Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Numbers: EA/09045/2017
EA/09342/2017
EA/09343/2017

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 30 May 2019	**On 23 August 2019**

Before

UPPER TRIBUNAL JUDGE ALLEN
UPPER TRIBUNAL JUDGE FINCH

Between

MARZIA [A] (FIRST APPELLANT)
[H A] (SECOND APPELLANT)
[M A] (THIRD APPELLANT)
(ANONYMITY DIRECTION NOT MADE)

Appellants

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellants: Mr A Slatter instructed by Sohaib Fatimi Solicitors
For the Respondent: Mr S Kotas, Senior Home Office Presenting Officer

DECISION AND REASONS

1. This appeal comes before us following the decision of Upper Tribunal Judge Finch on 31 January 2019 finding errors of law in and setting aside the decision of the First-tier Tribunal in this case.

2. The essential facts are as follows. The appellants are nationals of Afghanistan, a mother and two children, and the first appellant, the mother of the children is married to a British citizen, initially from Afghanistan. Her husband, the sponsor, arrived in the United Kingdom from Afghanistan on 8 May 2002 and married the first appellant on 6 May 2007. The second and third appellants, who were born respectively in 2008 and 2011, were both born in Afghanistan, and the first appellant and the sponsor have a third child who was born in the United Kingdom in February 2018 and who is a British citizen.

3. The sponsor went to Ireland to seek accommodation and employment and then travelled to Afghanistan to visit the appellants in June 2015. They were granted EEA residence cards as the dependants of an EEA national exercising treaty rights in another EEA state and arrived in Ireland on 28 June 2015.

4. The sponsor worked for a firm of building contractors between July 2015 and October 2016 and also had part-time work with another company between January 2016 and January 2017, as a translator for foreign exports. The family lived in the same area, albeit in three different rented houses, until April 2017. The second and third appellants enrolled in the local school and remained there until April 2017. The sponsor felt that he was unable to obtain a further job and decided the family needed to move to the United Kingdom so he could work, making use of the licence he had to drive a taxi in the United Kingdom.

5. The current applications for residence cards as direct dependants of the sponsor were made on 22 June 2017, and this is the appeal against the refusal of those applications, that being dated 2 November 2017.

6. The first appellant gave evidence. She was referred to her statements of 11 February 2019 and July 2018 and confirmed her signature on both of those and that they had been translated to her and everything there was true and accurate and she was happy to allow for them to form part of her evidence.

7. When cross-examined by Mr Kotas she said that she had known her husband before she married him. He was a cousin. He had first come to the United Kingdom in 2002, she thought, and then corrected this to 2000. He had come back to marry her when he got his status. She had never left Afghanistan before they left to go to Ireland. As to whether she spoke any English before she left for Ireland she said she had been attending an English language course for two months in Kabul and that was a year to a year and a half before she came to the United Kingdom. Her English was therefore not that good when she first moved to Ireland but she had enrolled into a further language programme to improve her English and that had been at the school her children attended, where there were language classes. The first address they had lived at in Ireland was at [~], then corrected to [#] Inver Geal. They had lived there for less than a year.

The tenancy agreement had been for a year but there was flooding so they had to move before the end of the tenancy. The flooding was very bad and many people left their properties.

8. They had then moved to [~] Oaklands Manor for up to a year.

9. She was asked how they could then have lived thereafter at [~] Inver Geal, Boyle Road when they had only been in Ireland for two years. It was put to her that she had said that in December 2016 they had moved to number [~] so how could they have been in Oaklands Manor for a year. She said that that property was very run down and in a state of disrepair and it was leaking water from the roof so they had had to be moved to another property.

10. She had not worked when in Ireland. She was asked whether she had made friends there and said she made friends with some Bengalis but nobody from the Afghan community. She was asked where the Bengali people were living and she said that the property at Oaklands Manor was found for them by one of her Bengali friends, and they lived in that area. She had met them at the school where she attended English courses. She had attended the English courses once a week for approximately two years. She had become ill towards the end of the programme. She was asked what the school's name was and said it was Mary's school and it was difficult to spell and she did not have the exact address. It was a twenty minutes' walk to the school from their first address.

11. The second appellant, her older son, had started school when the next term began after they arrived in Ireland as they had arrived during the school holidays. She could not recall what month it was. They had arrived in Ireland on 22 June 2015.

12. She was asked how many months after they arrived had he started school and she said the school was off for three months and they had enrolled the children and did all the paperwork to start the next term. He had been in school for two years. While they were there he had attended school. His first year teacher was Ms [K]. She could not name all his second year teachers. She had gone to parents' evenings for her son, with her husband. She was asked who spoke to the teachers if she had problems with English. At the start she had said her husband did and if he could not as he was working then her Bengali friend helped. This friend's children were at the same school. Her son was in the same class as the appellant's daughter.

13. She was asked how they chose the school and said her husband had made enquiries with his friends and they recommended this as being the best in the area. It was put to her that her husband had not been to Ireland before he decided to move there and she said yes he had before they moved there, with his friends. She did not know, and did not remember when he first went to Ireland.

14. She was asked who her daughter's first year teacher was and said she thought it was Mrs Kepi or something and was not sure. Her daughter had enrolled in the school at the same time as her son had, she being 4 at that time.

15. She was asked how she had spent her time in Ireland for two years and said that she had done the school run and when her husband was at work she took the children out with her friends when school was out. She and her close Bengali friend visited each other's homes. She had had three friends, the Bengali lady and two Punjabi ladies. She could recall their names.

16. She was asked whether they had visited anywhere else apart from where they were living and she said her husband would take the children on visits to different places, parks and out with their Bengali friends. She was asked whether she had ever left the town while in Ireland and said she had not gone outside the city. It was two hours' drive from Dublin and they went there occasionally for main shopping. As to whether they had had any friends or family in Ireland before going there she said her father-in-law's friends still lived in Dublin. She was asked whether she had never thought to join her husband in the United Kingdom before they went to Ireland and she said that it had never been their decision to leave Afghanistan. She was asked why her husband had not got a job in Dublin when he lost his job and said it was because of the distance involved as it was a two hours' drive. She was asked why the family had not moved to Dublin and said it was because of the cost of properties and of living and it was cheaper and better where they were.

17. When they came to the United Kingdom they had moved into the address where they were still living. She was asked whether they had always lived in London since coming to the United Kingdom and said they tried to move but because of her visa issues they were overcrowded where they were.

18. She was asked whether it was true that from when she married her husband until they decided to go to Ireland they had not discussed living together and said no, when the children were grown up enough her husband had decided and also there was the security risk and he decided it was better for them to leave Afghanistan. It was put to her that it was surprising they would not discuss how they would live together and she said they were living in a close-knit family network. His friends had told him about things that could happen and it was done for the sake of the family and the children.

19. She was asked whether when her husband was working in the United Kingdom before they decided to go to Ireland they had discussed how they could live in the United Kingdom, and she said no. The decision was made very quickly and it was not planned or not long planned. In Afghanistan women got married and lived with their husband's families.

20. She was asked why the decision was made quickly and said that in 2014 her husband told her he was thinking of leaving Afghanistan and his friends told him about the possibility of a move to Ireland.

21. It was put to her that they had only gone to Ireland as they knew they could not meet the Immigration Rules to come to the United Kingdom and she said no, that was not true.

22. There was no re-examination.

23. The sponsor, Mr [NA], gave evidence. He confirmed that the contents of his witness statements of 11 February 2019 and 23 July 2018 were true and he was happy to rely on them as part of his evidence.

24. He was asked when he came back to the United Kingdom from Ireland and said he came first in 2017 in February, and his wife and the children in April. He agreed that he had said in the first statement that they arrived in Ireland on 28 June 2015 as a family and that they had all arrived together. He had gone to Afghanistan and brought them with him to Ireland. He had been to Ireland previously, in 2015. He wanted to find out where the school was from where they would live and he had been there for nearly a week. He did not remember in what month in 2015 he had gone to Ireland.

25. When cross-examined by Mr Kotas the witness said the first address they stayed at in Ireland was at Inver Geal, number [~]. There was an issue with flooding so they had moved. They had moved to [~] Oaklands Manor. They were at Inver Geal for six to nine months. He thought they had moved after Christmas 2015. They were at Oaklands Manor for about six months. There was a problem with water from the ceiling so they had moved to the last address but he did not remember when.

26. It was put to him that the dates given in the witness statement did not tally with one year in each of the first two addresses.

27. He was asked about the school's name and said it was Kilmore or something like that. It was the same school for both and it was Scoil Mair or something like that.

28. He had gone to parents' meetings. He referred to Ms [K] as the teacher. His wife had looked after the children.

29. He was asked whether they had made any friends and he said some Bengali people and they were neighbours and it was not like their home, the society there. He had not engaged in any sport or any charitable work or clubs.

30. He was asked if his wife had done any vocational courses and said no, she had done a once a week course in English and that was not far from the house, where the school was, opposite there. She had done it on and off.

As regards family visits to other towns they had been to Sligo and a couple of other places whose names he did not recall, and also Dublin. He was asked whether it was true to say that there was no intention to bring his wife and family to the United Kingdom in 2007 when they married and that they were going to Ireland and he said no. When asked why not, he said because of his circumstances and his illness he was not ready for that and then after a while. He had had a back problem. He was asked what circumstances had meant that he did not want to bring them to the United Kingdom and he said he had a back problem and financial issues as well. It was the illness and the financial issues. He was asked whether he was not able to work and said yes, part-time but not full-time. He had worked in the United Kingdom at a car rental company doing general work, sorting out the paperwork, doing desk work. He had lost that job for a period of time. He had been living in London.

31. He was asked whether he had decided to go to Ireland as it would be easier to find work and said he had heard the education was really good and it was also to get a job. The children had not been to Ireland. He had spoken to friends about this and researched about the school and the distance from work and someone told him it was a nice area and the school. He was asked why he had thought it was important to look for schools in Ireland and said he had gone there for a few days and had looked only at that town. He was asked whether he had looked up work before he went to look at schools and said of course. The school had been closed but he saw the site and spoke to someone. Refurbishing was going on. He thought it was a teacher he had spoken to, about the school. The children started school in the September.

32. He was asked whether when he lost his job in January 2017 he had looked for other work and said yes, he had found a job in Dublin but it was too far from home. It was put to him that he could have moved the family and he said rents there were really expensive. He was asked whether London was cheaper than Dublin and he said he was working full-time, there were not enough jobs in Dublin. He was asked whether he could not find a job in Ireland and said people were sitting at home doing nothing.

33. He was not still in contact with anyone in Ireland. He had no relatives there and nor did his wife. They had a friend in Dublin. They had not been back to Ireland since coming to the United Kingdom. His wife and the children were not allowed to go.

34. It was put to him that the real reason for going to Ireland was that they could not meet the requirements of the Immigration Rules and he said how could you prove that that was his aim. It was not his aim.

35. On re-examination he was asked how long they had intended to stay in Ireland when they went there and he said as long as he could. There was no plan to go back and it was for the rest of their lives. They had come

back to the United Kingdom as he could not find a job. The city was far away and he needed transportation and it was expensive to live in Dublin.

36. He said that his children were in school, there were problems with the landlord and because of his wife's visa no-one did anything and that it was a problem for the children, they had nowhere to go and his wife wanted to study in the United Kingdom.

37. In his submissions Mr Kotas relied on and developed the points made in his skeleton argument. The evidence was that the sponsor had no intention of bringing his family to the United Kingdom after he married his wife in 2007. The court had been told there had been no discussion about this. There was reference to his circumstances, health and financial, but he had been working. It was rather opaque, in that even if that were the case, the expectation would be to unite the family. It would be credible if there had been a discussion but he had said there had been none and it should be questioned why they had not considered how they could live together as a family and this was a serious point of credibility. The sponsor's evidence was that it was quite a quick decision and that lacked credibility. His reasons for moving to Ireland were that there were better work prospects, but he had been London, and it was fanciful to consider that he would be in a better position in rural Ireland. The appellant had never left Afghanistan and had little English and there was no previous connection to Ireland and no family there and they had never visited. The sponsor expressed a concern to get the best education for the children but his evidence was vague. He had visited the school when it was closed and spoke to a person about enrolment. There was no credible evidence about efforts to find out about the school or any research. A friend of a friend had spoken to him and there had been a brief visit to Ireland. There was nothing organic about the decision to move to Ireland.

38. As regards Regulation 9(4), motive was relevant to whether residence was genuine. It was necessary to consider that rather than looking at the Regulation disjunctively. AA [2017] ScotCS CSIH 38 was helpful. Also, his wife had done English courses but they had joined no societies or clubs and had made a few friends and the sponsor had not been back to Ireland and that all suggested a move solely to avoid immigration control, and the minimum income Regulations in particular. There was a lack of credibility in the lack of discussion as to where they could be together and as regards the quality of life in Ireland. The sponsor had to work and the children had to go to school but it should be questioned whether it was genuine in the sense of wanting to establish themselves there.

39. Reference was also made to the decision in O & B [2014] C C-456/12 which was more recent than Akrich [2003] ECR I-9607. It should be questioned whether family life had been created or strengthened. Certainly, the former was not the case and nor was the latter. It could not be assumed. There was no more than mere presence. That was a relevant factor.

40. Further or in the alternative, if as a matter of fact the motivation was to circumvent the Immigration Rules it should be questioned whether that was an abuse of treaty rights. What was said in Sexton was inconsistent with paragraph 37 in Akrich. Akrich was not considering marriages of convenience and did not explore in great depth abuse of treaty rights. It could not be read into paragraph 57 that it was only marriages of convenience that could be abuses of treaty rights. Paragraphs 9 and 10 of the skeleton were of relevance to this. The correct jurisprudence was to be found in Emsland-Starke [2000] ECR I-11569 setting out the test for a finding of abuse of rights. The facts of this case met that test. The real motive was circumvention of the minimum income requirements. The decision of the Supreme Court in Sadovska [2017] UKSC 54 was not particularly relied on, but it was a marriage of convenience case and it was status that was sought not pecuniary advantage. There were similarities here as status was the issue. The test was satisfied and abuse of rights was made out.

41. If the Tribunal agreed, effectively the family had moved to Ireland purely to avoid the Immigration Rules in respect of third country nationals and that must be an abuse of treaty rights as that was the only motivation. If it was not the sole motivation, then as was argued in paragraph 12 of the skeleton, it was met on the facts of the case, as being the predominant purpose. There was no evidence of any other motive, for example family members in Ireland or job prospects being better there. It did not stand up to scrutiny. The sponsor could not get a job elsewhere in Ireland so he had returned to expensive London. It went to the heart of the case. There was a strong public policy argument. If Regulation 9(4) was incompatible with the jurisprudence there was a significant problem for the Secretary of State to control the entry of third country nationals. If motive were irrelevant, then any family could take residence in another state with no temporal minimum, and they could say it was a genuine exercise of treaty rights and the purpose was irrelevant as long as it was genuine residence. In effect, UK law could not be gazumped by EU law. It should be said that motivation was relevant to the question of genuineness and as a matter of principle when motivation was to evade immigration control it was capable of being an abuse of treaty rights.

42. In his submissions Mr Slatter argued that it was wrong to construe the case as one concerning credibility. There had not been an interview, yet abuse was invoked by the Secretary of State. Regulation 9 was not a faithful transition of EU law and was inconsistent with Akrich and Levin [1982] ECR 1035. It was unclear where the “centre of life” test had come from. The word “genuine” was included in Regulation 9(2)(c). Reference was made to part 3 of Mr Slatter’s skeleton argument and it was a question of derivative rather than autonomous rights as family members, and they were available when the citizen exercised his rights. The skeleton at paragraph 16 made the point that the purpose and justification of any such derived right of residence was based on the fact that refusal to allow such a right would 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, as set out in O and B (C-456/12). Genuine residence of the EU citizen was required as set out at paragraph 51 of O and B, to enable and create or strengthen family life. Paragraphs 52 and 53 of O and B were of relevance. Where Article 7(1)(a) was satisfied and it was not disputed that the sponsor was a worker and it was effective and genuine work, and also part of the exercise of his rights, that was all that was required as a matter of EU law and the family was then entitled to reside with him in the Member State. More strict conditions could not be imposed. Article 9(4) contrasted with what had been said in Akrich and also Levin. It was clear from Akrich at paragraph 55 that motives were of no account. Using EU law to obtain a benefit was not an abuse as set out at paragraph 61. Article 35 had been transposed by Regulation 26. The only example of abuse of rights cited at paragraph 57 of Akrich was with regard to marriages of convenience. The burden of proof was on the Secretary of State. There was no fair procedural process to inform the appellant pre-decision.

43. An analogy was drawn with Papajorgji, but there was no evidence and the burden had been put by the Secretary of State on the appellant to give an explanation for why he had moved to Ireland. There were safeguards in Article 35 and it was inconsistent to impose further conditions on the appellants to do more than require EU citizens to show they were a worker in their home state and it was a genuine marriage. There was therefore no marriage of convenience issue. As regards intention to obtain advantage, deceit as set out in Sadovska by both would have to be shown. It was necessary to ascertain the actual state of an individual's knowledge and a question of whether they had a genuinely held belief. There was nothing in the evidence to suggest dishonesty or deceit even if the motive of going to Ireland were relevant. Akrich was not consistent with the issue of abuse outside the context of marriages of convenience. It was a genuine exercise of EU rights. The appeal should be allowed.

44. We reserved our decision.

The Law

45. Paragraph 9 of the Immigration (European Economic Area) Regulations 2016 states as follows:-

> "9. Family members of British citizens
>
> (1) If the conditions in paragraph (2) are satisfied, these Regulations apply to a person who is the family member ('F') of a British citizen ('BC') as though the BC were an EEA national.
>
> (2) The conditions are that—
>
> (a) BC—

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

(ii) 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;

(d) F was a family member of BC during all or part of their joint residence in the EEA State; and

(e) genuine family life was created or strengthened during their joint residence in the EEA State.

(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."

Discussion

46. In his skeleton Mr Slatter helpfully set out relevant provisions demonstrating the legal basis for a derived right of residence. As a consequence of what is set out in Article 21 of the Treaty on the Function of the European Union (TFEU), citizenship of the Union confers a primary and individual right to move and reside freely within the Member States subject to the limitations and restrictions laid down in the Treaties and measures adopted for their implementation. Directive 2004/38 aims to facilitate the exercise of the primary and individual right to move and freely reside within the Member State which is conferred directly on Union citizens by the Treaty. This is established by authorities such as Surinder Singh and Eind. That means that if the national of a Member State has availed himself of the right to freedom of movement and returns to his state of origin his spouse must enjoy at least the same rights of entry and residence as had been granted to him under Union law if he chose to enter and reside in another Member State. The rights conferred by Directive 2004/38 are not autonomous rights of third country nationals of family members, but are derived rights acquired through their status as family members. The purpose and justification of such a derived right of residence is based on the fact that refusal to allow such a right would 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 (O and B [2014] EUECJ C-456/12). A derived right of residence seeks to remove the obstacle to leaving the Member State by guaranteeing that the citizen will be able to continue the family life created or strengthened in the host Member State.

47. It is established, for example in Carpenter [2002] EUECJ C-60/00, that the Member State may invoke reasons of public interest to justify a national measure which is likely to obstruct the exercise of a fundamental freedom only if that measure is compatible with the fundamental rights whose observance the court ensures. Exercise of the fundamental freedom of

movement could not be fully effective if the citizen were deterred from exercising it by obstacles raised in their country of origin to the entry and residence of their spouse.

48. Mr Kotas placed emphasis on the wording of the Regulations and in particular Regulation 9(4), but he emphasised that the Regulation needed to be read as a whole. He argued that the question of motive or intention with which Regulation 9(4) was concerned was required to be interpreted as relevant to the question of whether the move was in fact genuine. In this regard he placed emphasis on what had been said by the Inner House in AA [2017] ScotCS CSIH 38 where it is said, for example at paragraph 54, that in determining whether the conditions which must be set aside to obtain the benefit in question did genuinely exist, the intention of the individual would be one of several factors to be taken into account. He argued that the sole motivation for moving to Ireland in this case was to circumvent immigration control, and in particular the minimum income requirement.

49. Mr Kotas also referred to what was said by the Court of Justice in O and B [2014] EUECJ C-456/12 which emphasises the creation or strengthening of family life of a third country national and argued that neither had family life been created nor was there evidence of it having been strengthened in Ireland.

50. It is helpful to consider as a starting point the case of Levin [1982] ECR 1035 where the court said at paragraph 23:

> "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".

51. Subsequently in Akrich [2003] ECR I-9607, the court said at paragraph 61:

> "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".

It is clear, from paragraphs 46, 47 and 51 in particular in O & B that an obstacle to leaving the Member State of which the worker is a national is created by the refusal to confer, when that worker returns to his Member State of origin, a derived right of residence on his family members who are third-country nationals and who resided with him in the host Member State from which he is returning. Such an obstacle will arise only where the residence of the Union citizen in the host Member State has been sufficiently genuine so as to enable him to create or strengthen family life in that Member State. If (paragraph 54) no such derived right 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.

52. The references to residence being "genuine" in the decisions of the Court of Justice do not appear to carry with them a consideration of the motives behind that residence in the sense of being an abuse of rights. It seems rather to be a qualitative evaluation of the residence which is required to be carried out. Intentions are of relevance in the sense, for example, of addressing whether the parties were properly exercising Treaty rights or having a temporary period of residence where the main home was elsewhere or it was simply an extended holiday. The notion of genuineness is in our view to be interpreted as meaning real, substantive or effective. It does not carry with it a consideration of the motives of the persons involved. Regulation 9(4) has to be seen in the context of the guidance in the Court of Justice, in particular in cases such as Levin and Akrich. Motives are irrelevant, but residence may not be genuine in circumstances where there is no effective exercise of Community rights.

53. As regards the alternative argument put forward by Mr Kotas that Regulation 9(4) must be interpreted as going to the issue of abuse of treaty rights, we have noted what was said in Akrich at paragraph 57 that there would be an abuse if the facilities afforded by Community law in favour of migrant workers and their spouses were invoked in the context of marriages of convenience entered into in order to circumvent the provisions relating to entry and residence of nationals of non-Member States. It is also relevant to note paragraph 58 of O & B, where it was said that the scope of Union law cannot be extended to cover abuses. Proof of such an abuse requires, first, a combination of objective circumstances in which, despite formal observance of the conditions laid down by the European Union Rules, the purpose of those Rules has not been achieved, and secondly, a subjective element consisting in the intention to obtain an advantage from the European Union Rules by artificially creating the conditions laid down for obtaining it.

54. Mr Kotas quotes further from the decision in Hans Markus Kofoed [2007] ECR 1-5795 where it was said:

> "The application of Community legislation cannot be extended to cover abusive practices, that is to say, transactions carried out not in the context of normal commercial operations, but solely for the purpose of wrongfully obtaining advantages provided for by Community law ...".

55. Mr Kotas makes the further point that with regard to what was said by the Supreme Court in Sadovska [2017] UKSC 54, it was required to be the predominant purpose rather than the sole purpose.

56. If one applies this guidance to the facts in the instant appeal, it is in our view sufficiently clear that the period of residence of nearly two years in Ireland cannot be described as one which involved an abuse of treaty

rights. It is in our view difficult if not impossible to see how a period of residence of that duration cannot be said to have been genuine and effective. Nor do we consider that it cannot be said on the facts of the case to have been shown to be the case that the centre of the parties' lives moved to Ireland (noting that it is far from clear what is the origin in EU law of this concept), and that family life, albeit not created in Ireland, must inevitably have been strengthened there. It is difficult to see how a period of two years during which the children went to school, the husband pursued employment, and the wife looked after the home and the children and developed friendships can fail to be regarded as a situation where family life was strengthened.

57. Bringing these matters together, we do not consider that it has been shown that Regulation 9(4) operates so as to preclude the grant of a residence card in this case. Nor has it been shown that there has been an abuse of treaty rights. It has not been shown that the predominant purpose of the move to Ireland was to obtain wrongfully advantages provided for by Community law. Accordingly, we allow the appeal of the appellants against the decision of the Secretary of State.

58. No anonymity direction is made.

Signed Date 20 August 2019

Upper Tribunal Judge Allen