



**Upper Tribunal
(Immigration and Asylum Chamber)**

Appeal Number: EA/01067/2019

THE IMMIGRATION ACTS

Heard at Field House

**Decision & Reasons
Promulgated**

On 10th February 2020

On 3rd March 2020

Before

UPPER TRIBUNAL JUDGE FRANCES

Between

**RINRIN [R]
(ANONYMITY DIRECTION NOT MADE)**

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: No appearance

For the Respondent: Ms A Everett, Home Office Presenting Officer

DECISION AND REASONS

1. The Appellant is a citizen of Indonesia. She appeals against the decision of First-tier Tribunal Judge S Gillespie promulgated on 17 July 2019 dismissing her appeal against the refusal of a residence card under Regulation 9 of the Immigration (EEA) Regulations 2016.
2. Permission to appeal was granted by Upper Tribunal Judge Grubb on the ground that the judge failed to adopt the approach in ZA (Reg 9 EEA Regs; abuse of rights) Afghanistan [2019] UKUT 281 (IAC) which was reported

after his decision. Further, if Regulation 9(4) was relied on, the burden was on the Respondent.

3. The matter came before me on 11 November 2019 and was adjourned pending the appeal of SZ, which raised similar issues to ZA. The Appellant did not attend and directions were given for her to submit further evidence because, at the hearing before the First-tier Tribunal, the Respondent's bundle did not contain the documents submitted with the Appellant's application.
4. At the hearing today, the Appellant did not attend but submitted evidence of her husband's employment with HSBC from 6 February 2017 to 12 June 2017 and Premier Restaurant from 24 January 2017 to 28 February 2017. No evidence was submitted by the Respondent.
5. The Appellant has submitted cogent evidence that her husband was exercising Treaty rights in Malta. Had this evidence been before the First-tier Tribunal Judge he may have come to a different conclusion. Although the judge cannot be criticised for failing to take into account evidence which was not before him, there has been a procedural irregularity which gives rise to an error of law. There was no fault on the part of the Appellant that the documents submitted with the application were not in the Respondent's bundle or on the court file. Accordingly, I find that there has been a material error of law in the decision of 17 July 2019 and I set the decision aside. I remake the decision as follows:
6. Having considered the written evidence of the Appellant and the documents in support of her application, I find that the Appellant and her family lived in Malta between 16 December 2016 and 24 July 2017. Her husband worked part-time for a restaurant in January and February 2017 and was employed full-time by HSBC from 6 February to 12 July 2017. Applying ZA Afghanistan, I find that the Appellant has shown that the exercise of Treaty rights in the host member state was genuine and effective. On the evidence before me, the Respondent has failed to show that there was an abuse of rights. Accordingly, I allow the Appellant's appeal under Regulation 9 of the Immigration (EEA) Regulations 2016.

Notice of Decision

Appeal allowed

J Frances

Signed
Upper Tribunal Judge Frances

Date: 17 February 2020

TO THE RESPONDENT
FEE AWARD

As I have allowed the appeal and because a fee has been paid or is payable, I have considered making a fee award and have decided to make a fee award of any fee which has been paid or may be payable.

J Frances

Signed

Date: 17 February 2020

Upper Tribunal Judge Frances