IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2022-001060
First-tier Tribunal No: EA/05828/2021

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On the 30 March 2023

Before

UPPER TRIBUNAL JUDGE KEITH
DEPUTY UPPER TRIBUNAL JUDGE STOUT

Between

Mr Mazhar Maqbool
(NO ANONYMITY ORDER MADE)

Appellant

and

The Secretary of State for the Home Department

Respondent

Representation:
For the Appellant: Mr S Mustapha, Counsel instructed under Direct Access
For the Respondent: Mr S Whitwell, Senior Home Office Presenting Officer

Heard at Field House on 8 February 2023

DECISION AND REASONS

1. These are the reasons which we have given orally at the hearing today.

Background and First-tier Tribunal decision

2. The appellant appeals against the decision of the First-tier Tribunal (Judge Hendry, the "FtT") promulgated on 9th December 2021, who dismissed the appellant's appeal. That in turn was an appeal by the appellant against the decision of the respondent, made on 16th March 2021, to refuse to grant him a residence card as an extended family member of a British citizen under Regulation 9 of the Immigration Rules (EEA) Regulations 2016, or as we refer to them in the remainder of these reasons, the 2016 Regulations.

3. The very broad gist of the factual circumstances (although for the avoidance of doubt, we preserve none of the FtT's findings) are that the appellant was born in Pakistan, lived there until he entered the UK, and (it is said in a sponsor's witness statement in the bundle) entered the UK unlawfully on a false passport. The appellant's biometric details were substituted for those of a person entitled to apply for a passport. The appellant remained in the UK until, it is said, his sponsoring brother moved from the UK to the Republic of Ireland. By the time his sponsoring brother moved to Ireland, the sponsor had naturalised as a British citizen. The appellant moved to Ireland in 2016, where he lived with the sponsor. At paragraph [4] of her decision, the FtT noted that the sponsor returned from Ireland to the UK in 2020. At para [5], the FtT recorded that on 24th December 2020, the appellant applied for an EEA residence card as a dependant of his brother, which the respondent refused in the decision under appeal of 16th March 2021. The appellant appealed against that decision on 30th March 2021.

4. At para [81], the FtT noted:

> "81. His application was refused on 16 March 2021 on the basis that as an extended family member of a British citizen under Regulation 9, he had to demonstrate that his residence in the EEA member state in which he lived with the sponsor had been lawful. In practical terms, this meant that he had to provide evidence that he had been issued with an EEA residence card during his residence in Ireland and which would show that he was extended family member of his British citizen sponsor or that he had been granted leave to remain in Ireland under that country's own domestic Immigration Rules.
>
> 82. It was not in dispute that the appellant had not had such a residence card in Ireland because his application had been refused. Neither did he have leave to remain in Ireland under the domestic legislation.
>
> 83. The background details to this appeal were not, therefore, in dispute and for this reason the appellant and the sponsor gave only oral evidence……
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> 85. Regulation 9 provides that, where a British Citizen resides in an EEA state as a worker, self-employed person …and the British citizen's family member has resided with him, then the family member is to be treated as a family member of an EEA national.
>
> 86. In this case, the sponsor, the British Citizen, had moved to Ireland, an EU country, in 2015, and the appellant, his brother, had lived with him and had been dependent on him in that country and in Ireland."

5. At para [93], the FtT noted that the Irish immigration authorities had refused the appellant a residence card, because they did not accept his claim to be a dependant of his sponsor. The appellant did not contest that refusal (para [94]). At para [95], the FtT noted that the 2016 Regulations made clear, as did the respondent's own guidance, that an applicant's lawful residence in another EEA country was a "requirement" of an entitlement to a EEA residence card. The FtT cited Regulation 9(3)(e) as to the relevance of lawful residence to the genuineness of that relevance. At para [96], the FtT considered that in this case,

the appellant had not lawfully resided in Ireland, and indeed did not appear to have lived lawfully in the UK prior his move to Ireland. At para [97], the FtT considered the possible application of Article 8 ECHR, but as there was no human rights appeal, the FtT did not have jurisdiction to consider such a claim, following Amirteymour v SSHD [2017] EWCA Civ 353. At para [98], the FtT concluded that the appellant had not had lawful residence in Ireland, and so could not satisfy the requirements of Reg. 9. The FtT dismissed the appellant's appeal on that basis.

Grounds of Appeal and Grant of Permission

6. The appellant appealed on 22nd March 2022. He argued, in very high level terms, that the FtT had failed to consider the respondent's discretion and the broader factors under Reg. 9. That required an extensive examination of the circumstances and the respondent was not obliged to dismiss his application (nor was it permissible for the FtT to do so) solely on the basis of a lack of lawful residence. In the alternative, the FtT had failed to provide adequate reasons and her decision was perverse. Whilst the permission to appeal was initially refused on the papers by First-tier Tribunal Judge Moon in a decision of 2nd February 2022, permission to appeal to the Upper Tribunal was granted by Upper Tribunal Judge Hanson on 24th May 2022. In particular, Judge Hanson was concerned that the FtT had failed to consider the reported decision of ZA (Reg 9. EEA Regs; abuse of rights) Afghanistan [2019] UKUT 281 (IAC). As a consequence, the FtT had arguably failed to consider a broader exercise of discretion under Reg 9(3), in considering lawful residence as determinative.

Rule 24 Response

7. Following the grant of permission, the respondent provided a Rule 24 response dated 28th September 2022. The respondent accepted that the FtT had erred in focussing on lawful residence as a determinative factor under Reg 9(3). However, the respondent pointed out that the FtT had cited, at para [10], an out-of-date version of Reg 9. As a consequence of amendments to the 2016 Regulations by the Immigration (EEA Nationals) (EU Exit) Regulations 2019, an additional Reg. 9(1A) had been inserted, which had been laid before Parliament on 7th March 2019 and the changes took effect on 28th March 2019. Reg. 9(1A) stated:

> "(1A) These Regulations apply to a person who is an extended family member ("EFM") of a BC as though the BC were an EEA national if:
>
> (a) the conditions in paragraph 2 are satisfied; and
>
> (b) the EFM was lawfully resident in the EEA State referred to in paragraph 2A(i)."

8. The effect of reg. 9(1A) was that the FtT was entitled to consider that the appellant was not lawfully resident and therefore he could not satisfy the Regulations. Given the undisputed evidence that the appellant had no lawful residence in either Ireland or the UK, the appellant's appeal would have failed, so that even though the FtT had erred in her reasoning, because she had cited the wrong version of the Regulations, the error was not such that the FtT's decision was unsafe and could not stand.

Further developments

9. To his credit, Mr Whitwell drew our attention at the hearing, to an unreported decision of this Tribunal, which was directly relevant to the issues before us, but which undermined the Rule 24 response and the respondent's position. He sought permission to refer to the unreported decision of Upper Tribunal Judge Bruce of Kutbuddin and others v SSHD, with the lead reference number EA/05182/2019, promulgated on 22nd March 2022.

10. We bore in mind the Practice Directions of the Immigration and Asylum Chambers of the First-tier Tribunal and the Upper Tribunal dated 19th December 2018, para [11]. We have a full decision of the Upper Tribunal. The proposition for which the Upper Tribunal's decision is cited is that an applicant should not fail in their application for an EEA document simply because they fail to show that they were "lawfully resident" for the entire time that they lived in the EEA country with their British Citizen sponsor. In treating the requirement at Reg. 9(1A)(b) of the 2016 Regulations as determinative, a decision-maker risked breaching an applicant's rights under the EU Treaties. Although Mr Whitwell did not go so far as to formally certify that the proposition is not to be found in any reported determination of this Tribunal and has not been superseded by the decision of a higher authority, we are satisfied that this test is met (bearing in mind that Mr Whitwell, in drawing this to our attention, is undermining his own case) and we therefore waive this requirement. Pursuant to para [11.3], we are satisfied that we would be materially assisted by citation of the determination, as opposed to adopting the reasoning in it. This avoids the need to repeat in full the lengthy reasoning in Kutbuddin, with which Mr Whitwell did not argue, and with which, although we are not bound by it, we saw no reason to depart. Mr Whitwell conceded, on the respondent's behalf, that the FtT's error was therefore material, such that her decision was not safe and cannot stand.

11. Bearing in mind the concession, and to explain our reasons for accepting that concession, we do no more than summarise the gist of Judge Bruce's analysis, which led her to conclude, at para [48] of her decision, the proposition already outlined. In brief, Judge Bruce reasoned at paras. [39] to [42] that a requirement of lawful residence of an extended family member, while referred to in the 2016 Regulations and UK government guidance, was not mandated by EU law. The issue did not arise in Surinder Singh C-370/90 [1992] ECR I-4265 or Banger C-89/17 [2019] 1 WLR 845 and the Court in O v Minister voor Immigratie, Integratie en Asiel and Minister voor Immigratie, Integratie en Asiel v B C-456/12 [2014] 3 WLR 799 placed no weight on the grant, or lack of grant, of a residence card. For example, 'Mr B' was living in Belgium with no leave at all. The respondent's position that residence must be "lawful" breached the principle in Metock (Metock & Ors v Minister for Justice, Equality and Reform C-127/08 [2009] 1 WLR 821) that non-EEA national spouses were entitled to benefit from the provisions of the Directive "irrespective" of how he or she entered the host member state. The requirement of "lawful residence" rested, at its highest, on an obiter comment of Sales LJ in SSHD v Christy [2018] EWCA Civ 2378, to the effect that the requirement of "genuine" residence would "probably preclude" the third country national having a Banger right of facilitation if the family life in question had been created or strengthened at a time when he was living in the EU illegally (para [42] of Christy). Not only was the comment obiter, but it pre-dated discussion of the word, "genuine" in ZA (Regulation 9: EEA Immigration

(European Economic Area) Regulations 2016: abuse of rights) Afghanistan [2019] UKUT 00281 (IAC). "Synthesising the principle in Metock with that in Surinder Singh there would appear to be no basis for distinguishing between the family members of those with leave, and those without" (para [46] of Kutbuddin).

12. Whilst we have considered the skeleton argument of Mr Mustapha, and whilst we intend him no discourtesy, it is unnecessary to recite his skeleton argument in light of Mr Whitwell's concession. We therefore set aside the FtT's decision, without any preserved findings of fact.

Disposal of Proceedings

13. We then turn to the consideration of how we should dispose of proceedings. We have considered para [7.2] of the Senior President's Practice Statement and in particular sub-paras [7.2(a)] and [(b)]. Both representatives urged us to remit remaking to the First-tier Tribunal. The nature and the extent of any fact-finding which is necessary in order for the decision to be remade is complex and broad-ranging. In not preserving any findings, we do not preclude a remaking Tribunal from considering the evidence in the bundles before us, including a sponsor's witness statement indicating that the appellant entered the UK on a false passport; and a letter from a UK employer, purportedly confirming the sponsor's continuous employment for the purposes of Transfer of Undertakings (Protection of Employment) Regulations 2006, covering the same period when the sponsor claimed to be living and working in the Republic of Ireland (a letter dated 4th January 2021, at page [409] of the appellant's bundle).

14. We also bear in mind that as the FtT had applied potentially the wrong version of the 2016 Regulations, the effect has been to deprive the appellant of an opportunity to put his case to the FtT, on the basis of the correct version.

15. Therefore sub-paras [7.2(a)] and [(b)] of the Senior President's Practice Statement apply. It is appropriate that we remit remaking back to the First-tier Tribunal.

Notice of Decision

16. The First-tier Tribunal erred in law, such that her decision is not safe and cannot stand. We set it aside, without any preserved findings of fact.

17. We remit this appeal to the First-tier Tribunal for a complete rehearing.

Directions to the First-tier Tribunal

18. This appeal is remitted to the First-tier Tribunal for a complete rehearing with no preserved findings of fact.

19. The remitted appeal shall not be heard by First-tier Tribunal Judge Hendry.

20. No anonymity direction is made.

J Keith

Judge of the Upper Tribunal
Immigration and Asylum Chamber

10th March 2023