



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: EA/00884/2016

THE IMMIGRATION ACTS

Heard at North Shields
On 31 August 2017

Decision & Reasons Promulgated
On 4 September 2017

Before

DEPUTY UPPER TRIBUNAL JUDGE DOYLE

Between

FATIMA ABOULHASSANE
(NO ANONYMITY DIRECTION)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms V Adams (counsel) instructed by Latif solicitors

For the Respondent: Ms R Petterson, Senior Home Office Presenting Officer

DECISION AND REASONS

1. I have considered whether any parties require the protection of an anonymity direction. No anonymity direction was made previously in respect of this Appellant. Having considered all the circumstances and evidence I do not consider it necessary to make an anonymity direction.

2. This is an appeal by the Appellant against the decision of First-tier Tribunal Judge Buckwell promulgated on 29 December 2016, which dismissed the Appellant's appeal on all grounds.

Background

3. The Appellant was born on 20 October 1987 and is a national of Morocco. On 29 December 2015 the Secretary of State refused the Appellant's application for an EEA residence card.

The Judge's Decision

4. The Appellant appealed to the First-tier Tribunal. First-tier Tribunal Judge Buckwell ("the Judge") dismissed the appeal against the Respondent's decision. Grounds of appeal were lodged and on 15 June 2017 Judge Kinnell gave permission to appeal stating

It is arguable that the Judge failed when dismissing the appeal to take account of the legal submissions put by the appellant's representative in closing argument. The decision records the fact that the skeleton argument was relied upon together with a written reconsideration request made to the respondent. Neither figures in the Judge's reasons for the decision.

The Hearing

5. (a) For the appellant, Ms Adams moved the grounds of appeal. She had prepared a 10-page skeleton argument, which she took me through. She told me that counsel before the First-tier had referred to a skeleton argument and a letter requesting reconsideration of the respondent's decision, which is reproduced from page 127 of the appellant's bundle. She told me that the Judge failed to take account of the submissions contained in those two documents. She conceded that at [42] the Judge records that reference was made to each document, but told me that no consideration or analysis is given to the submissions contained in those documents.

(b) Ms Adams told me that the appellant was granted a family permit by the respondent before she entered the UK (from Ireland) on 1 June 2015. She told me that because a family permit had been granted an application for a residence card, proceeding on the same basis and on exactly the same evidence, should automatically have been granted. She told me that because a family permit had been granted the Home Office accepted (in May 2015) that the centre of the appellant's husband's life had transferred to the Republic of Ireland.

(c) Ms Adams referred me to *O and B v Minister voor Immigratie (and others)* Case C-456/12 CJEU Grand Chamber and told me that the only two relevant considerations in this case were (i) whether or not there was genuine residence in the Republic of Ireland and (ii) the strengthening of family life there. She told me that the Judge found that the sponsor had genuinely resided in Ireland, but had gone on

to look at whether or not he had transferred the centre of his life there and considered the quality of the business that the appellant and her husband started there. She told me that those were irrelevant considerations. She told me that what should have been considered was whether or not the appellant and her husband were genuinely resident in the Republic of Ireland for three months. She told me that the evidence and the Judge's fact-finding indicated that they were. She told me that the evidence and the Judges findings of fact indicated that residence in Ireland strengthened their family life. On that basis, she told me that the appeal should succeed.

(d) Ms Adams insisted that the purpose of moving to an EU state is irrelevant. The question for the Judge was whether or not there was genuine residence. As the Judge found that the appellant and her husband lived in the Republic of Ireland, genuine residence was established. She told me that the Judge had clouded his mind with considering whether or not there had been an attempt to exploit a loophole in the law. The consideration of abuse of the terms of EEA law, she told me, is irrelevant. Relying on *SSHD v Akrich C-109/01* Ms Adams told me that there was no room for consideration of motive. The Judge accepted that the appellant's husband had started a leafleting business. The success or failure of that business was an irrelevant consideration.

(e) Ms Adams told me that the Judge's decision is tainted by material error of law because the Judge has considered irrelevant matters and because the Judge had failed to follow European jurisprudence. She urged me to set the decision aside and substitute my own decision allowing the appellant's appeal.

6. (a) For the respondent Ms Petterson told me that the decision does not contain errors of law material or otherwise. She relied on the terms of the respondent's rule 24 response. She told me that the Judge had taken account of both the skeleton argument and the letter requesting reconsideration. She told me that at [42] of the decision the Judge clearly takes account of submissions. She told me that between [49] and [50] the Judge reaches his credibility conclusions, and that throughout the decision the Judge focuses on regulation 9 of the Immigration (EEA) Regulations 2006. She drew my attention in particular to regulation 9(2) and 9(3) of the 2006 Regulations.

(b) Ms Petterson told me that there is no legal principle that a residence card should be issued because a family permit has been issued. He told me that the Judge carefully analysed the evidence before reaching sustainable findings of fact. She told me that the Judge had taken all relevant considerations into account, so that the decision does not contain a material error of law. She urged me to dismiss the appeal and allow the decision to stand.

Analysis

7. In the decision, the Judge refers to the appellant's letter to the respondent asking for reconsideration and the skeleton argument reproduced at pages 2 and 3 of the appellant's bundle. That is the only reference the Judge makes to the two documents which are said to summarise the law relied on by the appellant.

8. The Judge's findings of fact are found between [48] and [50] of the decision. The Judge's conclusions are contained at [51] of the decision. The findings of fact are brief. There is no reasoned analysis of the impact of the law on the facts as the Judge finds them to be.

9. The Judge summarises the law at [44] of the decision and restricts himself to regulation 9 of the 2006 Regulations. The Judge does not carry out an analysis of the European jurisprudence relied on by the appellant. Although the Judge records that there is both a skeleton argument and a detailed letter reproduced at pages 127 to 130 of the appellant's bundle, inadequate consideration is given to the submissions contained in those two documents. No analysis of what is contained in those documents can be found in the decision.

10. The lack of analysis of detailed written submissions means that the Judge's conclusions are inadequately reasoned. In MK (duty to give reasons) Pakistan [2013] UKUT 00641 (IAC), it was held that (i) It was axiomatic that a determination disclosed clearly the reasons for a tribunal's decision. I therefore find that the decision contains a material error of law, and must set the decision aside.

11. Although I set the decision aside there is sufficient information before me to substitute my own decision.

My findings of fact

12. (a) The appellant is a Moroccan citizen. In 2011, she married Abdul Al-Asadi, a British citizen who originates from Iraq. The appellant and her husband were married in Morocco. After marriage, the appellant's husband returned to the UK. Towards the end of 2014 the appellant's husband moved to Waterford, Ireland, where he established a leafleting business.

(b) On 4 December 2014, the appellant joined her husband in Ireland. They have lived together as husband and wife since then. The appellant's husband's leafleting business was not successful. In the six months between December 2014 and June 2015 he did not earn enough to meet expenditure. The appellant and her husband decided to return to the UK. On 8 May 2015, the appellant applied for an EEA family permit so that she could accompany her husband to the UK.

(c) The appellant and her husband now live in Middlesbrough. When the appellant applied for her family permit she was pregnant. She has now safely delivered twins.

(d) On 27 July 2015, the appellant applied for a residence card. She supported her application with exactly the same information used in her application for a family permit. On 29 December 2015, the respondent refused the appellant's application for a residence card on the basis that the appellant's husband had not transferred the centre of his life to the Republic of Ireland. The respondent also suggested that the marriage between the appellant and her husband might not be genuine.

(e) The respondent now accepts that the appellant and her husband are parties to a genuine marriage. The respondent accepts that the appellant and her husband lived together in the Republic of Ireland for approximately 6 months. The respondent accepts that the appellant's husband was self-employed throughout his time in the Republic of Ireland.

Discussion

13. Reg 9 of the 2006 Regulations says

9. (1) If the conditions in paragraph (2) are satisfied, these Regulations apply to a person who is the family member of a British citizen as if the British citizen ("P") were an EEA national.

(2) The conditions are that-

- (a) P is residing in an EEA State as a worker or self-employed person or was so residing before returning to the United Kingdom;
- (b) if the family member of P is P's spouse or civil partner, the parties are living together in the EEA State or had entered into the marriage or civil partnership and were living together in the EEA State before the British citizen returned to the United Kingdom; and
- (c) the centre of P's life has transferred to the EEA State where P resided as a worker or self-employed person.

(3) Factors relevant to whether the centre of P's life has transferred to another EEA State include-

- (a) the period of residence in the EEA State as a worker or self-employed person;
- (b) the location of P's principal residence;
- (c) the degree of integration of P in the EEA State.

(4) Where these Regulations apply to the family member of P, P is to be treated as holding a valid passport issued by an EEA State for the purposes of the application of regulation 13 to that family member.

14. In Surinder Singh (1992) ECR I-4265 it was held that, a national of a member state who has exercised his rights deriving from community law in another Member State,

is entitled to return to his state of origin in the company of his spouse who is a national of a non Member country.

15. In Osoro (Surinder Singh) [2015] UKUT 00593 (IAC) it was held that (i) The rationale of the decision in R v Immigration Appeal Tribunal and Surinder Singh ex parte SSHD [1992] ECR I-4265 is formed by two principles, namely the principle of the efficacious enjoyment of Treaty rights and the principle of non-discrimination; (ii) These are the two principles to which Tribunals must have particular regard in deciding cases in which the appellant does not satisfy any of the provisions of the Immigration (European Economic Area) Regulations; (iii) The co-existence of the decision in Surinder Singh with Directive 2004/38/EC ("the Citizens Directive") raises questions which may require to be determined in some appropriate future case.

16. In O v Minister voor Immigratie (and others) Case C-456/12 CJEU Grand Chamber the Dutch EEA nationals lived and worked in the Netherlands. Their non EEA national partners lived in Spain and Belgium respectively. One couple met in Spain by way of regular holidays and the other in Belgium at weekends. On a preliminary ruling, it was held that refusal by the Netherlands, the EEA's nationals' home Member State, of a residence card to the non-EEA family members could amount to a breach of the Citizens Directive, even though the EEA nationals worked and had their principal place of residence in the Netherlands, if family life was based and conducted in the host Member States - Spain and Belgium - and if the EEA national's residence in those host Member States was sufficiently genuine so as to enable the EEA national to create and strengthen family life in those states such that the EEA nationals' "centre of life" may have been transferred to the host Member States - although the court suggested regular holidays or weekends in the host Member States alone may not suffice for this purpose.

17. Regulation 9 sets out matters which may be illustrative of genuine residence. It is not a complete list of determinative factors. In this case the respondent's decision is based on the belief that the appellant and her husband have entered into a dishonest scheme to give the appearance of genuine residence in the Republic of Ireland. The basis for that conclusion is that the appellant's husband's business there was not successful.

18. On the facts as I find them to be the appellant's husband genuinely resided in the Republic of Ireland. His residence there was short lived because his new business was not financially viable. There is no reliable evidence which supports the respondent's conclusion that the failed business was part of an overall scheme. The weight of reliable evidence indicates that the appellant and sponsor created a home in the Republic of Ireland. It is accepted by the respondent that they lived there, and that the appellant's husband was self-employed in the Republic of Ireland.

19. The documents produced to support the application included the appellant's husband's employment invoices and receipts; Irish bank accounts for both the

appellant and her husband; an Irish tenancy agreement; electricity bills incurred in Ireland; copies of the appellant's husband's business website and Irish tax registration letters.

20. The respondent accepted that evidence in May 2015 and granted an EEA family permit. The application for a residence card was made just weeks later, on 27 July 2015, relying on the same evidence. The respondent gives inadequate reasons for finding that what was viewed as genuine residence in May 2015 could no longer be viewed as genuine residence in July 2015.

21. Regulation 9(3) of the 2006 regulations sets out factors relevant to establishing whether or not the appellant's husband's centre of life transferred to another EEA state. The weight of reliable evidence indicates that the appellant's husband lived in the Republic of Ireland as a self-employed person for six months. The evidence indicates that the appellant's husband's principal residence during that period was in the Republic of Ireland. The production of bank statements, tax documents and evidence of pursuit of self-employment provides evidence of the degree of integration in the Republic of Ireland.

22. It is arguable that six months is not a lengthy period. The European jurisprudence considers half of that time as adequate to establish a period of genuine residence. Six months can feel like a long time when a new business is haemorrhaging money and showing signs of failure. On the facts as I find them to be the appellant meets the requirements of regulation 9 of the Immigration (EEA) regulations 2006.

Decision

23. The First-tier Tribunal decision promulgated on 29 December 2016 is tainted by material errors of law. The decision is set aside.

24. I substitute my own decision.

25. The appeal is allowed under the Immigration (EEA) Regulations 2006.

Signed *Paul Doyle*
Deputy Upper Tribunal Judge Doyle

Date 4 September 2017