Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: EA/06364/2018**

THE IMMIGRATION ACTS

Heard at Manchester Civil Justice Centre	**Decision & Reasons Promulgated**
On 14 May 2019	**On 17 May 2019**

Before

DEPUTY UPPER TRIBUNAL JUDGE BIRRELL

Between

WISSEM BEN AMOR

(ANONYMITY DIRECTION NOT MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms Johnrose for the Appellant

For the Respondent: Mr Tan Senior Home Office Presenting Officer

DECISION AND REASONS

Introduction

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 R Price promulgated on 11 February 2019, which dismissed the Appellant's appeal against a refusal of a residence card under the EEA Regulations. The application was made for a residence card as the direct family member of a British citizen who had previously exercised treaty rights in Malta and the refusal was on the basis that the parties had not demonstrated that they genuinely relocated to Malta.

3. Grounds of appeal were lodged by the Appellant in person summarised in the grant of permission as the Judge construed the treaty rights too narrowly and took into account irrelevant factors. On 25 February 2019 First tier Tribunal Judge S H Smith gave permission to appeal.

4. At the hearing I heard submissions from Ms Johnrose on behalf of the Appellant that:

5. In determining whether the Appellant met the requirements of Regulation 9 the Judge found that the Appellant had failed to explain why they had moved to Malta when their purpose was implicit: they went there so that the Appellants wife could exercise her treaty right of free movement as she stated in the application form at 9.4

6. The Judge took into account irrelevant factors such as whether the employment she obtained was unique to Malta or whether they had friends or family there.

7. She referred to the cases of Eind C-291/05 and O & B C-456/12 to support her argument that the Regulations are intended to eliminate barrier to the exercise of free movement rights. The Judge used the Regulations to leapfrog European caselaw.

8. She referred to those factors set out in the caselaw which suggested that the move was genuine such as the length of residence, whether the EEA national had a job and whether their family life was strengthened during the period of residence. These were also factors set out in the Respondents own policy guidance. The Appellants produced evidence of their registration with the Maltese authorities, her employment, the child attended a nursery, that they had signed a 12 month rental agreement, registered with a GP and opened a bank account and none of this evidence was referred to in the findings.

9. The Judge did not identify in what way he asserted that the Appellant and his wife had artificially created the conditions that appeared to meet the Regulations.

10. On behalf of the Respondent Mr Tan submitted that:

11. The Appellants position appeared to be that she felt that he did not have to give a reason for the move as he did not answer Q9.53 in the EEA application form.

12. The Judge was entitled to look at the reasons for the move to Malta and this should be a holistic assessment of all of the evidence in the context of why they moved.

13. There is clearly a test of the genuine nature of the move as that is set out in O & B.

14. Their recourse was a fresh fully completed application

15. In reply Ms Johnrose stated that their motivation was to exercise free movement rights.

16. The Appellant produced evidence of all of the factors as set out in the Respondents own policy.

Finding on Material Error

17. Having heard those submissions I reached the conclusion that the Tribunal made material errors of law.

18. This was an appeal against a refusal of a Residence card by the Appellant a Tunisian citizen. His application was based on the status of his wife, a British citizen, who lived with him in Tunisia and had a child and then the family moved to Malta where the Sponsor worked in a hotel exercising treaty rights. The family lived in Malta for 6 months before taking a holiday in the UK and ultimately returning to live there.

19. The Appellant is to some extent the author of his own misfortune in having his application refused in that both the case of O & B and the Regulations require that the relocation is '*genuine*'. Thus at paragraph 58 of O & B the Court held

> *"It should be added that the scope of Union law cannot be extended to cover abuses (see, to that effect, Case C-110/99 Emsland-Stärke [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)."*

20. This requirement is found in Regulation 9 in this way

> *"(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 any applicable requirement under the 1971 Act to have leave to enter or remain in the United Kingdom);"*

21. A consideration of whether the move was genuine and was not motivated by a desire to secure an immigration advantage is therefore, to some degree, addressed in the application form at questions 9.4 and 9.53. The Appellant states at 94 that she does not believe she is required to give a reason for the move as it was done in the exercise of free movement and where this question

is asked *'What was the reason you went to live in the EEA state?*' and it is not in dispute that the Appellant left this question blank. I am not persuaded that the question was answered as Ms Johnrose suggests that the Sponsor went there to exercise treaty rights as I am satisfied that was her *intention*, something she had to establish in law before consideration of whether the move was genuine. Both EU law and the Regulations require the move to be genuine and in so far as the motive may shed light on that it is a matter that is part of the overall assessment

22. However I am persuaded that the reason behind the move was not the only evidence that the Judge was required to look at in determining whether the move was genuine as the evidence had to be looked at in the round. I am satisfied that the Judge erred in focusing on the evidence the Appellant did *not* produce (the reason for the move) rather than the evidence he *did* produce as there is no reference to any of it in his findings. The Appellant produced exactly the sort of evidence (registration documents, long term lease, medical registration, bank accounts, employment evidence) that was set out in Regulation 9(3) and in the Respondents guidance and there is no engagement with the evidence that was before him. The Judge has also focused on integration of the family in Malta rather than whether their own family life developed during the period of residence there.

23. The failure of the First-tier Tribunal to address and determine whether Regulation 9 was met on the basis of the evidence before him constitutes a clear error of law. This error I consider to be material since had the Tribunal conducted this exercise the outcome could have been different. That in my view is the correct test to apply

24. Under Part 3 paragraph 7.2(b) of the Upper Tribunal Practice Statement of the 25th of September 2012 the case may be remitted to the First Tier Tribunal if the Upper Tribunal is satisfied that:

> *(a) the effect of the error has been to deprive a party before the First-tier Tribunal of a fair hearing or other opportunity for that party's case to be put to and considered by the First-tier Tribunal; or*

(b) the nature or extent of any judicial fact finding which is necessary in order for the decision in the appeal to be re-made is such that, having regard to the overriding objective in rule 2, it is appropriate to remit the case to the First-tier Tribunal.

25. In this case I have determined that the case should be remitted because the Appellant did not have a fair hearing due to the failure to make findings in respect of the evidence that was before him.

26. I set aside the decision with no preserved findings for a complete re hearing. I remit the matter back to the First-tier Tribunal sitting at Manchester to be heard on a date to be fixed before me.

Signed Date 15.5.2019

Deputy Upper Tribunal Judge Birrell