to or reside in a Member State other than that of which they are a national, and to their family members as defined in [Article 2(2)] who accompany or join them.'

6 Article 6 of Directive 2004/38 states:

'1. Union citizens shall have the right of residence on the territory of another Member State for a period of up to three months …

2. The provisions of paragraph 1 shall also apply to family members in possession of a valid passport who are not nationals of a Member State, accompanying or joining the Union citizen.'

7 Article 7(1) and (2) of that directive is worded as follows:

'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

(c) — are enrolled at a private or public establishment, accredited or financed by the host Member State on the basis of its legislation or administrative practice, for the principal purpose of following a course of study, including vocational training; and

– have comprehensive sickness insurance cover in the host Member State and assure the relevant national authority, by means of a declaration or by such equivalent means as they may choose, that they 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; or

(d) are family members accompanying or joining a Union citizen who satisfies the conditions referred to in points (a), (b) or (c).

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).'

8 Article 10(1) of that directive provides:

'The right of residence of family members of a Union citizen who are not nationals of a Member State shall be evidenced by the issuing of a document called "Residence card of a family member of a Union citizen" no later than six months from the date on which they submit the application. A certificate of application for the residence card shall be issued immediately.'

9 Under Article 16(1), first sentence, of Directive 2004/38, 'Union citizens who have resided legally for a continuous period of five years in the host Member State shall have the right of permanent residence there'. Article 16(2) provides that '[p]aragraph 1 shall apply also to family members who are not nationals of a Member State and have legally resided with the Union citizen in the host Member State for a continuous period of five years'.'

It is important also to examine the questions which the Court was asked to resolve in *O and B*:

In those circumstances the Raad van State decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling, the first three of which are formulated in the same terms in the cases of Mr O. and Mr B., with only the fourth question specific to the case of Mr B.:

'(1) Should Directive 2004/38 …, as regards the conditions governing the right of residence of members of the family of a Union citizen who have third-country nationality, be applied by analogy, as in the judgments of the Court of Justice of the European Communities in [Singh and in Eind], where a Union citizen returns to the Member State of which he is a national after having

resided in another Member State in the context of Article 21(1) [TFEU], and as the recipient of services within the meaning of Article 56 [TFEU]?

(2) [If the first question is answered in the affirmative], is there a requirement that the residence of the Union citizen in another Member State must have been of a certain minimum duration if, after the return of the Union citizen to the Member State of which he is a national, the member of his family who is a third-country national wishes to gain a right of residence in that Member State?

(3) [If the second question is answered in the affirmative], can that requirement then also be met if there was no question of continuous residence, but rather of a certain frequency of residence, such as during weekly residence at weekends or during regular visits?

(4) As a result of the time which elapsed between the return of the Union citizen to the Member State of which he is a national and the arrival of the family member from a third country in that Member State, in circumstances such as those of the … case [concerning Mr B.], has there been a lapse of possible entitlement of the family member with third-country nationality to a right of residence derived from Union law?'

7. Question (3) refers to the requirement for residence in the Host Member State and queries whether an abuse of the law may occur if there is "no question of continuous residence but rather … weekly residence at weekends or during regular visits". In my opinion, the context of this question is important in understanding the Court's comments at [58]. In that paragraph, the Court speaks of "the purpose of those Rules" having not been "achieved". Given the factual matrix in *O and B* and the questions before the Court, the purpose in question was the free movement of members within the EU, together with their family members, and the acknowledgement of their rights of residence by the issue of a residence card after a period of three months. In *O and B*, the facts were that the individuals concerned were visiting a residence in the Host Member State and thereby potentially "artificially creating the conditions laid down for obtaining" an advantage from the European Union Rules. In the instant appeal, I agree with Mr Bonavera that the factual matrix is quite different. The appellant and her husband have lived for the required period in Germany and her husband has worked in the country during that time. Residence cards have been issued by the German authorities so, to that extent, "the purpose of those Rules has" been achieved. The appellant and her husband did not "artificially create" the conditions for obtaining an advantage under the European Union Rules; they fulfilled those conditions by residing and working in Germany. I agree with Mr Bonavera's submission that the focus of the Tribunal in cases such as these should be upon what *actually occurs* in the Host Member State. If what occurs is plainly some device (maintaining an address and only visiting and then infrequently) then the abuse identified by the Court in *O and B* at [58] may be evident. That was not the case in the instant appeal. What the judgment in *Akrich* shows is that the motivation of the individuals concerned is not relevant. In other words, if the primary motivation of the appellant and her husband in moving to

Germany and the husband working there for a period of time was that the couple would then be able to relocate to the United Kingdom then that is not a factor in determining the "genuineness" of their conduct.

8. I find that Judge Chana has erred in law by failing to engage with these issues and to resolve them. The "question" which the judge had to determine in the appeal was not "whether the appellant and sponsor are one such couple who have contrived to frustrate the requirements of the Immigration Rules", but, rather, whether, irrespective of motivation, the couple were in a genuine and subsisting relationship, had resided in the Host Member State for the requisite period whilst Mr Finn was exercising Treaty Rights as a worker. On the judge's own findings of fact, those requirements were fulfilled. The judge's assessment of the couple's "legal situation" (see *Akrich*) did not require her to seek out "mischief" as it appears she believed to be the case.

9. Although I reserved my decision, I briefly discussed with the advocates the matter of disposal in the event that I found that the judge had erred in law such that her decision fell to be set aside. In the light of the judge's findings at [25] (see above) both representatives agreed that the decision could be remade allowing the appeal. I agree.

Notice of Decision

10. The decision of the First-tier Tribunal which was promulgated on 11 July 2018 is set aside. I have remade the decision. The appellant's appeal against the respondent's decision dated 11 May 2017 is allowed.

11. No anonymity direction is made.

Signed Date 12 February 2019

Upper Tribunal Judge Lane