Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: UI-2021-001422
On appeal from EA/50471/2021
[IA/02787/2021]

THE IMMIGRATION ACTS

Heard at Field House
On the 9th September 2022

Decision & Reasons Promulgated
On the 31 October 2022

Before

UPPER TRIBUNAL JUDGE FRANCES

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

SHOAIB IQBAL
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:
For the Appellant: Ms A Nolan, Home Office Presenting Officer
For the Respondent: Mr A Aslam, direct access

DECISION

1. Although this is an appeal by the Secretary of State for the Home Department, I shall refer to Mr Iqbal as 'the appellant' as in the First-tier Tribunal. The appellant's appeal against the refusal of a residence card under Regulations 9 of the Immigration (EEA) Regulations 2016 ('the 2016 Regulations') was allowed by First-tier Tribunal Judge Veloso ('the judge') on 9 September 2021.

2. The appellant is a citizen of Pakistan born on 1 May 1993. He applied for a residence card as an extended family member of his uncle, Qaisar Matloob ('the sponsor'), a British citizen. The Secretary of State ('SSHD') refused the application on 1 December 2020 on the grounds that it was not accepted the sponsor was exercising Treaty rights in Ireland for the vast majority of the appellant's residence there or up until the appellant's return to the UK because the sponsor returned to the UK in October 2018 and the appellant returned to the UK in July 2020. Further, there was no evidence that the appellant had been issued with any residence documents in Ireland and therefore he had failed to show his residence there was lawful. In any event, the appellant's residence after the sponsor returned to the UK was not in accordance with the "EEA Regulations".

Relevant law

3. Regulation 9 of the 2016 Regulations states as follows in material part:

(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.

(1A) These Regulations apply to a person who is the extended family member ("EFM") of a BC as though the BC were an EEA national if—

(a) the conditions in paragraph (2) are satisfied; and

(b) the EFM was lawfully resident in the EEA State referred to in paragraph (2)(a)(i).

(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 or EFM and BC resided together in the EEA State;

(c) F or EFM and BC's residence in the EEA State was genuine.

(d) either—

(i) F was a family member of BC during all or part of their joint residence in the EEA State;

(ii) F was an EFM of BC during all or part of their joint residence in the EEA State, during which time F was lawfully resident in the EEA State; or

(iii) EFM was an EFM of BC during all or part of their joint residence in the EEA State, during which time EFM was lawfully resident in the EEA State;

(e) genuine family life was created or strengthened during F or EFM and BC's joint residence in the EEA State;

(f) the conditions in sub-paragraphs (a), (b) and (c) have been met concurrently.

4. In ZA (Reg 9, EEA Regs; abuse of rights) Afghanistan [2019] UKUT 281 (IAC), the Upper Tribunal held:

(i) The requirement to have transferred the centre of one's life to the host member state is not a requirement of EU law, nor is it endorsed by the CJEU.

(ii) Where an EU national of one state ("the home member state") has exercised the right of freedom of movement to take up work or self-employment in another EU state ("the host state"), his or her family members have a derivative right to enter the member state if the exercise of Treaty rights in the host state was "genuine" in the sense that it was real, substantive, or effective. It is for an appellant to show that there had been a genuine exercise of Treaty rights.

(iii) The question of whether family life was established and/or strengthened, and whether there has been a genuine exercise of Treaty rights requires a qualitative assessment which will be fact-specific and will need to bear in mind the following:

(1) Any work or self-employment must have been "genuine and effective" and not marginal or ancillary;

(2) The assessment of whether a stay in the host state was genuine does not involve an assessment of the intentions of the parties over and above a consideration of whether what they intended to do was in fact to exercise Treaty rights;

(3) There is no requirement for the EU national or his family to have integrated into the host member state, nor for the sole place of residence to be in the host state; there is no requirement to have severed ties with the home member state; albeit that these factors may, to a limited degree, be relevant to the qualitative assessment of whether the exercise of Treaty rights was genuine.

(iv) If it is alleged that the stay in the host member state was such that reg. 9 (4) applies, the burden is on the Secretary of State to show that there was an abuse of rights.

The decision of the First-tier Tribunal

5. On appeal to the First-tier Tribunal, the appellant's representative, Mr Aslam, confirmed the two issues were the sponsor's return to the UK two years before the appellant and the lawfulness of the appellant's residence. There was no attendance at the hearing on behalf of the SSHD.

6. The SSHD's review is set out in full at [11] of the judge's decision. The SSHD relied on the refusal decision of 1 December 2020 and submitted there was no evidence the sponsor was exercising Treaty rights and there was insufficient evidence to show the appellant was dependent on the sponsor in Ireland, the UK or Pakistan. The appellant remained in Ireland when the sponsor returned to the UK and therefore he was not continuously living with or dependant on the sponsor.

7. At [12] and [13], the judge considered Regulation 9 of the 2016 Regulations and quoted ZA at [75] where the Upper Tribunal summarised the position in European law under the EU Treaties:

> "(i) Where an EU national of one state ("the home member state") has exercised the right of freedom of movement to take up work or self-employment in another EU state ("the host state"), his or her family members have a derivative right to enter the member state if the exercise of Treaty rights in the host state was genuine;
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> (ii) "genuine" must be interpreted in the sense that it was real, substantive, or effective;
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> (iii) An analysis of "genuine" residence cannot involve the consideration of the motives of the persons who moved except in the limited sense of what they intended to in the host member state;
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> (iv) Whether family life was established and/or strengthened, requires a qualitative assessment which will be fact-specific; the burden of doing so lies on the appellant;
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> (v) There must in fact have been an exercise of Treaty rights; any work or self-employment must have been "genuine and effective" and not marginal or ancillary;
>
> (vi) The assessment of whether a stay in the host state was genuine does not involve an assessment of the intentions of the parties over and above a consideration of whether what they intended to do was in fact to exercise Treaty rights;
>
> (vii) There is no requirement for the EU national or his family to have integrated into the host member state, nor for the sole place of residence to be in the host state; there is no requirement to have severed ties with the home member state; albeit that these factors may, to a limited degree, be relevant to the qualitative assessment of whether the exercise of Treaty rights was genuine;
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> (viii) The requirement to have transferred the centre of one's life to the host member state is not a requirement of EU law, nor is it endorsed by the CJEU;
>
> (ix) If it is alleged that the stay in the host member state was such that reg. 9 (4) applies, the burden is on the Secretary of State to show that there was an abuse of rights."

8. The judge made the following relevant findings at [19] to [24]. The appellant and sponsor were related as claimed and, from the time of the death of the appellant's father in 1994, the appellant has been financially and emotionally supported by the sponsor. The appellant lived with the sponsor when he entered the UK as a student in February 2013.

9. The sponsor's evidence about the reasons and intentions for his move to Ireland in 2016, his departure in 2018 and his ongoing financial support of the appellant was credible [27]. The sponsor saw an opportunity to run a takeaway in Ireland and spent two years there before returning to the UK. At [29] and [31] the judge concluded:

> "29. I find that the sponsor and the appellant's residence in Ireland was genuine, in the sense that it was real, substantive or effective" (ZA at para 75(ii)). They lived together in the country for a period of 2 years, during which the sponsor exercised his Treaty Rights by setting up and running a takeaway business. Their time together further strengthened a family life, which started from 1994, since when the sponsor has been in the appellant's life and more directly since 2013, when he came to the United Kingdom at the age of 19 and lived with him at his home. Whilst no longer a minor, he was a student, therefore not living an independent life."
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> …
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> "31. With regards to financial support from October 2018, when the sponsor returned to the United Kingdom and July 2020 when the appellant left Ireland to join him, in oral evidence the appellant stated that the sponsor supported him by giving him money on his visits to Ireland, giving family friends who visited money to give to him and through the pocket money his uncle had given him, which he had saved. He confirmed that he had not receive money from any other source. In oral evidence, the sponsor confirmed that he financially supported the appellant and gave him money when he visited him every 8 or so weeks."

10. The judge did not find the appellant's evidence about his communications with the Irish immigration authorities to be credible. At [35] to [37] the judge found:

> "35. I note that a refusal from the Irish immigration authorities is not of itself determinative (Christy [2018] EWCA Civ 2378 at para [48]) and consider my adverse credibility finding in the round alongside the remainder of the evidence, namely the appellant and the sponsor sharing the address in Ireland during their time living together, the sponsor running a takeaway business for 2 years and after his return to the United Kingdom visiting the appellant and giving him money for financial support.
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> 36. When considering Regulation 9's requirement for the appellant to have been lawfully resident in Ireland, 'have resided legally' was held in Ziolkowski v Land Berlin [2014] ALL ER (EC) 314 to mean the following as (referred to in Christy at para [41]):

> "a period of residence which complies with the conditions laid down in the directive, in particular those set out in Article 7(1)'; i.e. the relevant test is set by reference to whether the individual satisfies the conditions laid down in Article 7(1) so as to enjoy a right under that provision, even if he may not have had to exercise or invoke that right in his dealings with the immigration authorities of the host member state"

I find on balance that this definition addresses the appellant's time in Ireland when living with and being supported by the sponsor, which I have found above was genuine (ZA at para. 75(ii)).

37. With regards to the 2 years he remained in Ireland after the sponsor's return to the United Kingdom, I accept Mr Aslam's submission in closing that Regulation 9 does not specifically require that the appellant return to the United Kingdom with the sponsor in October 2018. Regulation 9(2) imposes requirements specifically in relation to the time of the appellant and sponsor's joint residence."

Permission to appeal

11. The SSHD appealed on two grounds. Firstly, the judge erred in law in finding the appellant had been lawfully resident in Ireland when there was insufficient evidence to show the appellant had been issued with documentation under EU law or had been granted leave under domestic law following the SSHD's policy guidance version 5 published on 9 March 2020: 'Free Movement Rights: Family Members of British Citizens' ('the SSHD guidance'). It was submitted the judge failed to give adequate reasons for finding at [37] that Regulation 9(2) only applied to the period in which the appellant and sponsor resided together in Ireland and not the two years that followed.

12. Secondly, the judge had given weight to immaterial matters at [20], [21] and [24] when considering dependency on the sponsor prior to the sponsor exercising Treaty rights in 2016.

13. Permission to appeal was granted by Upper Tribunal Judge Gill on 25 February 2022 who noted that it may be necessary to decide whether the SSHD's guidance is compatible with EU law. I adjourned the error of law hearing on 8 July 2022 to enable the parties to submit skeleton arguments/written submissions.

The SSHD's submissions

14. The SSHD submitted a skeleton argument dated 11 August 2022 drafted by Mr Deller and relied on by Ms Nolan at the hearing before me. In

summary, the SSHD submitted that the judgment in SSHD v Banger (C-89/17) did not come close to suggesting that the Surinder Singh principle would be extended to individuals residing in the host member state unlawfully. Extended Family Members ('EFMs') did not enjoy a right to reside and must apply for facilitation of their entry and residence or ensure they are otherwise lawfully resident in the host member state.

15. The SSHD submitted that requiring an EFM to have been lawfully resident in the host member state, as a precondition of a right of residence under the 2016 Regulations, could not be said to be 'less favourable treatment' than that provided under the Citizen's Directive 2004/83/EC ('the Directive'). It was not an unreasonable burden to require an EFM to provide evidence of lawful residence in the host member state when seeking to reside in the UK under Regulation 9. Living unlawfully in a host member state knowingly and deliberately could arguably lead to an abuse of EU law rights. I note that abuse of rights was not relied on in the refusal decision or the SSHD's review and was not raised before the First-tier Tribunal.

16. The SSHD submitted unlawful residence cannot be considered to be 'genuine residence' if there is no real expectation that it would be permitted to continue. Precarious status cannot be regarded as 'genuine residence' if it is contingent on potentially committing an immigration offence. Following Rahman (C-83/11), O v Minister voor Immigratie, Integratie en Asiel and Minister voor Immigratie, Integratie en Asiel v B (C-456/12) and Banger (C-89/17), those seeking to rely on Surinder Singh jurisprudence must have been lawfully resident in the host member state.

17. In the alternative, the SSHD submitted there had been scant attention to whether the appellant's essential needs were being met by the sponsor when the sponsor returned to the UK and the joint residence had ceased. If the appellant does not meet the requirements of Regulation 8 as an EFM, then his lawful residence in Ireland was not material.

18. In the SSHD's skeleton argument, Mr Deller quite properly brought the Tribunal's and the appellant's attention to the decision of Upper Tribunal Judge Bruce in Shabbir Kutbuddin & Others EA/05182/2019, unreported, in which 'lawful residence' under Regulation 9(1A)(b) was considered. The decision was not challenged by the SSHD.

The appellant's submissions

19. Mr Aslam relied on his skeleton argument dated 30 August 2022 in which he adopted the reasoning in Kutbuddin, in particular [37] to [48], and submitted there was no error of law in the decision of the First-tier Tribunal.

Conclusions and reasons

20. It is not in dispute that the Immigration (EEA) Regulations 2006 (now 2016 Regulations) were amended to reflect the CJEU's judgment in Surinder Singh or that the principle has been extended to other family members. EFMs have a right of facilitation, not a right of entry or residence.

21. The relevant provision is Regulation 9 of the 2016 Regulations. Regulation 9(1A)(b) contains the requirement that the EFM was lawfully resident in the host member state. The SSHD considers 'lawful residence' to mean that the appellant has been issued with a residence card under EU law or leave to remain under Ireland's domestic immigration policy as per the SSHD's guidance: 'Free Movement Rights: Family Members of British Citizens'.

22. The issue of whether an EFM had to show 'lawful residence' in an EEA member state (Ireland) was considered in detail by Upper Tribunal Judge Bruce in Kutbuddin. I agree with her conclusions some of which I refer to below. In considering whether Regulation 9(1A)(b) had any basis in EU law, Judge Bruce acknowledged there was no dispute that there was no similar provision in the Citizen's Directive 2004/83/EC. At [19] to [33] she reviewed the caselaw on Regulation 9: Surinder Singh, O and B, Banger, Metock & Ors v Minister for Justice Equality and Reform (C-127/08) and SSHD v Natasha Anne Christy [2018] EWCA Civ 2378. At [39] Judge Bruce concluded:

> "Insofar as the Secretary of State contends that 'lawful residence' should be interpreted to mean that the family were granted residence cards by the Irish authorities pursuant to their obligations under the EU Treaties, there is no support for that in any of the materials to which I have been referred. The issue did not arise in either Banger or Surinder Singh, since the applicants in those cases had in fact been granted residence cards in the host member state: it is however of note that in neither case did the Court of Justice regard that as in any way relevant. In O & B the Court placed no weight at all on the fact that Mr B had not been granted a residence card in Belgium, and commented in respect of Mr O that the "mere fact" that he had been granted a residence card in Spain could not compel the Netherlands to follow suit. In Christy the Court of Appeal comprehensively demolishes the Secretary of State's suggestion that the Surinder Singh route is open only to those whose EU residence rights have been expressly recognised elsewhere. Moreover all of these authorities are consistent with the principle in Metock: as the Court notes in that decision, the fact that Article 5 of the Directive does not mandate applicants to have entered the EU in possession of a family permit speaks for itself. It would be nonsensical if the Treaties operated to protect family life created when treaty rights were being exercised but only on the proviso that the subject of their affection was already in situ as someone else's family member. By contrast, there is no authority at all in support of the Secretary of State's position – and policy guidance - on this point."

23. Judge Bruce also found that there was no support in the case law for the SSHD's requirement that the appellant should have been granted leave to enter or remain under Ireland's domestic immigration law at [41]. She then made the following findings:

> "42. In the final analysis then, the Secretary of State's case rests upon Lord Justice Sales' comments in Christy, to the effect that the requirement of "genuine" residence would "probably preclude" the third country national having a Banger right of facilitation if the family life in question had been created or strengthened at a time when he was living in the EU illegally.
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> 43. The first thing to be said, and acknowledged by Mr Deller, is that these comments are *obiter*. As such they do not appear to be a good foundation upon which to deny a right of facilitation that would otherwise seem to exist.
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> 44. The second point to be made is that the judgment in Christy predates the Upper Tribunal's exploration of the term "genuine" in ZA (Regulation 9: EEA Immigration (European Economic Area) Regulations 2016: abuse of rights) Afghanistan [2019] UKUT 00281 (IAC). It is this term which expressly leads Lord Justice Sales to infer that no benefit could be expected to accrue from a relationship formed under these circumstances:
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> > "The CJEU makes reference here and elsewhere to the relevant residence needing to be "genuine": that would in my view probably preclude a third country national having a derived right of residence or facilitation if they had been in the relationship Member State as an illegal immigrant, since an EU citizen could not reasonably expect that a relationship established in another Member State in circumstances of illegal presence there of his partner should be recognised by the home Member State as the foundation of any derived rights for the partner…"
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> 45. In ZA, however, Upper Tribunal Judge Rintoul explains how the word "genuine" has a specific meaning in this context. The First-tier Tribunal had dismissed ZA's appeal, accepting the Secretary of State's case that bad faith was at play, and that the family in question had only ever gone to Ireland in order to take advantage of the Surinder Singh route. Careful analysis of the jurisprudence, in English and French, led the Upper Tribunal to conclude that for the purpose of Regulation 9 motive is irrelevant: it did not matter, on the facts of that case, why the couple in question had chosen to go and live in Ireland. The only legitimate questions were whether they had in fact done so, whether the EEA national sponsor had exercised treaty rights whilst there, and whether family life had been created or strengthened during that period of residence. The term "genuine" is used by the CJEU simply in the sense that the exercise of treaty rights must have been real, substantive or effective. Whether there was another ulterior - or primary – purpose is, absent abuse of rights or fraud, of no concern to decision makers.
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> 46. Applying this definition to the scenario considered in Sales LJ's obiter dicta, it is difficult to see how the status of the non-EEA

> family member might impact upon whether the relevant residence is "genuine" or not. That is particularly so when one considers the principle underlying all of these cases: would a national of a member state be inhibited from exercising his free movement rights if he knew that a family life created or strengthened during that time would not be recognised upon his return home? Synthesising the principle in Metock with that in Surinder Singh there would appear to be no basis for distinguishing between the family members of those with leave, and those without…."

24. For the reasons given above, I find there is no requirement in EU law for the appellant to show that he was lawfully resident in Ireland. The judge applied the correct test following ZA and her finding that the appellant's and sponsor's residence in Ireland was genuine was open to her on the evidence before her. The judge gave adequate reasons for her finding at [37]. There was no error of law as alleged in ground 1.

25. The matters in [20], [21] and [24] were relevant considerations, but in any event, the judge's conclusions in these paragraphs were not material to [31] when she considered the break in joint residence from 2018 to 2020. The judge's finding that that the appellant remained dependant on the sponsor during this time was open to her on the evidence before her. There was no error of law as alleged in ground 2 or [20] of the SSHD's skeleton argument.

26. I find there we no material error of law in the decision of 9 September 2021 and I dismiss the SSHD's appeal.

Notice of decision

Appeal dismissed.

J Frances

Signed Date: 16 September 2022
Upper Tribunal Judge Frances

NOTIFICATION OF APPEAL RIGHTS

1. A person seeking permission to appeal against this decision must make a written application to the Upper Tribunal. Any such application must be **received** by the Upper Tribunal within the **appropriate period** after this decision was **sent** to the person making the application. The appropriate period varies, as follows, according to the location of the individual and the way in which the Upper Tribunal's decision was sent:

2. Where the person who appealed to the First-tier Tribunal is **in the United Kingdom** at the time that the application for permission to appeal is made, and is not in detention under the

Immigration Acts, the appropriate period is **12 working days (10 working days, if the notice of decision is sent electronically).**

3. Where the person making the application is in detention under the Immigration Acts**, the appropriate period is 7 working days (5 working days, if the notice of decision is sent electronically)**.

4. Where the person who appealed to the First-tier Tribunal is **outside the United Kingdom** at the time that the application for permission to appeal is made, the appropriate period is **38 days (10 working days, if the notice of decision is sent electronically).**

5. A "working day" means any day except a Saturday or a Sunday, Christmas Day, Good Friday or a bank holiday.

6. The date when the decision is "sent' is that appearing on the covering letter or covering email.