Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Numbers: EA/07999/2017**
EA/08000/2017

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 19 November 2019	**On 20 December 2019**

Before

UPPER TRIBUNAL JUDGE COKER
UPPER TRIBUNAL JUDGE RINTOUL

Between

BIBI OMARKHAIL
MOHAMMAD ULLAH OMARKHAIL
(ANONYMITY DIRECTION NOT MADE)

Appellants

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellants: Mr R de Mello and Mr T Muman, instructed by Guildhall Solicitors
For the Respondent: Mr P Deller, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellants appeal under the Immigration (EEA) Regulations 2016 against a decision of the respondent made on 8 September 2017 to refuse to issue them with residence cards on the basis that they are the dependent relatives of a British citizen who had previously exercised treaty rights in Poland. Their appeals to the First-tier Tribunal against those decisions were dismissed but, for the reasons set out in our decision

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promulgated on 25 July 2019, a copy of which is attached, we set aside the decisions of the First-tier Tribunal, having concluded that some of the findings of fact were in error, and directed that they be remade in the Upper Tribunal.

2. There is no real dispute as to the basic factual scenario of this case. The appellants' son, Mr Omarkhail ("the sponsor"), travelled to Poland and he was joined by his parents. He worked there for a period in running his own business and the parties were all duly issued with the relevant residence cards by the Polish authorities. The appellants say that they lived with their son in rented accommodation from 27 January 2016 until 20 December 2016; a tenancy agreement was provided to that effect.

3. On return to the United Kingdom, the appellants applied for residence cards under the Immigration (European Economic Area) Regulations 2016 ("the EEA Regulations").

4. The respondent was not satisfied that the sponsor had in fact been exercising treaty rights in Poland nor was he satisfied that the requirements of Regulation 9(2) and 9(3) were met in that in summary the sponsor had not transferred his centre of life to Poland.

5. In his skeleton argument dated 15 November 2019, Mr Deller expressly conceded at [8] that the respondent no longer contended that the sponsor had not properly exercised his Treaty Rights in Poland. He also observed at [11] that in the light of that concession, it was not necessary for us to determine whether, as the appellants submit, that on a proper understanding of article 5 of Directive 2004/38 ("the Directive") as interpreted by McCarthy [2014] EUECJ C-202/13 it is in fact not open to the deciding authority or the judge for that matter to go behind the issue of the residence card. We agree.

6. No purpose is served in the Upper Tribunal considering points which are academic. That is contrary to the overriding objective, and no proper reason has been given to us why judicial time should be devoted to such an exercise.

7. The respondent stated also in the skeleton that although her position on the principles set out in ZA (Reg.9 EEA Regs; abuse of rights) Afghanistan [2019] UKUT 281 is reserved, the appeal is not resisted.

8. In the circumstances, we are satisfied on the basis of the evidence before us, that the appellants did meet the requirements of the Immigration (EEA) Regulations and that accordingly their appeals are to be allowed.

Notice of Decision

1. The decision of the First-tier Tribunal involved the making of an error of law and we set it aside.

2. We remake the decisions by allowing the appeals under the Immigration (European Economic Area) Regulations 2016.

No anonymity direction is made.

Signed Date 11 December 2019

Upper Tribunal Judge Rintoul

ANNEX – ERROR OF LAW FINDING

Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Numbers: EA/07999/2017**
EA/08000/2017

THE IMMIGRATION ACTS

Heard at Birmingham Civil Justice Centre	**Decision & Reasons Promulgated**
On 16 July 2019	**…………………………………**

Before

UPPER TRIBUNAL JUDGE COKER
UPPER TRIBUNAL JUDGE RINTOUL

Between

BIBI OMARKHAIL
MOHAMMAD ULLAH OMARKHAIL
(ANONYMITY DIRECTION NOT MADE)

Appellants

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellants: Mr R de Mello and Mr T Muman, instructed by Guildhall Solicitors
For the Respondent: Ms H Aboni, Home Office Presenting Officer

DECISION AND REASONS

3. The appellants appeal with permission against a decision of First-tier Tribunal Judge C E Burns promulgated on 4 May 2018 dismissing their appeal against a decision of the Secretary of State to refuse to issue them with residence cards on the basis that they are the dependent relatives of a British citizen who had previously exercised treaty rights in Poland.

4. There is no real dispute as to the basic factual scenario of this case. The appellants' son, Mr Omarkhail ("the sponsor"), travelled to Poland and he was joined by his parents. He worked there for a period in running his own business and the parties were all duly issued with the relevant residence cards by the Polish authorities. The appellants say that they lived with their son in rented accommodation from 27 January 2016 until 20 December 2016; a tenancy agreement was provided to that effect.

5. On return to the United Kingdom, the appellants applied for residence cards under the Immigration (European Economic Area) Regulations 2016 ("the EEA Regulations").

6. The respondent was not satisfied that the sponsor had in fact been exercising treaty rights in Poland nor was he satisfied that the requirements of Regulation 9(2) and 9(3) were met in that in summary the sponsor had not transferred his centre of life to Poland.

7. The judge heard evidence from the sponsor and found that he was not credible given an inconsistency identified at paragraph [37]. She also considered the documentary evidence in the round, finding at paragraph [40] that she was not satisfied given the evidence that he had in fact properly been in business, noting that the invoices produced were a type of document that can be manufactured on a word processor, and also a lack of detail of the work done, finally concluding that he had not undertaken genuine self-employment.

8. The judge then went on to find that Regulation 9 of the EEA Regulations could not be used to penalise a Union citizen but that this fell away because she was not satisfied the sponsor had exercised treaty rights. She also found that he had not transferred his residence to Poland nor was his residence there genuine, habitual and permanent, his permanent residence being the marital home in the UK. She also considered that as the Polish authorities had issued residence cards to the appellants this could not prevent her making her own assessment as to whether the sponsor was exercising treaty rights based on the evidence before her.

9. The appellants sought permission to appeal on three principal grounds:

   (i) that the judge had erred in the fact-making exercise in finding that the self-employment was not genuine and effective but only marginal and ancillary, this being predicated on an improper approach to the evidence set out at ground 3;

   (ii) that in reaching her decision the judge took into account irrelevant matters, in addressing the sub-Articles of Regulation9 (3) as regarding the transfer of the centre of life, the centre of life test being unlawful and contrary to European law, and

(iii) that the judge erred in concluding that her decision would not interfere with the genuine enjoyment of the rights conferred on EU citizens which it in fact did.

10. The respondent did provide a Rule 24 notice but this adds little.

11. On 18 April 2019 I issued directions in this matter with which neither party has seen fit to comply. That has in view of the panel made our job more difficult today as there were specific questions put which is why we set out the directions in the first place and why we directed production of a skeleton argument.

12. In submissions Mr de Mello raised another issue which is somewhat different from that which has been prefigured in the grounds of appeal and that is, in short, that on a proper understanding of article 5 of Directive 2004/38 ("the Directive") as interpreted by McCarthy [2014] EUECJ C-202/13 it is in fact not open to the deciding authority or the judge for that matter to go behind the issue of the residence card and thus the judge had compounded the errors in her approach.

13. Ms Aboni submitted that the judge had reached findings of fact which were open to her and had not misdirected herself in law or otherwise failed properly to apply the law.

14. In reaching our decision we bear in mind that the sole ground of appeal is whether the decision was contrary to the United Kingdom's obligations under the EU treaties. We say that because much of Regulation 9 is not underpinned by the Directive and is reliant on the case law interpreting the Treaties.

15. We turn first to the issue of the findings of fact. We consider that there are several points at which the findings of fact are questionable and are in error. First, there appears to be no engagement in the last two sentences of paragraph [40] with the witness statement and the evidence produced by the appellant in that he did give an explanation as to how he was able to conduct his business without speaking Polish. This has not been properly taken into account by the judge. The explanation recorded by her is not the sole explanation.

16. The suggestion that documents can be manufactured on a word processor is with the greatest of respect irrelevant. It is difficult to think of invoices that are not produced with the aid of a "word processor" and nothing can turn on that. There is no indication that the judge did ask the appellant to give more detail about the work he did but equally there appears to be no engagement with what he said in his witness statement about that.

17. Leaving that to one side, we consider also that the findings of fact cannot be separated from what is said in ground 2. We consider that there is merit in the observation that the centre of life test has no basis in European law, it does not appear in the Directive, it does not appear in the

case law and would, if anything, appear to be contrary to what the Advocate General said in **O and B** at paragraphs 100 to 104.

18. In particular, there is no requirement that someone should have their sole residence in the host member state, nor is there a requirement that any move to that state should be permanent, nor is there a requirement that somebody should integrate. Taking these two factors together we consider that the errors made by the judge with regard to the findings of fact on the issue of first whether there had been an exercise of treaty rights on the facts, and, secondly. as to whether that was sufficient in terms of **O and B** and subsequent case law such that the **Surinder Singh** principles invoked are flawed and must be set aside.

19. For these reasons we are satisfied that the decision of the First-tier Tribunal did involve the making of an error of law and needs to be set aside. That is irrespective of any issues to whether the mere possession of the residence cards is a sufficient basis such that that would be determinative of the outcome of the application. That is a matter which may or may not become necessary depending on how the facts are found again, and was a matter which we consider is best dealt with on re-making when the facts are properly established.

Directions

1. This appeal will be relisted to be remade in the Upper Tribunal. As agreed with the parties, it will be listed in Field House. The date will be fixed in consultation with counsels' clerks.
2. The appeal will be listed for 3 hours. It is assumed that there will be no further oral evidence and so no interpreter will be booked. If the appellant wishes to adduce further evidence, oral or otherwise, he must make an application pursuant to rule 15 (2A) of the Tribunal Procedure (Upper Tribunal) Rules 2008 at least 21 days before the hearing, such application to be accompanied by the evidence upon which it is sought to rely.
3. The appellant must serve on the respondent and on the Upper Tribunal a skeleton argument at least 10 working days prior to the hearing to be accompanied by an indexed and paginated bundle of authorities
4. The respondent must serve on the appellant and on the Upper Tribunal a skeleton argument at least 5 working days before the hearing.

No anonymity direction is made.

Signed Date 25 July 2019

Upper Tribunal Judge Rintoul