Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: EA/07842/2017

THE IMMIGRATION ACTS

Heard at Field House **Decision & Reasons Promulgated**
On 22 November 2018 **On 10 January 2019**

Before

UPPER TRIBUNAL JUDGE McWILLIAM

Between

MRS DURGADEVI BABUBHAI DUBAL
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Ms S Iqbal and Mr A Metzer QC, Counsel instructed by A Y & J Solicitors
For the Respondent: Mr S Walker, Home Office Presenting Officer

DECISION AND REASONS

1. The Appellant is a citizen of India. Her date of birth is 5 August 1958. On 27 February 2017 she made an application for a residence card as the direct family member of her son Yash Babulal Dubal ("the Sponsor"), a British citizen.

2. The application was refused on 6 September 2017. The Appellant appealed against the decision of the Secretary of State. Her appeal was dismissed by First-tier Tribunal (FTT) Judge Rowlands, following a hearing on 11 July 2018 in a decision that was

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promulgated on 28 August 2018. The Appellant was granted permission by FTT Judge Grimmett on 8 October 2018 on the basis that it was arguable that the judge erred in consideration of the law by assessing the Appellant's position by reference to a withdrawn Immigration Rule rather than to the Immigration (European Economic Area) Regulations 2016 ("the 2016 Regulations").

3. On 22 February 2016 the Appellant was granted a ten-year visit visa to the UK. She came to the UK as a visitor and stayed with her daughter. I understand that this was in September. On 9 September 2016 she made an application for visit visa to visit the Sponsor in the Republic of Ireland. She withdrew this application on 27 October 2016. She travelled to the Republic of Ireland on 24 December 2016 using her visit visa that was granted to her by the Respondent. On 12 January 2017 she made an application for entry clearance. She came to the UK on 20 February 2017. She made an application for a residence card on 27 February 2017.

4. The Reasons for Refusal Letter states that the application was considered under Regulation 9 of the 2016 Regulations but that the Appellant has not provided evidence in support of her application as the family member of a British citizen who was exercising treaty rights in another EEA state. It was not accepted by the Respondent that the Appellant and the Sponsor's residence in the EEA host country was genuine and it was concluded that the purpose of the residence in the EEA host country was a means for circumventing the UK's domestic Immigration Rules or other immigration law. The Respondent considered that nineteen days after her arrival in the Republic of Ireland she made an application for entry clearance to return to the UK. It was concluded that it was never the Appellant's intention to move the centre of her life to Ireland. The decision maker went on to consider the English language requirement under E-ECP.4.1 of the Immigration Rules and E-ECP.4.2 and concluded that the Sponsor's residence was not genuine.

5. The judge found that the Sponsor was genuinely resident in the Republic of Ireland; however, he did not accept that Appellant had established genuine residency. The judge heard evidence from the Sponsor and he had before him his and the Appellant's witness statements. The Sponsor's evidence was that he and his family moved to Ireland in December 2015. He set up a company. He was also employed as a business consultant and earned an income from this. The family returned after a year because the Sponsor's wife was depressed, and they were not doing well financially. They had not expected the Appellant to join them in Ireland.

6. The Sponsor was cross-examined. He said that the Appellant visited his sister in the UK in September 2016 and then she came to Ireland to live with him permanently. When he was asked why after a few days she made an application to return to the UK, he stated that she applied in order to return with him and his family. She was not aware when she joined them in Ireland that the family had been thinking of moving back to the UK. He was asked why he did not tell her to remain with his sister in the UK and he said that there were issues with her staying there. There was

evidence from the Sponsor that his mother had been dependent on him before coming to Ireland and he was sending money to her in India.

7. The judge said at paragraph 16 that it was for the Appellant to show that she meets the condition and for the Respondent to show that the purpose of the residence in the EEA state was as a means for circumventing the Immigration Rules. The judge recorded that the total joint residence had been 58 days. The judge said he considered all the evidence (see paragraph 21) and he stated as follows:

> "22. In order to put the matter in context I have considered what the Rules are in relation to her joining him in the United Kingdom directly as opposed to through the European Union route.
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> 23. The requirements for leave to enter the United Kingdom as the parent of a person present and settled in the United Kingdom are contained in Paragraph 317 of the Immigration Rules. Because of her age the Appellant would have to show that she was living alone outside the United Kingdom in the most exceptional compassionate circumstances, is financially wholly or mainly dependent on the person she is joining i.e. her son and has no other close relatives in her own country to whom she could turn to for support. I am satisfied that I was initially mislead by the Appellant and her son as to the fact that there clearly are family members in India to whom she can turn for support and also clearly satisfied that she is not financially dependent on her son. The simple fact that he feels a commitment because he is the eldest is no basis for saying that she should be allowed to join him under the Immigration Rules in the United Kingdom and for that reason I am satisfied that she would not be able to do so were it not for the EEA Rules that she wishes to rely on.
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> 24. I do not accept that the 2014 judgment in **<u>O and B</u>** makes Regulation 9 obsolete. The facts in those cases are not similar to this case and, in any event, it does nor more than say that when a citizen has created or strengthened a family life with a third country national during genuine residence in the Member State other than that of which he is a national of the Rules <u>shall</u> apply.
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> 25. As a fact, I am satisfied that the British (her son) was residing in the EEA state (Ireland) as a self-employed person. The evidence shows that including the business accounts, tenancy agreement, witness statements, school enrolment and letting of his own property in the United Kingdom. The case of **<u>O and B</u>** does suggest that three months residence would be enough but clearly they stayed longer. I do not see any evidence that makes me conclude that <u>his</u> residence was not genuine.
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> 26. I am satisfied that the two of them have resided together in Ireland. I am satisfied that his residence was genuine but am <u>not</u> satisfied that hers was, which is also a requirement of the Rules.
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> 27. The Regulations make it clear that it is not just the British citizen who has to be genuine but also the family member, Regulation 9(2)(c) says so. I have concluded the factors and, in doing so, have considered the fact that, contrary to their evidence, the Appellant knew when she went to Ireland

that they were also intending to return. I do not accept that they would not have told her so.

28. Her joint residence was very short, it only lasted 19 days before she applied to enter the United Kingdom and, having had that refused, she returned to the United Kingdom 39 days later. She had not integrated at all in Ireland. I am given to understand that she doesn't speak English and she actually wasn't there long enough to integrate at all. Finally, it clearly was her first lawful residence in an EU country with her son. I understand perfectly well that the sponsor treats it as his duty to look after his mother but the reality is that she was perfectly able to look after herself back in India and this is an opportunistic application rather than any attempt to circumvent the Rules from the outset. I am satisfied that her residence in the EEA state was <u>not</u> genuine and that she tried to take advantage of the circumstances."

8. At the hearing before me I made sure that I had all relevant evidence. I was given a copy of the Appellant's bundle before the First-tier Tribunal which included the Appellant and the Sponsor's witness statements. I had before me an Authority's bundle and a letter from the Appellant's solicitors of 19 November 2018 enclosing the skeleton argument of 19 November 2018. I had the Appellant's bundle prepared for the hearing before me. There was an Appellant's supplementary bundle containing evidence which the Appellant sought to adduce pursuant to Rule 15 of the 2008 Procedure Rules. I indicated that it would only be necessary for me to consider that application if the decision was to be remade. There was no reason advanced by Mr Metzer why the evidence in the supplementary bundle should be taken into account when determining whether the judge erred in law and indeed he did not seek to persuade me otherwise. Mr Metzer made lengthy submissions responding to my questions from time to time. He also gave me a copy of a document he had prepared concerning post error of law considerations.

<u>The grounds of appeal</u>

9. The grounds of appeal are threefold and expanded upon in the skeleton argument. The first ground is that the judge failed to properly apply the relevant law. The judge did not apply anxious scrutiny and in support of this the grounds rely on paragraph 23 of the decision and the judge's consideration of paragraph 317 of the Immigration Rules. Again, at paragraph 22, the judge made reference to the Rules when he stated, "In order to put the matter in context I have considered what the Rules are in relation to her joining him in the United Kingdom directly as opposed to through the European Union route".

10. On 9 July 2012 paragraph 317 was replaced by E-ECDR (Appendix FM). Paragraph 317 was obsolete. In any event, it is unclear why the judge wished to place the Appellant's application within the context of the Immigration Rules because it was an application under European Union law. The judge's findings at paragraph 23 relating to financial dependency supports the argument that he failed to make any finding of fact about dependency, despite the Sponsor's evidence (recorded at paragraph 7) that he had been sending the Appellant money and the evidence that was submitted to support dependency. In any event, it was not a matter that was

raised by the Respondent in the Reasons for Refusal Letter. No proper consideration was given to the matter by the judge. There was a lack of proper scrutiny to the Appellant's case. The Respondent erroneously made reference to the Immigration Rules and Appendix FM in the Reasons for Refusal Letter.

11. The second ground asserts that the judge failed to properly consider the decision of O and B v The Netherlands C-456/12 which essentially rewrote the principals set out in Surinder Singh C-370/90. My attention was drawn to the conclusion reached by the court as follows:

> "Article 21(1) TFEU must be interpreted as meaning that where a Union citizen has created or strengthened a family life with a third-country national during genuine residence, 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/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Members States amending Regulation (EEC) No 01612/68 and repealing Directives 64/221/EEC, 68/360 EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC, in a Member State other than that of which he is a national, the provisions of that Directive apply by analogy where that Union citizen returns, with the family member in question, to his Member State of origin. Therefore, the conditions for granting a derived right of residence to a third-country national who is a family member of that Union citizen, in the latter's Member State of origin, should not, in principle be more strict than those provided for by that directive for the grant of a derived right of residence to a third-country national who is a family member of a Union citizen who 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."

12. It is submitted that the factors contained in Regulation 9(3) were not mentioned in O and B or Surinder Singh and therefore Regulation 9 was not lawful. The submission before the First-tier Judge made by the Appellant's Counsel was not that regulation was obsolete in contrast to what is said at paragraph 24 by the judge. The grounds rely on the case of Coman (C-673/16) where the CJEU further endorsed that during the genuine residence of a union citizen, where family life is created or strengthened in that Member State, then it required the continuance of this position by virtue of the grant of residence derived from the union citizen (see paragraph 23 – 25). The grounds refer to the decision of the CJEU in Banger (C- 89/17) which reaffirmed that:

> "21. It is the court's established case law that the purpose of Directive 2004/38 is to facilitate the exercise of the primary and individual right to move and reside freely within the territory of the Member States, which is conferred directly on citizens of the Union by Article 21(1)(TFEU), and that one of the objectives of that Directive is to strengthen that right (judgments of 12March 2014, O. and B., C-456/12, EU: C:2014:135, paragraph 35, and of 5 June 2018, Coman and others, C-673/16, EU: C:2018:385, paragraph 18)."

13. It is asserted that the court held that more stringent conditions must not be attached by Member States for entry of a third country national with a British citizen to the UK than are provided for by the Directive.

14. The skeleton argument refers to paragraph 24 of the case of Rahman and others C-83/11 where the CJEU stated:-

> "24. In the light both of the absence of more specific rules in Directive 2004/38 and of the use of the words 'in accordance with its national legislation' in Article 3(2) of the directive, each Member State has a wide discretion as regards the selection of the factors to be taken into account. None the less, the host Member State must ensure that its legislation contains criteria which are consistent with the normal meaning of the term 'facilitate' and of the words relating to dependence used in Article 3(2), and which do not deprive that provision of its effectiveness."

15. It is asserted that the judge's approach specifically at paragraphs 24 and 28 was unduly restrictive and failed to consider the relevant applicable law. The grounds refer to the Home Office Guidance from the European Operational Policy Team dated 1 January 2014 which highlights at paragraph 14 the following:

> "14. It should be noted that the factors set out in Regulation 9(3) are not determinative. The question as to whether the British citizen would be deterred from exercising their free movement rights were their spouse/civil partner refused, must be determined having regard to all relevant factors."

16. It is asserted in ground 3 that the 2016 Regulations do not require any consideration of the application of the Immigration Rules and if the judge's reference to them was to demonstrate that the Appellant's residence with her son was not genuine then such an approach would demonstrate a material error of law. In relation to the issue of genuine residence, the judge, at paragraph 27, did not accept that the Appellant did not know that her son and family intended to return to the UK when she travelled to be with them in Ireland. It is asserted that the judge did not have regard to the Appellant's fragile state of mind evidenced by the psychiatric report and other medical evidence within the Appellant's bundle before making a finding of fact as to whether she had been informed of the family decision to relocate.

17. The medical evidence highlights that the Appellant was suffering from a major depressive disorder. There was a report from Dr Adrian Window a consultant psychiatrist of 20 March 2017 who had diagnosed her with a moderate depressive episode under the ICD.10 classification. He considered two previous medical reports from India which confirmed the Appellant's fragile state of mind. The family's decision to relocate to the UK and the Appellant's knowledge of that decision was wholly irrelevant. The judge was satisfied that the Sponsor had demonstrated that he had transferred the centre of his life to Ireland and that he and his mother had resided together in Ireland for nineteen days before the application was made to return to the UK and 58 days in total before they returned to the UK on 20 February 2018. Despite the short period of residence the judge did not properly consider the

guidance in O and B. The Appellant's move to Ireland was to strengthen or create family life with her son. It is not a requirement of the Regulations for the Appellant to be able to look after herself in India and this was not a material consideration (see paragraph 28 of the decision). This highlighted the judge's lack of understanding of the relevant considerations. The judge in finding it to be an opportunist application failed to consider the factual matters set out in the application. In the Appellant and her son's statement and the series of events that led to the deterioration of her mental health after retirement and the decision that the Appellant should join the family in Ireland. In any event, were it an opportunist application the case of Akrich C-109/01 is relied on and the conclusions of the ECJ in relation to parties to a genuine marriage installing themselves in another Member State to obtain a benefit conferred by EC law which was held not to be relevant to an assessment of their legal situation: -

> "3. Where the marriage between a national of a Member State and a national of a non-Member State is genuine, the fact that the spouses installed themselves in another Member State in order, on their return to the Member State of which the former is a national, to obtain the benefit of rights conferred by community law is not relevant to an assessment of their legal situation by the competent authorities of the latter State."

18. In respect of ground 3 again the case of Banger is relied upon which makes clear that there should be an extensive examination of the Appellant's personal circumstances and reference is made to paragraphs 38 to 40 of that decision.

19. Mr Walker made submissions. He relied on paragraph 21 of the decision to support his contention that the judge considered all the evidence. He referred to a Home Office Presenting Officer's minute from the hearing but conceded that this had not been shown to the Appellant prior to the hearing. There was no Rule 24 response or counter claim.

20. The judge set out the Sponsor's and Appellant's evidence. My attention was drawn to various parts of that evidence by Mr Metzer. The Appellant's evidence in her witness statement reads as follows:

> "5. I confirm that my initial letter of application sets out in details my level of financial and physical dependency on my sponsor, I will not repeat the information here. I confirm my dependency has increased and is ongoing. The stress of the uncertainty of my immigration status had contributed to a decline in my mental health.
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> …
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> 9. The next paragraph (last on page 1) states that because of the time I moved to Ireland to join my son suggests that I had never planned to move the 'centre of my life' to Ireland. I will say in response that I moved to Ireland to join my son, so I could be cared for and supported by him. My belief was at the time I moved was that we would be residing in Ireland. The decision to relocate back to the UK was taken by my son following how unhappy and depressed his wife became. I do not believe he could cope

with caring for me and his wife and still operate his business. The centre of my life is with my son."

21. I was referred to parts of the Sponsor's witness statement, specifically the following:

"10. At the time we moved to Ireland, my mother was residing in India, and I would send her money each month towards her living expenses, without the additional assistance she would have struggled. She did not join me until 24 December 2016 quite some time after I moved. If it was my intention to 'circumvent' the rules I would have arranged for her to join me sooner and would not have resided in Ireland for as long as I did, or at very least have remained in Ireland for a longer period after she joined me.

11. I have previously explained why the decision to relocate was made; I could not leave my mother in the condition she was in. Her mental health had deteriorated, and she almost burnt down her house while she was still in it. I had calls from her neighbours raising concerns. I believe that her loss of family caused her to have a breakdown. As the eldest son, it is my responsibility to care for my mother, and I could not do so from overseas. So, I made the decision to have her live with me and my family, I thought that being surrounded by others who could keep an eye on her might actually help her mental health improve. Although that has not actually happened, I at least know she is being cared for on a daily basis in my home.

12. The UKVI has taken the view that my move to Ireland was not 'genuine based on the fact that when I relocated to Ireland I did not sell my house in the UK. Property in the UK is an investment, many people own property in the UK but it is not their main residence. I earned money from renting it out. UKVI have also taken the view that by renting it out through an Estate Agent, with a standard 12-month Tenancy Agreement was indicative of my intention to return. I disagree, a 12-month tenancy Agreement is standard, also the tenant who rented the property did not want to commit to more than one year.'

…

18. I woke up one morning and realised that I had a choice to make. It was clear that my wife did not want to remain in Ireland, and I could not lose her and my son. I had to think about what was best for the whole family, as the eldest male that is my job. I knew that if I did not make this decision the outcome could have been devastating for my family unit as a whole. I love my wife and son, and I have a duty to my mother. I made the decision to move back to the UK and try to make a go of the business I had left behind. When Arjun had been researching the setting up of legal advice service in Ireland he discovered that we could set up an ABS law firm in the UK, we could not do it in Ireland but if it worked well in the UK and we got to a position where we could expand into Ireland. Although with Brexit looming nothing is certain.

19. We started the paperwork for the ABS and incorporated A & Y Law Limited in June 2017 which is now trading as AY & J Solicitors. Building this business is the focus of my brother and me now."

22. There was evidence of the Appellant's medical state before the judge. I was referred to the medical evidence. There was a psychiatric report by consultant psychiatrist Adrian Winbow of 20 March 2007. He examined the Appellant on 16 March 2017. He states that the Appellant initially moved to England in September 2016 for a short period from India and then she moved to Ireland to be with her relatives in December 2016. He describes the suicide of the Appellant's husband in 1997 and he considered the medical evidence that he had from the Appellant's doctors in India and that she has been diagnosed as having a moderate depressive episode which under the ICD.10 classification is classified as F32.1 and that she was now on antidepressants. She retired in August 2016. She was worried that no-one would look after her in India on her retirement. There was a statement from Dr Rathod of 30 August 2016 which stated that she lived alone and that she has had in in the past intermittent hypertension. She saw a general practitioner in Dublin on 18 January 2017 and was prescribed antidepressants. Dr Winbow concludes that at present she was lethargic and eating excessively due to the antidepressants. She is disinterested and apathetic. In his opinion she has a moderate depressive episode which started originally after her husband's death and which was made worse by her retirement in August 2016. She is on antidepressants and needs regular support from her relatives. She is a danger to herself should she live alone.

Conclusions

23. The grounds overlap I shall initially engage with the O and B point. The Secretary of State considered that the Appellant failed to satisfy the requirements of Regulation 9 of the 2016 Regulations. They read 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 a British citizen ("BC") as though the BC were an EEA national.

(2) The conditions are that—

(a) BC—

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

(ii) has acquired the right of permanent residence in an EEA State;

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

(5) Where these Regulations apply to F, BC is to be treated as holding a valid passport issued by an EEA State for the purposes of the application of these Regulations to F.

(6) In paragraph (2)(a)(ii), BC is only to be treated as having acquired the right of permanent residence in the EEA State if such residence would have led to the acquisition of that right under regulation 15, had it taken place in the United Kingdom.

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

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

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

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

24. The Grand Chamber's decision in <u>O and B</u>, unlike Regulation 9, makes no reference to any "centre of life" test, the nature and quality of accommodation, the question of principal residence and integration. It may be arguable that Regulation 9 is more restrictive than the Directive to which it is intended to give force and certainly more restrictive than the judgment of the court in <u>O and B</u>. However, both Regulation 9

and O and B are concerned with the genuineness of the residence in the host Member State. In O and B, the court stated at paragraph 54:

> "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 the 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 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."

25. The judge considered whether the residence was genuine, and this is a requirement as made clear in O and B; notwithstanding, the specific factors in regulation 9. Any challenge to the lawfulness of the regulations, an issue not pursued by Mr Metzer at the hearing before me, is not a matter on which this Tribunal has jurisdiction and is not, in any event, material. In addition, any interpretation issue is not material. The judge was entitled to require residence to be genuine. The approach is consistent with O and B. The decision did not turn on the centre of life test.

26. The Respondent's decision to refuse the application is lacking in detail. It is stated that the Appellant did not provide adequate evidence to support her application to be a family member of a British citizen exercising treaty rights in another EEA state. I reasonably assume that the reason why the Appellant submitted a significant amount of evidence relating to dependency was to address this. It is unarguable that the findings relating to dependency were irrelevant; on the contrary, it was incumbent on the judge to make findings to order to determine whether she was in fact a family member. It is unarguable that there was any unfairness in the judge applying his mind to this issue. The judge determined dependency and concluded that the Appellant was not financially dependent on the Sponsor. I am not satisfied he applied the applicable test in Case C-1/05 Yunying Jia v Migrationsverket. However, this was not an issue raised at by the Appellant. In any event, it is not material because even if the Appellant is a family member, the appeal could not succeed without the Appellant establishing that she was genuinely residence.

27. The Sponsor's oral evidence as recorded by the judge was that the Appellant was not aware of the intention of the family to return to the UK. The Appellant's evidence was that she did not know they were to return and that her belief was, at the time she moved to the Republic of Ireland, that she would be residing there. However, the judge did not believe this. Mr Metzer argued at the hearing before me that the Appellant's knowledge was not specifically canvassed at the hearing and he suggested that there had been unfairness caused by the judge making findings about

it. This is a submission entirely without substance. It was a matter that was raised at the hearing. If the Appellant's legal team failed to properly engage with the issue, it would show a lack of judgement because it is very clear from the decision of the Respondent that genuine residency was an issue. Whilst not determinative, the knowledge and intentions of the Sponsor and the Appellant were factors that the judge was entitled to take into account when determining whether she was genuinely resident. Fairness in any event, is not an issue raised in the grounds.

28. Mr Metzer argued that the evidence that the Appellant was not aware of the intention of the Sponsor was not challenged by the Respondent; the implication being that the judge was not entitled to reject this evidence. I disagree. The core of the Respondent's case is that the Appellant was not genuinely resident and credibility was an issue. Because of the unusual circumstances of the case, it is reasonable to expect the Appellant to explain how it came to be that she was not aware of the Sponsor's intentions bearing in mind that a matter of days after her arrival she returned to the UK. There was no evidence to explain this.

29. In the absence of evidence explaining why the Sponsor had not told the Appellant, the judge was entitled to find this was not what happened and therefore that the Appellant was aware of the Sponsor's intention to return to the UK. Mr Metzer argued before me that the Appellant's state of mind was such that either the Sponsor decided not to tell her because of her mental health or that he told her, but she was not capable of understanding. It is not clear on which basis the case is now advanced. However, it was not advanced on either basis before the FTT. The case was advanced on the basis that the Sponsor did not tell the Appellant. No reason was given to account for this. Whilst the medical evidence could potentially support the Sponsor having decided not to tell the Appellant (because of her state of mind), this was not how the case was advanced. Moreover, the medical evidence does not go anywhere near to establishing that the Appellant was not capable of understanding what she had been told by her son. The grounds rely on Banger to argue that the judge did not carry out an extensive examination of the Appellant's circumstances which required according to Mr Metzer consideration of capacity in the context of the Appellant's mental health. I wholly reject that following Banger the FTT, faced with a diagnosis of depression relating to a represented Appellant, must engage in the type of speculation suggested by Mr Metzer. Furthermore the evidence does not nearly establish incapacity. In any event, I am not persuaded that either scenario as advanced by Mr Metzer, if accepted by the FTT support genuine residence in the circumstances in this case. If the Appellant intended to reside in the Republic of Ireland and or did know that her son was to return, there was still an absence of evidence capable of establishing genuine residence.

30. The judge considered matters under the Immigration Rules. This was not a material consideration. He may have been misled by the decision letter. He also considered matters such as the Appellant's language skills when considering genuine residence. I am not persuaded that this was a wholly immaterial consideration when assessing genuine residence. However, I am satisfied that he took into account immaterial

matters and made findings about matters that were not relevant. I accept that he may have conflated the issues of dependency (a requirement to be met in order to be family member) and genuine residence. The Appellant has to establish dependency in order to be a family member. Overall, I am satisfied that any error in the assessment by the judge did not infect the ultimate conclusion in respect of whether the Appellant was a genuine resident. Whilst motive is not material to genuine residence as properly concluded by the judge, he was entitled to take into account intentions and knowledge in assessing whether residency was genuine. Credibility was a factor to consider. The judge was entitled to find that the Appellant and the Sponsor were not credible.

31. Notwithstanding that the Sponsor was found to be genuinely resident; the Appellant's stay in the Republic of Ireland was extremely brief. Whilst this is not determinative of the issue, it is undoubtedly of significance in this case. Regardless of her intentions or knowledge of what was going to happen shortly after she arrived, there is in this case a dearth of evidence that residence was genuine, effective or real. It is unarguable that she satisfied the centre of life test or that her residence was genuine in the O and B sense. Her claim that it was genuine was wholly unsupported. My attention was not drawn to any material evidence that the judge did not take into account which is capable of undermining his conclusion that the Appellant was not genuinely resident. The judge was entitled to conclude that she was a visitor. Moreover, the conclusion was inevitable on the evidence before the judge. From the brief duration of her stay in the Republic of Ireland, notwithstanding that the Appellant has medical problems, it cannot sensibly be argued that family life between the Appellant and the Sponsor was created or materially strengthened whilst she was there. She stayed with the Sponsor for just over 8 weeks.

32. It was not the intention of the court in O and B to extend union law to cover abuses. However, the judge did not find that there had been an abuse. The decision is not incompatible with Akrich C-109/01 because ultimately the judge concluded that the Appellant's residence was not genuine. Her motivation was not an issue material to that decision.

33. There is no error of law capable of having an impact on the outcome in this case. There is no need for me to interfere with the decision of the FTT to dismiss the Appellant's appeal under the 2016 Regulations.

34. No anonymity direction is made.

Signed *Joanna McWilliam* Date 20 December 2018

Upper Tribunal Judge McWilliam