



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

Appeal Numbers: EA/01661/2017
EA/01664/2017
EA/01668/2017
EA/01750/2017

THE IMMIGRATION ACTS

**Heard at Field House
On 5th October 2018**

**Decision & Reasons
Promulgated
On 08th January 2019**

Before

UPPER TRIBUNAL JUDGE JACKSON

Between

**SZ
MZ
AZ
SZ**

(ANONYMITY DIRECTIONS MADE)

Appellants

And

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr A Gilbert of Counsel, instructed by Rahman and Company Solicitors

For the Respondent: Ms L Kenny, Home Office Presenting Officer

DECISION AND REASONS

1. The Appellants appeal against the decision of First-tier Tribunal Judge Pears promulgated on 26 April 2018, in which the Appellants' appeals against the Respondent's decision to refuse their applications for an EEA Residence Card under regulation 9 of the Immigration (European Economic Area) Regulations 2016 (the "EEA Regulations") dated 26 January 2017 were dismissed.
2. The Appellants are all nationals of Afghanistan and are three siblings and their step-mother, who applied for EEA Residence Cards on the basis of being family members of their father/husband, the "Sponsor", a naturalised British Citizen.
3. The Respondent refused the applications the basis that although the relationships were accepted, as was that the Sponsor was a qualified person in the United Kingdom, it was not accepted that he had genuinely resided as a qualifying person in Ireland such as to engage regulation 9 of the EEA Regulations by the exercise of treaty rights by a British Citizen. In particular, the Respondent accepted that the Sponsor had worked in Ireland between September 2015 and January 2016, followed by a claimed period of self-sufficiency and jobseeking before returning to the United Kingdom in July 2016. The Respondent did not accept that the residence was genuine as there was no evidence of any integration in Ireland, the Appellants arrived in Ireland at the same time as the Sponsor, the Sponsor had no employment in Ireland for the first three months and only then undertook unskilled work.
4. Judge Pears dismissed the appeal in a decision promulgated on 26 April 2018 on the basis that although the family relationships and the exercise of treaty rights in Ireland by the Sponsor were accepted, it was found that the residence in Ireland was not genuine for the following reasons. The Sponsor had no connections to Ireland, there was no evidence of integration in Ireland, no evidence of the Sponsor trying to buy or establish a business there, the Sponsor had only a brief period of unskilled work in Ireland, he returned home to the same house in the United Kingdom and the same job having decided to return on the same day. The First-tier Tribunal found that the sponsor had acted deliberately to try to circumvent the Immigration Rules as the Appellants could not meet the requirements set out therein for a grant of entry clearance to the United Kingdom.

The appeal

5. The Appellants appeal on four grounds. First, that the First-tier Tribunal erred in failing to make credibility findings about the Appellants themselves; secondly, that the First-tier Tribunal erred in its approach to the Sponsor's credibility which was irrational; thirdly, that the First-tier Tribunal misapplied the law on residence and abuse of rights; and finally, that the First-tier Tribunal failed to consider Zambrano or the issue of proportionality with respect to a settled resident.

6. Permission to appeal was granted by Judge Landes on 13 August 2018 on all grounds.
7. At the oral hearing, Counsel for the Appellant relied on the written grounds of appeal and expanded upon them in oral submissions. In relation to the first two grounds as to credibility, it was submitted that the First-tier Tribunal failed to make any credibility findings about the Appellants or whether their evidence was accepted or rejected. It is not possible from the decision for the Appellants to understand why their evidence, which was corroborative of the Sponsor's activity in Ireland, was rejected. Counsel submitted that the First-tier Tribunal was duty bound to articulate the reasons why the Appellants' evidence did not show an intention to settle in Ireland and why the consistent evidence that the Sponsor sought to buy a business in Ireland was rejected. The Appellants' claim that the failure to make credibility findings in relation to their evidence infected the adverse credibility findings made against the Sponsor.
8. The second ground of appeal is pursued as a matter of principle rather than any factual or substantive error as to how the First-tier Tribunal treated a letter from the Appellants' solicitors as if it were evidence. The letter referred to a decision being taken to move the family back to the United Kingdom and they left the same day. Counsel confirmed at the hearing before me that the Sponsor's evidence was entirely consistent with the solicitor's letter, that he decided to and did move back to the United Kingdom on 8 June 2016. Despite no claimed error of fact, Counsel maintained the ground of appeal as a matter of principal and submitted that it was material because adverse credibility findings were made by the First-tier Tribunal against the Sponsor.
9. In the written grounds of appeal, the Appellants also submit that the First-tier Tribunal erred in its credibility assessment of the Sponsor in relying on the lack of evidence of integration in Ireland, without, for example, specific questions being put to the Appellants about which mosque they attended; and lack of evidence prior to the hearing of the Sponsor seeking to buy a business in Ireland. These matters were not pursued orally.
10. In relation to the third ground of appeal, the Appellants' case is that the Sponsor had established genuine residence in Ireland pursuant to his accepted exercise of treaty rights there as a worker and his motive for doing so is irrelevant to that further to Directive 2004/38/EC and the ECJ decision in, inter alia, Case 53/81, D M Levin v Staatssecretaris van Justitie. It can not be an abuse of rights for an EEA national to exercise treaty rights in another country even if the motive for doing so is to confer an immigration advantage on family members.
11. The fourth ground of appeal was not pursued separately at the oral hearing, the comments made in the grant of permission to appeal that there is nothing in the last ground in relation to Zambrano and Article 8 being accepted.

12. On behalf of the Respondent, the Home Office Presenting Officer submitted that in relation to credibility, the evidence of the Appellants was based entirely on what the Sponsor had told them and at its highest, confirms his account to them. It was submitted that the Appellants' evidence added very little given the finding that all of the information was coming from the Sponsor who made the decisions for the whole family. There was little evidence from the Appellants on the other issues about the Sponsor seeking work/to buy a business. Even if the Appellants were entirely credible and that was expressly accepted by the First-tier Tribunal, that would not materially affect the adverse credibility findings made in relation to the Sponsor.
13. The Respondent's position in relation to the second and fourth grounds of appeal are that they amount to disagreement with the decision and/or are immaterial to the outcome of the appeal. The Respondent relies on the comments given in the grant of permission to appeal as to the lack of merit in these grounds and highlighted the almost complete lack of evidence of any integration into Ireland.
14. In relation to the third ground of appeal, the Respondent submitted that in accordance with AA v Secretary of State for the Home Department [2017] CSIH 38, the parties' intentions are a relevant factor when considering the genuineness of residence and the First-tier Tribunal was entitled on the evidence to find this was not genuine. In the alternative, the Respondent maintains the position that the scenario in this case where a person exercises treaty rights for the purposes of securing an immigration advantage for family members can amount to an abuse of rights.

Findings and reasons

15. I start by considering the third ground of appeal as it is the one with arguably the greatest substance to consider, as to the correct law to be applied as to the Sponsor's residence in Ireland. The First-tier Tribunal set out the domestic provisions in regulation 9 of the EEA Regulations in paragraph 9 of the decision and went on to quote from Secretary of State for the Home Department v Akrich C-109/01 [2004] QB 756 (paragraphs 55 and 56) and AA v Secretary of State for the Home Department [2017] CSIH 38 (paragraphs 52 to 56). The First-tier Tribunal does not undertake any further detailed analysis of this case law and instead simply states at paragraph 38, "*Motive is not relevant what is relevant is whether there was genuine residence in Ireland.*". There follows a lengthy list of findings to support the conclusion in paragraph 52, which states as follows:

"I do not find the evidence of the claim as credible. I find [the Sponsor] had artificially created the necessary conditions, that he and they had no intention of trying to settle in Ireland, and that such residence which they had could not meet the necessary tests of being genuinely resident. I find without hesitation on the balance of probabilities that the residence of

the family in Ireland was not genuine and that [the Sponsor] had not transferred the centre of his life to Ireland.”

16. It must be inferred from the First-tier Tribunal decision that the case of AA was relied upon, not in respect of abuse of rights (although reference is made to that as a finding not necessary for the decision in the final paragraph) but in a qualitative assessment of whether residence in Ireland was genuine.
17. The origin of rights for family members of British Citizens on re-entry to the United Kingdom having exercised treaty rights in another Member State comes not from Directive 2004/38/EC but from the case of C-370/90, Surinder Singh and subsequently for different reasoning, from the case of O and B v Minister voor Immigratie, Intergratie en Asiel [2014] QB 1163.
18. The general conclusion of the Court in O and B is as follows:

“Article 21(1) TFEU must be interpreted as meaning that where a Union citizen has created or strengthened a family life with a third-country national during genuine residence, pursuant to and in conformity with the conditions set out in Article 7(1) and (2) and Article 16(1) and (2) of Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC, in a Member State other than that of which he is a national, the provisions of that directive apply by analogy where that Union citizen returns, with the family member in question, to his Member State of origin. Therefore, the conditions for granting a derived right of residence to a third-country national who is a family member of that Union citizen, in the latter’s Member State of origin, should not, in principle, be more strict than those provided for by that directive for the grant of a derived right of residence to a third-country national who is a family member of a Union citizen who has exercised his right of freedom of movement by becoming established in a Member State other than the Member State of which he is a national.”
19. In Surinder Singh, the European Court of Justice confirmed that the rights for family members did not include situations of an abuse of rights, stating in paragraph 24 as follows:

“As regards the risk of fraud referred to by the United Kingdom, it is sufficient to note that, as the Court has consistently held (see in particular the judgements in Case 155/78 Knooks v Secretary of State for Economic Affairs [1979] ECR 399, paragraph 25, and Case C-61/89 Bouchoucha [1990] ECR I-3551,

paragraph 14), the facilities created by the Treaty cannot have the effect of allowing the persons who benefit from them to evade the application of national legislation and of prohibiting Member States from taking the measures necessary to prevent such abuse.”

20. Similarly, the Court stated in O and B in paragraph 22:

“It should be added that the scope of Union law cannot be extended to cover abuses (see, to that effect, C-110/99 Emsland-Starke [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).”

21. The issue of abuse of rights was specifically considered in Akrich where it was held that the motives of a person in exercising treaty rights in another Member State were not relevant for the reasons set out in the following paragraphs:

“55. As regards the question of abuse mentioned at paragraph 24 of the Singh judgment, cited above, it should be mentioned that the motives of which may have prompted a worker of a Member State to seek employment in another Member State are of no account as regards his right to enter and reside in the territory of the latter State provided that he there pursues or wishes to pursue an effective and genuine activity (Case 53/81 Levin [1982] ECR 1035, paragraph 23).

56. Nor are such motives relevant in assessing the legal situation of the couple at the time of their return to the Member State of which the worker is a national. Such conduct cannot constitute an abuse within the meaning of paragraph 24 of the Singh judgment even if the spouse did not, at the time when the couple installed itself in another Member State, have a right to remain in the Member State of which the worker is a national.”

22. The matter was considered further in AA which although is not binding as it is a Scottish case, it is persuasive. The Court therein considered separately the requirements of residence in paragraphs 46 to 51 and abuse of rights in paragraphs 52 to 53, with the latter interpreted consistently with the authorities set out above.

23. The First-tier Tribunal did not, in the present case, quote from paragraphs 46 onwards in relation to residence which is more relevant to the present appeal and provides as follows:

“46. In O and B the Court noted that it would be an obstacle to free movement were equivalent rights not available on return to the citizen’s home state: however, a refusal to grant such rights would only create such an obstacle if (para 51):

“... the residence of the Union citizen in the host member state has been sufficiently genuine so as to enable that citizen to create or strengthen family life in that member state.”

Not every residence will qualify: for example, someone pursuing residence under article 6 does not intend to settle in such a way as to create and strengthen family life. The opposite may be the case where someone “intends to exercise his rights” under article 7: genuine residence in conformity with that article would engage the derivative right (paras 52-54). The more so would the right be engaged had permanent residence in the host state been acquired under article 16.

47. The Appellant relied on these paragraphs to argue that as long as the residence in question lasted for at least three months, the terms of the article had been met and were sufficient for the purposes of Regulation 9. However, that argument fails to recognise the context in which the discussion takes place. It is central to the decision in O and B that for “residence in” the host state it is a “genuine residence” which requires to be established, not a residence of any specific duration. Of course, duration may be a relevant factor, but its is only one factor. As the Court went on to say in O and B

“57. It is for the referring court to determine whether [the sponsors], who are both Union citizens, settled and, therefore, genuinely resided in the host member state and whether, on account of living as a family during that period of genuine residence [the spouses] enjoyed a derived right of residence in the host member state.

58. In that regard, short periods of residence such as weekends or holidays spent in a member state other than that of which the citizen in question is a national, even when considered together, fall within the scope of article 6 of Directive 2004/38 and do not satisfy the conditions.”

Elsewhere the Court stated that on return, the conditions which apply should not be more strict than those which apply when the citizen has exercised his right of movement by “becoming established” in a host state (para 61).

48. The reference to “becoming established” echoes the approach taken in *Metock v Minister for Justice, Equality and Law Reform* [2009] QB 318. In that case, the Court rejected an argument that the spouse’s derivative right to reside in the host state depended on that spouse having previously been lawfully resident within a member state. ...

49. The use of the word “established” is significant. In that paragraph, and elsewhere, the Court discusses the nature of the derivative rights as those which follow when the EU national has become “established” in the host state (paras 68; 81; 89; 90). This was noted by the Advocate General in *Surinder Singh*, from whose opinion it is apparent that there was already jurisprudence of the ECJ to the effect that the economic activity which required to be the subject of free movement had to be effective and genuine; and that in assessing the genuine and effective nature of an activity, courts were entitled to take into account the irregular nature and limited duration of work done (para 14, p370). The same point arose in *LN* where the activity required to be more than marginal or ancillary.

50. ...

51. As in the present case, the argument advanced in *CPC* was that Regulation 9 created minimal criteria, and that the phrase “residing in an EEA state as a worker” meant no more than “being present in an EEA state as a worker”. The UT subjected *O* and *B* to a careful analysis, concluding (para 31) that “the Court’s concern was, if not with habitual residence, with a concept of residence which went beyond mere physical presence.” The concern was with a residence which was “sufficiently genuine” as to enable a person to create or strengthen family life there, which indicated a qualitative element. What is required of the decision maker (para 40)

“... is to make a judgment of fact and degree as to whether the individual has lived in the EEA State in question with sufficient permanence, continuity or at least some expectation of continuity, to warrant the conclusion that he “resided” there within the ordinary meaning of the word.”

24. The above is consistent with the factors set out in Regulation 9 of the EEA Regulations, which in any event have to be interpreted consistently with EU law. As above, although not strictly binding, the decision is persuasive and I find no error of law in the First-tier Tribunal’s decision which is entirely consistent with this approach to residence. The First-tier Tribunal expressly did not consider motive alone or as the basis of a finding that there was an abuse of rights, but instead considered it as one of the relevant factors to determine genuine residence.

25. The Appellants' contention is essentially that the above is wrong and that once an EEA national is genuinely and effectively exercising treaty rights in another Member State (as the Sponsor was accepted to have done by the Respondent and First-tier Tribunal), then that person is resident in another Member State regardless of their motive for doing so. The Appellants further state that a resident will have settled in a Member State if the character of their residence there most closely matches that of a person who has a right of residence of more than three months compared to a person of shorter duration or has goes on holiday to another Member State. Duration is of course a relevant factor but so is motive, integration and so on.
26. The submission above inherently recognises that there is a qualitative assessment to be made as to "residence", which is what the First-tier Tribunal did in the present case, consistent with the authority set out above. There is no error of law in the First-tier Tribunal's assessment of the Sponsor's residence, which takes into account the relevant factors as to whether this was genuine and established. The appeal is dismissed on the third ground.
27. As to the first ground of appeal, I do not find any material error of law in the First-tier Tribunal's decision. Although there is no express finding in relation to the Appellants' credibility, the issues in this appeal clearly focus on the position of the Sponsor. The First-tier Tribunal did expressly find that the Sponsor was the person who made the decisions for the family and against that background, the Appellants' evidence of what he told them adds little if anything to his credibility. Even if considered to be corroborative of the Sponsor's claim, this would go only to a limited number of the reasons for the adverse credibility findings (set out in paragraphs 39 to 51 of the decision) and the overall conclusion that residence was not genuine. In particular, the Appellants' evidence as to the Sponsor's work and intentions was lacking, as was evidence of their own integration beyond the children attending school in Ireland, such that even if credible, they simply didn't address these points in their evidence.
28. The second ground of appeal is entirely without merit and in part misreads the First-tier Tribunal's decision and in part pursues something as a matter of principle which is accepted can have no material bearing on the outcome of the appeal. The First-tier Tribunal highlighted the lack of information and evidence both prior to and at the oral hearing. These were not matters upon which any specific questions needed to be asked but, for example in relation to the mosque attended, were used as illustrative examples of the lack of the general evidence of integration in Ireland which could reasonably be expected if the Appellants' claim was credible.
29. As to matters contained in a letter from the Appellants' solicitors, the First-tier Tribunal was entitled to take the contents of the same into account even if not formally a witness statement. The strict rules of

evidence do not apply in the Tribunal and the contents of the letter clearly represented the Appellants' case and in fact was entirely factually correct. In those circumstances, on the facts, there can be no material error of law even if the Appellant was right as a matter of principle (which I do not accept).

30. The final ground of appeal was not formally withdrawn at the oral hearing but was not pursued with any vigour and the comments in the grant of permission to appeal as to its lack of merit were accepted. I find no merit in the final ground of appeal which does not amount to any error of law in the First-tier Tribunal's decision. It is not clear that any Zambrano points were argued before the First-tier Tribunal and the fourth Appellant is of course entitled to make an application on that basis if she so wishes. The First-tier Tribunal has no jurisdiction to consider Article 8 of the European Convention on Human rights more broadly with in an EEA appeal for the reasons set out in Amirteymour v Secretary of State for the Home Department [2017] EWCA Civ 353.
31. For these reasons, the First-tier Tribunal decision did not involve the making of a material error of law and the decision is therefore confirmed.

Notice of Decision

The making of the decision of the First-tier Tribunal did not involve the making of a material error of law. As such it is not necessary to set aside the decision.

The decision to dismiss the appeal is therefore confirmed.

Direction Regarding Anonymity - Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008

Unless and until a Tribunal or court directs otherwise, the appellant is granted anonymity. No report of these proceedings shall directly or indirectly identify him or any member of their family. This direction applies both to the appellant and to the respondent. Failure to comply with this direction could lead to contempt of court proceedings.

Signed

December 2018



Date

17th

Upper Tribunal Judge Jackson