Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: EA/00519/2020

THE IMMIGRATION ACTS

Heard as a remote hearing by Microsoft teams	**Decision & Reasons Promulgated**
On the 17 September 2021	**On 17 March 2022**

Before

UPPER TRIBUNAL JUDGE REEDS

Between

MR TESFALIDET MEHARI ABRAHA
(ANONYMITY DIRECTION NOT MADE)

Appellant

AND

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr M. Mustafa, Counsel instructed on behalf of the appellant
For the Respondent: Mr C. Bates, Senior Presenting Officer

DECISION AND REASONS

Introduction:

1. On 28 July 2021, the Upper Tribunal heard the appellant's appeal against the decision of the First-tier Tribunal Judge O'Garro(hereinafter referred to as the "FtTJ") who dismissed his appeal in a decision promulgated on the 17 December 2020.

2. The FtTJ did not make an anonymity direction and the Upper Tribunal was not asked to make such a direction.

3. The appellant is a national of Ethiopia. There is no dispute about the core relevant history. The sponsor is a British citizen. She met the appellant in 2011 by way of social media when she was studying her degree in the United Kingdom and the appellant was working and living in Saudi Arabia having obtained a qualification in IT from the University there. He worked as a door automation technician in the Middle East. The parties met in person in 2012 and were married on 16 June 2012. The appellant wanted the sponsor to live with him in Saudi Arabia, but she had yet to finish her degree. After her graduation in 2013 she looked for jobs commensurate with her qualification in fashion. In 2014 the parties met in Ethiopia and spent time together in that country.

4. On 19 October 2015 the sponsor went to Dublin to look for employment. There were difficulties in obtaining the Visa for her husband due to the high volumes and the processing time and therefore the appellant returned to the UK. In 2016 the sponsor went to Ethiopia to see her husband.

5. On 5th February 2017 the sponsor went to Dublin to live and work and was joined by her husband on the 6th of February 2017. Both the appellant and the sponsor worked full-time in Ireland for a period of approximately 5 months. They came to the UK for a holiday and whilst in the UK they decided that their employment prospects would be better in the UK and therefore both found employment.

6. On the 23 August 2019 an application was made for a residence card as confirmation of his right to reside here as a family member of his spouse, a British citizen. The appellant had made an earlier application which had been refused and his appeal was dismissed after a hearing on the papers by the FtT (Judge Hamilton) promulgated on 27 July 2018.

7. The respondent refused the second application in a decision dated 2 January 2020.

8. In essence the respondent considered that the residence in Ireland was contrived to circumvent the Immigration Rules and that the appellant and sponsor had not established that their residence in Ireland was genuine.

9. The appellant appealed that decision before the FtT and in a decision promulgated on 17 December 2020, the FtTJ dismissed his appeal. The appellant's claim relied on demonstrating that the sponsor had been exercising treaty rights in Ireland and did so immediately before returning to the UK, and that both of their residence was genuine. The

FtTJ dismissed the appeal on the basis that all of the requirements under Regulation 9 were not met.

10. Permission to appeal was granted by UT Judge Martin on the basis that the Judge had arguably erred in failing to consider the entirety of the appellant's evidence when deciding whether the exercise of Treaty Rights in Ireland was genuine and therefore applying the *ratio* of ZA (Regulation 9: EEA Regulation; abuse of rights) Afghanistan [2019] UKUT 281 (IAC) .

11. At the hearing before the Upper Tribunal, Mr McVeety (on behalf of the respondent) conceded that the FtTJ erred in his assessment by failing to consider the entirety of the evidence and applying the wrong test as set out.

12. In a decision promulgated on 29 July 2021 the Upper Tribunal gave its reasons for accepting that concession and set aside the decision of the FtTJ. This decision should be read in conjunction with that earlier decision.

13. As to remaking the decision, both advocates agreed that both parties would be required to give evidence to the Tribunal and that whilst fact finding would be necessary, it did not preclude the Upper Tribunal from hearing the appeal rather than a remittal to the First-tier Tribunal. The appeal was therefore listed as a resumed appeal.

14. This is the re-making of the appeal.

15. The hearing took place on 17 September 2021, by means of Microsoft teams which has been consented to and not objected to by the parties. A face-to-face hearing was not held because it was not practicable, and both parties agreed that all issues could be determined in a remote hearing. The advocates attended remotely via video as did the appellant and the sponsor who gave oral evidence before the Tribunal. There were no issues regarding sound, and no substantial technical problems were encountered during the hearing, and I am satisfied both advocates were able to make their respective cases by the chosen means.

The evidence:

16. I heard oral evidence from each of the parties. In addition I was provided with a copy of the appellant's bundle which consisted of the documents relied upon for the purposes of the hearing. There was also a supplementary bundle of documentation provided prior to the hearing by electronic means. I also had a copy of the respondent's bundle.

17. The appellant adopted his witness statement dated 17 March 2020 as his evidence in chief. In cross-examination he was asked about any intention to reside in the UK. He stated that his intention was not to reside in UK ;they were not sure where they wanted to live but that his wife did not want to live in Saudi Arabia even though he had a good job there and that they thought the best place would be Ireland as a result of the IT industry there. He said he did not apply for jobs before he arrived because when he asked the embassy they said he could only apply for a visit visa and only once there could he obtain a residence permit and without one he could not work. The appellant was asked about the job vacancies and the appellant stated that he had made an assessment via research of the companies in Ireland and that he had approached them that they had told him as he wasn't an EU citizen or was without residence he could not apply. He looked on their websites.

18. In cross-examination he was asked why he had not been able to obtain employment in his chosen field and the appellant stated that he had obtained interviews; some had replied that he was not suitable or that others had been better qualified candidates. He confirmed in his evidence that he and the sponsor had not lived as a couple anywhere other than Ireland.

19. The sponsor adopted her witness statement dated 7 March 2020. She was asked about her timesheets for employment and her payslips at page 238. She stated that she worked for an agency and that sometimes her over time was up to 10 hours sometimes 6 hours. She said that her minimum hours of 4 ½ weeks in a maximal 10 hours per day

20. She was not able to find all the payslips but provided what she could by way of timesheets at pages 11 -35 of the supplementary bundle.

21. In cross-examination it was put to her that her husband could only enter the United Kingdom if she earned £18,600 and she was asked if she had ever earned that amount. The sponsor stated that she had 2 jobs in the UK working with an agency and working 2 days at McDonald's and that she could do as many hours as she needed to. At McDonald's she could do 2 days Monday and Tuesday and could do 5 days with the agency. She said that she had earned £18,600 for a year when working at the fashion studio being paid £10.50 an hour working 5 days a week and if she did over time also. She confirmed that there was no P 60 in the bundle but that before she went to Ireland she would have been able to earn that money via over time. However she stated after the pandemic it was difficult to work but she was working now with agencies.

22. The sponsor was asked why she went to Ireland in 2015. She said that when she went she was working at McDonald's and also with the

agencies, but she was trying to find a job in her field, and she thought she could get a better opportunity in Ireland. Her husband wanted to work in IT and they both discussed it and thought there were opportunities in Ireland. She was asked what steps she had taken between 2015- 2017 to see if there were any job opportunities. The sponsor said there had been applications made (see evidence in the bundle) but she came back because her husband could not join quickly in Ireland due to the volume of applications and she did not want to live there without him.

23. The sponsor was asked about the property that was rented in Ireland for €800 per month and that the last payment was made on 16 June 2017. It was suggested to her that her payslips (page 238) demonstrated that she did not earn enough money to pay the rent from her salary. The sponsor agreed and said that the shortfall was paid for by savings. When asked about the savings and where they were, the sponsor said that they were in cash and that the shortfall was made up from the cash.

24. She was asked if they had paid tax in Ireland and pages 228-229 or referred to as to show the tax payments.

25. Returning to the rental payments on their accommodation the sponsor was asked if she took out another contract and she said that she had not and that the payments for the rent were in cash.

26. When asked about why she had returned to the UK the sponsor stated that she and her husband came to the UK for a holiday so that her husband could see his sister and that they were planning for a visit only and were to return to Ireland. It was suggested that it was quite a long holiday if working on an agency basis. The sponsor stated that when she came to the UK she was working for an agency, and she could do the same in Ireland as also in the UK she could do work when she wished. She said that she came in July 2017 and started work in August 2017 with an agency which had flexible hours. The sponsor was asked why her husband needed to visit the UK to visit his sister. The sponsor said that her husband had to see his sister and that she also wanted to show him London and see the other opportunities in the UK.

27. When asked about what she had done with the rental accommodation, she said that she had informed the landlord that they were on holiday, and they left the luggage in the apartment. However when they started looking at the opportunities for jobs they let the landlord know that they would not be returning, and this was in August. When asked about the payments made and that the last payment was for a two-week period (page 225) the sponsor was asked to explain why she had paid for 2 weeks accommodation of €400 and not the usual €800? She said that she couldn’t remember

but that they had left their items in Ireland and that in the UK only had their clothes in a backpack. Their possessions were in the studio apartment. She said that she had paid half a month's rent because they did not want to lose the apartment and were planning to return.

28. At the end of cross-examination I asked some questions to clarify her evidence. The sponsor was asked if she had planned to return to Ireland why had only 2 weeks been paid? The sponsor stated that they had already deposited money with the landlord and that he was happy to use that deposit. In his questions Mr Mustapha asked the sponsor to look at page 2 to 3 which showed €1600 paid which included €800 deposit on 25 February 2017. The sponsor was asked that when she left the property to come to the UK did she receive the deposit back? She said she thought only half of it was returned.

29. At the conclusion of the evidence, the appellant stated that he had not been asked questions on these issues and that in his view they should have been asked of him rather than the sponsor as he knew what the position was. Mr Mustapha was given time to take instructions from the appellant. Having done so, Mr Mustapha sought to recall him on limited issues. Mr Bates did not object to this having made the obvious point that the parties had now heard each other's evidence and that any weight given to the evidence now given would be of limited value.

30. The appellant therefore was recalled, and he was asked to explain why he came to the UK to visit. He said that he had come to visit his sister and child because he had not seen them for 10 years since he left Eritrea and wanted to spend time with them. When asked how the rent was paid he said that it was paid by cash payments and that he had some money that he had saved from his employment in Saudi Arabia and that money was used to supplement their rental costs. As to the position when they went to the UK, the deposit was not received in full and that €400 was deducted and a cheque was sent back that they were not able to "transact it".

31. In cross-examination the appellant was asked if he had evidence in the landlord as to any outstanding rent arrears. The appellant stated that the landlord had sent a cheque and he had received €400 for the cheque was returned. He was asked if he had any evidence to show the money sent to the landlord. The appellant explained that the money for the rent that was owing was deducted from the money that he had left with the landlord but not the whole month. It was put to him in cross-examination that the shortfall between the living expenses and rent before he began working had not been referred to in the witness statement and why had it not been referred to previously? The appellant stated that they'd never been asked that question before and that was why he had not been referred to previously.

The submissions:

32. At the conclusion of the evidence I heard the submissions from each of the advocates. I confirm that I have taken into account those submissions, but it is not necessary to set out those submissions in their entirety and I summarise the main points made by each of the advocates.

33. Mr Bates on behalf of the respondent submitted that the central concern is whether the move to Ireland was to evade immigration control rather than the genuine exercise of treaty rights. It was the sponsor's assertion that there was no need to circumvent the immigration rules because she had to sources of employment prior to the move to Ireland which would have met the income threshold of £18,600. However there was no independent corroborative evidence to support this and that the supplementary bundle at page 32 showed £12,874 the year P60 2020. That did not reach the income threshold of £18,600. The income in the bundle prior to the move to Ireland gave an approximate income of £10,000 and therefore there was a shortfall. The sponsor asserts that the shortfall could have been made up by overtime but looking at the figures there was a prima facie incentive for the sponsor to circumvent the immigration control by moving to Ireland.

34. A credibility point relating to their residence in Ireland related to the payments made for the rent. The rental agreement showed a 1st payment of €1600. Mr Bates said that he accepted that most rental agreements would have a deposit for damage and breakage, but it did not explain why the sponsor's oral evidence was that they intended to return to Ireland. It was a point adverse to them that when in Ireland they were struggling to make ends meet yet they had gone to visit the UK for a holiday. Thus the question arose as to whether there was any genuine intention to return to Ireland and whether there was a genuine intention to exercise treaty rights. In the appellant's evidence (recalled) he stated that he wanted to spend time with his family that this was not in the witness statement and came only from oral evidence. The documentary evidence of the tenancy show that only a two-week payment was made therefore on the balance of probabilities it demonstrates that the appellant and the sponsor did not pay the full rent and shows that they did not intend to return to Ireland. Their evidence does not explain why the landlord would lose 2 weeks remuneration.

35. As to the general payment of rent, it was suggested that the initial payments were made in cash to cover the shortfall. This is only a retrospective attempt to explain how they survived in Ireland.

36. Mr Bates invited the tribunal to look at matters holistically but to attach less weight to the recalled evidence. He submitted that in any event that evidence did not take matters any further. When looking at the evidence holistically he submitted that the parties had been married several years and there had been no attempt to bring the sponsor to the UK because there was no prospects of success. The evidence suggested that the sponsor then went to Ireland in 2015 to "test the waters" but there was no desire to obtain effective employment and little credible evidence that there was any real incentive to work in Ireland. The sponsor was unwilling to go on her own despite the fact that she did not live with her husband in the UK. Thus this was a strong indication that the sponsor was not seeking to substantively exercise treaty rights because she could have gone to Ireland and live there with her husband joining her later on.

37. Mr Bates submitted that in reality it was the intention of the parties for family life to take place in the UK and to facilitate this they lived for a short period of time in Ireland and that the primary focus of the parties was to circumvent the immigration rules. He therefore invited me to dismiss the appeal.

38. Mr Mustafa on behalf of the appellant submitted that the evidence of the parties was consistent as to why they had resided in Ireland and that their evidence had been set out in the witness statements as to why they had chosen Ireland. Their evidence was supported by the documentary evidence. In particular the account of the sponsor having made applications for employment in 2015 was evidenced in the bundle which demonstrated that the sponsor was genuinely exercising treaty rights in Ireland. At page 206, it demonstrates that the sponsor travelled to Ireland where she went to assess the job market and demonstrates the parties were planning to move to Ireland in 2015 and that this was not an impulsive decision.

39. Mr Mustapha submitted that the evidence given by the parties was supported by the documentary evidence. This included the appellant's evidence relating to his background in employment, his history and qualifications.

40. As to the assertion made that the parties sought to circumvent the immigration rules, Mr Mustapha submitted that before moving to Ireland the sponsor was in a position to sponsor her husband under the immigration rules. This is based on the fact that the sponsor had 2 jobs and that if she worked overtime she would be able to cover the gap in her income. Furthermore, the appellant demonstrated that he had passed the English language requirement to make the application. If this was a couple who had married in 2012 and wanted to circumvent the immigration rules it was not likely that they would wait until 2015. In any event, when looking at the bank statements, the picture demonstrates that the appellant had been earning an

income for a period of 4 weeks in excess of £1350 net which would have been more than sufficient to meet the £18,600 minimum income requirement which was in gross terms. He submitted that in the period December- January the sponsor was able to earn £1100 with a shortfall of £250 and the sponsor's evidence was that she could meet that from 2 jobs with her over time and therefore the sponsor's evidence was credible.

41. As to the assertion made by the respondent that the parties struggled to make ends meet this was not supported by the evidence. Mr Mustapha submitted that looking at the payslips for the period when added up demonstrated that as a couple they were able to meet the €800 rental and still have money available for their expenses.

42. When looking at their residence in Ireland, Mr Mustapha submitted that the tribunal should look at other factors including the tax payments made by the parties to the Irish authorities, that they lived in a flat that had a tenancy agreement for 5 months evidenced by the rental receipts and that this was their 1st marital home. There was evidence that they had both registered for personal public services and health services and that the Irish authorities were satisfied that the move to Ireland was genuine by issuing a family permit. Whilst integration was not a relevant factor, there was evidence before the tribunal to demonstrate that during the period of residence they heard attended church services (page 239) and that both the appellant and the sponsor had completed courses whilst in Ireland (see page 245 and 242 and 328 and 329).

43. As to the circumstances of the rental payment following their visit to the United Kingdom, Mr Mustapha submitted that this issue had to be assessed against and in the light of the evidence of the appellant and the sponsor which was consistent that the sponsor provided half of the deposit back and that the two-week rental period was close to the period when they had given the landlord notice.

44. At the conclusion of the submissions I reserved my decision which I now give.

The relevant law:

45. Regulation 9 provides:

9.-"(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)has acquired the right of permanent residence in an EEA State;

(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).

46. Regulation 9 was considered by the Upper Tribunal in ZA (Reg 9. EEA Regs; abuse of rights) Afghanistan [2019] UKUT 281 (IAC) as noted by the FtTJ. In ZA, after noting the obligation on Courts and Tribunals to construe domestic legislation consistently with EU law, the Upper Tribunal stated at paragraphs [73]-[75]:

73. It follows that in the case of reg. 9(3), the factors identified need to be read in the light of the case law of the CJEU. Little or no weight need be attached to those factors which are not supported by EU law and the regulation must be read applying properly what is meant by "genuine".

74. In the case of reg. 9 (4) (a), this must be interpreted as it being for the Secretary of State to establish that there has been an abuse of rights as established under EU law. Further, and in any event, even if I am wrong on this issue, the sole ground of appeal here is that the decision of the respondent was in breach of the rights under the EU Treaties, not the 2016 Regulations.

75. To summarise the position in European law under the EU treaties:

(i) Where an EU national of one state ("the home member state") has exercised the right of freedom of movement to take up work or self-

employment in another EU state ("the host state") , his or her family members have a derivative right to enter the member state if the exercise of Treaty rights in the host state was genuine;

(ii) "genuine" must be interpreted in the sense that it was real, substantive, or effective;

(iii) An analysis of "genuine" residence cannot involve the consideration of the motives of the persons who moved except in the limited sense of what they intended to do in the host member state

(iv) Whether family life was established and/or strengthened, requires a qualitative assessment which will be fact-specific; the burden of doing so lies on the appellant;

(v) There must in fact have been an exercise of Treaty rights; any work or self-employment must have been "genuine and effective" and not marginal or ancillary;

(vi) The assessment of whether a stay in the host state was genuine does not involve an assessment of the intentions of the parties over and above a consideration of whether what they intended to do was in fact to exercise Treaty rights;

(vii) There is no requirement for the EU national or his family to have integrated into the host member state, nor for the sole place of residence to be in the host state; there is no requirement to have severed ties with the home member state; albeit that these factors may, to a limited degree, be relevant to the qualitative assessment of whether the exercise of Treaty rights was genuine;

(viii) The requirement to have transferred the centre of one's life to the host member state is not a requirement of EU law, nor is it endorsed by the CJEU;

(ix) If it is alleged that the stay in the host member state was such that reg. 9 (4) applies, the burden is on the Secretary of State to show that there was an abuse of rights.

47. With respect to abuse of rights, the Upper Tribunal in ZA stated at [70] that:

70. In summary, the doctrine of abuse of rights can apply only where it is shown by the respondent that there was no genuine (as properly construed) exercise of the Treaty right to free movement and where there was an intention to use an artificial constructed arrangement. Both elements have to be demonstrated by the respondent .

48. The doctrine of abuse of rights can apply only where it is shown by the respondent that there was no genuine exercise of treaty rights to free movement and where there was an intention to use an artificial construct arrangement. Both elements have to be demonstrated by the respondent.

49. The Grand Chamber emphasised that failure to confirm a derived right of residence on a family member on return to the Member State of nationality may create an obstacle to the exercise of rights of free movement. At [51] the only test laid out by the CJEU was that residence in the host Member State has been "sufficiently genuine to as to enable that citizen to create or strengthen family life in that Member State." In *O* and B, the CJEU did not seek to lay down a strict set of criteria required to show that residence in the host Member State was 'genuine and effective'.

Analysis and conclusions:

50. In order to qualify under Regulation 9 the appellant and his spouse must (i) have resided in another member state and (ii) that residence must have been “genuine”. As to the analysis of (i) and residing in another EU state, it is accepted on behalf of the respondent and by applying the principles in Devaseelan by reference to the decision of the FtTJ in 2018 that it is accepted that the appellant and the sponsor lived in Ireland for approximately 5 months and that they had both worked in Ireland when they were there (at paragraph [27]). Mr Bates therefore accepted that the appellant and the sponsor had resided in another member state. It is also right to record that Mr Bates did not seek to rely upon any credibility point arising from the previous decision at paragraph 18 where the respondent had raised concerns about the appellant’s account of going on holiday to Ireland. Mr Bates fairly pointed out that the evidence to support that assertion was not in the respondent’s bundle and had not been put before the previous judge either. In my view the facts before me are materially different from those considered by the earlier FtTJ who did not have the opportunity of hearing the parties give evidence or have the documentary evidence that the tribunal now has. Mr Bates did not seek to rely upon any other factual finding made in 2018.

51. The issue relates to the 2nd question of whether their residence in Ireland was “genuine” and it is this issue that requires careful analysis.

52. I have carefully considered the evidence before the tribunal, both oral and documentary and have done so in the context of the applicable legal principles and the submissions of each of the advocates. Mr Bates on behalf of the respondent submits that there was no genuine exercise of treaty rights in Ireland and that that is established by a number of points. He submits that the period between 2015 – 2017 is of relevance and that the sponsor’s evidence as to why she did not remain in Ireland following her initial visit in 2015 is not credible.

53. I have therefore considered the evidence as to that particular period of time. There is no dispute from the evidence that the appellant went to Dublin in October 2015 with a view to establishing a family life with her husband in Ireland. I accept the evidence of the sponsor and the appellant as to the circumstances at that time. The evidence, which was consistent, was that following their marriage in June 2012 they had discussed where they would live. The appellant had good employment in Saudi Arabia in the field of IT and did not want to give up work in that particular field. The sponsor's circumstances again related to her employment. She graduated in 2013 with a degree in fashion business but it is plain from the documentary evidence that she had not been able to find work that was commensurate with that degree or in her chosen field. The documents before me demonstrate that she has had to undertake work with agencies and also with McDonald's rather than taking up employment in the fashion industry.

54. I am satisfied on the balance of probabilities that this evidence accurately reflects the circumstances of the parties. It is confirmed by the documentary evidence. The appellant's qualifications are in the field of IT and that is demonstrated by his three-year degree in IT technologies at pages 231 – 232. As to the sponsor's circumstances, as I have said she graduated in 2013 with a degree (see page 246) and that was a field that she wished to obtain employment in. The evidence thereafter demonstrates that she had applied for a number of jobs but was unable to obtain the type of work that she would have wished.

55. Against that background and on the balance of probabilities I am satisfied that the couple's evidence that they chose Ireland as a place that they could obtain work and establish their family life to be true. The sponsor's evidence was that she did not wish to live in Saudi Arabia where the appellant had employment in the IT industry. I find her evidence on this to be entirely plausible. In her evidence she said she did not speak Arabic and as a Christian she would not be able to practice her religion there. I observe that in the evidence before me, when living in Ireland both the appellant and the sponsor attended church. As to Ireland, the appellant's evidence which I accept as true, was that he wished to undertake work in the IT industry. I accept his evidence that there are a number of well-known IT-based companies in Ireland which he had researched and that this would provide him with an opportunity to apply for such employment. The appellant speaks English to the requisite level and has relevant qualifications (see page 330).

56. I reject the submission made by Mr Bates that the visit made in 2015 was "testing the waters" in an attempt to circumvent the immigration rules. Looking at that period, I am satisfied that it is more likely than not that the sponsor was genuine in her attempt

to establish their lives in Ireland. I am satisfied that she made applications to work in Ireland which is supported by and consistent with the documentary evidence (I refer to page 197 looking for employment as a sales assistant, page 198 application made for sales assistant in fashion). Her explanation that she did not want to live in Ireland without the sponsor is one that I find to be entirely understandable. Whilst Mr Bates submitted she did not live with the appellant in the UK, that fails to take account of the fact that in the UK she had the advantage of having friends and having established a social network in the UK. If she moved to Ireland she would be on her own and would not have that similar social circle there. I also accept her evidence which I find to be entirely plausible that given the length of time that it was likely that she would have to live on her own, she decided that it was too long a period (I refer to her witness statement paragraph 10). I am therefore satisfied that is more likely than not that on the evidence of the sponsor and the appellant which I find to be consistent that they had genuinely attempted to establish family life in Ireland, and I accept the reasons given by the sponsor as to why that was ultimately not possible in 2015.

57. As to their residence in Ireland, there is no dispute that both the appellant and the sponsor obtained employment in Ireland. The issue raised by Mr Bates in his submissions relates to the quality/type of employment and that it was in essence “not genuine or effective” employment. Mr Bates submitted that they had a large rental bill of €800 per month and that they were struggling to pay this, and this undermined their credibility.

58. When the parties began living in Ireland, the sponsor was initially the only one in employment. The rental agreement before the tribunal states that the amount was €800 per month. The appellant’s salary plainly did not meet this. When asked to account for the shortfall, the evidence of the appellant and the sponsor was that it was made up from the cash savings that they had from the appellant’s employment in Saudi Arabia. Mr Bates submitted that it was not evidenced by any documents and was not in the witness statement thus he submitted their evidence was not credible or reliable. I reject that submission for the following reasons. Firstly, there is no dispute that the parties lived in Ireland in rented accommodation pursuant to the tenancy agreement. It is also evident from the documents and the given history that the parties lived there for the period of 5 months. If the rent had not been paid they would have been required to leave the property. The fact that they remained living in the property is supportive of the sponsor’s evidence that the shortfall was made up from their savings.

59. Secondly, I have considered the issue of employment in the context of the documentary evidence. The sponsor was

registered with a number of recruitment agencies in Ireland to obtain employment (see page 234). The sponsor's payslip with the recruitment agencies indicate for a period of 4 weeks between 26 May 2017 and 16 June 2017 the sponsor had an income of €911.84. An additional source of income came from the appellant as he was also employment. The evidence at page 254 – 251 show that for a 3 week period between 2 June 2017 - 16 June his employment provided €612.48. Taking the evidence together, I am satisfied on the balance of probabilities that once they had use their savings for the initial period and that when looking at the joint income using those 2 figures set out above when both are in employment that this was sufficient to meet the rent and any other expenses they may have. I therefore reject the submission made by the respondent that they were struggling to make ends meet.

60. Mr Mustapha on behalf of the appellant submitted that the Irish authorities provided the parties with a family permit on 17 January 2017 and therefore they had demonstrated to the Irish authorities that their residence was genuine. That submission is not a complete answer to the qualitative assessment that I should make.

61. In my judgment, a qualitative assessment or evaluation of the residence needs to be undertaken. It is in that context that intentions are relevant -what was it they intended to do? Could it be said that the sponsor was properly exercising treaty rights or was it an extended holiday or was it fixed term employment (see decision of Knoch) or were the sponsor and the appellants visiting the residence in the host state and thus artificially creating the conditions laid down for obtaining an advantage form the European Union Rules (see facts in O and B). The focus on cases should be on what actually occurs in the host member state and for example, if what occurs is a device such as maintaining an address and only visiting infrequently, then the abuse identified at paragraph [58] of O and B may be made out.

62. When viewing their residence in Ireland, I take into account also that they had not only established employment in the host state but that they had also registered with the Irish tax authorities (the confirmation see the registration dated 23rd of May 2017). Other relevant evidence demonstrates that both had registered and were provided with public service cards (page 9 and 24), and both undertook courses during their residence in Ireland which was evidenced in the bundles. In terms of their residence, they rented an apartment in which they lived for a period of 5 months. It does not correspond in my view to an extended holiday and during the time of the parties lived in the property I am satisfied that both parties undertook their attempts to find work

commensurate with their qualifications and in the absence of such employment undertook what work they were able to get.

63. Importantly in my judgement Ireland was the place that the parties first lived together as a family unit and therefore it can be said that their residence in Ireland strengthened their family life. Integration is not a relevant factor but in addition I observe that both parties attended church in Ireland (see the evidence of the pastor page 239) and as I have said they have completed courses in Ireland during their residence.

64. I now turn to the circumstances in which the parties left Ireland. Mr Bates submits that the evidence as to why they left Ireland and did not return was implausible and that their evidence was not credible. I have therefore assessed their evidence on this issue by reference to their oral evidence and also the documentary evidence. Having done so, the evidence before me demonstrates that the appellant and the sponsor came to London for a visit so that the appellant could visit his sister and other family members. It is submitted on behalf of the respondent that the evidence that they only came for a visit was not credible for a number of reasons. Firstly, they were in precarious employment in Ireland and only “making ends meet” and that the reason for the visit was not a likely reason. Secondly, the evidence as to the rental agreement and how the accommodation was paid did not support their claim that it was for a visit only.

65. Dealing with the 1st point raised, the sponsor’s evidence (in the witness statement) was that they had come to the UK for a visit to see the appellant’s sister and family. In her oral evidence, she stated that she wanted to show the appellant life in London and that was another reason. In the evidence that the appellant gave when he was recalled he made the point that it was important for him to come to the UK because he had not seen his sister for 10 years.

66. In my assessment of their evidence I attach less weight to the appellant’s evidence on this issue as he gave his evidence after the sponsor had given hers to deal with that particular evidential point. Notwithstanding that, the sponsor’s written evidence was clear that they had come to the UK to see the appellant’s family members and therefore the evidence taken together and prior to the appellant’s subsequent oral evidence, was consistent about the purpose of the visit. Furthermore I am satisfied that it is more likely than not for the reasons already given that they were not “struggling to make ends meet” and that whilst neither of them were in the types of employment they really wanted, both had jobs, and both had established their lives in Ireland.

67. The written evidence was that having been in the UK and having discussed their life in Ireland it was considered that the

appellant would be able to obtain employment in the field of the door automation industry and that there were 2 large companies in London. The appellant's oral evidence and that of the sponsor that the appellant was unable to obtain employment in London without a residence permit is entirely plausible. The point relied on by the respondent is that relating to their accommodation. Mr Bates submits that their evidence about keeping their accommodation Ireland during this period is not supported by the documentary evidence. In particular he points to the evidence of the rental paid which was not consistent with her account.

68. I have therefore considered the evidence. The rental for the accommodation was €800 (see page 213). When they moved into the property they paid €1600 which appears to be a month's rent and deposit. The sponsor's account was that she informed the landlord that they would be returning and that they had left their luggage and other personal items in the flat. However they let him know in August that they were not returning. The last rental payment was €400 (page 225482 week period. Thus there is a difference of approximately €400 for the end payment. Mr Bates submits the landlord would not accept less than €800 because if they were returning he would not be able to sublet their room. The sponsor also said in answer to questions relating to this issue that they had deposited money with the landlord and that the money was used by the landlord to cover their rent. The appellant and his evidence albeit when recalled was that they did receive the deposit back but that the landlord had utilised the money from the deposit to cover the unpaid rent and sent the remainder by a cheque.

69. I take on board the point made by Mr Bates that this evidence was not in their witness statements. However on the other side as the appellant submits no one had asked either of them about the rental payments when drafting statements. That seems in my view to be a plausible explanation in the circumstances where this issue only arose in cross examination. It was not a point made in the respondent's decision letter nor previously. Furthermore, even if I discounted the evidence given by the appellant when he was recalled, his evidence was consistent with the documentary evidence of the deposit that they had originally paid and that if it had been held back by the landlord for that period of time which was 2 weeks it roughly equated to the money that the landlord retained. In my judgement and considering the evidence holistically, it is not likely that the appellant and the sponsor would give up a deposit of €800 willingly and I am prepared to accept their evidence that the remainder of the rental money was deducted from that amount.

70. The last issue relates to the intention of the parties to circumvent the immigration rules. It is submitted on behalf of the respondent that the reason for the move to Ireland was because the parties

could not meet the minimum income threshold of £18,600. He submits that the evidence does not demonstrate that she could earn that amount.

71. I have therefore considered the documentary evidence and the oral evidence in this regard. There is no dispute that the MIR is 18,600 and Mr Mustafa calculated that the net figure would be approximately £1350 net per month. Mr Bates provided a calculation. However he gave the reference for the P 60 in the supplementary bundle. This was not the sponsor's P60 but in fact the appellant's P60. I have looked at the period between 17 December 2016 – January 2017 which demonstrates 3 payments of 709.84, 648.40 and 184.73 which gives euros 1542.97. It is difficult to do any real calculation given the lack of continuous bank statements and thus I accept that this is for a limited period. However it does demonstrate that the sponsor did have the capacity to meet the minimum income requirement.

72. Even if it could be said that the appellant could not meet the MIR, on the evidence before me and taken holistically I am satisfied that the appellant and the sponsor lived together in Ireland and that their residence was genuine in the sense that it was real, substantive and effective. They had a home in Ireland and in employment and I am satisfied on the balance of possibilities that their family life together developed during the time that they lived in Ireland and that this was their first marital home. Whilst I am not concerned with the extent to which the couple "integrated" into Irish society or with their intentions, for the reasons that I have given above I am satisfied that the period of residence was genuine and effective, and that the respondent has not demonstrated that there has been any abuse of rights. I remind myself that the ECJ has emphasised that residence must be genuine and that this is the qualitative assessment that I have undertaken.

73. Accordingly I allow the appeal under Regulation 9 of the EEA regulations 2016.

74. I make no anonymity direction.

Notice of Decision

The decision of the First-tier Tribunal did involve the making of an error on a point of law and therefore the decision shall be set aside. The decision is re-made as follows:
The appeal is allowed under the EEA regulations 2016.

Signed Upper Tribunal Judge Reeds

Dated: 20/9 2021