



**IN THE UPPER TRIBUNAL**  
**IMMIGRATION AND ASYLUM CHAMBER**

Case No: UI-2023-004802

First-tier Tribunal No: EA/50752/2021

**THE IMMIGRATION ACTS**

**Decision & Reasons Issued:**  
**On 17 September 2023**

**Before**

**UPPER TRIBUNAL JUDGE JACKSON**

**Between**

**SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Appellant

**And**

**UMER FAROOQ**  
**(NO ANONYMITY ORDER MADE)**

Respondent

**Representation:**

For the Appellant: Mr C Bates, Senior Home Office Presenting Officer

For the Respondent: Mr C Holmes of Counsel, instructed by Axis Solicitors

**Heard at Field House by remote video means on 27 July 2023**

**DECISION AND REASONS**

1. This has been a remote hearing which has not been objected to by the parties. The form of remote hearing was by video, using Teams. There were no technical difficulties for the hearing itself and the papers were all available electronically.
2. The Appellant appeals with permission against the decision of First-tier Tribunal Judge Malik promulgated on 2 August 2022, in which the Appellant's appeal against the decision to refuse his application for an EEA Residence Card dated 20 March 2021 was dismissed. For ease I continue to refer to the parties as they were before the First-tier Tribunal, with Mr Farooq as the Appellant and the Secretary of State as the Respondent.
3. The Appellant is a national of Pakistan, born on 3 March 1990, who applied on 30 December 2020 for an EEA Residence Card as the extended family member of his brother, a British citizen who had previously exercised treaty rights in Ireland.

4. The Respondent refused the application the basis that the Appellant had not demonstrated lawful residence in Ireland and that the Sponsor must be a qualified person in the United Kingdom. There was insufficient evidence of his claimed self-employment by way of HMRC registration, earnings, evidence of active trading. Overall the requirements of Regulation 9 of the Immigration (European Economic Area) Regulations 2016 were not met.
5. Judge Malik allowed the appeal in a decision promulgated on 2 August 2022 under the Immigration (European Economic Area) Regulations 2016. It was accepted that the Sponsor was self-employed in the United Kingdom running a driving school, with sufficient supporting evidence of this economic activity. Whilst there was no evidence of the Appellant or the Sponsor being in Ireland or exercising treaty rights there, the specific basis for refusal was that the Appellant did not have a document showing he had lawful residence in Ireland, not that he was never in Ireland at all. With reference to the then, unreported decision of Kutbuddin & Ors (Regulation 9. EEA Regulations, Lawful Residence) [2023] UKUT 00076, the First-tier Tribunal found that there was no requirement of lawful residence in EU law and therefore the appeal was allowed against the two specific reasons for refusal given by the Respondent.

### **The appeal**

6. The Respondent appeals on three grounds as follows. First, that the First-tier Tribunal erred in law by restricting the scope of the appeal to only the two matters specifically raised in the reasons for refusal letter, contrary to its statutory function to determine the ground of appeal which is whether the Appellant's rights under the Immigration (European Economic Area) Regulations 2016 were breached. On the narrow basis considered, the First-tier tribunal could not properly conclude that the requirements of Regulation 9, or the remaining requirements of Regulations 8 and 17(4) of the same were met. Secondly, that the First-tier Tribunal erred in law in giving inadequate consideration to the issue of lawful residence, if any. The decision in Kutbuddin was decided on whether the whole period of residence in an EU state was lawful, but it is not directly relevant to a case in which there was no evidence of any lawful residence at all. The purpose of the Surrinder Singh principle in Regulation 9 is that joint and genuine residence in a host state where the Sponsor is exercising treaty rights would involve the strengthening of family life. Finally, the First-tier Tribunal erred in law in failing to recognise that the Respondent would still be required to consider whether to issue the Appellant an EEA Residence Card having regard to all of the factors in Regulations 8 and 9.
7. At the oral hearing, Mr Bates relied on the written grounds of appeal. He also recognised that since those were written, the Upper Tribunal's decision in Lata FtT: principal controversial issues [202] UKUT 00163 had made it clear that for cases in the reformed appeal process (such as the present appeal), a party would struggle to identify an error of law in a First-tier Tribunal's decision if the issue had not been raised directly or in the review document. However in the present case, it was submitted that the issue of residence in Ireland, not just a document showing lawful residence (which would be one way of evidencing this, but there may be other documents showing exercise of treaty rights there) was expressly raised in the Respondent's review. The Respondent relied on the lack of any evidence of residence in Ireland at all and it was not conceded that the Sponsor had exercised treaty rights there.

8. Mr Bates submitted that once the First-tier Tribunal had found in paragraph 17 of the decision that there was no evidence of any residence in Ireland by the Appellant or the Sponsor, the appeal should have been dismissed as the requirements of the Regulations could not be met. The Judge however adopted an approach that only the specific points in the refusal letter could be considered which impermissibly narrowed the scope of the appeal and led to a failure to make findings on material matters, contrary to R v IAT and another, ex part Kwok on Tong [1981] Imm AR 214 that an appeal is not limited to matters raised in the notice of refusal.
9. On behalf of the Appellant, Mr Holmes opposed the appeal on the basis that there were significant other documents which were not before the First-tier Tribunal (but had been submitted with the original application form) on the basis that they related to matters not directly in issue in the appeal. The Respondent had not disputed or put in issue whether the Sponsor was exercising treaty rights in Ireland, nor that there was any issue beyond whether the Appellant had lawful residence in Ireland. Mr Holmes submitted that in these circumstances, the Respondent's appeal was highly opportunistic and unfair against the Appellant who appealed and dealt with the only two reasons for refusal given, (i) that the Sponsor was not exercising treaty rights in the United Kingdom (which was satisfied with the submission of further evidence); and (ii) that the Appellant's residence in Ireland was not lawful (but was not required to be). By implication, residence was accepted, only that there was no evidence of lawful residence. The Appellant's skeleton argument correctly identified these two reasons for refusal as the issues to be determined by the First-tier Tribunal, which were expressly agreed with in paragraph 4 of the Respondent's review which also went on to emphasise the need for lawful residence only.
10. Mr Holmes submitted that during the hearing before the First-tier Tribunal there was some difficulty in the Respondent's position initially advanced which was based on a misreading of the reasons for refusal letter as to whether the Sponsor was exercising treaty rights in Ireland or lawfully resident there; but this was not pursued given these matters were not raised in the decision letter. Further, a point was raised that the Appellant had never been resident in Ireland, which was objected to on behalf of the Appellant and the Presenting Officer then proceeded only on the basis of the pleaded case with the two live matters already identified.
11. The Appellant had not had any notice prior to the hearing that his presence in Ireland may be in issue and there had not been any application to amend the reasons for refusal or Respondent's review. It was not permissible for the Respondent to attempt to raise a new matter at the hearing and doing so completely ignores the procedural rigour required in reform cases as emphasised in Lata and TC (PS compliance, "issues-based" reasoning) [2023] UKUT 00164. The First-tier Tribunal in reform cases only required to consider the matters directly identified as in dispute by the parties and appropriately did so in this appeal.
12. In reply, Mr Bates relied further on the statutory function of the First-tier Tribunal identified in Kwok on Tong which still applies to an appeal under the Immigration (European Economic Area) Regulations 2016 as it is an appeal against refusal against a specific set of rules. It was submitted that a reasons for refusal letter is not a pleading for the purposes of an appeal and separate grounds can be raised. The Appellant in this case can only succeed in his appeal if all of the

requirements in the Immigration (European Economic Area) Regulations 2016 are met.

13. In addition, in the present case there is disagreement between the parties as to what the reasons for refusal letter actually said, a matter not resolved by the First-tier Tribunal in the decision and a fair outcome would have been to adjourn the hearing so all relevant points could be addressed. Further, the Appellant could only have been lawfully resident in Ireland if the Sponsor were exercising treaty rights there, such that that was in issue in any event.
14. Prior to the hearing the Appellant had provided an additional bundle of documents in relation to his residence in Ireland which were not before the First-tier Tribunal but were submitted with the Appellant's original application and it was indicated there were further documents as to the Sponsor's exercise of treaty rights there, also submitted with the original application. As a matter of practicality to ensure all matters were finalised in this appeal, directions were given for the Appellant to file and serve a copy of these additional documents and for the Respondent to make any further written submissions as needed, but in particular to confirm whether there was in fact any dispute as to the Appellant's residence in Ireland or the Sponsor's exercise of treaty rights there. The documents were served in accordance with those directions, following which Mr Bates confirmed on behalf of the Respondent that it was accepted that the Appellant was resident in Ireland with the Sponsor, who was exercising treaty rights there.

### **Findings and reasons**

15. This appeal has been an entirely fruitless waste of time and resources for both parties. The Respondent sought to appeal a decision on the basis that the First-tier Tribunal did not go beyond what it was required to do in a reform case to decide issues not properly raised before it and which in any event, having considered the documents that were submitted to the Respondent with the original application, were never in issue in any event.
16. The Respondent's reasons for refusal letter was entirely clear that the application was refused under Regulation 9 of the Immigration (European Economic Area) Regulations 2016 for two reasons, first, that the Appellant had not demonstrated lawful residence in Ireland (by way of a residence card or leave under the Irish immigration rules); and secondly, that there was insufficient evidence to show that the Sponsor was self-employed in the United Kingdom as claimed. In paragraph 7 of the Appellant's skeleton argument, the same two issues were identified as the only two live issues in the appeal and upon which submissions were then made. The documentary evidence submitted to the First-tier Tribunal directly addressed only those two issues.
17. The Respondent's review begins with general remarks, including that, *"The schedule of issues and counter schedule below are clear on what matters are now accepted. Any other aspect of the Refusal and relevant sections of the Immigration Rules remain a concern and are expected to be addressed at the appeal hearing. The RFRL as a whole alongside this document provides an overall view of the case and points in the ASA which are not specifically addressed should not be taken as accepted by the Respondent."*
18. In substance, there were no matters then accepted by the Respondent and the document identifies the same two issues as in the reasons for refusal letter and

the Appellant's skeleton argument, including *"Whether the Respondent was correct to refuse the Applicant on the basis that the Appellant's residence in Ireland was not "lawful"."*. The submissions on this point focused only on lawful residence in another EEA state, relying on the reasons for refusal. At no point is there any further or separate issue identified or upon which submissions are made as to whether the Appellant was resident in Ireland and to the contrary, the way the issue of lawful residence was identified by the Respondent strongly suggests that residence itself was accepted.

19. It appears from the First-tier Tribunal decision that on behalf of the Respondent, submissions were made that there was no evidence of any residence at all by either the Appellant or the Sponsor, as well as no evidence of a residence card, as recorded in paragraph 17. These are reiterated at paragraph 21 of the decision, with agreement following that there was no evidence of either person being in Ireland at all, or of the Sponsor exercising treaty rights there. The point is then dealt with as follows in paragraph 23:

*"23. Yet the respondent did not refuse the appellant's application because they doubted the sponsor was exercising Treaty rights in the Republic of Ireland. Nor did they refuse the application on the basis the appellant (and/or sponsor) had not resided in the Republic of Ireland at all. The appellant's written application to cite the unreported UT cas was made on 19/05/22 and the respondent therefore had ample opportunity to address the basis of their refusal. Consequently, I can only consider those matters that form the refusal decision and the appellant cannot be criticised for not addressing matters that were not put to him in the refusal decision."*

20. It can be seen from this paragraph that the First-tier Tribunal directly addressed the additional points that the Respondent attempted to raise at the hearing and gave a perfectly clear, rational and lawful response to them; identifying that it was appropriate only to address the two issues specifically raised on notice to the Appellant. That is entirely in accordance not only with principles of fairness but also with the process in reform cases and as confirmed in both Lata and TC. As recognised by Mr Bates, those cases emphasise that a party will struggle to identify an error of law on a issue not directly raised in the reasons for refusal letter and/or Respondent's review. This is precisely such a case where the issue of whether there was any residence at all simply had not been raised by the Respondent prior to the hearing, despite repeated opportunities to do so. There is no error of law in the First-tier Tribunal's decision in not going beyond a decision on the two specific issues raised and agreed by both parties prior to the hearing. In any event, the appeal was not expressly allowed on the basis that all of the requirements in Regulation 9 of the Immigration (European Economic Area) Regulations 2016 were met, only that the appeal was allowed on the two specific points considered. There was no unlawful restriction on the scope of the appeal and no failure to carry out the Tribunal's statutory functions.

21. The factor that compounds the wastefulness of this appeal being pursued on the first and third grounds of appeal is that in any event, the Respondent had been furnished with relevant documentary evidence as to residence in Ireland of both the Appellant and the Sponsor, as well as documentary evidence as to the Sponsor exercising treaty rights in Ireland with the original application for an EEA Residence Card. This was material that has been in the possession of the Respondent all along (although I appreciate not specifically with Mr Bates until provided to him in the course of this appeal and on which he then promptly

sought instructions and responded) and upon which a view could and should have sensibly been taken before even an application for permission to appeal was pursued on matters which were ultimately not disputed by the Respondent anyway. This only serves to reinforce what appears to be clear, that the original decision maker did not include these matters in the reasons for refusal because there was no issue with them.

22. The second ground of appeal was not pursued with any vigor at the hearing before me, rightly so as in accordance with the now reported decision in Kutbuddin, the First-tier Tribunal's assessment of whether there was a requirement for 'lawful residence' contained no error of law.

### **Notice of Decision**

The making of the decision of the First-tier Tribunal did not involve the making of a material error of law. As such it is not necessary to set aside the decision.

The decision to allow the appeal is therefore confirmed.

G Jackson

Judge of the Upper Tribunal  
Immigration and Asylum Chamber

**12<sup>th</sup> September 2023**