Upper Tribunal
(Immigration and Asylum Chamber)

ZA (Reg 9. EEA Regs; abuse of rights) Afghanistan [2019] UKUT 281 (IAC)

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 14 November 2018	
And 22 May 2019	……

Before

UPPER TRIBUNAL JUDGE RINTOUL

Between

Z A
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant:	Mr M Alison, instructed by Rahman & Co Solicitors (14/11/19)
	Ms G Kiai, instructed by Rahman & Co, Solicitors (22/05/19)
For the Respondent:	Mr I Jarvis, Senior Home Office Presenting Officer (14/11/19)
	Ms A Holmes, Senior Home Office Presenting Officer (22/05/19)

(i) 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.

(ii) 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" in the sense that it was real, substantive, or effective. It is for an appellant to show that there had been a genuine exercise of Treaty rights.

(iii) *The question of whether family life was established and/or strengthened, and whether there has been a genuine exercise of Treaty rights requires a qualitative assessment which will be fact-specific and will need to bear in mind the following:*

(1) *Any work or self-employment must have been "genuine and effective" and not marginal or ancillary;*

(2) *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;*

(3) *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.*

(iv) *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.*

DECISION AND REASONS

1. The appellant appeals with permission against a decision of First-tier Tribunal Judge S H Smith, promulgated on 17 May 2018, dismissing her appeal against the decision of the respondent made on 13 February 2017 under the Immigration (European Economic Area) Regulations 2016 ("the 2016 Regulations") to refuse her application for a residence card as the family member of an EEA national.

2. The appellant is a citizen of Afghanistan. She and her husband, a British citizen, were married in Pakistan in 2003. Her applications for entry clearance as a spouse in 2006 and 2008 were refused.

3. As stated by the First-tier Tribunal at [6] the appellant's case is that her husband decided to leave the stress of London and move to Ireland to exercise his free movement rights he enjoyed under the EU Treaties, with the intention of settling in May 2015. He worked while there and learned from friends that it would be possible for him to apply for a visa for his wife to accompany him pursuant to EU law. He successfully applied for a family permit on behalf of the appellant and she joined him in Ireland shortly afterwards. His job came to an end in May 2016 and the couple, along with her children, returned to the United Kingdom at the end of the month. On return, the appellant applied for a residence permit.

4. The respondent concluded from the information provided that the appellant and her husband's residence in Ireland was not genuine and that the purpose of the residence in Ireland was as a means of circumventing the UK's domestic Immigration Rules.

5. On appeal the judge noted [24] that the central issue is whether the residence of the appellant and sponsor was "genuine", the starting point for his analysis being that the motive for exercising free movement rights in another member state is not a determinative factor in assessing whether residence was genuine, following AA

(Nigeria) v SSHD [2017] CSIH 38. The judge also directed himself [13] that the Secretary of State bore the burden of demonstrating that Regulation 9 (4) applied but that this arises only if the applicant has succeeded in establishing that the residence was genuine in the first place.

6. The judge did not accept that the family's residence in Ireland was genuine, noting that the picture that emerges from her evidence was a period of residence in Ireland which bears the hallmarks of having been staged or created in order to generate the conditions in order to benefit from a free movement right. He found that the centre of the appellant's life had not been transferred to Ireland [32] and that while she and her husband lived in Ireland for a year, a weighty factor capable of potentially tipping the balance in favour of the conclusion that the residence was genuine, he was not satisfied the residence was genuine.

7. The appellant sought permission to appeal on the grounds that the judge had erred:-

   (i) in failing to take into account the fact that the motivation for exercising treaty rights was irrelevant, following Akrich [2003] EUECJ C-109/01;

   (ii) in failing properly to apply the correct Regulations, with the respondent purportedly applying the 2006 Regulations rather than the amendments brought in in 2013;

   (iii) in failing properly to apply AA (Nigeria).

The Law

8. Schedule 6 of the 2016 Regulations provides at section 4, so far as is relevant:

> 4. (1) an application for –
>
> …
>
> (c) a residence card
>
> …
>
> Made but not determined before 1st February 2017 is to be treated as having been made under these regulations.

9. Schedule 2 to the 2016 Regulations provides, so far as is relevant:

> 1. The following provisions of, or made under, the 2002 Act have effect in relation to an appeal under these Regulations to the First-tier Tribunal as if it were an appeal [against a decision of the Secretary of State under section 82(1) of the 2002 Act (right of appeal to the Tribunal)—
>
> section 84 (grounds of appeal), as though the sole permitted ground of appeal were that the decision breaches the appellant's rights under the EU Treaties in respect of entry to or residence in the United Kingdom ("an EU ground of appeal");

10. The Immigration (European Economic Area) Regulations 2006 contained, as at the date of application, the same provision within schedule 1 to those Regulations.

11. The core issue in this case is correct interpretation of Regulation 9 of the 2016 Regulations which (as at the date of decision) provide as follows:-

> 9.—(1) If the conditions in paragraph (2) are satisfied, these Regulations apply to a person who is the family member ("f") of an 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; and
>
> (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); or
>
> [(b) *to a person who is only eligible to be treated as a family member as a result of regulation 7(3) (extended family members treated as family members)*.[1]]"

[1] Reg 9(4)(b) was revoked by the Immigration (European Economic Area) Regulations (EU Exit) Regulations 2019 (SI 2019/468) subject to transitional provisions specified at reg. 4 of those regulations.

Ground (ii)

12. It is convenient to deal with ground (ii) first, as it can readily be rejected. The application was made on 9 June 2016. On 25 November 2016 while the application was still under consideration the 2016 Regulations came into force but only in respect of Regulation 44 and Schedule 5 of the 2016 Regulations. The effect of this was to bring Regulation 9 of the current 2016 Regulations into the 2006 Regulations.

13. On 1 February 2017 Regulation 44 and Schedule 5 of the 2016 Regulations were revoked. This had the effect of removing Regulation 9 from the 2006 Regulations but paragraph 4(1) of Schedule 6 of the 2016 Regulations provides that applications outstanding at that date were to be considered in line with the 2016 Regulations. The decision in this case was made on 13 February 2017 and thus the correct Regulations were Regulation 9 of the 2016 Regulations as the judge properly noted.

Grounds (i) and (iii)

14. These grounds overlap and, it being established which version of the regulations apply, they fall to considered together.

15. The appellant contends that, on the basis of AA(Nigeria), O. and B. [2014] EUECJ C-456/12 and Akrich, the couple's intentions in seeking to live in another member state are not relevant. It is further contended that the judge had improperly considered motivation in assessing "genuine residence" and had, in effect, confused the issue of abuse of rights and in so doing had imported the abuse of rights concept improperly into his consideration.

16. As an aside, it must be borne in mind that the assessment of intentions by the member state of a worker from another state seeking to regularise his position are very limited. Article 8 of Directive 2004/38 limits what can be asked for to identity documents and evidence of employment. This is reflected also in article 3 (2) where an extensive examination is limited to beneficiaries. While it is possible to invoke article 35 to refuse, terminate or withdraw any right conferred by the Directive in the case of abuse of rights or fraud, such as marriages of convenience, that is not a straightforward issue. Broadly, following Emsland-Stärke GmbH v Hauptzollamt Hamburg-Jonas [2000] EUECJ C-110/99)a two-stage process test is to be applied: first an objective test where by the objective circumstances must indicate that, despite *formal observance* of the conditions for obtaining an advantage provided by EU law, the *purpose* of the rules had not been fulfilled. Secondly, there must the *intention* to obtain the advantage by artificially creating the conditions laid down for obtaining it.

17. In order to qualify under regulation 9, an applicant and his or her British national spouse (or durable partner, following Banger [2018] EUECJ C-89/17) must:

    (i) have resided in another member state; and

    (ii) that residence must have been genuine.

18. Both of those issues require careful analysis.

19. Regulation 9 is intended to put rulings of the CJEU interpreting the EU Treaties into domestic legislation and so a detailed analysis of the case law is necessary.

20. In doing so it should be borne in mind that decisions of the ECJ are written in French not English. It is also to be borne in mind when interpreting European law that it is an autonomous system in which words may have a specific meaning in European law. Great care needs to be taken in assuming that words used by the legislator, and for that matter the court, bear the same meaning as they do in Member States.

21. An analysis of the relevant case law must begin with Surinder Singh [1992] EUECJ C-370/90 where the Court of Justice said this:-

> 19 A national of a Member State might be deterred from leaving his country of origin in order to pursue an activity as an employed or self-employed person as envisaged by the Treaty in the territory of another Member State if, on returning to the Member State of which he is a national in order to pursue an activity there as an employed or self-employed person, the conditions of his entry and residence were not at least equivalent to those which he would enjoy under the Treaty or secondary law in the territory of another Member State.
>
> 20 He would in particular be deterred from so doing if his spouse and children were not also permitted to enter and reside in the territory of his Member State of origin under conditions at least equivalent to those granted them by Community law in the territory of another Member State.
>
> 21 It follows that a national of a Member State who has gone to another Member State in order to work there as an employed person pursuant to Article 48 of the Treaty and returns to establish himself in order to pursue an activity as a self-employed person in the territory of the Member State of which he is a national has the right, under Article 52 of the Treaty, to be accompanied in the territory of the latter State by his spouse, a national of a non-member country, under the same conditions as are laid down by Regulation No 1612/68, Directive 68/360 or Directive 73/148, cited above.
>
> 22 Admittedly, as the United Kingdom submits, a national of a Member State enters and resides in the territory of that State by virtue of the rights attendant upon his nationality and not by virtue of those conferred on him by Community law. In particular, as is provided, moreover, by Article 3 of the Fourth Protocol to the European Convention on Human Rights, a State may not expel one of its own nationals or deny him entry to its territory.
>
> 23 However, this case is concerned not with a right under national law but with the rights of movement and establishment granted to a Community national by Articles 48 and 52 of the Treaty. These rights cannot be fully effective if such a person may be deterred from exercising them by obstacles raised in his or her country of origin to the entry and residence of his or her spouse. Accordingly, when a Community national who has availed himself or herself of those rights returns to his or her country of origin, his or her spouse must enjoy at least the same rights of entry and residence as would be granted to him or her under Community law if his or her spouse chose to enter and reside in another Member State. Nevertheless, Articles 48 and 52 of the Treaty do not prevent Member States from applying to foreign spouses of their own nationals rules on entry and residence more favourable than those provided for by Community law.
>
> 24 As regards the risk of fraud referred to by the United Kingdom, it is sufficient to note that, as the Court has consistently held (see in particular the judgments in Case 115/78 Knoors v Secretary of State for Economic Affairs [1979] ECR 399, paragraph 25, and Case C-61/89

Bouchoucha [1990] ECR I-3551, paragraph 14), the facilities created by the Treaty cannot have the effect of allowing the persons who benefit from them to evade the application of national legislation and of prohibiting Member States from taking the measures necessary to prevent such abuse.

22. It is of note that motivations were not under consideration by the ECJ in Surinder Singh. On the facts, that is unsurprising. That is because having worked for two years in the Federal Republic of Germany, Mr and Mrs Singh returned to the United Kingdom and Mr Singh was granted limited leave to remain under the Immigration Rules. His wife then subsequently sought to divorce him and the Secretary of State sought to cut short his leave to remain and to refuse him indefinite leave to remain. It was only in a subsequent appeal against the decision made under Section 3(5)(a) of the Immigration Act 1971 that the appellant raised the issue that he had a right under EU law to remain. It should be borne in mind the legislation as it was then enacted, a limited right of appeal against a Section 3(5)(a) deportation order to whether there was a power in law to make the decision. The court was considering whether a right arose at all rather than any motivations for travelling to Germany, remaining there or returning to the United Kingdom.

23. The next decision which requires consideration is Levin [1982] EUECJ R-53/81. There, the Netherlands refused to issue a residence card to Mrs Levin, a British Citizen, accompanied by her non- EEA national husband on the basis that Mrs Levin's income which was less than the minimum requirement of subsistence, and so the issue arose whether she was a "worker" in the meaning of the Treaty. Those issues are not of relevance here, but the third question put by the referring court was as follows: -

> Can the right of such a worker to free admission into and establishment in the member state in which he pursues or wishes to pursue an activity or provides or wishes to provide services to a limited extent still be relied upon if it is demonstrated or seems likely that his chief motive for residing in that member state is for a purpose other than the pursuit of an activity or provision of services to a limited extent

The CJEU replied:

> 19. The third question essentially seeks to ascertain whether the right to enter and reside in the territory of a member state may be denied to a worker whose main objectives, pursued by means of his entry and residence, are different from that of the pursuit of an activity as an employed person as defined in the answer to the first and second questions.
>
> 20 Under article 48 (3) of the treaty the right to move freely within the territory of the member states is conferred upon workers for the 'purpose' of accepting offers of employment actually made . By virtue of the same provision workers enjoy the right to stay in one of the member states 'for the purpose' of employment there. Moreover , it is stated in the preamble to regulation (EEC) no 1612/68 that freedom of movement for workers entails the right of workers to move freely within the community ' in order to' pursue activities as employed persons , whilst article 2 of directive 68/360/EEC requires the member states to grant workers the right to leave their territory 'in order to' take up activities as employed persons or to pursue them in the territory of another member state.

> 21 However , these formulations merely give expression to the requirement, which is inherent in the very principle of freedom of movement for workers, that the advantages which community law confers in the name of that freedom may be relied upon only by persons who actually pursue or seriously wish to pursue activities as employed persons. They do not , however , mean that the enjoyment of this freedom may be made to depend upon the aims pursued by a national of a member state in applying for entry upon and residence in the territory of another member state , provided that he there pursues or wishes to pursue an activity which meets the criteria specified above, that is to say , an effective and genuine activity as an employed person.
>
> 22 Once this condition is satisfied, the motives which may have prompted the worker to seek employment in the member state concerned are of no account and must not be taken into consideration.

24. Thus, the case is concerned with whether the motives of a person seeking to exercise Treaty Rights in a member state (a condition precedent to seeking to return to the member state of nationality) are relevant to assessing whether he is entitled to a permit to let him stay, to which the answer is no, but it is important to note the proviso at the end of paragraph 21 and the emphasis on freedom of movement for workers being conferred on those who actually pursue activities as employed persons.

25. I pause at this point to observe that the French original in the last sentence of paragraph [21] refers to an activity which is "réelle et effective". In this context it is of note that in regulation 31(5) that the trigger for a power to deport an EU national is whether the individual represents as "genuine, present and sufficiently serious, threat to the interests of society. "Genuine" in this context does not have the connotation of being the opposite of "false" and the French version again uses "réelle" when English uses "genuine".

26. Following on from Levin, in Akrich, the CJEU noted [39] that

> Having found as a fact, *inter alia*, that Mr and Mrs Akrich had moved to Ireland for the express purpose of subsequently exercising Community rights to enable them to return to the United Kingdom, the Immigration Adjudicator nevertheless concluded that, as a matter of law, there had been an effective exercise by Mrs Akrich of Community rights which had not been tainted by the intentions of the spouses, and that they had therefore not relied on Community law to evade the provisions of the United Kingdom's national legislation. He also found that Mr Akrich did not constitute such a genuine and sufficiently serious threat to public policy as to justify the continuation of the deportation order.

27. The Court also held:

> 55. As regards the question of abuse mentioned at paragraph 24 of the *Singh* judgment, cited above, it should be mentioned that the motives which may have prompted a worker of a Member State to seek employment in another Member State are of no account as regards his right to enter and reside in the territory of the latter State provided that he there pursues or wishes to pursue an effective and genuine activity (Case 53/81 *Levin* [1982] ECR 1035, paragraph 23).

56. Nor are such motives relevant in assessing the legal situation of the couple at the time of their return to the Member State of which the worker is a national. Such conduct cannot constitute an abuse within the meaning of paragraph 24 of the *Singh* judgment even if the spouse did not, at the time when the couple installed itself in another Member State, have a right to remain in the Member State of which the worker is a national.

28. As noted earlier, what is meant by "residence" must also be considered and in that context I turn next to O. and B. [2014] EUECJ C-456/12. The questions raised were, so far as is relevant

> (1) Should Directive 2004/38 …, as regards the conditions governing the right of residence of members of the family of a Union citizen who have third-country nationality, be applied by analogy, as in the judgments of the Court of Justice of the European Communities in [*Singh* and *Eind*] where a Union citizen returns to the Member State of which he is a national after having resided in another Member State in the context of Article 21(1) [TFEU], and as the recipient of services within the meaning of Article 56 [TFEU]?
>
> (2) If so, is there a requirement that the residence of the Union citizen in another Member State must have been of a certain minimum duration if, after the return of the Union citizen to the Member State of which he is a national, the member of his family who is a third-country national wishes to gain a right of residence in that Member State?
>
> (3) If so, can that requirement then also be met if there was no question of continuous residence, but rather of a certain frequency of residence, such as during weekly residence at weekends or during regular visits?

29. Turning first to the opinion of Advocate General Sharpston it is useful to consider the opinion insofar as it relates to defining "residence" at [96] to [111]. In particular what was said at paragraph 100:-

> 100. In ***Swaddling*** the Court held that the definition of residence in Article 1(h) of Regulation No 1408/71 (81) meant 'habitual residence' and suggested that it therefore had an EU-wide meaning. (82) The Court interpreted the phrase 'the Member State in which they reside' as being the place 'where the habitual centre of their interests is to be found', which should be determined taking into account 'the employed person's family situation; the reasons which have led him to move; the length and continuity of his residence; the fact (where it is the case) that he is in stable employment; and his intention as it appears from all the circumstances'. (83) In so saying, the Court has indicated that a proper understanding of whether a person is resident or not must be based, not on a single factor, but on a collection of elements that together enable the individual's situation to be assessed and categorised as residence or non-residence.

30. Swaddling [1999] EUECJ C-90/97 it should be recalled, related to the restrictions on paying certain social security benefits to "a person from abroad", that is somebody who is not habitually resident in the United Kingdom.

31. In Swaddling, the Advocate General stated as follows: -

> 17. The criterion of the principal or habitual centre of the worker's interests has, moreover, been reaffirmed in the case-law on other branches of Community law. Merely by way of example, I would mention the case-law on the European civil service concerning the

expatriation allowance granted to officials who, by reason of their entry into the service of the Communities, are obliged to move from their country of residence to the country where they are posted. Since the purpose of that allowance is to alleviate the expense and inconvenience entailed in integrating into a new environment, the (habitual) residence of the person concerned prior to entry into service, that is to say, the place where he had established the permanent centre of his interests, is one of the primary criteria governing recognition of entitlement to the allowance. (18) In the quite different area of tax exemption, the Court explained that normal residence — which, for the purposes of Council Directive 83/182/EEC of 28 March 1983 on tax exemptions within the Community for certain means of transport temporarily imported into one Member State from another, (19) serves to determine whether a vehicle has been temporarily imported — is the place where the person concerned established the permanent centre of his interests and is to be identified in the light of all the relevant factual circumstances of the particular case. In *Ryborg* the Court ruled that the fact that, for more than a year, the person in question spent every night and every weekend in a State other than that of residence was not sufficient for it to be concluded that he had transferred the permanent centre of his interests to that State. The Court added — significantly in that it affirms the need for a subjective criterion — that 'the position would be different if the person concerned settled in Member State B and manifested an intention to live there with his woman friend and not to return to Member State A'. (20)

18. Those examples may come from different areas of law, but they show that the references to residence in the various Community rules cited above share the same conceptual basis, namely the idea that the country of residence is that to which the person concerned has formed a 'social attachment' which is stronger and more stable than any links he may have with other Member States. It is a connection of that nature which justifies, in the present case, payment of the special non-contributory benefits referred to in Article 10a of the regulation, or, given the fulfilment of certain other conditions, confers entitlement to unemployment benefits on the basis of Article 71, just as, in a different context, it gives a person who enters the service of the Communities a right to the expatriation allowance.

32. In Swaddling the CJEU held at [28] to [29]: -

> 28. Pursuant to Article 1(h) of Regulation No 1408/71, the term 'residence' for the purposes of that regulation 'means habitual residence' and therefore has a Community-wide meaning.
>
> 29. The phrase 'the Member State in which they reside' in Article 10a of Regulation No 1408/71 refers to the State in which the persons concerned habitually reside and where the habitual centre of their interests is to be found. In that context, account should be taken in particular of the employed person's family situation; the reasons which have led him to move; the length and continuity of his residence; the fact (where this is the case) that he is in stable employment; and his intention as it appears from all the circumstances (see, *mutatis mutandis*, concerning Article 71(1)(b)(ii) of Regulation No 1408/71, Case 76/76 *Di Paolo* [1977] ECR 315, paragraphs 17 to 20, and Case C-102/91 *Knoch* [1992] ECR I-4341, paragraphs 21 and 23).

33. It is in this context that the Advocate General said in her opinion in O. and B. at [101]:-

101. In other areas of EU law, the Court has articulated a similar understanding of residence: it is where a person has his habitual or usual centre of interests and it must be determined in light of the facts at issue, which include both objective and subjective elements. (84)

84 – See, for example, Case 76/76 *Di Paolo* [1977] ECR 315; Case C-102/91 *Knoch* [1992] ECR I-4341; see also Advocate General Saggio's Opinion in *Swaddling*, cited in footnote 82 above, point 17. See also, for example, Case C-297/89 *Ryborg* [1991] ECR I-1943, paragraphs 24 and 25, and Case C-262/99 *Louloudakis* [2001] ECR I-5547, paragraph 55.

34. In the circumstances it is sensible to consider also those cases given that they are cited as examples. Di Paolo concerns whether an Italian national who last worked in the United Kingdom and then returned to family in Belgium is entitled to employment law benefit in Belgium. He had not worked there. The court held at [17]

"The concept of 'the Member State in which he resides' must be limited to the State where the worker, although occupied in another Member State, continues habitually to reside and where the habitual centre of his interests is also situated."

35. It is also stated at [19 to [22]]:-

19. In fact, whenever a worker has a stable employment in a member state there is a presumption that he resides there, even if he has left his family in another state.

20. Accordingly it is not only the family situation of the worker that should be taken into account, but also the reasons which have led him to move, and the nature of the work.

21. The addition of the words 'or who returns to that territory' implies merely that the concept of residence, such as defined above, does not necessarily exclude non-habitual residence in another member state.

22. For the purposes of applying Article 71(1)(b)(ii) of Regulation No 1408/71, account should be taken of the length and continuity of residence before the person concerned moved, the length and purpose of his absence, the nature of the occupation found in the other member state and the intention of the person concerned as it appears from all the circumstances."

36. Equally, in Knoch [25] the court noted that Miss Knoch had been employed for two years as a university assistant in another Member State under a programme for university exchanges and at the end of the period she became unemployed and her attempts to find work in the State proved unsuccessful and that she cannot therefore have been considered to have been in stable employment. The court held:-

26. As regards the fact that she held a post for 21 months in another Member State, it should be borne in mind, as the Court has already indicated in its judgment in Case 76/76 Di Paolo, cited above, that there is no precise definition of the criterion of length of absence and that it is not an exclusive criterion.

27. Indeed, no provision of Regulation No 1408/71 lays down a time-limit beyond which Article 71(1)(b)(ii) must no longer be applied. A contrary interpretation would conflict with the aim pursued by that provision, which is to optimize a worker' s chances of resuming employment.

28. Finally, the fact that the worker received unemployment benefits and sought employment in the other Member State is not a decisive factor such as to determine that she was resident in that State for the purposes of Article 71(1)(b)(ii). At most, it indicates that she might have transferred her residence to that State had she found work there.

29. As regards the argument based on the meaning of habitual residence under Article 7 of Directive 83/182, it need merely be observed that that is a definition peculiar to taxation which must be interpreted in the light of the aim and scheme of the Community legislation concerned.

37. The High Court considered much of this case law in M v M [2007] EWHC 2047 (Fam) in which Munby P held at [31] – [33]:

31. At para [36] Singer J made an important observation with which I agree:

> "the European authorities tend to demonstrate, in my judgment, far less, if any, emphasis on the ingredients which English law has developed that there needs to pass an appreciable time before a person can become established as an habitual resident of this country."

He added at para [44] that:

> "although length of time clearly can be a relevant factor it is not a conclusive factor. Nor is there any particular period set down as a minimum."

Again, I agree. That approach, in my judgment, and as Singer J recognised, is borne out by what the ECJ said in Swaddling v Adjudication Officer (Case C-90/97) [1999] ECR 1–01075, [1999] 2 FLR 184.

32. By way of what he called a gloss on the definition of habitual residence given in the *Borrás* report, Singer J commented at para [38] that:

> "it does not have to be permanent. It needs to be habitual. The emphasis is on a person's centre of interests. The verb used is "established" and all relevant factors are to be taken into account. But there is nothing beyond any degree of length of time in the words used, except as can be ascribed to the word "established". One can establish something very quickly, or it may take time to establish. Once a situation is firm it is established."

I respectfully agree. See further L-K v K (No 3) [2006] EWHC 3281 (Fam), where Singer J gave an autonomous meaning to the word "lodge" in Article 16 of the Regulation.

33. Accordingly, in my judgment, the phrase "habitually resident" in Article 3(1) has the meaning given to that phrase in the decisions of the ECJ, a meaning helpfully and accurately encapsulated by Dr Borrás in para [32] of his report:

> "the place where the person had established, on a fixed basis, his permanent or habitual centre of interests, with all the relevant facts being taken into account for the purpose of determining such residence"

and by the Cour de Cassation in Moore v McLean:

> "the place where the party involved has fixed, with the wish to vest it with a stable character, the permanent or habitual centre of his or her interests."

38. Munby P also noted [36]

> 36 It follows from this, in my judgment, that one has to be careful in this particular context not to read too much into the observation in *Silvana di Paulo v Office national de l'emploi (Case 76/76) [1977] 2 CMLR 59* at para [19], as elsewhere, that there is a *presumption* that a worker, even if his family is in another Member State, resides in the Member State where he has stable employment. *Qua* worker that no doubt is so. But where the claimant comes before the court not *qua* worker but rather, as here, *qua* spouse, the presumption carries less weight and is more easily rebutted.

39. Returning to O. and B. and the substance of the case, the CJEU answered the questions put as follows:-

> 39. Accordingly, Directive 2004/38 establishes a derived right of residence for third-country nationals who are family members of a Union citizen, within the meaning of Article 2(2) of that directive, only where that citizen has exercised his right of freedom of movement by becoming established in a Member State other than the Member State of which he is a national (see, to that effect, *Metock and Others*, paragraph 73; Case C-256/11 *Dereci and Others* [2011] ECR I-11315, paragraph 56; *Iida*, paragraph 51; and Joined Cases C-356/11 and C-357/11 *O. and Others* [2012] ECR, paragraph 41).

> 45 In that regard, it should be borne in mind that the purpose and justification of that derived right of residence is based on the fact that a refusal to allow such a right would be such as to interfere with the Union citizen's freedom of movement by discouraging him from exercising his rights of entry into and residence in the host Member State (see *Iida*, paragraph 68; *Ymeraga and Ymeraga-Tafarshiku*, paragraph 35; and *Alokpa and Others*, paragraph 22).

> 46 The Court has accordingly held that where a Union citizen has resided with a family member who is a third-country national in a Member State other than the Member State of which he is a national for a period exceeding two and a half years and one and half years respectively, and was employed there, that third-country national must, when the Union citizen returns to the Member State of which he is a national, be entitled, under Union law, to a derived right of residence in the latter State (see *Singh*, paragraph 25, and *Eind*, paragraph 45). If that third-country national did not have such a right, a worker who is a Union citizen could be discouraged from leaving the Member State of which he is a national in order to pursue gainful employment in another Member State simply because of the prospect for that worker of not being able to continue, on returning to his Member State of origin, a way of family life which may have come into being in the host Member State as a result of marriage or family reunification (see *Eind*, paragraphs 35 and 36, and *Iida*, paragraph 70).

47 Therefore, an obstacle to leaving the Member State of which the worker is a national, as mentioned in *Singh* and *Eind*, is created by the refusal to confer, when that worker returns to his Member State of origin, a derived right of residence on the family members of that worker who are third-country nationals, where that worker resided with his family members in the host Member State pursuant to, and in conformity with, Union law.

49 That is indeed the case. The grant, when a Union citizen returns to the Member State of which he is a national, of a derived right of residence to a third-country national who is a family member of that Union citizen and with whom that citizen has resided, solely by virtue of his being a Union citizen, pursuant to and in conformity with Union law in the host Member State, seeks to remove the same type of obstacle on leaving the Member State of origin as that referred to in paragraph 47 above, by guaranteeing that that citizen will be able, in his Member State of origin, to continue the family life which he created or strengthened in the host Member State.

50 So far as concerns the conditions for granting, when a Union citizen returns to the Member State of which he is a national, a derived right of residence, based on Article 21(1) TFEU, to a third-country national who is a family member of that Union citizen with whom that citizen has resided, solely by virtue of his being a Union citizen, in the host Member State, those conditions should not, in principle, be more strict than those provided for by Directive 2004/38 for the grant of such a right of residence to a third-country national who is a family member of a Union citizen in a case where that citizen has exercised his right of freedom of movement by becoming established in a Member State other than the Member State of which he is a national. Even though Directive 2004/38 does not cover such a return, it should be applied by analogy to the conditions for the residence of a Union citizen in a Member State other than that of which he is a national, given that in both cases it is the Union citizen who is the sponsor for the grant of a derived right of residence to a third-country national who is a member of his family.

51 **An obstacle such as that referred to in paragraph 47 above will arise only where the residence of the Union citizen in the host Member State has been sufficiently genuine so as to enable that citizen to create or strengthen family life in that Member State.** [emphasis added].Article 21(1) TFEU does not therefore require that every residence in the host Member State by a Union citizen accompanied by a family member who is a third-country national necessarily confers a derived right of residence on that family member in the Member State of which that citizen is a national upon the citizen's return to that Member State.

40. The phrase here used is "sufficiently genuine" which militates against a definition of "genuine" in the sense of being the opposite of false or untrue or for that matter, tainted by dishonesty. It should also be noted that the use of the word "settle" in paragraph 52 is a translation of the same word in the French original (s'installer) which was in earlier cases translated as "install" and does not have the connotations of permanence of "settle." It is sufficient to note for the purposes of this decision that settle cannot here mean settle in the sense meant in domestic law.

41. Regard must also be had to S. and G. [2014] EUECJ C-457/12 determined in parallel with O. and B. In S. and G. the EU nationals were commuting to another member state to work, but had continued to reside in the member state of their nationality.

Having concluded that the member state of nationality could refuse an application for a residence cared under Directive 2004/38/EC, it held [44] that:

> In the light of the foregoing, Article 45 TFEU must be interpreted as conferring on a third-country national who is the family member of a Union citizen a derived right of residence in the Member State of which that citizen is a national, where the citizen resides in that Member State but regularly travels to another Member State as a worker within the meaning of that provision, if the refusal to grant such a right of residence discourages the worker from effectively exercising his rights under Article 45 TFEU, which it is for the referring court to determine.

42. More recently, in Banger the court held:

> 27. However, the Court has acknowledged, in certain cases, that third-country nationals, family members of a Union citizen, who were not eligible on the basis of Directive 2004/38 for a derived right of residence in the Member State of which that citizen is a national, could, nevertheless, be accorded such a right on the basis of Article 21(1) TFEU (judgment of 5 June 2018, *Coman and Others*, C-673/16, EU:C:2018:385, paragraph 23).
>
> 28. That consideration is based upon settled case-law, according to which, in essence, if no such derived right of residence were granted to such a third-country national, a Union citizen would be discouraged from leaving the Member State of which he is a national in order to exercise his right of residence under Article 21(1) TFEU in another Member State because he is uncertain whether he will be able to continue in his Member State of origin a family life which has been created or strengthened, with that third-country national, in the host Member State, during a genuine residence (see, to that effect, judgments of 12 March 2014, *O. and B.*, C-456/12, EU:C:2014:135, paragraph 54, and of 5 June 2018, *Coman and Others*, C-673/16, EU:C:2018:385, paragraph 24).

43. It is evident from the approach of the CJEU in O. and B. in the passages cited about that its primary concern is whether the EU national would be discouraged from leaving his state of nationality to exercise his right of residence under the Treaty owing to an uncertainty over whether he can continue a family life which has been created or strengthened during a *genuine* residence. What is meant by *genuine* requires detailed consideration.

44. It must be recalled that the French original of the decisions uses the word "effectif" to qualify residence. "Effectif", translated into English as "genuine" in the more recent decisions (earlier cases translate that as "effective"), does not imply the opposite of false unlike the ordinary English usage word "genuine". What it does mean is that there must be substance to the residence as is indicated in the opinion of the A-G in O. and B. That is mirrored in the CJEU's decision at [51].

45. The CJEU did not in O. and B. seek to lay down specific criteria for assessing what factors should be taken into account in assessing the quality of the residence over and above noting that the initial three-month period permitted by the Citizenship Directive would not be sufficient and observing at [51] that the residence of the Union citizen in the host Member State has been sufficiently genuine so as to enable that citizen to create or strengthen family life in that Member State. That implies a fact-sensitive approach to be applied in individual cases and that there must be some

substance to it; it does not, however imply any particular factors to be taken into account, nor does it suggest that intentions are relevant.

46. Some assistance in assessing what is genuine can be drawn from the other cases, but subject to the caveat that as Munby P noted in M v M , there is a distinction drawn between residence for work and benefits on the one hand, and tax liability on the other.

47. Where the jurisprudence of the Court of Justice refers to residence being "genuine", it does not import with it a consideration of the motives behind that residence in the abuse of rights sense. Rather, it is a qualitative evaluation of the residence which needs to be undertaken. It is in that sense that the intentions are relevant in the sense of what it was that the individuals who moved to another member state intended to do? Did they intend properly to exercise Treaty rights or was it, for example, simply an extended holiday or was it a fixed-term employment of short duration where the person concerned retained an official address with her parents as in Knoch?

48. Further support for "genuine" in Regulation 9.3 to "genuine" being a qualitative analysis is that if it were to import the issue of whether, on the contrary, it was an abuse of rights as being an artificial creation, then there would be little or no purpose to Regulation 9(4).

49. Properly understood in the context of the case law set out above in assessing whether the residence was genuine, this must be done through the lens of the case law and it follows from the list of factors being non-exhaustive that none of them are determinative nor should they be read as a checklist of requirements; the absence of one factor being established does not necessarily mean that there has not been a genuine residence.

50. While the Court of Session in AA (Nigeria) placed significant reliance on the issue of establishment at [48] to [51], it is to be recalled that the word used in the French original is "s'installer", which, as with the concept of habitual residence does not import a long duration of time. As noted above, it has also been translated as "settle" which cannot bear the technical meaning given to it in domestic immigration law. Rather, it is simply an indicator of some degree of permanence as does the phrase "habitual resident". Although that is defined in EU law, it is not used in the case law except to illustrate the type of considerations to be undertaken in evaluating residence.

The "centre of life" test

51. I turn next to the issue of the transfer of an individual's centre of life which is a key concept within reg.9.

52. The phrase "centre of life" does not occur in the case law. It is not a term of art, nor is it defined in European Law. In A-G Sharpston's opinion in O. and B. at [100] to [101] she refers to "habitual or usual centre of interests" but that must be seen in context of what she wrote at [99]:

In the context of EU citizenship law, residence in another Member State is, apart from being a right, sometimes a condition for exercising ancillary rights attached to that status (for example, the right to vote and to stand as a candidate in elections to the European Parliament and in municipal elections, but it can also be a requirement that restricts other freedoms guaranteed under EU law.

53. The context here where it is necessary to identify one place of residence from which other rights flow, be that a right to vote of , in the cases where an EU civil servant's relocation expenses, the place from which he moved. In the latter, the case law appears to flow from the requirement in Germany and Austria to have an official, registered address.

54. It is not the case that in other contexts it is necessary to have a sole residence. As A- G Sharpston wrote:

> 103. Nor do I think that whether an EU citizen has taken up residence in another Member State turns on whether that is his sole place of residence. In many cases, exercise of the right to reside freely in the European Union will involve moving residence from one Member State to another, without keeping any meaningful connection with the former place of residence. In other cases, however, it will be expedient for various reasons to maintain significant ties.
>
> 104. Provided that EU citizens satisfy the test for establishing residence in a Member State, it should not matter that they might keep some form of residence elsewhere. There is no general rule of EU law whereby residence in one Member State precludes concurrent residence in another Member State. That appears to be implied also by the provisions of Directive 2004/38 which make residence of longer than three months dependent on the condition that an EU citizen either is a worker or a self-employed person or has sufficient resources available in order to avoid becoming a burden on the social assistance system of the host Member State. By contrast, full solidarity (when the 'sufficient resources' condition no longer applies) must be shown to permanent residents.

55. The A-G's opinion does not form part of the judgment of the CJEU, but it is grounded in the case law of the CJEU as can be seen from the footnotes to the passages cited. There is nothing in the decision to contradict the A-G's opinion and it is of note that at [103] and [104], there is a strong indication that there is no need to reside exclusively in the host member state.

56. There is nothing in the case of law of the CJEU to contradict this summary of the law or to show that in order to generate a derivative right that an individual must have moved his centre of life; or, even if that were so, that that requires him to have ceased to have a residence in his home state; or to have integrated to any particular degree.

57. There is some indication of a European provenance for the centre of life test. Rosa v SSHD [2016] EWCA Civ 14 at [20] refers to non-binding guidance issued by the European Commission on the Directive (COM (2009) 313 Final, 2 June 2009) which at [4] provides:

> There is no abuse where EU citizens and their family members obtain a right of residence under Community law in a Member State other than that of the EU citizen's nationality as they are benefiting from an advantage inherent in the exercise of the right of free movement protected by the Treaty, regardless of the purpose of their

move to that State. By the same token, Community law protects EU citizens who return home after having exercised their free movement rights.

…

When necessary, Member States may define a set of indicative criteria to assess whether residence in the host Member State was genuine and effective. National authorities may in particular take into account the following factors.

58. This appears to be the origin of the tests in reg. 9 b. The Factors cited are:

- the circumstances under which the EU citizen concerned moved to the host Member State (previous unsuccessful attempts to acquire residence for a third country spouse under national law, job offer in the host Member State, capacity in which the EU citizen resides in the host Member State);

- degree of effectiveness and genuineness of residence in the host Member State (envisaged and actual residence in the host Member State, efforts made to establish in the host Member State, including national registration formalities and securing accommodation, enrolling children at an educational establishment);

- circumstances under which the EU citizen concerned moved back home (return immediately after marrying a third country national in another Member State).

59. But the guidance also says:

> It cannot be inferred that the residence in the host Member State is not genuine and effective only because an EU citizen maintains some ties to the home Member State, all the more if his status in the host country is unstable (e.g. a work contract of limited duration). The mere fact that a person consciously places himself in a situation conferring a right does not in itself constitute a sufficient basis for assuming that there is abuse.

60. It must, however, be borne in mind that the guidance is non-binding; it is not an EU Treaty nor is it a distillation of established case law or doctrine.

Reg 9 (4)

61. It is to be recalled that restrictions on the rights of free movement, derived or otherwise, are to be narrowly construed as the Court of Justice has made clear. They may be restrained on limited grounds, including where there is abuse of rights or fraud.

62. Turning to the issue of abuse of rights, as was noted in R (Gureckis) v SSHD [2017] EWHC 3298 at [77]

> 77. The leading case on abuse of rights under EU law is Case C-110/99 *Emsland-Sta¨rke GmbH v Hauptzollamt Hamburg-Jonas* [2000] ECR I-11569. In *Emsland-Stärke* the CJEU, having

reviewed the earlier case law, propounded the following test for establishing an abuse of rights:

> "52. A finding of an abuse requires, first, a combination of objective circumstances in which, despite formal observance of the conditions laid down by the Community rules, the purpose of those rules has not been achieved.
>
> 53. It requires, second, a subjective element consisting in the intention to obtain an advantage from the Community rules by creating artificially the conditions laid down for obtaining it. The existence of that subjective element can be established, inter alia, by evidence of collusion between the Community exporter receiving the refunds and the importer of the goods in the non-member country."

63. This is further considered at [83] to [86]:

83. The abuse of rights principle only applies where a person meets the conditions laid down for the enjoyment of the right in question. In Case C-413/01 *Franca Ninni-Orasche v Bundesminister für Wissenschaft, Verkehr und Kunst* [2003] ECR I-13187, the ECJ had to consider whether a person's application for study finance was an abuse because she had only worked for a short period in the host State before making the application. The ECJ held, at [31]:

> "31. Finally, as regards the argument that the national court is under an obligation to examine …. whether the appellant has sought abusively to create a situation enabling her to claim the status of a worker within the meaning of Article 48 of the Treaty with the aim of acquiring advantages linked to that status, it is sufficient to state that any abusive use of the rights granted by the Community legal order under the provisions relating to freedom of movement for workers presupposes that the person concerned falls within the scope ratione personae of that Treaty because he satisfies the conditions for classification as a 'worker' within the meaning of that article. It follows that the issue of abuse of rights can have no bearing on the answer to the first question."

84. The ECJ has held that abuse of rights will arise only where the conduct is engaged in solely for the purpose of satisfying the criteria necessary to access the benefit. In Case 39/86 *Lair v Universität Hannover* [1988] ECR 3161, the Court said at [43]:

> "43. In so far as the arguments submitted by the three Member States in question are motivated by a desire to prevent certain abuses, for example where it may be established on the basis of objective evidence that a worker has entered a Member State for the sole purpose of enjoying, after a very short period of occupational activity, the benefit of the student assistance system in that State, it should be observed that such abuses are not covered by the Community provisions in question."

85. Recital (28) of the Directive also refers to sole purpose:

> "To guard against abuse of rights or fraud, notably marriages of convenience or any other form of relationships contracted for the sole purpose of enjoying the right of free movement and residence, Member States should have the possibility to adopt the necessary measures."

86. The paradigm of an abuse of rights in the context of the Directive is a "marriage of convenience", as identified in Article 35. Whilst married partners might formally comply with the relevant conditions in the Directive to benefit from rights of movement

and residence, the compliance has been created in an artificial way by a sham marriage in order to obtain the rights conferred by the Directive. However, even in the context of a marriage of convenience, the Supreme Court emphasised in *Sadovska v Secretary of State for the Home Department* [2017] UKSC 54 that the predominant purpose of the marriage of convenience must be artificially to gain EU law rights and that this must be the purpose of both partners to the marriage.

64. It is of note that in Sadovska the Supreme Court simply relied on guidance documents and did not address any of the CJEU's case law on abuse of rights. Further, it is to be noted that the material cited relates to marriages of convenience which is not the case here.

65. In Cadbury-Schweppes v Commissioners of Inland Revenue [2006] EUECJ C-196/04, a UK company set up subsidiaries in Ireland in order to raise and provide funds to companies within the group, ostensibly to benefit from the lower rate of corporation tax in Ireland. HMRC applied UK legislation to charge tax on the Irish companies, to which the company objected as being contrary to the freedom of establishment under the TREU. The ECJ held that where there had been no genuine economic activity in Ireland such that subsidiaries in Ireland represented 'wholly artificial arrangements there would have been no fulfilment of the purpose of the freedom to establish businesses– the assistance of economic and social interpenetration within the EU. What is notable is that that the *sole* purpose of the legal act of establishment must be to improperly obtain the relevant advantage

66. In cases such as this there are two stages in which EU law is engaged. There is first the exercise of Treaty rights in another member state, in this case Ireland, analogous to the establishment of a business. The second stage of the process arises when a person who has done so returns to his home member state.

67. In a marriage of convenience, once the parties are lawfully married, the non-EEA partner obtains a large bundle of rights not only the right of residence, but to work, to set up in business and in some cases to obtain social support. Other procedural rights accrue also. But a legal relationship or status, marriage, has been brought into being for no purpose other than to secure those rights which accrete to that status. It is where the gaining of those rights is the predominant purpose that it becomes abusive.

68. In contrast, where an EEA national goes to another member state and takes employment, he undertakes work for pay. Taxes are paid, and the right of residence necessary to do all of that is exercised. As the case law makes clear, the intentions of a person taking work are not relevant; such a system whereby a host state would have to examine motives would be contrary to the Directive.

69. If, however, an entirely artificial step in the process were introduced, such as a British Citizen working notionally for an Irish company but posted to work exclusively in the United Kingdom (analogous to the position in Cadbury-Schweppes) it might be different.

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.

Interpreting the Regulations

71. I turn now as to how the regulations are to be interpreted. In British Gas Trading Ltd v Lock and Anor [2016] 1 CMLR 25 the Court of Appeal reviewed the case law on 'conforming interpretation' of EU and human rights law and considered the core principles outlined in Marleasing S.A v LA Commercial Internacional de Alimentacion S.A. [1992] 1 CMLR 305, Ghaidan v Godin-Mendoza [2004] UKHL 30, Vodafone 2 v Revenue and Customs Commissioners [2009] EWCA Civ 446 and Swift (trading as A Swift Move) v Robertson [2014] 1 WLFR 3438.

72. In Vodafone 2 the Court of Appeal approved the summary of the principles of conforming interpretation prepared by counsel for the HMRC.

> "37. …
> "In summary, the obligation on the English courts to construe domestic legislation consistently with Community law obligations is both broad and far-reaching. In particular: (a) it is not constrained by conventional rules of construction (per Lord Oliver of Aylmerton in the *Pickstone* case, at p. 126B); it does not require ambiguity in the legislative language (per Lord Oliver in the *Pickstone* case, at p. 126B and Lord Nicholls of Birkenhead in *Ghaidan's* case, at para 32); (c) it is not an exercise in semantics or linguistics (per Lord Nicholls in *Ghaidan's* case, at paras 31 and 35; per Lord Steyn, at paras 48–49; per Lord Rodger of Earlsferry, at paras 110–115); (d) it permits departure from the strict and literal application of the words which the legislature has elected to use (per Lord Oliver in the *Litster* case, at p 577A; per Lord Nicholls in *Ghaidan's case,* at para 31); (e) it permits the implication of words necessary to comply with Community law obligations (per Lord Templeman in the *Pickstone* case, at pp 120H–121A; per Lord Oliver in the *Litster* case, at p 577A); and (f) the precise form of the words to be implied does not matter (per Lord Keith of Kinkel in the *Pickstone* case, at p 112D; per Lord Rodger in *Ghaidan's* case, at para 122; per Arden LJ in the *IDT Card Services* case, at para 114)
> ……
> "The only constraints on the broad and far-reaching nature of the interpretative obligation are that: (a) the meaning should 'go with the grain of the legislation' and be compatible with the underlying thrust of the legislation being construed': see per Lord Nicholls in *Ghaidan v. Godin-Medoza* [2004] 2 AC 557, para 53; Dyson LJ in *Revenue and Customs v. EB Central Services Ltd* [2008] STC 2209, para 81. An interpretation should not be adopted which is inconsistent with a fundamental or cardinal feature of the legislation since this would cross the boundary between interpretation and amendment (see per Lord Nicholls, at para 33, Lord Rodger, at paras 110–113 in *Ghaidan's* case; per Arden LJ in *R (IDT Card Services Ireland Ltd) v. Customs and Excise Comrs* [2006] STC 1252, paras 82 and 113); and (b) the exercise of the interpretative obligation cannot require the courts to make decisions for which they are not equipped or give rise to important practical repercussions which the court is not equipped to evaluate: see the *Ghaidan* case, per Lord Nicholls, at para 33; per Lord Rodger, at para 115; per Arden LJ in the *IDT Card Services* case, at para 113.'"

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 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;

The decision under challenge

76. Having reached these conclusions as to the applicable law, I turn next to whether the decision of the First-tier Tribunal involved the making of an error of law

77. It is evident that the judge directed himself properly at [24] and that he undertook an evaluation of all of the evidence concluding that in all the circumstances of the case, which included a fair evaluation on the lack of credibility of evidence. Whilst evaluating the quality of the residence in Ireland and noting [34] that it was for a period of around a year and was capable of potentially tipping the balance, the judge has erred in that at several points, most clearly at [32], that he has conflated the issue of a qualitative nature of the residence with motivations to an extent which is not permissible. Those factors may well have been relevant to an assessment under Regulation 9(4) but it is the Secretary of State who bears the burden of proof in respect of such an allegation.

78. For these reasons I set aside the decision of the First-tier Tribunal as it involved the making of an error of law, the judge effectively interpreting Regulation 9(3) and 9(4) in such a way as to reverse the burden of proof with regard to an abuse of rights.

79. Owing to a number of administrative problems, including difficulties due to interpreters not being booked, it was not possible to proceed with the adjourned hearing until 22 May 2019. By then, owing to a deterioration in his health and incipient dementia, the appellant's husband was not able to give reliable evidence and he did not do so.

Remaking the decision

80. I heard evidence from the appellant as well as from MA.

81. The appellant adopted her witness statements and was cross-examined. She said that she and her husband had not discussed them going to Ireland before they did so and at the time he had no health issues and was "very well". She said he had not told her that he had felt a little stressed by living in London.

82. The appellant said that when they arrived in Limerick people were friendly and at supermarkets and shops nearby. She said they lived in a one bedroomed property which had a sitting room and they were very happy there. She said her husband's working hours were flexible and he worked three, four sometimes five hours a day.

83. Asked what happened to her when her husband had lost his job, and whether he tried to find out if he could get benefits in Ireland, the appellant said they could not find anyone to help to get benefits; she had no information as to what she was entitled to receive and that they had asked. She said she did not know if he had asked anyone at the mosque if they could help. She then said that they had not asked people about benefits out of shame about the fact that her husband was no longer in employment. She said they did ask people, a couple, but not their friends.

84. The appellant said her husband did try to find jobs through the mosque, but people were at best only able to point him to where he might find employment rather than to find him a job. The appellant said also what flow from her having a PPS number she said that she was told she needed to get one. She said that the place where they had obtained the number was not able to help them. She said that they had been happy and they would have been if there had been no financial problems which is

where their problems started. Then she said that returning to England, she did not know that she would have faced this sort of problem.

85. In response to my questions, the appellant said that her husband had had diabetes, but this had been stable whilst they were in Ireland.

86. I then heard from MA who adopted his witness statements. In cross-examination MA said the appellant's husband was OK at the time and was in very good health. He said there were no visible signs of the appellant's husband not being well. He said that he did not know if the appellant's husband had been entitled to benefits in Ireland but that he had been told that he paid tax. He said that he had told him that he should call his old boss.

87. He said that in his experience people at the mosque did help each other out.

88. The witness said that he did know a Mr Stockman (the appellant's husband's landlord). He did not know how many properties he owns.

89. In submissions, Ms Holmes submitted, relying on the refusal letter, that the appellant's time spent in Ireland was not genuine and that Regulation 9(3) had not been met. She submitted that in this case there had been no real transfer of the centre of life nor had there been any real degree of integration beyond the community mosque and the Islamic community within Limerick. She did, however, accept the children had been attending school in Ireland.

90. Ms Holmes submitted that there had in this case been a degree of obfuscation about the issue of benefits, it being somewhat surprising if the people in the mosque were helpful that they would have been unable to assist.

91. Ms Kiai submitted that there had been a genuine residence in Ireland. She submitted that the context of this case was the sponsor was not educated nor was her husband who had been the sole breadwinner. She submitted in that context their actions in not seeking to claim benefits in Ireland but a return to the United Kingdom was sensible. She submitted in this case that the family had properly integrated into life in Ireland and that the Secretary of State had not shown that Regulation 9(4) was met.

Findings

92. I draw no inferences adverse to the appellant or, for that matter, her husband, from the fact that he did not give evidence before me. It is apparent from the most recent medical reports that he has begun to suffer significantly from memory impairment as a result of dementia. I am satisfied that in the circumstances, it was sensible not to call him to give evidence and that it would in consequence of his illness, have been difficult to attach much weight to his evidence in the sense that he would not have been reliable. That does not mean that I find his credibility is impaired.

93. I do, however, have some doubts about the account given to me of the appellant's husband being in good health when he went to Ireland. It is evident from the medical records that he was by that point already suffering from diabetes and a number of other complaints. While there is nothing to contradict the evidence that

his diabetes was under control, nonetheless they consider the evidence of both witnesses whom I heard but perhaps putting too favourable a gloss on his condition.

94. Similarly, I found the evidence regarding why no assistance was sought in finding out if they could acquire or obtain benefits was contrived. I can understand that somebody may not, out of shame and a sense of pride, wish to state that they needed to claim benefits. But it must have been known that the appellant's husband was looking for a job as he was asking for assistance with this. Further, the appellant's evidence on this issue is a little confused. That she said firstly she did not know how to go about to find out; but nobody was able to tell them; but, they had not asked anybody in the mosque. She then said that they asked people who were not friends. This is not coherent or consistent.

95. This does not, however, in my view impact on whether and for how long the couple lived in Ireland or that they had been accompanied by their children.

96. That said, I bear in mind the observations made by the First-tier Tribunal. There is a lack of evidence as to why the appellant's husband had decided to go to Ireland. On the evidence before me he had not discussed it with his wife and given his age, lack of skills and lack of communication, it is surprising that a decision was taken at such short notice with such little discussion. I accept in this case there was residence of approximately a year and they lived in rented accommodation. This is not a case in which, for example, accommodation was maintained in the United Kingdom, for example how she was let out or no longer occupied and, viewing the evidence as a whole, I consider that the residence was genuine in the sense that what was intended was achieved; that is, the exercise of treaty rights whereby the appellant's husband worked but that they then returned to the United Kingdom when he lost employment. There is sufficient evidence to show employment and the renting of accommodation.

97. Whilst there is significant evidence as documented by the First-tier Tribunal indicating that the motivation in so doing was to circumvent the Immigration Rules, it is not such which can be taken into account assessing whether the residence and exercise of treaty rights was in fact genuine in the proper sense.

98. Accordingly, I am satisfied that Regulation 9.3 was met in this case.

99. It is of course for the Secretary of State to show that there has been an abuse of rights. This does, however appear to have been confused in the refusal letter, the Secretary of State observing on the evidence that it did not appear that the appellant's husband had genuinely transferred the centre of his life to Ireland and that the purpose of the stay in Ireland was really to allow him to exercise treaty rights there so that there could then be an application for a residence card under the EEA Regulations under the Immigration Rules. The letter states expressly:

> "It is not accepted that you and your British citizen sponsor's residence in the EEA host country was genuine and it is considered that the purpose of residence in the EEA host country was as a means for circumventing the UK's domestic Immigration Rules or other immigration law."

100. This is not a sufficient basis to show that this amounted to an abuse of rights. Accordingly, I am not satisfied that reg 9 (4) is made out.

101. For these reasons, I allow the appeal.

Notice of decision

1. The decision of the First-tier Tribunal involved the making of an error of law and I set it aside.

2. I remake the decision by allowing the appeal under the Immigration (European Economic Area) Regulations 2016.

Direction Regarding Anonymity – Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008

Unless and until a Tribunal or court directs otherwise, the appellant is granted anonymity. No report of these proceedings shall directly or indirectly identify him or any member of their family. This direction applies both to the appellant and to the respondent. Failure to comply with this direction could lead to contempt of court proceedings.

Signed Date 23 July 2019

Upper Tribunal Judge Rintoul