Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: EA/02514/2019

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 2nd March 2020	**On 16th March 2020**

Before

UPPER TRIBUNAL JUDGE COKER

Between

GURJIT SINGH

Appellant

And

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr S Shah of 786 Law Associates
For the Respondent: Mr D Clarke, Senior Home Office Presenting Officer

DETERMINATION AND REASONS

1. In a decision promulgated on 23rd July 2019, First-tier Tribunal judge O'Hagan dismissed the appellant's appeal against a decision of the respondent refusing to issue him with a residence card as the family member of a British citizen who had previously exercised Treaty Rights in an EEA state.

2. The appellant was granted permission to appeal on the grounds that given the overall findings made by the First-tier Tribunal judge, it was arguable the judge had incorrectly found the appellant did not meet regulation 9, taking into account *ZA (reg 9 EEA Regs; abuse of rights) Afghanistan* [2019] UKUT 00281,

the appellant and his wife had produced and relied upon evidence that fulfilled many of the requirements of Regulation 9 including that the couple had spent time in Germany, had socially interacted with people in Germany, that they were building a life together in Germany and that Mrs Kaur had attended at least some immigration classes and had made some effort to learn German.

Background

3. The appellant is a national of India. He previously entered the UK illegally and claimed asylum under a false name. His asylum claim was refused; he did not appeal but remained unlawfully in the UK. He met his British Citizen wife Ms Kaur in 2010. He then returned to India voluntarily. She travelled to India in October 2011 where the couple were married. She returned to the UK; his subsequent application for entry clearance as a spouse was refused under the Immigration Rules because, inter alia, of his adverse immigration history.

4. In January 2014 the appellant travelled to Italy. Ms Kaur joined him there and they lived there until December 2014. Ms Kaur returned to the UK; the appellant remained in Italy. On 30th October 2015 the appellant travelled to Germany and Mrs Kaur travelled to Germany where they both recommenced living with each other.

5. Mrs Kaur commenced employment on 2nd November 2015 and was employed for one month. Her next employment was from 30th December 2016 until June 2017 at Burger King in Frankfurt am Main. On 6th November 2017 she commenced work with Koch and Benedict but was injured and issued with a sick note covering the period 28th November 2017 until 20th December 2017. She did not work again in Germany.

6. The appellant was issued with a Residence Card in Germany on 30th October 2015.

7. On 30th May 2018 the appellant and his wife travelled to the UK. 11 days later Mrs Kaur obtained employment in the UK; the application under regulation 9 was made on 13th November 2018.

8. The appellant's application under regulation 9 of the EEA regulations was refused by the respondent for reasons set out in a letter dated 16th May 2019. In essence the respondent took the view that the residence in Germany was contrived to circumvent the Immigration Rules, and that the appellant had not established that their residence in Germany was genuine.

Error of Law

9. In reaching his decision the First-tier Tribunal judge identified the factors he had to consider and amongst those factors he referred to whether the 'centre of the British Citizen's life had transferred to the EEA State'. This is plainly incorrect – see *ZA*.

10. Mr Clarke submitted that irrespective of the time the couple had spent in Germany, that they had rented a home and that Mrs Kaur had undertaken

integration and language tuition, they could not meet the requirements of regulation 9[1]. The findings of the First-tier Tribunal judge as to Mrs Kaur's employment history in Germany and her intentions on return to the UK in May 2018 were such that firstly she was not exercising Treaty Rights immediately prior to returning to the UK – a finding which undermines the claimed genuineness of the residence in Germany; and secondly that it was her intention on her return to the UK to obtain employment and the move to Germany had been contrived to circumvent the Immigration Rules – an abuse of rights.

11. There was, Mr Clarke submitted, what could be described as a two-stage process. The first question to be asked was whether there was, as per paragraph (ii) of the headnote of *ZA*, a genuine in the sense of real, substantive or effective exercise of Treaty Rights in Germany and, depending on the answer to that question, there may then be a second question: had there been an abuse of rights. With regard to the latter question, the burden of proof is upon the Secretary of State.

12. Mr Clarke submitted that regulation 9 required the sponsor to be exercising Treaty rights immediately prior to coming back to the UK – regulation 9(2)(a)(i). Mrs Kaur was, he submitted not exercising Treaty rights and had not been exercising Treaty Rights since June 2017 or, at its most generous December 2017. She could not meet 9(2)(a)(i) because that required the exercise of rights to be immediately prior to entry to the UK.

13. Furthermore, her very limited employment during the time she was in Germany did not support the submission that she was genuinely exercising Treaty Rights: there was no real or effective or substantive employment.

14. In any event, he submitted, the finding by the First-tier Tribunal judge that it was the intention of the parties to circumvent the Immigration Rules was in itself

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1 9.- Family members of British citizens

(1) If the conditions in paragraph (2) are satisfied, these Regulations apply to a person who is the family member ("F") of a British citizen ("BC") as though the BC were an EEA national.

(2) The conditions are that—

(a) BC—

(i) is residing in an EEA State as a worker, self-employed person, self-sufficient person or a student, or so resided immediately before returning to the United Kingdom; or

(ii) …

(b) F and BC resided together in the EEA State;

(c) F and BC's residence in the EEA State was genuine

(3) Factors relevant to whether residence in the EEA State is or was genuine include—

(a) whether the centre of BC's life transferred to the EEA State;

(b) the length of F and BC's joint residence in the EEA State;

(c) the nature and quality of the F and BC's accommodation in the EEA State, and whether it is or was BC's principal residence;

(d) the degree of F and BC's integration in the EEA State;

(e) whether F's first lawful residence in the EU with BC was in the EEA State.

(4) This regulation does not apply—

(a) where the purpose of the residence in the EEA State was as a means for circumventing any immigration laws applying to non-EEA nationals to which F would otherwise be subject (such as any applicable requirement under the 1971 Act to have leave to enter or remain in the United Kingdom)

(5) …

(6) …

(7) For the purposes of determining whether, when treating the BC as an EEA national under these Regulations in accordance with paragraph (1), BC would be a qualified person—

(a) any requirement to have comprehensive sickness insurance cover in the United Kingdom still applies, save that it does not require the cover to extend to BC;

(b) in assessing whether BC can continue to be treated as a worker under regulation 6(2)(b) or (c), BC is not required to satisfy condition A;

(c) in assessing whether BC can be treated as a jobseeker as defined in regulation 6(1), BC is not required to satisfy conditions A and, where it would otherwise be relevant, condition C.

sufficient to have enabled the appeal to be dismissed. That finding had been taken holistically on the basis of all the evidence that was before the First-tier Tribunal judge considering Mrs Kaur's employment immediately after her return to the UK, her employment history as well as the length of time they had been away from the UK.

15. Mr Shah submitted that although Mrs Kaur had not been employed throughout her time in Germany, her periods of unemployment were such that, by analogy with a person seeking permanent residence in the UK she remained a qualifying person and, because she had been working in the 6 month period prior to coming to the UK she was thus exercising Treaty Rights. He drew attention to the tenancy agreement, that the appellant had been employed and that although she had not been working immediately prior to entry to the UK the reasons for that were reasonable and included her being away from work because of injury. The fact that the appellant had been issued with a Residence Card in Germany was relevant because it meant it was accepted that Mrs Kaur was exercising Treaty Rights.

Discussion

16. Regulation 9(2)(a)(i) requires Mrs Kaur to have been exercising Treaty Rights immediately prior to her entry to the UK. The evidence before the First-tier Tribunal could not have led to that conclusion. She was not working from December 2017 at the latest.

17. In so far as Mr Shah's submission that because 6 months had not elapsed after she ceased work and she returned to the UK she thus did not cease to be exercising Treaty Rights is concerned, he could not refer me to where this was stipulated in the Regulations either directly or by analogy. Regulation 6 sets out the criteria to be satisfied to be a Qualifying person for the purpose of the Regulations. In this case, Mrs Kaur has to be a qualifying person, as defined by regulation 6, for her husband to be able to meet regulation 9(2)(a)(i), accepting at its highest the submission that if she were a Qualifying person then being unemployed for less than 6 months would not affect her status as a qualifying person.

18. Mr Shah accepted that, because Mrs Kaur had been employed for less than a year in Germany, she had to meet regulation 6(2)(c) in order to be a Qualified person as defined. He accepted she was not working after December 2017, that she had not registered as a job seeker and had not voluntarily ceased working in order to embark on vocational training related to her previous employment. Although she had not been unemployed for more than 6 months she did not, by analogy, meet regulation 6(3) because she had not retained 'worker status', ie she did not meet regulation 6(2)(c), after December 2017.

19. Mr Shah submitted that the appellant's Residence Card was relevant to the question of whether Mrs Kaur was exercising Treaty Rights, it having been accepted by the German authorities that she was. It is correct that the German authorities accepted at the date of issue of the Residence Card that Mrs Kaur was exercising Treaty Rights. But it is not evidence that she continued to exercise Treaty Rights – which factually she did not.

20. Nor, given that Mrs Kaur was not exercising Treaty Rights, was it relevant that the couple had been in Germany for the time they had or that she had undertaken integration and language training or that he was working. The failure to exercise Treaty Rights is fatal to the application for a Residence Card under regulation 9.

21. In so far as the finding by the First-tier Tribunal judge that the appellant and his wife had contrived to circumvent the Immigration Rules is concerned, that finding was predicated upon the evidence as a whole which included a finding, in effect, by the First-tier Tribunal judge that the couple had not transferred the centre of their life to Germany. As established in *ZA*, that is an incorrect test and, had that been the only finding by the First-tier Tribunal judge it is possible the decision would have been flawed by material error of law.

22. But in this case, the fact that Mrs Kaur was not exercising Treaty Rights means that, irrespective of any other findings by the judge, the appellant could not meet the requirements of the Regulations and the First-tier Tribunal judge has not erred in law such that the decision is set aside to be re-made.

Conclusions:

The making of the decision of the First-tier Tribunal did not involve the making of an error on a point of law such that the decision is to be set aside to be remade.

I do not set aside the decision.

The decision of the First-tier Tribunal judge dismissing the appeal stands.

Date 2nd March 2020

Upper Tribunal Judge Coker