Upper Tribunal
(Immigration and Asylum Chamber)

Appeal number: EA/06581/2017

THE IMMIGRATION ACTS

Heard at:	Decision & Reasons Promulgated
Field House	On 10 May 2019
On 24 April 2019	

Before

Upper Tribunal Judge Gill

Between

Nicholas Andre Phillips — Appellant
(ANONYMITY ORDER NOT MADE)

And

The Secretary of State for the Home Department — Respondent

Representation:
For the appellant: Ms S Akinbolu, of Counsel, instructed by Cahill De Fonseka Solicitors
For the respondent: Mr. Whitwell, Senior Presenting Officer.

Decision and Directions

1. The appellant, a national of Jamaica born on 25 September 1974, appeals against a decision of Judge of the First-tier Tribunal Sweet who, in a decision promulgated on 5 July 2018 following a hearing on 26 June 2018, dismissed his appeal against a decision of the respondent of 28 June 2017 to refuse his application for a residence card as confirmation of his right to reside as the spouse of Ms Nadine Phillips, a British citizen born on 15 August 1977 in the United Kingdom (hereafter the

"sponsor"), under regulation 9 of the Immigration (European Economic Area) Regulations 2016 (the "EEA Regulations").

2. The appellant first came to the United Kingdom in 1999. He then returned to Jamaica and married the sponsor there in 2000. Between 1999 and 2015, the appellant lived in Jamaica whilst the sponsor lived and worked in the United Kingdom. In September 2015, the appellant travelled to Ireland. The sponsor also travelled to Ireland in September 2015. They said that they wanted to start a new life there. They travelled to the United Kingdom in November 2015 with a view to spending Christmas with the family but did not return to Ireland because the sponsor's mother became ill. The appellant was not employed in Ireland but the sponsor worked as a nanny there.

3. The issues before me are: (i) whether the judge erred in law by failing to make any findings on the evidence of the appellant and the sponsor or any relevant findings of fact; and (ii) in the alternative, whether the judge failed to give adequate reasons for his findings.

4. Ms Akinbolu submitted that the judge failed to assess the evidence and merely re-stated the evidence in the section of his decision entitled "*Findings of Fact*". She submitted that the judge had simply failed to engage with the evidence of the sponsor's employment in Ireland. He made no mention of the sponsor's employment in the section entitled "*Findings of Fact"* except at para 37*.* In the alternative, Ms Akinbolu submitted that, even if I concluded that the judge had made an inferred finding that the sponsor's employment in Ireland was not genuine, the judge gave inadequate or no reasons for his decision.

5. Mr Whitwell submitted that the judge had implicitly found that the sponsor's employment in Ireland was not genuine. He gave his reasons at para 40 of his decision, i.e. the short period of the appellant's and the sponsor's residence in Ireland, from September 2015 until 12 2015; the temporary nature of their accommodation in Ireland; and the lack of integration in Ireland. Mr Whitwell reminded me that the judge had earlier recorded, in his summary of evidence, the length of the residence at para 11; the evidence given about the accommodation in Ireland at para 15; and the evidence concerning the lack of integration in Ireland, at paras 13, 18, 18 34 and 33, which showed that the evidence was that the appellant was not employed in Ireland, the appellant and the sponsor had no family in Ireland, the sponsor had no bank account in Ireland, there was no evidence of any tax being paid in Ireland and there was little planning before the appellant and the sponsor went to Ireland. He submitted that, read as a whole, the judge had given adequate reasons for his findings, albeit that they were brief.

6. I heard Ms Akinbolu in reply and then reserved my decision.

Assessment

7. I agree with Ms Akinbolu that the judge failed to engage with the evidence of the sponsor's employment in Ireland. The evidence of employment was at the core of the case, since this evidence was relied upon to assert that the sponsor was exercising Treaty rights in Ireland. As Ms Akinbolu submitted, there was a childcare contract, invoices, receipts for money paid and the sponsor was registered for tax purposes. The sponsor and the appellant also gave oral evidence. The judge simply failed to engage with the evidence of the sponsor's employment and failed to explain whether he accepted or rejected the evidence of employment.

8. It is clear that paras 35-39 of the judge's decision, under the heading “Findings of Fact”, amounted to no more than a re-statement by the judge of the evidence in the case. Mr Whitwell did not seek to suggest otherwise. However, he submitted that the judge made his finding and gave his reasons at paragraph 40, which reads as follows:

> “40. **It is for these reasons** that the appellant therefore cannot meet the requirements of Regulation 9 of the EEA Regulations. I am not persuaded that their residence in the EEA state was genuine, taking into account the short period of time that they lived there, the temporary nature of their accommodation and their lack of integration in the EEA state. I am persuaded that their purpose in residing in the EEA state was to circumvent the Rules which the appellant would have to meet on order to obtain a residence card in the UK. In short, it was not a genuine stay in the EEA state and therefore I conclude that the appellant cannot meet the requirements of regulation 9 of the EEA Regulations. The appeal should therefore be dismissed.”

(my emphasis)

9. However, contrary to the opening words of para 40, there were no reasons given in paras 35-39 which, as I have said, only amounted to a re-statement of the evidence.

10. The fact that there was evidence of the sponsor's employment in Ireland in the form of the contract of service, invoices and receipts and that the sponsor was registered for tax purposes in Ireland was potentially capable of showing that she was genuinely employed in Ireland. Plainly, para 40 of the judge's decision shows that the judge found that the sponsor's employment in Ireland was not evidence that showed that her residence in Ireland was genuinely for the purpose of exercising Treaty rights but it is not clear whether he accepted that she was employed. If he rejected the evidence of employment and found that the sponsor was not employed in Ireland, his reasons are not known. If he accepted that she was employed in Ireland but did not accept that the employment was in genuine exercise of the Treaty rights but was instead a mere ruse for the appellant to avoid having to comply with the requirements of the Immigration Rules, it is not known why.

11. Mr Whitwell referred me to the evidence summarised by the judge at paras 9-31 of his decision. However, I am satisfied, given my reasoning at paras 7-10 above, that any reliance upon the judge’s summary of the evidence would be tantamount to my having to consider the evidence and provide my own reasoning, which is inappropriate.

12. I am therefore satisfied that, whilst the judge had by implication found that the evidence of the sponsor's employment in Ireland was not evidence that showed that her residence in Ireland was genuinely for the purpose of exercising Treaty rights, he made inadequate findings on material matters, including whether he accepted that the sponsor was employed in Ireland. In addition, he failed to give any or any adequate reasons for his implied finding that the evidence of the sponsor's employment in Ireland was not evidence that showed that her residence in Ireland was genuinely for the purpose of exercising Treaty rights.

13. Accordingly, I set aside the judge's decision. Paras 35-40 shall not stand, including the final sentence of para 39 which states that the sponsor had stated that she was homesick, in view of the fact that the appellant disputes that the sponsor gave such evidence and the fact that I was unable to read the judge's Record of Proceedings. Paras 9-31 shall stand as the record of the evidence that was given to the judge.

14. As the hearing before the judge did not result in any assessment of credibility, the appellant has been deprived of the benefit thereof. I therefore agree with Ms Akinbolu and Mr Whitwell that this appeal should be remitted to the First-tier Tribunal for a fresh hearing. In addition, Mr Whitwell submitted a copy of the decision of Judge of the First-tier Tribunal Bart-Stewart in the appellant's previous appeal (OA/05693/2014) which was omitted from the respondent's bundle and which the respondent now wishes to rely upon.

15. In all of the circumstances, I have concluded that it is appropriate and just for this appeal to be remitted to the First-tier Tribunal for a fresh hearing on the merits on all issues.

Notice of Decision

The decision of Judge of the First-tier Tribunal Sweet involved the making of material errors of law. His decision is set aside.

The appeal is remitted to the First-tier Tribunal for a fresh hearing on the merits on all issues by a judge other than Judge Sweet and Judge Bart-Stewart.

Directions to the parties

(1) The decision on the appeal awaits determination by a Judge of the First-tier Tribunal other than Judge Sweet and Judge Bart-Stewart.

(2) The Appellant shall notify the Tribunal within five days of the date on which these Directions are despatched the following:

(a) if an interpreter is required at the hearing, the language in which an interpreter is required;

(b) the number of witnesses who will give evidence.

(3) Any further evidence the appellant seeks to rely on must be served within 21 days of the date on which this “Decision and Directions” is sent to the parties. The appellant’s bundle must include:

a. Witness statements of the evidence to be called at the hearing, to stand as examination-in-chief.
b. A paginated and indexed bundle of all documents to be relied on at the hearing. Essential passages must be identified in a schedule, or highlighted.
c. A skeleton argument, identifying all relevant issues and citing relevant authorities.
d. A chronology of events

Upper Tribunal Judge Gill Date: 5 May 2019