Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: EA/06151/2018

THE IMMIGRATION ACTS

Heard at Royal Courts of Justice, Belfast	**Decision & Reasons Promulgated**
On 2 October 2019	On 17 October 2019

Before

UPPER TRIBUNAL JUDGE DAWSON

Between

AMANDA DIANN CORBIT
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Simon Barr, Simon Barr Immigration Law
For the Respondent: Ms Petterson, Senior Presenting Officer

DECISION AND REASONS

1. The appellant, who is a Canadian national, has been granted permission to appeal the decision of First-tier Tribunal Judge Gillespie who dismissed her appeal against the Secretary of State's decision dated 5 July 2018 refusing her application under the Immigration (European Economic Area) Regulations 2016 for an EEA residence card. The judge observed that the appellant and a Mr Fox had moved to Cork in the Republic of Ireland in January 2015, where he obtained bar work. She had previously been to a teacher's college in Glasgow and had moved to London to work as a

teacher for two years on a work permit. They had been together in Canada previously. They married in Cork in June 2015. The appellant gave evidence where the couple had lived in the Republic of Ireland where she had undertaken childminding work. They moved back to the United Kingdom on 27 November 2015.

2. After directing himself in relation to a decision of the Court of Justice in *O & B v the Netherlands* and a decision of the Inner House *AA v the Secretary of State* [2017] CSIH 38 the judge reached the following conclusions:

> "50. I am not persuaded, on a consideration of the entirety of the evidence, that this couple's move from Canada to Ireland was anything other than to circumvent the consequences of Mr Fox's leave in Canada coming to an end and his inability to have his partner, and now wife, join him in the United Kingdom because of the unattainable income threshold. She candidly admitted this was a problem for them.
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> 51. Their evidence of the research they carried out prior to migrating to Ireland was somewhat in conflict. Mrs Corbit said they had investigated but Mr Fox was less sure.
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> 52. Neither party has had any previous connection with Ireland. Mrs Corbit had gone there on holiday when a student. Neither had any family there. That in itself does not give rise to any suspicion per se, but in the context of the entirety of the evidence does not support their claim that this was a bona fide intention to establish themselves in Ireland with any degree of permanence.
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> 53. Their evidence was in conflict on the availability of work in the United Kingdom. Mr Fox said his type of work presented no difficulties, and that in my judgement it manifestly true. Bar work is ubiquitous throughout the British Isles. Its low skilled nature and their lack of preplanning does not again persuade me that there was any intention to establish themselves in Ireland or any real concern on their part about obtaining work elsewhere; the primary issue being the immigration objective. The explanation that they moved to Northern Ireland because the type of work was seasonal is again implausible and easily anticipated by someone in Mr Fox's position. He did not deny that alternative work could have been obtained when the work at the boutique hotel ended, but that what was available was unattractive.
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> 54. The parties were vague in regard to the childminding work undertaken by Mrs Corbit. There is no evidence that she sought work commensurate with her qualifications or that her inability to speak Irish was a bar to obtaining employment, if not as a teacher, then in some capacity that reflected her ability as a university graduate with teaching experience. Someone in her position would be well used to preparing a CV and approaching the task of getting work in a purposeful way, such that the Tribunal can fairly conclude that they were indeed making Ireland their home.

> 55. The length of the parties' joint residence in Ireland – no more than eight months – is again a relevant factor in determining whether their move was genuine. Neither does that short stay persuade me that there could have been any meaningful integration in Ireland during the eight months. It is also worth noting that Mrs Corbit's first lawful residence in the EU with her British spouse was when she obtained the registration certificate in Ireland.
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> 56. In the result, I find she has not proved that her presence in the Republic of Ireland was "sufficiently genuine" applying the above test in regard to permanence, continuity or at least expectation of continuity, to amount to residence within the ordinary meaning of the word."

And thus dismissed the appeal.

3. The grounds of challenge argue that no weight had been given to the qualitative effect of the appellant marrying his sponsor during the period of residence and thus strengthening the relationship. Furthermore, the concern is expressed that the judge had not referred to the decision of the Court of Appeal in *SSHD v Christy* [2018] EWCA Civ 2378. Although not clearly argued in the form of a submission it is contended that it was not proper to usurp the authority's decision-making role with reference to *Akrich Case C-109/01* [2003]. The grounds conclude with the argument that the judge had failed to give reasons for not following the caselaw presented to him.

4. In granting permission to appeal First-tier Tribunal Judge Boyes explained that the grounds asserted the judge erred by not correctly applying the caselaw. He considered there was little he needed or could say and that the grounds were arguable.

5. Since the decision of First-tier Tribunal, the Upper Tribunal has given guidance on the approach to be taken with reference to regulation 9 and an allegation of abuse of rights. *ZA (Reg 9 EEA Regs; abuse of rights) Afghanistan* [2019] UKUT 281 (IAC) explains:

> "(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.
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> (ii) Where an EU national of one state ("the home members state") has exercised the right of freedom of movement to take up self-employment in another EU state the host 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 and effective. It is for an appellant to show that there had been a genuine exercise of Treaty rights.
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> (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 an abuse of rights."

6. With commendable candour Ms Pettersen accepts that the judge took the wrong approach in his decision in focusing on the intentions of the parties and that the decision is tainted by error of law. Accordingly the decision is set aside.

7. The issues to be addressed are those captured in the guidance given in *ZA* and it is for the appellant to demonstrate that the employment of which he gave evidence before the First-tier Tribunal was genuine and effective and not marginal or ancillary. Until that is resolved it is not possible for the appellant to rely on the exercise of treaty rights nor can there be engagement with any allegation by the Secretary of State that there has been an abuse of those rights. The judge noted the history on employment on which he received evidence but he did not consider whether the aggregate income during the period of stay in Cork was sufficient to engage free movement rights. This case needs to be remitted to the First-tier Tribunal for its further consideration of this issue, and the further issue of genuineness of the exercise of those rights raised by the Secretary of State in the decision letter dated 5 July 2018.

8. By way of conclusion therefore the decision of the First-tier Tribunal is set aside for error of law and the case remitted to the First-tier Tribunal for its further consideration by a different judge.

Signed Date 11 October 2019

UTJ Dawson
Upper Tribunal Judge Dawson