



Upper Tribunal  
(Immigration and Asylum Chamber)

Appeal Numbers: EA/12470/2016  
EA/12472/2016  
EA/12471/2016

THE IMMIGRATION ACTS

Heard at Field House  
On 25 April 2018  
Extempore

Decision & Reasons Promulgated  
On 22 May 2018

Before

UPPER TRIBUNAL JUDGE RINTOUL

Between

JAVED AKHTAR (1)  
FARZANA JAVED (2)  
HADIQA JAVED (3)  
(ANONYMITY DIRECTION NOT MADE)

Appellants

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellants: Mr M K Shahzad instructed by Selva Solicitors  
For the Respondent: Mr P Deller, Home Office Presenting Officer

DECISION AND REASONS

1. The appellants were refused family permits under the Immigration (European Economic Area) Regulations 2006. The appellants are, respectively, the father, mother and sister of Mr Zark Javaid who is married to Ms Restas ("the Sponsor"), an Irish Citizen exercising Treaty Rights in the United Kingdom. The respondent refused the applications on the basis that the appellants had not shown that they were dependent on the

2. On appeal, First-tier Tribunal Judge Cope accepted that dependence had been shown but dismissed the appeals on the sole basis that the EEA sponsor in this case was not an EEA national for the purposes of reg. 2 of the EEA Regulations because she is a dual national. He reached that conclusion on the basis that she had been born in London in 1991.
3. That was not a point raised by the respondent, and neither party was given the opportunity to make submissions on the issue. Permission to appeal to the Upper Tribunal was granted on the basis that this was a procedural error amounting arguably to an error of law. In his decision of 9 March 2018 Deputy Upper Tribunal Judge Storey found that the decision of First-tier Tribunal Judge Cope involved the making of an error of law, a point very properly conceded by the respondent. Judge Cope should not have relied on a point not raised by the parties without first asking for submissions.
4. As identified in the decision of Deputy Upper Tribunal Judge Storey promulgated on 9 March 2018, the question is this: is the sponsor a British national by operation of Section 1(1)(b) of the British Nationality Act 1981? If so, then the appeals must fail as she would not be an EEA national as defined in reg. 2 excludes those who are also British citizens.
5. Section 1(1)(b) of the 1981 Act provides:  
  
Acquisition by birth or adoption.  
  
(1) A person born in the United Kingdom after commencement, or in a qualifying territory on or after the appointed day, shall be a British citizen if at the time of the birth his father or mother is –  
  
(a) a British citizen; or  
  
(b) settled in the United Kingdom or that territory.
6. For the sponsor to have acquired British Nationality by operation of law, two conditions have to be met. First, that she was born in the United Kingdom and second that at least one of her parents was either a British citizen or settled in the United Kingdom as defined in Section 50 of the British Nationality Act 1981.
7. The definition of “settled” is set out in section 50 the Act as follows:  
  
“ settled ” shall be construed in accordance with subsections (2) to (4)  
  
Subsection (2) provides:  
  
(2) Subject to subsection (3), references in this Act to a person being settled in the United Kingdom or in a British overseas territory are references to his being ordinarily resident in the United Kingdom or, as the case may be, in that territory without being subject under the immigration laws to any restriction on the period for which he may remain.  
  
(Subsections (3) and (4) are not relevant to these appeals)

8. This means that for a person to be settled, she must meet two conditions. First, that she was present in the United Kingdom lawfully without there being any time limit on her presence and second that she was “ordinarily resident” in the United Kingdom.
9. The first condition is met. It is not in doubt that the sponsor’s mother is an Irish national and by virtue of the common travel area provisions set out in the Immigration Act 1971 and also in the Immigration Control of Entry to the Republic of Ireland Order 1972 (as amended) Irish nationals are, in effect, not subject to immigration control on entry and also are deemed to have leave to be here without a time limit. The second condition – ordinary residence – is more problematic.
10. Whether the sponsor’s mother was ordinarily resident in the United Kingdom at the time of the sponsor’s birth is the sole point of dispute between the parties, Mr Deller accepting that the burden is on the Secretary of State, who makes that assertion, to prove that she was ordinarily resident.
11. What constitutes ordinary residence was considered at length by the House of Lords in R v Barnet London Borough Council (ex parte Shah) [1982] UKHL 14 In summary, it was concluded that a person is ordinarily resident in the country which he has adopted voluntarily and for settled purposes as part of a regular order of his life for the time being of short or long duration. Settled purposes can vary but establishing ordinary residence requires a careful assessment of the United Kingdom connections including for example ownership of property, family ties and circumstances in general. A person’s intentions are clearly part of that definition.
12. It is to be observed that Judge Cope did not engage with any of these issues before reaching his decision.
13. There is in this case little or no evidence about the sponsor’s mother’s position at the time. It is said that she returned to Ireland in 1996, possibly slightly earlier, when the sponsor’s younger brother was born. The only evidence that Mr Deller could point to in respect of the mother is a short statement in a witness statement prepared by the sponsor dated March 2018 in which she says that her mother has resided in the United Kingdom for 26 years. Whilst that may be true what that does not do is cover the period around the sponsor’s birth as a matter of arithmetic. As I have already said, mere presence in the United Kingdom is not sufficient; there is a whole host of other factors which would have to be taken into account, including the mother’s intentions at the time, before it could be concluded that she was ordinarily resident.
14. I find on the basis of the very limited evidence that the Secretary of State has not shown on the balance of probabilities that the sponsor’s mother was ordinarily resident in the United Kingdom. On that basis it cannot be shown that both limbs of the test for settlement as set out in the British Nationality Act are met and accordingly I am satisfied that the sponsor is not a British citizen. I am satisfied that she is a citizen of Ireland and on that basis she is a citizen of the European Economic Area for the purposes of the Immigration (EEA) Regulations and for these reasons, that being the agreed sole issue in this appeal, I allow all the appeals.

**Notice of Decision**

1. The decision of the First-tier Tribunal involved the making of an error of law and it is set aside.
2. I remake the decision by allowing the appeals under the Immigration (European Economic Area) Regulations.
3. No anonymity direction is made.

Signed

Date: 18 May 2018

A handwritten signature in black ink, appearing to read 'James Rintoul', written in a cursive style.

Upper Tribunal Judge Rintoul