**Upper Tribunal**
**(Immigration and Asylum Chamber)** Appeal Number: EA/04716/2017

**THE IMMIGRATION ACTS**

| **Heard at Field House** | **Decision & Reasons Promulgated** |
|---|---|
| **On 21 January 2020** | **On 7 February 2020** |

**Before**

**UPPER TRIBUNAL JUDGE ALLEN**
**UPPER TRIBUNAL JUDGE RINTOUL**

**Between**

**RASHMIBEN PANKAJBHAI DESAI**
**(ANONYMITY DIRECTION NOT MADE)**

Appellant

**and**

**THE SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Respondent

**Representation:**

For the Appellant: Ms C Taroni, Richmond Chambers LLP
For the Respondent: Mr D Clarke, Senior Home Office Presenting Officer

**DECISION AND REASONS**

1. The appellant is a national of India who appeals with permission to the Upper Tribunal against the decision of a First-tier Judge dismissing her appeal against the decision of the Secretary of State of 28 April 2017 refusing to issue her with a residence card as confirmation of a right to reside in the United Kingdom pursuant to

the Immigration (European Economic Area) Regulations 2016 ("the EEA Regulations").

2. Following a hearing on 16 August 2019 a panel consisting of Upper Tribunal Judge Rintoul and Upper Tribunal Judge Owens found that the decision of the First-tier Judge was infected by error of law and it was set aside and the matter was listed for rehearing in its entirety. A copy of that decision is annexed to this decision.

3. By way of essential background we note that the appellant, who had lived in India since her birth in 1961, went to live with her son, the sponsor, in Ireland in August 2015. He had gone there in July 2015 to work. Her son is her only child. He left home in around 2000, according to his witness statement, when he went to Australia to study for a degree and stayed on working in Australia and eventually obtained Australian citizenship in 2006. After his father's death in 2007 he visited his mother in India and, having met his wife in 2008 in India he joined her in the United Kingdom from 2008 onwards working there until he went to Ireland to work in 2015. The appellant returned to the United Kingdom from Ireland on 26 August 2016 and subsequently made the application, the refusal of which is the subject of this appeal.

4. At the outset of the hearing it was made clear by Mr Clarke that consequent upon the error of law decision and the decision of the Upper Tribunal in ZA [2019] UKUT 281 (IAC), it was accepted on behalf of the respondent that the sponsor should be treated as an EEA national for the purposes of Regulation 9 of the EEA Regulations. The sole issue was that of dependency.

5. The sponsor, Mr Ankur Pankajbhai Desai adopted his witness statement as his evidence-in-chief.

6. In cross-examination he said that, with regard to the business of the appellant referred to in her visit visa application in 2011, a business which it was said she had run since 1990, she ran a small salon in the city where they lived. He was asked when the business closed and said it was since his father died in 2007 that his mother ran it but she was trying to keep herself busy with it and it was closed when she visited the United Kingdom and finally closed in 2015 when she came for a visit. It was her own business.

7. He was asked whether she also had a residential property in India and said yes, with his father. He was asked when both were sold and said that they had a flat which was the family home. On paper his mother owned it but it was really a family home. As to when the business premises were sold he did not know when that had happened. He did not think that anybody other than his mother owned the business. His mother did not have other relatives in India and he was the only son. As to when the business was sold or whether the money went to his mother he said he did not know what had happened. She did not have a pension from the business. It was a very small salon. He did not think that she had had any employees. Most of his time had been spent outside India and he did not know the day-to-day stuff.

8. He did not think that when his mother came to the United Kingdom in 2015 the business was run by anyone else.

9. He was referred to the Bank of Baroda account that his mother held and said he thought she still had that account. He did not know whether she held any other bank accounts. He was aware of the Bank of Baroda account because he had sent money to it. He did not know whether there was a lack of income from the business. It was insufficient so they had sent her financial aid.

10. He was asked about the Hong Kong entry stamp in his mother's passport and said that it was entry and exit on the same day and he guessed they had a rule to stamp it, and she had never visited Hong Kong but it could be a transit stop on the way to Australia.

11. There was no re-examination.

12. The next witness was the appellant who adopted her witness statement as her evidence-in-chief. She confirmed that it had been read to her in Gujarati or another language that she understood, before she had signed it.

13. In cross-examination she was referred to the visit visa application in 2011 and agreed that it confirmed she was a business owner at the time. The business was a beauty parlour which was owned by her husband and gradually it had been slowed down. As to whether they had had any employees she said there was one helper who helped in the house as well and if there was free time helped with the business also. She was asked whether this person had continued to run the business when she herself had come to the United Kingdom before 2015 and said that her own health was up and down and the helper did not run the business. It was closed down in 2015.

14. She was asked whether the business was in a property she owned and said yes, it was with the house and in the same property as her home and they were together. They still had that home. It was for her children.

15. She was referred to the fact that in his evidence her son had referred to two properties, a flat and holiday home and the business premises, as a separate property. She said that downstairs there was the salon and the kitchen and upstairs was the flat.

16. Her son had first gone to Australia for studies about twenty years ago. She agreed that in the visit visa application she had said the business had been owned since 1990. She was asked why then her son would think that the business was in a separate property when he had come home to visit the family home. She said that before it was rented the business was somewhere else and then it was brought to this

property, so when he left, the business was somewhere else. Her husband had died eleven years ago.

17. She was asked when they moved the business into their home and she said it was slow in the rented place and hence they moved it and she had had health issues as well. She thought that it had been moved into their home ten or fifteen years ago and then her health had deteriorated.

18. She was asked whether her son did not visit her after 2005 in India and she said he used to come every year. She was asked why therefore he did not know the business was downstairs in the family home and she said the business was very slow. She was asked whether in fact she had a business in another property and was not being truthful about it being downstairs in the home and she said that it was not true that the business was somewhere else.

19. She was referred to the HSBC bank statements at page 309 onwards in the bundle and was asked whether she had any other bank accounts and she said it was only the money her son used to send. When the question was repeated she said no and then was asked whether she had ever had any other bank accounts. She had said there was a Bank of Baroda account but there was no money in it and her son had sent money through that bank. She had not had a bank account for the business.

20. She was asked about the payment into the account on 17 August 2019, at page 317 of the bundle, and she said that her son would have deposited it. She was asked why if he was putting in regular amounts anyway this would be done and whether it was needed for anything in particular and she said her memory was not so good. She did not have any other sources of income than her son. She no longer had the Bank of Baroda account. She had not been back for the past five years. It was put to her that she was not dependent on her son as she did not need this money and she said no, they were the ones who were paying everything for her and were looking after her in the house. She had had health problems.

21. We asked the appellant about the payment of £500 out of the account on 15 August 2019. She said it could be for her travelling. They would have done the transaction and they put the money in and out. By "they" she meant her son and daughter-in-law. She said that if the children needed the money they would take it out. She was asked why they would need to take £500 from her account for travelling and she said it was not for travelling but for other expenses and they were putting money in and if they needed it they were taking it out.

22. With regard to the Bank of Baroda account there was no money there so the account was closed. We asked whether she had taken steps to close it. She said that in India if there was no activity in an account then it stopped. She had not received a letter from the bank. There had been no money in the account.

23. On re-examination the witness estimated that her income from the business before she came to the United Kingdom was 2 to 3 lakh rupee per annum which equated to £2,000-2,500 roughly. With regards the Bank of Baroda account there was money from her son as well and it had been for her health problems and expenses.

24. With regard to the £4,891.27 paid in by the sponsor in 2013 she said it was for things like weddings and other social events. She was asked how she paid her bills in India and said there was electricity and groceries and shopping. The income from the business was not enough to meet her bills.

25. The next witness was the sponsor's wife, Mrs Dhruti Ankur Desai. She adopted her witness statement as her evidence-in-chief.

26. Mr Clarke had no questions for her.

27. We asked whether she knew about the £500 taken from her mother-in-law's account as recorded at page 317 of the bundle and said she did not know and nor did she know about the cash paid in on 17 August 2019.

28. In his submissions Mr Clarke relied on the decision in Lim v ECO (Malaysia) [2015] EWCA Civ 1383 with regard to the test for dependency as to whether the person was able to support themselves even if given financial support by the EU national. He argued that the evidence of the appellant's true financial affairs was inconsistent and too vague for the Tribunal to be satisfied that she was not in a position to support herself. There were inconsistencies about the background business and finances of the appellant.

29. It could be seen from Annex D to the explanatory statement that she had had the business since 1990 and had made the visit visa application then. Her son had gone to Australia twenty years previously but was back every year. Her son's evidence was that they had two properties, the flat/house and a separate business premises. The appellant's evidence was that in fact it was a house with the home and the business in the building. She said the business moved downstairs in 2005. It should be questioned why the son would not be aware of this when he visited and the only explanation was that someone was lying and it was far more likely that an attempt was being made to cover up the finances to show dependency on the son.

30. With regard to the most recent bank statements, there were the £25 regular payments by the sponsor every month, but they were anomalies as could be seen at page 317 of the bundle which showed a lot of money going into the account: £990, but no explanation for it and this was unfathomable. It was indicative of an attempt to hide the true picture of the finances. The Bank of Baroda account had been relied on previously. It was argued that there was a deliberate attempt not to disclose other accounts or the picture with regard to the business and the Lim test was not made out.

31. In her submissions Ms Taroni argued that the burden of proof concerning dependency had been discharged. The appellant had been issued a residence card in Ireland as a family member and was dependent on her son and his wife. Contrary to what Mr Clarke had argued, there were no inconsistencies. The appellant had explained that there was a business premise and her son was unclear whether it was rented or not. After the appellant's husband had died the salon had been brought into the house and that was unsurprising. Her son would not necessarily observe that there was a lot of equipment as there was little to be seen. There was nothing to support the allegation of lying.

32. The appellant had explained that she received the equivalent of some £2,000 income from the business and this was inadequate to support her in India. The evidence at page 350 to page 374 and the table supported that. There was evidence from 2012 onwards.

33. As regards there being no evidence of the liabilities and dependency, the Home Office guidance said that Pedro was still to be relied on. There was the guidance at page 19, this being the February 2019 guidance. The dependency did not have to have existed for a person going to the United Kingdom. As to what the position would be now there was no evidence of withdrawals from the Bank of Baroda account. There was no detail of the expenditure, it was accepted. There was oral evidence that she used the money for bills and that there was no other issue. There was nothing to suggest that the business was ongoing. It was relied on in the 2011 application but that was not inconsistent with it slowing down, and bearing in mind also the appellant's health issues. As regards the evidence from India, the son paid all the bills including expenses and medication which was ongoing in the United Kingdom and the son and his wife supported the appellant. Dependency should be found to exist.

34. We reserved our decision.

35. In light of Mr Clarke's concession on behalf of the Secretary of State, the only issue that remains to be resolved is that of dependency.

36. The legal test is that set out in Lim at paragraph 25. There it is said that it is not enough simply to show that financial support is in fact provided by the EU citizen to the family member, but also that the family member must need this support from his or her relatives in order to meet his or her basic needs. As was further said at paragraph 32:

> "If he can support himself, there is no dependency, even if he is given financial material support by the EU citizen. Those additional resources are not necessary to enable him to meet his basic needs. If, on the other hand, he cannot support himself from his own resources, the court will not ask why that is the case, save perhaps where there is an abuse of rights."

**The Evidence**

37. In her witness statement the appellant said that it was planned for her to come to the United Kingdom for a long visit to her son and his wife and children, in June 2015. After he was offered the job in Ireland and his wife and the children were to stay in the United Kingdom she travelled to Ireland with him in August 2015. She had planned to spend time with him and return to the United Kingdom but partly because his wife and children had stayed in the United Kingdom and partly because of his concerns about her, her son felt it would be best if she stayed with him. She had previously been diagnosed with hypothyroidism, with uncomfortable symptoms, and in Ireland her health worsened and in December 2015 following some health problems she was diagnosed with ulcerative colitis. She was hospitalised for 28 nights and her son looked after her, together with his wife and children who came on regular visits. She said that her son spent time working from home so he could care for her.

38. Earlier in her statement she said that after her husband died in 2007 her son began to assist her financially and over the years as she became older she became increasingly dependent on him. From December 2012 to May 2015 he wire-transferred on average £300 a month from his UK bank account to her bank account in India. After the return to the United Kingdom in 2016 her treatment continued. Her son transferred £25 into her bank account on a weekly basis to pay for her personal needs and travel. She relies on her son to arrange her healthcare and ensure she is looked after.

39. We have set out above her oral evidence.

40. In his witness statement the sponsor said that from May 2012 to May 2015 he transferred on average £300 a month to his mother in India. He had a job working for CPA Global in London and that job came to an end in 2014 and he then looked for jobs in the United Kingdom and was contacted by an agency with regard to a job in Ireland which he was offered and accepted. His wife was not keen to move at the time due to having her own career and concerns about moving if things did not work out, so it was agreed that he would go there and she would visit with the children to explore social and professional life there before making her decision on a permanent move.

41. It had originally been intended that his mother would stay with him for a short period but he became worried about her health and in particular after the diagnosis of ulcerative colitis he was able to work remotely and spent a great deal of time at home looking after her and managing domestic arrangements.

42. His wife did not wish to leave the United Kingdom and her life there and after spending a significant time in Ireland they both realised the Indian community there was significantly smaller than the United Kingdom so it was decided to return to the United Kingdom. Since his return he had set up a weekly transfer of £25 a week to

his mother from about May/June 2018 and before that he transferred on an ad hoc basis. He said that his mother did not have any other source of regular income.

43. In her witness statement the sponsor's wife confirmed the reasons for her and the children not going to Ireland and the reasons for wishing to remain in the United Kingdom and hence her husband and his mother's return to the United Kingdom. She confirmed that her husband transfers money to his mother's UK bank account on a weekly basis and also that he was supporting her financially and emotionally before they went to Ireland.

44. The documentary evidence confirms the regular £25 per week payments made by the sponsor to the appellant since their return to the United Kingdom. There are also some payment confirmations of payments into the appellant's Bank of Baroda account, it appears from the sponsor, on various dates between 2012 and 2015.

45. Doubts have been raised about the truthfulness of the evidence given with regard to dependency. In particular Mr Clarke raised concerns about whether or not the appellant retained the beauty salon business which she said had been closed in 2015, noting that there was a discrepancy between her evidence that the business was moved to the ground floor of the residence in which the family has a flat and in which she lived previously, having been moved ten or fifteen years ago and the sponsor's evidence, at variance to this, bearing in mind that the sponsor had visited every year prior to coming to the United Kingdom and then moving to Ireland. Concerns were also raised about unexplained payments into and out of the appellant's HSBC account, in particular a payment out of £500 on 15 August 2019 and a receipt of £990 on 17 August 2019. The sponsor was not asked about these and the appellant was vague about them.

46. As against that is the evidence of the payments into the Bank of Baroda account between 2012 and 2015, referred to above, as well as the ongoing payments of £25 a week. As Ms Taroni argued, the fact that the appellant relied on the existence of the salon in 2011 is in no sense inconsistent with the business having slowed down and ultimately being closed subsequently. It is also relevant to note that the appellant was granted a residence permit by the Irish authorities.

47. Bringing these matters together, though we have some concerns about the discrepancies in respect of the business and to a lesser extent the payments in and out of the account in August 2019, this taken together is not enough in our view to displace the positive matters relied on by the appellant in particular as set out in the witness statements. Going back to the guidance in Lim, we consider that it has been established on a balance of probabilities that the appellant is dependent on the sponsor in that she cannot support herself, since we are satisfied that the business from which she previously derived an income no longer exists, and she has no other sources of income. As a consequence dependency is made out and the appeal is allowed.

48. No anonymity direction is made.

Signed Date: 04 February 2020

Upper Tribunal Judge Allen

ANNEX – ERROR OF LAW DECISION

IAC-AH-CO-V1

**Upper Tribunal**
**(Immigration and Asylum Chamber)** Appeal Number: EA/04716/2017

**THE IMMIGRATION ACTS**

**Heard at Field House**
**On 16 August 2019**

**Decision & Reasons Promulgated**

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**Before**

**UPPER TRIBUNAL JUDGE RINTOUL**
**UPPER TRIBUNAL JUDGE OWENS**

**Between**

**MRS RASHMIBEN PANKAJBHAI DESAI**
**(ANONYMITY DIRECTION NOT MADE)**

Appellant

**and**

**THE SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Respondent

**ORDER**

1. The application made by the appellant to admit further evidence pursuant to rule 15(2A) of the Tribunal Procedure (Upper Tribunal) Rules 2008 is granted as I am satisfied that it is in the interests of justice.

2. A Gujarati interpreter is to be booked for the hearing.

3. On 11 August 2015 the appellant went to live with the sponsor in Ireland who had gone there on 15 July 2015 to work. She returned to the United Kingdom on 26 August 2016 (where she had arrived originally as a visitor on 25 June 2015). The sponsor returned to the United Kingdom on 6 September 2016.

4. The Secretary of State was not satisfied that the sponsor's employment in Ireland was genuine concluding that the purpose of the residence of the sponsor and the appellant in Ireland was to circumvent the United Kingdom domestic Immigration Rules or other immigration law.

5. The appeal was first heard by the First-tier Tribunal on 16 May 2018 when it was dismissed for the reasons set out in a decision of 7 June 2018. Permission to appeal to the Upper Tribunal was granted on 13 December 2018 and the matter then came before the Upper Tribunal on 29 January 2019. For the reasons set out in the decision of 6 March 2019 it was remitted to the First-tier Tribunal.

6. The judge heard evidence from the appellant, the sponsor and the sponsor's wife finding that:

   (i) the main issue was to determine whether the sponsor's move to Ireland to work was to take up genuine employment there or whether it was simply to circumvent the United Kingdom's Immigration Rules to secure status for his mother in the United Kingdom [28];

   (ii) the most important factor into determining the genuineness of the sponsor's move to Ireland is whether he transferred his centre of life to Ireland [28];

   (iii) the sponsor's move to Ireland and residence there as well as employment was not genuine, noting that the sponsor had left his wife and children both of whom were under 5 [29], there being no credible evidence that he could not find employment locally;

   (iv) there is no evidence that the appellant had previously taken employment in another EU state [30] there was no credible reason to explain why he had returned to the United Kingdom after only a year [30].

   (v) there was no credible explanation as to why the appellant had followed her son to live in Ireland when she had no reason to stay in the United Kingdom with her daughter-in-law and grandchildren [32]; the explanation given – that she was there to cook food for the sponsor – was not credible, the true motivation being to obtain a residence card there as a family member of the sponsor and return to the United Kingdom thereby circumventing the Immigration Rules [33];

   (vi) Neither the sponsor nor the appellant had integrated into society in Ireland [34].

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

   (i) in attaching undue weight to the centre of life test this not being the sole or primary test;

(ii) in failing to consider whether Regulation 9(3)(a) is an accurate transposition of EU law; the "centre of life test" having no basis in the case law for the CJEU the judge failing properly to apply O & B v (Netherlands) [2014] EUECJ C-456/12;

(iii) the judge had approached the question of abusive rights incorrectly failing to have regard to Emsland-Stärke [2000] ECR I-11569 the judge incorrectly referring to the sponsor's employment as not being genuine yet failing properly to apply the test as to whether his employment was genuine as set out in Lawrie-Blum [1996] EECJ C-66/A5 and Levin [1982] EUECJ R-53/81; and, in failing properly to direct himself in line with Gureckis [2017] EWHC 3295 (Admin) in particular at [82];

(iv) in failing to take into account as a relevant matter that a residence card had been issued to the appellant by the Irish authorities and in failing properly to take into account evidence of integration in Ireland as well as taking into account irrelevant matters.

**The Law**

8. The starting point is that the sole ground of appeal in this case is whether the decision of the respondent was in breach of the United Kingdom's obligations under the EU treaty. The central 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]]"

9. In ZA (Reg 9. EEA Regs; abuse of rights) Afghanistan [2019] UKUT 281 (IAC) the Upper Tribunal held:

*(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.*

[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.

10. We turn also to O. and B. where the ECJ held at [54] to [57]:

> 53 On the other hand, an obstacle such as that referred to in paragraph 47 above may be created where the Union citizen intends to exercise his rights under Article 7(1) of Directive 2004/38. **Residence in the host Member State pursuant to and in conformity with the conditions set out in Article 7(1) of that directive is, in principle, evidence of settling there and therefore of the Union citizen's genuine residence in the host Member State and goes hand in hand with creating and strengthening family life in that Member State** [Emphasis added]**.**
>
> 54 Where, during the genuine residence of the Union citizen in the host Member State, pursuant to and in conformity with the conditions set out in Article 7(1) and (2) of Directive 2004/38, family life is created or strengthened in that Member State, the effectiveness of the rights conferred on the Union citizen by Article 21(1) TFEU requires that the citizen's family life in the host Member State may continue on returning to the Member of State of which he is a national, through the grant of a derived right of residence to the family member who is a third-country national. If no such derived right of residence were granted, that Union citizen could 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 with his immediate family members which has been created or strengthened in the host Member State (see, to that effect, *Eind*, paragraphs 35 and 36, and *Iida*, paragraph 70).
>
> 55 *A fortiori*, the effectiveness of Article 21(1) TFEU requires that the Union citizen may continue, on returning to the Member State of which he is a national, the family life which he led in the host Member State, if he and the family member concerned who is a third-country national have been granted a permanent right of residence in the host Member State pursuant to Article 16(1) and (2) of Directive 2004/38 respectively.
>
> 56 Accordingly, it is genuine residence in the host Member State of the Union citizen and of the family member who is a third-country national, pursuant to and in conformity with the conditions set out in Article 7(1) and (2) and Article 16(1) and (2) of Directive 2004/38 respectively, which creates, on the Union citizen's return to his Member State of origin, a derived right of residence, on the basis of Article 21(1) TFEU, for the third-country national with whom that citizen lived as a family in the host Member State.
>
> 57 It is for the referring court to determine whether sponsor O and sponsor B, who are both Union citizens, settled and, therefore, genuinely resided in the host Member State and whether, on account of living as a family during that period of genuine residence, Mr O. and Mr B. enjoyed a derived right of residence in the host Member State pursuant to and in conformity with Article 7(2) or Article 16(2) of Directive 2004/38.

11. It is also of relevance to consider what was said in Eind [2007] EUECJ C-291/05

> 33 In their written observations, the Netherlands and Danish Governments contended that a Community national is unlikely to be deterred from moving to the host Member State in order to take up gainful employment there by the prospect of not being able, on returning to his Member State of origin, to continue a family life which may have been established in the host Member State. In particular, the Netherlands Government emphasised the fact that Mr Eind could not have been deterred from exercising that freedom, through moving to the

United Kingdom, by the fact that it would be impossible for his daughter to reside with him once he returned to his Member State of origin, given that at the time of the initial move Miss Eind did not have a right to reside in the Netherlands.

34 That approach cannot be accepted.

35 A national of a Member State could be deterred from leaving that Member State in order to pursue gainful employment in the territory of another Member State if he does not have the certainty of being able to return to his Member State of origin, irrespective of whether he is going to engage in economic activity in the latter State.

36 That deterrent effect would also derive simply from the prospect, for that same national, of not being able, on returning to his Member State of origin, to continue living together with close relatives, a way of life which may have come into being in the host Member State as a result of marriage or family reunification.

37 Barriers to family reunification are therefore liable to undermine the right to free movement which the nationals of the Member States have under Community law, as the right of a Community worker to return to the Member State of which he is a national cannot be considered to be a purely internal matter.

12. In the light of this, we find no merit in the submission from Mr Clarke that Regulation 9(3) reflects the factors to be taken into account in O and B. The ECJ emphasised that the residence must be genuine which is a qualitative assessment and what was stated at [56] must be read in the light of what was said at [53], in particular the highlighted passage set out above.

13. It is to be borne in mind that restrictions on free movement are, as is the consistent jurisprudence of the ECJ to be construed narrowly. We consider that there is no basis for the assertion that O and B somehow overrides or is inconsistent with Akrich as is clear from Gureckis.

14. We accept that it is open to the state to set out tests to determine indicative criteria to assess whether residence is genuine and effective but what is meant by "genuine" and "effective" must be seen through the light of **O and B**. Further, genuine and effective must be properly understood. In the EU context "genuine" is not the opposite of false it is simply that something has substance.

15. In the light of these observations we consider that the First-tier Tribunal judge misdirected himself in law to a serious extent and in a manner which infected the findings. There is no basis for the assertion that the centre of life test is important let alone the most important test. On the contrary, what is required is the evaluation set out in O and B.

**Abuse of Rights**

16. The correct test for abuse of rights is clear from Emsland-Stärke, as referred to in Gureckis. Further, the intentions behind somebody seeking employment in another state are not relevant. See Akrich.

17. We note Mr Clarke's submission that the issue in this case is whether the appellant (as opposed to the sponsor) exercise of rights was abusive. We consider that in any event this point is moot; the judge simply fails properly to apply the abuse of rights test.

18. Accordingly, for these reasons, we are satisfied that grounds 1 and 2 are made out as well as is ground 3.

19. In the circumstances, and given that on that basis the findings are unsafe and the appeal must be set aside, it is unnecessary for us to consider whether also ground 4 is made out.

20. Accordingly, for these reasons, we are satisfied that the decision of the First-tier Tribunal involved the making of an error of law and set it aside. We consider that none of the findings of fact can be preserved and that accordingly the matter will need to be reheard in its entirety. We are, however, satisfied that it would be appropriate to retain this in the Upper Tribunal for a full fact-finding exercise.

21. We note, however, that there is an issue raised in the refusal letter which does not appear to have been addressed in the previous determination, that is, whether the appellant's mother is in fact a dependant. There is prima facie evidence that that is so in the form of the issue to her by the Irish authorities of a residence card as the dependant relative in the ascending line. This is nonetheless a matter which will need to be considered.

**Notice of Decision**

1. The decision of the First-tier Tribunal involved the making of an error of law and we set it aside. None of the findings of fact are preserved.

2. The appeal will be remade in the Upper Tribunal on a date to be fixed.

3. The parties are to proceed on the basis that the Upper Tribunal will hear oral evidence and to inform the Upper Tribunal if an interpreter is required.

4. The parties are to exchange skeleton arguments 5 days before the hearing.

Signed Date 2 October 2019

Upper Tribunal Judge Rintoul