



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: EA/08843/2017

THE IMMIGRATION ACTS

Heard at Field House
On 10 December 2018

Determination Promulgated
On 10 January 2019

Before

UPPER TRIBUNAL JUDGE KEKIĆ

Between

FATIMA [S]
(ANONYMITY ORDER NOT MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms P Heidar, of Counsel, instructed by AA Immigration Lawyers
For the Respondent: Mr T Melvin, Senior Home Office Presenting Officer

DETERMINATION AND REASONS

1. This appeal comes before me after I set aside the decision of First-tier Tribunal Judge Nicholls who, on 25 May 2018, dismissed the appellant's appeal against the respondent's refusal to grant her a residence card as a family member under the EEA Regulations. For the reasons set out in my decision of 29 September 2018, I found that the judge's findings under reg. 9(4) were inadequately reasoned.

2. The appellant is an Afghan national born on 25 September 1991. Her spouse and sponsor (also her first cousin), born on 3 March 1994, whom she married in Afghanistan in August 2013, is a naturalised British citizen (since 2011). He arrived in the UK in 2007 and moved to Ireland in 2015, allegedly to exercise his treaty rights. On 2 May 2015, the appellant joined him there. The evidence as to what she travelled on is contradictory. It is claimed both that she travelled on a Schengen visa and on an EU permit. A son was born to them on 20 February 2016. They then returned to the UK in March 2016 and the appellant's subsequent application for a residence card, made on 15 February 2017, was refused on 26 July 2017 (served on 11 October 2017).

The Hearing

3. The appellant and the sponsor attended the hearing and I heard evidence from both. The sponsor gave evidence first. He spoke in English. He confirmed his address and adopted his witness statement. He stated that he first went to Ireland on 24 March 2015 because there were many Afghans there and he decided that he would form an immigration consultancy and work to help them to complete forms. He confirmed he was self employed and had started his business on 24 May 2016 (I assume he meant 2015). He stated that he had a business partner who also helped to complete forms that were downloaded from the internet and pertained to Irish immigration, National Insurance and registration with a doctor. When asked how he obtained his clients, he stated that he gave his cards out to an Asian community organisation. He did not need any qualifications to work in the business. It was registered with the local PCC office. He had to show them his office rental agreement and invoices. His wife joined him on 2 May 2015.
4. The sponsor stated that they left Ireland for the UK on 24 March 2016. This was because business was not profitable. It was taking too long for people to get their confirmation of leave through and he did not get paid enough. His wife had had a child and so there were more expenses to cover. They needed the help and support of his parents. For the first 6-7 months, the business had been good. It had taken about three weeks for the visas to come through but then from June or July 2016 there were delays of 6-7 months. It was pointed out to the sponsor that this was well after he had left Ireland. He then repeated what he had said, before stating he was not sure of the dates. He then said the business had done well for the first 4-5 months.
5. The sponsor stated that his wife had not applied to join him prior to her application to come to Ireland. They married on 12 August 2013. He had been studying at the time and had no work so could not call for her. His first job was in Ireland where he started working on 24 March 2015. He had completed his studies in 2014. When asked what he did after his studies, he said he had worked part time with his father in his garage. He had been looking for a job as a mechanic but had not found one.

6. The sponsor was then tendered for cross examination. He confirmed to Mr Melvin that he had studied car mechanics and had looked for work in car garages. He then decided to move to Ireland and open an immigration consultancy because he did not need any qualifications and there were a lot of Afghans entering Ireland and so a lot of scope for work. His partner in Limerick was Essan Hashemi. He was a friend of his father. He was an immigration consultant too but the appellant had no evidence of that. His appellant applied for a visa as soon as he got to Ireland. She did not wait for the business to establish itself because their culture did not allow them to be apart for long periods.
7. The sponsor said that he had no previous experience in immigration work but he did not need any as it was just a matter of filling out forms. He agreed there were other rival companies in Limerick and that others had qualifications. He stated that he had not opened a business bank account. He just had a personal account. He had provided evidence of three deposit slips to show money was paid into his account. He had no bank statements. Although he had submitted a letter from his accountant, he had no accounts to show. He had paid tax of €250 for a 6 month period but had no evidence of that.
8. The sponsor stated that he joined the Irish Asian Association in April 2015; he then changed this to August 2015. It was put to him that the letter from the organisation stated that membership commenced on 30 June 2016. He said that was a mistake. He did not get it corrected because he was here.
9. The sponsor said his son was born in Ireland in February 2016. They then returned to England in March 2016, shortly after the appellant obtained status in Ireland. He said they had decided to leave for financial reasons. He stated that if his business had been doing well, he would not have left. When asked why his parents could not have helped him out financially whilst he was in Ireland, he stated that they had their own business and he had more opportunities to work in that business here. When it was put to him that he could have done that in the first place, he replied his business partner in Ireland had let him down.
10. The sponsor was asked what activities he had participated in with the Irish Asian Association. He said anyone could join. They played football and talked to the community. He confirmed this was the organisation to whom he had handed out his card. He stated he had joined within a month of his arrival. He then said it was in fact 2-3 months later. He then said it was in August. He was asked how he had obtained his customers prior to August. He replied that business had been good then. The questions was repeated. He said he had handed out his card to friends and family and they contacted those they knew in Ireland. When asked how he could have given his Irish contact details to people before he left, he stated he had given them his 'WhatsApp' number. When asked why they should want to do business with someone who had no

experience, he replied it was because he had one successful client and so attracted others.

11. The sponsor said that he had utility bills to show that he had been in Ireland between March 2015 and February 2016. He did not know his business telephone number but said it must be on the invoices. His office was on the third floor of [~] Catherine Street. His first home address was [~] Alandale Orchard and five months later they moved to [~] Frederick House.
12. The sponsor was asked why he had continued to pay rent on the business premises after leaving in March 2016. He replied that this was because the agreement had been for a two-year period. Other than the business receipts showing rent for €350 a month between August and December 2016, he had no evidence as he had always paid cash. He was asked how did so after leaving Ireland and he replied he asked his friend to pay it but he had no evidence that he had reimbursed his friend. The sponsor was asked whether he had intended to trick the British authorities by moving to Ireland. He replied he had not and that he had intended to stay there forever. That completed cross examination.
13. In re-examination, the sponsor was asked what documents he had submitted when his wife applied for a residence permit following her arrival in Ireland. He stated that he had sent his business registration form, gas and electricity bills, evidence of his work and a doctor's form. He confirmed that he left Ireland by car and that he had not passed through any immigration control when leaving. That completed the examination.
14. I then put questions to the sponsor for clarification. The sponsor confirmed that the letter from Unique Accountants related to his business. I pointed out to him that they had the same business address as he did and he replied that they were based in the same building which also contained a mobile phone shop. The rent receipts were issued by the landlord. He did not know his name but they were on the receipts. He owned the mobile shop and the whole building. I brought his attention to the phrase 'Thank you for your business!', noting that was an unusual format and that it appeared both on the rental receipts and on his own invoices for work. I indicated that this suggested they were issued by the same individual or company but he denied this. He confirmed that he had arrived in Ireland on 24 March 2015. He said that the family friend he went to work with had been a taxi driver previously. The sponsor stated that he lived with his sister, Sharifa, and a cousin, Taimoor. They remained in Ireland.
15. The sponsor stated that his wife had continued to live with her parents in Kabul after the marriage and until she joined him. He stated that his father and brother had come once to visit them before the birth of their child. His father still had the garage business and had one employee. The sponsor stated that his monthly income in Ireland varied between €300 and €700 a month. His expenses were just under €500 a month. When there was a shortfall in his earnings, he made up the difference with €2000 in savings he had accumulated

when he worked with his father and had taken to Ireland in cash. The sponsor stated that he now had a garage of his own where he did diagnostic work. His father had given it to him as a gift. Following his marriage, he did not make any enquiries about his wife joining him in the UK because he had been a student at the time. He said he came to the UK in November 2007 and had known his wife since they were young. Those were my questions.

16. Mr Melvin then put questions to the sponsor arising from mine. He was asked why he had no evidence from his cousin or his sister about his business. He had no answer. He was asked whether all his business was conducted in cash and he replied that he had some savings.
17. In response to Ms Heidar's questions, the sponsor stated he paid some bills by bank transfer and others by cash. He then said that the majority of bills were paid by cash and the gas bill was paid by bank transfer.
18. The sponsor was asked to explain how the tenancy agreement for his accommodation in the UK came to be signed and dated by him prior to his return. He answered that there must have been a mistake in the date. It should have been dated two weeks earlier. That completed the sponsor's oral evidence.
19. I then heard evidence from the appellant through an interpreter. Although the appellant stated she spoke Pushtu and a Farsi/Dari interpreter had been booked, she also spoke Dari and no concerns were raised with comprehension during or at the conclusion of her evidence.
20. The appellant confirmed her address and adopted her witness statement. She stated that she arrived in Ireland on 2 May 2015 to join her husband. He was working in an immigration office. She was a housewife and as she could not speak English and was in a strange country, she was afraid to go out on her own. She married her husband on 12 August 2013 and although he wanted her to join him in the UK, no application had been made because he had been studying.
21. In cross-examination she confirmed that she left Ireland on 8 March 2016. This was because her husband's work was not doing well, they had a child and they needed help from his parents. She confirmed that she had lived with her parents in Afghanistan prior to joining her husband. She travelled to Abu Dhabi to apply for the visa in the March before her arrival here.
22. The appellant was asked whether her husband had arranged for her to join him in Ireland in order to avoid UK immigration control. She replied that he had just told her she could join him there and had not said anything else. She confirmed that she had tried to study English at home after her marriage. She was asked whom she lived with in Ireland and she replied they lived with members of the family. She specified this was a cousin called Sharifa and her husband. Both of them were her cousins. She then clarified that she and the sponsor were first cousins as their fathers were brothers and so Sharifa and her

husband were related to both of them. They worked in the same office as the sponsor. She was not sure of the name of the company but thought it was A H or A S Immigration. She stated that they split the rent of €700 per month for their home and that her husband paid €350 for his office rent. She had been to the office once and she thought it was on the third floor. She did not notice whether there were any other offices in the building because she was in a hurry.

23. The appellant could not recall when they had joined the Irish Asian organisation. She thought it was a few months after her arrival. She confirmed that they had attended some functions arranged by the organisation for New Year and for Eid. She said she sometimes did the weekly shopping alone and sometimes with her husband. She could not remember what they spent on their food every week. She did not know whether her husband earned any other income apart from the earnings through his immigration work but he did not have any other job. She did not ask him about money matters. She did not know if he had savings. She stated that eventually they met some other Afghans in the park and made friends. At first they remained in touch but gradually they lost contact with each other. She stated that her husband decided they would return to the UK after their child was born and when his business began to deteriorate. She could not remember when the business problems began.
24. In response to my questions, the appellant stated that she prepared her witness statement with the help of her solicitors. They asked questions and she answered. She confirmed that she understood all of it. As the statement made reference to the 'Surinder Singh principles', I asked what she understood by that. After that paragraph of her statement was read to her, she said that she had been given a card by the Irish authorities. I asked her to explain how she was fully integrated into the community as claimed in the statement. She replied that she had lived there for 11 months. She stated that she visited the park, saw friends and attended English classes. Her husband helped people to fill out forms. She confirmed that she had travelled back to England with her husband on 8 March 2016. I told her that her husband's evidence was that they had returned on 24 March 2016 but she insisted it had been on 8 March. They went to live with their in-laws for over a month before moving to their current accommodation. There were no questions arising from mine and that completed the oral evidence.
25. I then heard submissions from the parties. Mr Melvin relied on the decision letters and the written submissions. He stated there was no evidence to show that the business existed or that it was anything other than a move to circumvent the laws. There was no evidence of funds going through an Irish bank and nothing to show that rent or bills had been paid through a bank account. There was no evidence that tax had been paid. Nor was there evidence to show any routine transactions had been made. The sponsor had just set up a shell of a company designed to dupe the Irish authorities and circumvent the rules. There were several issues arising from the dates over the tenancy

agreement, the return date to the UK and the membership of the Irish Asian Association which should all be viewed against the backdrop of the absence of any application being made on return to the UK for 12 months. Whilst the sponsor had claimed to have closed the business in March 2016, the appellant's evidence had been that his sister and her husband continued to work in it. They appeared to be some sort of partnership between them and the sponsor but this had not featured in the sponsor's evidence. The sponsor was a car mechanic who suddenly decided to take up immigration work and move to Ireland and his wife then immediately applied for a visa to join him. The bank receipts were not stamped and there was no evidence to show that they had been paid into an account. The sponsor and appellant had not shown that they were fully integrated into Irish society or that the regulation 9 test had been met. It was accepted that the marriage was genuine and although the previous judge's finding that they had lived in Ireland had been preserved, the Tribunal was urged to find that it was all a ruse.

26. Ms Heidar relied upon her skeleton argument. She submitted that the first application had been made in August 2016 and there had been no delay. It would have been of help if the respondent had submitted the application form. The sponsor had been confused with dates but was not trying to deceive the Tribunal. The chronology set out the dates which tallied with the evidence of the appellant. The sponsor had been exercising treaty rights in Ireland. He set up a company there and the authorities issued a residence card to the appellant. There was no evidence that the respondent had contacted the Irish authorities about their concerns over the alleged deception used to obtain the residence card. In support of the claim, the Tribunal had a letter from the sponsor's accountant, rent receipts, the residence card issued in February 2016 and a letter from HMRC regarding the sponsor's work in the UK. The fact that he had taken up a different line of work did not mean that he was not working. His profession was confirmed on the child's birth certificate. With regard to the bank deposit slips, every country had its own system and the absence of stamps did not mean the money had not been deposited. There was case law which gave guidance on matters to be considered. The appellant and sponsor enjoyed family life in Ireland and the tenancy agreement demonstrated that he never intended to go for a short period. His motivation in going there was irrelevant. The appellant did not have a bad immigration history. The couple now had a child and there were provisions on which the appellant could rely as the mother of a British child. The appeal should be allowed.

Assessment and conclusions

27. I have taken account of all the evidence before me in reaching my decision. The appellant applied for a residence card under reg. 9 of the EEA Regulations 2016 on the basis of her residence with her British spouse. The provisions of that regulation (which are identical to those contained in the 2006 Regulations) provide:

Family members of British citizens

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).*

...

28. Articles 7 and 16 of the Citizen's Directive 2004/38/EC of 29 April 2004 provide:

Article 7: Right of residence for more than three months

1. *All Union citizens shall have the right of residence on the territory of another Member State for a period of longer than three months if they:*
- (a) *are workers or self-employed persons in the host Member State; or*
- (b) *have sufficient resources for themselves and their family members not to become a burden on the social assistance system of the host Member State during*

their period of residence and have comprehensive sickness insurance cover in the host Member State; or ...

(d) are family members accompanying or joining a Union citizen who satisfies the conditions referred to in points (a), (b) or (c).

2. *The right of residence provided for in paragraph 1 shall extend to family members who are not nationals of a Member State, accompanying or joining the Union citizen in the host Member State, provided that such Union citizen satisfies the conditions referred to in paragraph 1(a), (b) or (c).*

3. *For the purposes of paragraph 1(a), a Union citizen who is no longer a worker or self-employed person shall retain the status of worker or self-employed person in the following circumstances:*

(a) he/she is temporarily unable to work as the result of an illness or accident;

(b) he/she is in duly recorded involuntary unemployment after having been employed for more than one year and has registered as a job-seeker with the relevant employment office;

(c) he/she is in duly recorded involuntary unemployment after completing a fixed-term employment contract of less than a year or after having become involuntarily unemployed during the first twelve months and has registered as a job-seeker with the relevant employment office. In this case, the status of worker shall be retained for no less than six months;

(d) he/she embarks on vocational training. Unless he/she is involuntarily unemployed, the retention of the status of worker shall require the training to be related to the previous employment.

Article 16: General rule for Union citizens and their family members

1. *Union citizens who have resided legally for a continuous period of five years in the host Member State shall have the right of permanent residence there. This right shall not be subject to the conditions provided for in III.*

2. *Paragraph 1 shall apply also to family members who are not nationals of a Member State and have legally resided with the Union citizen in the host Member State for a continuous period of five years.*

29. I have also taken into account the authorities to which I was referred: Akrich C-109/01, O and B v The Netherlands (C-456/12, 12 March 2014) and Osoro (Surinder Singh) [2015] UKUT 00593 (IAC).

30. As argued for the appellant in her grounds for permission and in Ms Heidar's skeleton argument, following the guidance in Akrich, it is for the respondent, who alleges abuse of the Regulations, to prove both that the rules for a right are not really met and that there was a deliberate intention artificially to make it appear as if the rules were satisfied. The court held that "*...the motives which may have prompted a worker of a Member state to seek employment in another member State are of no account as regards his right to enter and reside in the territory of the*

latter State provided that he there pursues or wishes to pursue an effective and genuine activity".

31. In O and B (also cited in the appellant's grounds and skeleton argument), the court held that abuse was impermissible: "*... 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*". The court also clarified that the UK national must be able to demonstrate a "genuine" exercise of treaty rights.
32. I have regard to Ms Heidar's submission that the 'centre of life' test introduced by the UK has no place in a lawful assessment of a Surinder Singh case. She clarifies that although it originated in the Advocate General's Opinion that preceded the final judgment of O and B, it was not adopted therein. She also maintains that the judgment sets out that the length of residence as a worker/self-employed person must be at least three months and that the nature and quality of accommodation must be considered, with the guidance suggesting that a mortgaged home or long term rented accommodation is more likely to indicate genuine residence than living in a hotel, bed and breakfast or short stays with friends. She maintains that the judgment said nothing at all, however, about the degree of integration into the host State. It is also argued that the "circumvention test", in genuine marriages, is directly contrary to the case of Akrich.
33. According to the skeleton argument the key issue to be determined then, is "*whether the appellant has demonstrated there has been a genuine exercise of treaty rights by the EEA national*" (at 3.9 and 3.10). This is in direct conflict with the grounds for permission to appeal which criticised the judge so heavily for placing the burden upon the appellant. It also does not sit well with the Akrich guidance cited above and at 3.4 of the skeleton argument. As it is the respondent who asserts that there has not been a genuine exercise of treaty rights, I proceed to consider whether he has established that assertion. In so doing, I must of course carefully consider the evidence put forward by the appellant to show that treaty rights were genuinely exercised.
34. The following findings were preserved from the determination of the First-tier Tribunal: (1) that the appellant and sponsor entered into a genuine marriage (at 13); (2) that the appellant could not meet the requirements of the Immigration Rules (at 19); (3) that the appellant and sponsor lived in Ireland for under a year from 1-2 May 2015 (at 20); (4) that they had family life (at 20) and (5) that family life was strengthened by the birth of their son in February 2016 (at 20). Neither party has raised any objection to these although Mr Melvin urged me to find that the residence in Ireland was not genuine.

35. In assessing all the evidence (even if not specifically mentioned), and bearing in mind the guidance from the authorities cited, I conclude that the respondent has satisfied me that the residence in Ireland was not genuine and that the sponsor was not genuinely exercising treaty rights there. I reach this conclusion for the reasons I set out above which are not given in any order of priority.
36. The witness statements of both the appellant and the sponsor are identical in many parts. They were clearly not responsible for their preparation. The language, similarities throughout and reference to legal principles demonstrate that they were prepared by solicitors. Despite his claimed engagement in immigration work, the sponsor admitted he had no qualifications in that field and that he only assisted with completing basic information in application forms. It is not, therefore, accepted, that he could have been responsible for the preparation of the statements. Whilst, of course, it is expected that legal representatives will assist their clients in the preparation of witness statements, it is unhelpful when that preparation takes over to such an extent that the statements cease to be a meaningful expression of what the authors themselves wish to, or are able to, say.
37. The difficulties in the evidence begin with establishing the period of residence in Ireland, as the evidence as to when the sponsor moved there is conflicting. In oral evidence to me, he maintained he moved on 24 March 2015, but he told the First-tier Tribunal that he moved there on 1 May 2015 (at paragraph 5). Indeed, this was one of the findings that I preserved, and which the appellant and her representatives took no objection to. In his witness statement, the sponsor further confirms that he moved there in May 2015 (at paragraph 2). He adopted his statement as true and correct. The chronology prepared by the appellant's representatives also gives 1 May 2015 as the date he moved to Ireland. Whilst I could have accepted that the sponsor was mistaken about his March arrival date and had indeed arrived in 1 May, there is other evidence which throws this date into question. For example, the tenancy agreement for the first property occupied by the appellant and sponsor - [~] Alandale Orchard - although commencing on 1 May 2015 (for a period of three months and three weeks, until 24 August 2015) was signed on 28 April 2015. It was co-signed by Habib Saleh, as guarantor, of an address in Wembley, on the same date. He would appear to be the sponsor's father. This would have been *prior to* the sponsor's arrival in Ireland, if the May date is correct. The sponsor did not claim that the rental agreement was signed in England.
38. According to the First-tier Tribunal's Record of Proceedings (and I note Ms Heidar was also the appellant's representatives at that hearing and so would be aware of this), the sponsor gave evidence that the appellant's visa to join him took two months. This accords with her own evidence to the Upper Tribunal in cross examination, that she had gone to Abu Dhabi in March 2015. Plainly, the decision for her to travel to Ireland was made well before the sponsor moved there and set up his business. Whilst this in itself, is not an adverse factor, it does raise issues with the explanation the sponsor and appellant gave for the

absence of any application for entry to the UK. It was the sponsor's evidence that his culture did not permit separation after marriage yet the appellant did not join him until almost two years later. He claimed this was because he was a student when he married. No reason is offered as to why he then went ahead with the marriage when he was still a student in his teens, knowing full well that a separation would be inevitable. It was also the sponsor's evidence that he completed his studies in 2014 and worked part time for his father. It is not explained why he did not work full time, in view of his qualifications in that line of work, and why he did not seek to bring his wife to the UK at that time. If it is, as he claimed, because he was not in reliable employment and financially secure, then her arrival in Ireland, the very next day after his, and before he had even set up his business does not appear to me to be a smart decision. Certainly, his position was even worse than it was in the UK where he at least had an income and had the support of his family.

39. The key issue in this case is, however, whether the sponsor has had genuine residence in Ireland in the sense that he was genuinely exercising treaty rights there. I, therefore, turn to the evidence before me of the business.
40. Firstly, the evidence relating to how and when the sponsor's business started is contradictory. In his evidence to the First-tier Tribunal, the sponsor stated that he started his business after he moved to Ireland (at 6), that it commenced in August 2015 (at 8) and that it was *in Ireland* that he undertook research and came to discover that there was a business opportunity with people struggling to complete application forms (at 9). In his oral evidence to me, he stated that he had decided on the business venture *before* he left the UK and, indeed, had given his contact details out to friends and family with a view to obtaining clients when he got to Ireland. He said that he had identified the issue of many Afghans entering Ireland and having difficulties in completing application forms and, therefore, took the unusual step of abandoning his own area of experience to travel to another country and set up a business in which he had no previous experience and no qualifications. His witness statement contradicts that. There, he maintained that there were very few people who required his services (at 7). The appellant said the same in her statement (also at paragraph 7).
41. In oral evidence, the sponsor said that he started his business on 24 May 2015 and then changed this to 24 March 2015. Both contradict what he told the First-tier Tribunal Judge and the March figure does not accord with his stated date of entry of 1 May 2015. If he did start the business on or soon after arrival, then it is unclear why he waited until 1 August 2015 to employ accountants to act for him. If he started in August 2015 as he told the First-tier Tribunal, then there is no explanation for what he lived on until then (for either 5 or 3 months depending on which of his entry dates is correct). His savings would have been eaten up during his time and he would have had nothing left to supplement his lean months and cover his move back to the UK. No accounts for the business have been adduced; again this would have been simple to produce and there is

no explanation for why the letter from Unique Accountants is dated 21 June 2016, long after the appellant had returned to the UK. The letter also confirms they are acting for the sponsor (in present tense) and that the company is still trading.

42. I have not been provided with the registration document of the business and so I have no independent evidence as to when the business started. The documents submitted to show that the sponsor was self employed are limited and raise various concerns. The sponsor stated in evidence that he had a business partner but this individual has not featured in any of the documentary evidence and there is no evidence to show that he shared the office running costs. Nor is he referred to in any of the rental receipts. The appellant's evidence was that Taimoor and Sharifa also worked with the sponsor but this has not been mentioned before. I have no information as to their status in Ireland.
43. The only evidence of rent having been paid for the office premises is between 1 August 2016 and 1 December 2016 but this post dates the return of the sponsor and appellant to the UK. There is no explanation for why there should be no receipts for the period when the appellant and sponsor were in Ireland. These post departure receipts indicate that payment was always made in cash so there is no evidence of any bank transfers or a direct debit. The sponsor stated he asked his friend to pay the rent for him but there is no evidence that he was reimbursed. Nor is it clear to me why the appellant should continue to pay the full rent when he is no longer there and when the appellant's evidence was that Taimoor and Sharifa continued to run the business. Indeed, that evidence directly contradicts the sponsor's evidence that he closed the business down in January 2016, even before his child was born. It also raises difficulties with the claim that the business did not generate an income as both Taimoor and Sharifa continue to work there and, presumably, earn a living from it. I have seen no evidence of the terms of the rental lease and there is nothing to confirm the sponsor's claim that the rental period was for two years. That would have been a document easily obtainable.
44. The rent receipts are dated from 1 August 2016 - 1 December 2016 as INV001 through to INV005. It is not clear why, if as the sponsor claims, he was paying rent from May 2015, that the invoices would be numbered in this way.
45. All bear the same expression with an exclamation mark at the bottom as the sponsor's own business invoices - Thank you for your business! This is an unusual format.
46. The appellant was very clear in her evidence as to the amount of rent paid for the business premises and for their private accommodation yet when asked about their shopping expenses (which she would have been responsible for, at least on several occasions), she was unable to give any estimate. She also claimed not to know about financial matters, saying that she did not ask her

husband about such things. That rather goes against her knowledge of the rent, particularly of the office, and suggests that was part of rehearsed evidence.

47. The sponsor did not open a business bank account. He maintained he used his personal bank account but apart from confirmation that the account was opened, no bank statements have been adduced.
48. The bank account was opened on 4 September 2015 but it was done so using the Alandale Orchard address. I was not told why this would be so when the sponsor moved to his Frederick House address on 28 August 2015 (as confirmed by the tenancy agreement and the letter from the Private Residential Tenancies Board). Similarly, the registration with the Office of the Revenues Commissioner is dated 2 September 2015 but addressed to the sponsor at his old address.
49. The sponsor's evidence as to when the business began to deteriorate is also conflicting. Initially he stated in evidence to me that things had been good for the first 6-7 months, then he said it was until July 2016 and when it was pointed out to him that he said he had left in March 2016, he stated it had been fine for the first 4-5 months after his arrival. He also claimed to have closed down the business in January 2016. He said that his earnings varied monthly between €300 at the lowest to €700 at the highest and that his expenses amounted to just under €500 a month. He has only submitted invoices for earnings in December 2015. This would have been the month before he closed down the business, if his January 2016 date is correct. The invoices show earnings for €1030 in that month which is even higher than he claimed his highest monthly income had been. It makes no sense, whatsoever, for the sponsor to close down the business and leave after such a successful month. Furthermore, the numbering of the invoices (037 for 2 December 2015 and then 040 for 14 December 2015; the rest are in numerical sequence) indicate that three invoices for the period between 2 and 14 December are missing. That would mean that the sponsor made even more than €1030 in December. It is difficult to accept that the sponsor would not recall these substantial earnings when giving his oral evidence, particularly as he had provided invoices for them. The bank deposit clips are not supported by any bank statements but they show that €600 was deposited in November 2015 and €1000 in December 2015. Both these show the sponsor's earnings at the higher and beyond the highest level of the scale his oral evidence suggested and give further cause to question the claim that the business was shut down because his income had dropped.
50. Ms Heider pointed to the sponsor's profession being given as an immigration consultant on his son's birth certificate however at the date of registration of the birth he had already closed down the business and so was no longer an immigration consultant.
51. There is no evidence of rent having been paid for either of the sponsor's residential properties. There is no explanation for this. The tenancy agreement

for Alandale Orchard, which was signed prior to the sponsor's May 2015 arrival date, gives the rent as €7450 per month which contradicts the oral evidence of both the sponsor and the appellant. It also gives the name of Adid Saleh as one of the four tenants. This is then crossed out and the sponsor's name is inserted. I am not told who Adid is.

52. The tenancy agreement for Frederick House requires the rent of €650 (again contradicting the sum stated by the appellant and the sponsor) to be paid by bank draft or direct debit. Again, no evidence of this has been submitted.
53. The appellant gave birth to a child in Limerick. The child's birth certificate was issued on 14 March 2016; this is after the family's departure from Ireland, if the appellant's date of departure (confirmed by the chronology) is correct. I note that on the discharge certificate from the hospital, Sharifa is named as the contact and her telephone number is noted. I was not told why the sponsor was not named as the appellant's contact. That would have been what I would have expected.
54. The sponsor's evidence was that he returned to the UK at the end of March 2016. This contradicts the appellant's evidence. The tenancy agreement for their accommodation in Edgware was signed on 15 March 2016. When it was put to the sponsor that this was before his stated return, he complained that the document had the wrong date. This does not explain why he signed it and dated it as being the 15 March.
55. The sponsor claimed to have been given a garage business as a gift by his father on his return. Quite why this could not have been done before has not been explained. In the decision letter the respondent raised an issue with the signing of a 12 months rental agreement for the garage premises by the sponsor on 18 November 2015, prior to his return to the UK. Notwithstanding the identification of this serious issue, the sponsor and appellant have not sought to resolve this. The rental agreement demonstrates that the sponsor had already decided to return to the UK before November 2015 and that all the excuses he gave for leaving Ireland were untruthful. Further, if the sponsor was been in Ireland until March 2016, it is unclear how he was in the UK renting a garage several months earlier. The sponsor's co-tenant is Sharifa, his sister, but she is also said to be in Ireland. I note that regular payments are made from the sponsor's business bank account to Sharifa for "*monthly wages*". This is not explained.
56. I have also had regard to the gas bills submitted. These cover the period between 8 May 2015 and 18 September 2015. I am not told why there are no bills for the rest of the claimed period of residence. Further, the bills only related to the supply of gas at Alandale Orchard. Even those addressed to Frederick House are only for the supply at the other address.

57. The letter from the Irish Asian Association is dated 30 June 2016. This is several months after the sponsor and appellant returned to the UK. No explanation is offered other than that the date must be wrong but the same date appears on both membership letters. Both are issued at the Frederick House address to which the appellant and sponsor did not move until the end of August 2015 and at which they were not residing when the letters were issued. The documents appear to be membership application forms; there is nothing to confirm that membership was issued.
58. I now compare the documentary evidence adduced for the sponsor's business in the UK. This makes the limited and unsatisfactory nature of the evidence for the Irish business even more pronounced. The sponsor has adduced evidence from accountants setting out his net income. The accountants in Ireland gave no information as to earnings. There are accounts for the sponsor's business; none were produced for the company in Ireland. There is evidence from HMRC that the sponsor paid tax. I saw no evidence of any tax having been paid in Ireland. There are bank statements from a business bank account. No business bank account was opened in Ireland and no bank statements even from a personal bank account were adduced.
59. The sponsor openly admitted to the First-tier Tribunal that he took "*the easy option, which was Ireland*" and that he planned to stay for one year. Whilst this is not fatal to the case, or even damaging it itself, as it is open to an EU national to take advantage of the benefits of free movement to another member state, the evidence before me shows that there has not been genuine residence and self employment in Ireland. I am satisfied that the respondent has discharged the burden on him to show that the sponsor was not genuinely exercising treaty rights in Ireland and, it follows, that residence was not genuine either. Setting aside the motivation of the move, as I am required to do by the authorities cited, I conclude that there has not been a genuine exercise of treaty rights by a UK national in another member state. The evidence I have is far too limited and contradictory to show genuine self-employment. It has not been argued that the appellant should qualify under reg. 7(1)(b) and indeed no evidence of comprehensive sickness cover in the host member state was adduced.
60. I am conscious of the fact that the findings of the First-tier Tribunal that the sponsor and appellant resided in Ireland and had family life there, were preserved and so although I have serious concerns about whether the appellant and sponsor were in continuous residence in Ireland for the entire period claimed, I have proceeded on the basis that they were. Even then, the oral and documentary evidence is, for the reasons set out above, not indicative of a genuine exercise of treaty rights and that is required in order for the appellant to qualify for a residence card in the UK.
61. Having considered the Regulations, the Directive and the authorities relied on, I am satisfied that it is only "*genuine residence*" in the host member state of the Union citizen and the third country family member which creates on return to

the Union citizen's state of origin, a derived right of residence for the third country citizen (paragraph 56: O and B). I note that it is for the court to determine whether the parties are genuine residents in the host state and that the scope of Union law cannot be extended to cover abuses such as to obtain an advantage from the EU rules by artificially creating the conditions laid down for obtaining it. The fact that the appellant was issued a residence card in Ireland does not automatically entitle her to the issue of the same status in the UK as is clarified by O and B (at paragraph 60). So, whilst the appellant and sponsor's family life was strengthened by the birth of their son, the residence in the host state was not genuine to begin with. The obstacle referred to in the Directive (and clarified at paragraphs 47-51 of O and B) does not, therefore, arise.

62. In conclusion I find that the residence of the appellant and the sponsor in Ireland was not genuine as the sponsor was not genuinely exercising treaty rights there.
63. **Decision**
64. The appeal is dismissed.
65. **Anonymity**
66. No anonymity order was made by the First-tier Tribunal and no request for one was made to me.

Signed



Upper Tribunal Judge

Date: 20 December 2018