Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: EA/02691/2017**

THE IMMIGRATION ACTS

Heard at Field House **Decision & Reasons Promulgated**
On 1st October 2018 **On 18th October 2018**

Before

UPPER TRIBUNAL JUDGE FRANCES

Between

MURTAZA MOHAMMAD MUSA
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: No appearance
For the Respondent: Ms I Brocklesby-Weller, Home Office Presenting Officer

DECISION AND REASONS

1. The Appellant is a national of Afghanistan born on 16 March 1988. He appeals against the decision of First-tier Tribunal Judge D Ross dismissing his appeal against the refusal of a residence card as confirmation of a right of residence under Regulation 9 of the Immigration (EEA) Regulations 2016.

2. The Appellant appealed on two grounds. Firstly, the judge applied the wrong burden of proof and required the Appellant to prove his case whereas European law made clear that the burden lay on the party making the accusation. Secondly, the judge wrongly refused the application on the basis that there was no evidence the Appellant satisfied both the financial and English language requirements as set out in the Immigration Rules.

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3. Permission to appeal was granted by First-tier Tribunal Judge Alis on the following grounds: "The burden of proof set out in paragraph 8 of the judge's decision is correct because the appellant must demonstrate on the balance of probabilities that he met the 2016 Regulations but where the respondent is alleging the purpose of the residence in the EEA State was as a means for circumventing immigration laws. It is arguable he must prove that on the balance of probabilities. The second ground of appeal also has merit because the judge appears to import the requirements of the Immigration Rules into a European decision. Both grounds are arguable."

4. The Appellant did not attend the hearing. There was no explanation from him why he did not attend and there was no application for an adjournment. There was however an email from solicitors who had represented the Appellant before the First-tier Tribunal, AA Immigration Lawyers, stating that they were unable to continue representing the Appellant in this case due to a conflict of interest. The Appellant had been advised of this and of the need to seek alternative representation.

5. I am satisfied that the Appellant has been served with the notice of hearing and that he is aware of the hearing date and of the need to instruct alternative solicitors. There was no satisfactory explanation for his non-attendance today and, in the interests of the overriding objective and pursuant to Rule 28 of the Tribunal Procedure Rules 2014, I consider that it is in the interest of justice to proceed with the hearing in the Appellant's absence.

6. Ms Brocklesby-Weller relied on the Rule 24 response which stated:

> "The FTJ correctly finds at [8] that the burden of proof rests with the appellant to satisfy Regulation 9. Regulation 9(2)(c) requires the Appellant to show that the residence in the EEA State was genuine with reference to the factors set out in Regulation 9(3). The FTJ summarises this at [10]. The respondent's decision letter at pages 1 and 2 reject the appellant's claim to have met the centre of life test set out in Regulation 9 having considered the documents provided by the appellant (bearing in mind the failure to respond to a request for further evidence).
>
> It is submitted that whilst the FTJ does consider whether the appellant meets the financial requirements of the Immigration Rules that in itself is not a material error. The FTJ identifies at [12] that the earnings of the Appellant and partner would not have met the £18,600 threshold. It is submitted that although this is not a relevant test in this appeal it is a relevant factor when considering the credibility of the Appellant's case. This was considered in the round at [13-14] where it was open to the FTJ to find that the appellant and partner's claim to have moved their centre of their life to Ireland was not genuine as required by Regulation 9."

7. Ms Brocklesby-Weller submitted that the relevant Regulations were the 2016 Regulations and the burden was on the Appellant to satisfy Regulation 9. The issue in the appeal was whether relocation to Ireland was genuine. The Appellant did not

have to satisfy the Immigration Rules but the fact that he was unable to do so was a relevant factor in considering whether residence in Ireland was genuine. The judge dealt with all the evidence relevant to whether relocation to Ireland was genuine and he considered whether the Appellant's British citizen wife genuinely wanted to pursue Treaty rights there. The judge found that the financial accounts submitted may not be genuine, but in any event, the Appellant's wife had changed profession and the sums were so inconsequential that they did not support her case to be genuinely exercising Treaty rights.

8. Whilst there may be an error at paragraph 13, when the judge stated that the starting point was whether the Appellant could satisfy the Immigration Rules, this error was not material because it was a relevant factor in assessing whether residence in Ireland was genuine.

9. In the grounds of appeal, the Appellant relied on the case of O and B v The Netherlands CJEU C-456/12 at paragraph 58 which stated "It should be added that the scope of the Union law cannot be extended to cover abuses... 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.

10. Ms Brocklesby-Weller relied on paragraphs 52 onwards of that judgment. She submitted that it was genuine residence in another Member State which generated the right of residence to be recognised on return to the host Member State. EU law did not extend to cover abuse. The Respondent was not alleging abuse in this case but refused the application on the basis that the Appellant had failed to show genuine residence. On the Appellant's own account, he and his British citizen wife had specifically chosen to go to Ireland in order to circumvent domestic legislation and the Immigration Rules for entry.

Regulation 9

11. Regulation 9 of the Immigration (EEA) Regulations 2016 states:

"(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 UK, 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 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 an applicable requirement under the 1971 Act have leave to enter or remain in the UK; or
 (b) to a person who was only eligible to be treated as a family member as a result of Regulation 7(3) extended family members treated as family members.

The judge's findings

12. The judge made the following findings.

> "13. The starting point in this case that the Appellant would not be able to satisfy the requirements of the Immigration Rules because he does not have sufficient income and has not produced evidence that his wife earns £18,600. In addition he has not passed the English language test. The Appellant and his wife have both indicated to me that once they were married they looked into the best way of achieving settlement together. They decided that what they call the European route was the best option. They claim that they were intending to settle in Ireland and that this was genuine but the Appellant's wife has indicated that it would not have been possible for them to settle in Ireland because she has no family in Ireland who would provide them with support and enable them to start a family. I do not consider that it is plausible that they only considered this for the first time when they arrived in Ireland. I also considered that it is significant that the Appellant gave no evidence that they wished to live in Ireland. In other words that there was something about Ireland which attracted them such as the offer of a job or the fact that they liked the city of Limerick. The only reason for going to Ireland was to follow what they described as the European route. Therefore I must reject their evidence that they propose to settle in Ireland. I consider that it is far more likely that they decided that because the Appellant could not meet the requirements of the Immigration Rules they would circumvent the Rules by living in Ireland for about a year. The Appellant states that if they were not intending to settle in Ireland they would have left Ireland much earlier but I consider that it is significant looking at the chronology that they waited until they had been granted a certificate of registration in

Ireland on 1st May 2016. One day later on 2nd May 2016 they returned to the United Kingdom. Furthermore the Appellant's wife used to work in a pharmacy before she came to Ireland. After she returned to the UK she continued to work in a similar field because she worked as a laboratory assistant in a hospital. Her occupation in Ireland is not of a similar type at all because she did tailoring from home.

14. Although the documentary evidence tends to support the contention that the Appellant and his wife were living together in Ireland and they both did some work there I do not consider that looking at the bigger picture it is at all like that the Appellant's wife intended to settle in Ireland away from her family and in a completely different career to the one she had been pursuing in the UK. I therefore consider that the purpose of the residence in Ireland was as a means of circumventing any immigration laws which they were unable to meet. I consider this is the true meaning of what they described as the European route. I do not consider therefore that the Appellant has proved that he meets the requirements for a registration card and the appeal is dismissed."

Discussion and Conclusion

13. The Appellant and his British citizen wife were married on 9 April 2015 in Abu Dhabi. In her statement the Appellant's wife stated:

"6. After my marriage, I obtained advice with regards to my husband joining me so we can start our private life. I was advised about both the British route and the European route. Obviously, my husband and I wanted to live together as soon as possible so the European route through Ireland was the one we chose to take.
7. I travelled to Ireland around May 2015. I went in order to find a job and find a home so that my husband could join me. I registered a Tailoring company on a self-employed basis. The company was registered on 9 June 2015.
8. My husband was granted a family visa to join me in Ireland where I was exercising treaty rights. The Visa was issued from 26 April 2015 valid until 25 July 2015. He was then granted a residence card for a period of five years."

14. In cross-examination, the Appellant's wife stated that they had chosen the European route 'as this was quicker to reunite and start living together'. When asked why she did not stay in Ireland she stated that she needed the support of her family in the UK in order to have children. She needed help with childcare if she wanted to continue working. She was working part-time in a pharmacy in the UK. When she came back to the UK she was working as a laboratory assistant. In Ireland she worked as a tailor.

15. The Immigration Rules are relevant to the assessment of whether residence in Ireland was genuine. The fact that the Appellant was unable to satisfy the Immigration Rules, coupled with his wife's admission that they had sought advice about how they would be able to live together as soon as possible and had chosen the European route, was a factor which the judge was entitled to take into account. Although the

judge stated it was the starting point, it was only one factor that he took into account in assessing whether the Appellant had shown that he could satisfy Regulation 9. The judge was not assessing whether the Appellant could satisfy the Immigration Rules but whether the Appellant's residence in Ireland with his wife was genuine.

16. The judge erred in fact in stating that the Appellant was granted a certificate of registration on 1 May 2016. The Appellant was granted a residence card on 1 March 2016. This mistake of fact was not material given that the Appellant and his wife left Ireland 2 months after obtaining a residence card and the judge's other findings in relation to Regulation 9 which are dealt with below.

17. The judge properly applied the relevant Regulation and the correct burden of proof. It was for the Appellant to show that residence was genuine. The judge considered all relevant factors in relation to whether the centre of the British citizen's life had transferred to the EEA State. He took into account the fact that she had been working in a pharmacy in the UK and on return to the UK worked as a laboratory assistant, but in Ireland she had registered as a self-employed tailor. She also stated that the reason she had gone to Ireland was to follow a particular route to settlement which she identified as the European route. The judge considered the length of residence of eleven months. Their accommodation was rented and there was no evidence of any integration. This was the Appellant's first lawful residence in an EEA State.

18. The reasons the judge gives at paragraph 13 were all relevant to the application of Regulation 9(2) and 9(3). It was for the Appellant to show that his residence was genuine. The judge was satisfied that residence was not genuine and the appeal was properly dismissed. The conclusion that the intention was to circumvent the Immigration Rules was one which was open to the judge on the evidence and was relevant to the application of Regulation 9(4). On the Appellant's own evidence, he and his wife had specifically chosen the European route to settlement. Given the other factors which the judge quite properly considered, his finding that they did not intend to settle in Ireland was open to him. On the facts asserted, the Appellant could not satisfy Regulation 9.

19. Accordingly, I find that there was no material error of law in the decision promulgated on 26 May 2018 and I dismiss the Appellant's appeal.

<u>**Notice of Decision**</u>

Appeal dismissed

No anonymity direction is made.

J Frances

Signed Date: 15 October 2018

Upper Tribunal Judge Frances

TO THE RESPONDENT
FEE AWARD

As I have dismissed the appeal I make no fee award.

J Frances

Signed Date: 15 October 2018

Upper Tribunal Judge Frances