Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: EA/06247/2017

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 16 January 2019	**On 3 April 2019**

Before

UPPER TRIBUNAL JUDGE CANAVAN

Between

IRYNA SMAGINA

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the appellant: Ms B. Asanovic, instructed by Barnes Harrild & Dyer
For the respondent: Ms A. Everett, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellant appealed the respondent's decision dated 29 June 2017 to refuse to issue a residence card as the family member of a British citizen with reference to regulation 9 of The Immigration (European Economic Area) Regulations 2016 ("the EEA Regulations 2016").

2. First-tier Tribunal Judge Beg ("the judge") dismissed the appeal in a decision promulgated on 26 June 2018. She outlined the provisions contained in regulation 9 of the EEA Regulations 2016. At [14] she noted the terms of regulation 9(3), which

sets out several requirements for assessing whether residence in the EEA state was genuine. At [15] she noted that regulation 9(4) allowed for refusal of the application where the purpose of the residence in the EEA state was a means for circumventing any immigration laws that would otherwise apply to the non-EEA national. In assessing this aspect of the regulation she referred to the arguments put forward by the appellant's representative with reference to the Court of Justice of the European Union (CJEU) decision in *Minister voor Immigratie, Integratie en Asiel v O & B* [2014] EUECJ C-456/12. The judge went on to consider what was said by the Upper Tribunal in *Osoro (Surinder Singh)* [2015] UKUT 00593 [16]. She also noted the appellant's reliance on the principles outlined in *Akrich* [2003] EUECJ C-109/01 [17-18]. She summarised the principles as follows:

> "18. The court further held that were the marriage between a national of a member state and a national of a non-member state is genuine, the fact that the spouses install 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."

3. The judge went on to distinguish *Akrich* in the following terms:

> "19. In find that the case of **Akrich** was heard before the Immigration (European Economic Area) Regulations 2016 were drafted. The Regulations form part of English law. The United Kingdom as a member state of the European Union is entitled to apply domestic law to interpret and give effect to the Directive. Regulation 9(4) states that the regulation does not apply where the purposes of the EEA state was a means of circumventing any immigration laws applying to non-EEA nationals to which the family member would otherwise be subject to. I find that it is common ground that the appellant's previous application for leave to remain under the Immigration Rules was refused and a subsequent appeal dismissed."

4. The judge noted the appellant's explanation as to why she and her husband decided to move to Spain. They were unable to continue living in the United Kingdom because her application for leave to remain had been refused. The appellant's husband said that they moved to Spain because they wanted to be together [20]. The respondent accepted that the sponsor genuinely exercised treaty rights in Spain. Both he and the appellant were issued with residence cards [21]. The judge went on to consider what ties the sponsor retained with the UK while they were in Spain [21-25]. She concluded:

> "26. I find that they both intended to stay in Spain for a short period of time and then to return to the United Kingdom where Mr Mirza's principal residence was. I find that he ensured that at all times whilst he was in Spain, the residential part of his commercial property was always vacant for him. I find that the accommodation in the EEA state, that is Spain, was always temporary in nature. There is no credible evidence before me that either the appellant or her husband speak Spanish although I accept that English is widely spoken. In reaching my determination I take into account the article by Colin Yeo dated 2 September 2014 entitled "EU to investigate

> UK interpretation of Surrinder Singh". In assessing the evidence as a whole on a balance of probabilities, I do not find that the appellant meets the requirements of Regulation 9 of the Immigration (EEA) Regulations 2016."

5. The appellant appeals the First-tier Tribunal decision on the following grounds:

   (i) The judge erred in applying requirements of regulation 9 which did not conform with European law contrary to the decisions in *O & B* and *Akrich*.

   (ii) In any event, the judge failed to consider relevant evidence put forward to show that the sponsor had transferred the centre of his life to Spain, albeit it turned out to be for a relatively short period.

Legal framework

6. At the date of the First-tier Tribunal hearing regulation 9 of the EEA Regulations 2016 stated (later amendments were introduced by way of the Immigration (European Economic Area) (Amendment) Regulations 2018 on 24 July 2018):

> 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.
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> (2) The conditions are that—
>
> (a) BC—
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> (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
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> (ii) has acquired the right of permanent residence in an EEA State;
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> (b) F and BC resided together in the EEA State; and
>
> (c) F and BC's residence in the EEA State was genuine.
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> (3) Factors relevant to whether residence in the EEA State is or was genuine include—
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> (a) whether the centre of BC's life transferred to the EEA State;
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> (b) the length of F and BC's joint residence in the EEA State;
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> (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;
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> (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); …

7. In *Levin* [1982] EUECJ R-53/81 the Court of Justice of the European Union ("CJEU") made the following findings:

> "19. The third question essentially seeks to ascertain whether the right to enter and reside in the territory of a member state may be denied to a worker whose main objectives, pursued by means of his entry and residence, are different from that of the pursuit of an activity as an employed person as defined in the answer to the first and second questions.
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> 20. Under article 48(3) of the treaty the right to move freely within the territory of the member states is conferred upon workers for the 'purpose' of accepting offers of employment actually made. By virtue of the same provision workers enjoy the right to stay in one of the member states 'for the purpose' of employment there. Moreover, it is stated in the preamble to regulation (EEC) no 1612/68 that freedom of movement for workers entails the right of workers to move freely within the community 'in order to' pursue activities as employed persons, whilst article 2 of directive 68/360/EEC requires the member states to grant workers the right to leave their territory 'in order to' take up activities as employed persons or to pursue them in the territory of another member state.
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> 21. However, these formulations merely give expression to the requirement, which is inherent in the very principle of freedom of movement for workers, that the advantages which community law confers in the name of that freedom may be relied upon only by persons who actually pursue or seriously wish to pursue activities as employed persons. They do not, however, mean that the enjoyment of this freedom may be made to depend upon the aims pursued by a national of a member state in applying for entry upon and residence in the territory of another member state , provided that he there pursues or wishes to pursue an activity which meets the criteria specified above, that is to say, an effective and genuine activity as an employed person.
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> 22. Once this condition is satisfied, the motives which may have prompted the worker to seek employment in the member state concerned are of no account and must not be taken into consideration."

8. The right of residence in the UK under European law as the family member of a British citizen who has exercised rights of free movement before returning to the UK was outlined by CJEU in *Surinder Singh* [1992] EUECJ C-370/90:

> "19. A national of a Member State might be deterred from leaving his country of origin in order to pursue an activity as an employed or self-employed person as envisaged by the Treaty in the territory of another Member State if, on returning to the Member State of which he is a national in order to pursue an activity there as an employed or self-employed person, the conditions of his entry and residence were not at least equivalent to those which he would enjoy under the Treaty or secondary law in the territory of another Member State.

> 20. He would in particular be deterred from so doing if his spouse and children were not also permitted to enter and reside in the territory of his Member State of origin under conditions at least equivalent to those granted them by Community law in the territory of another Member State.
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> 21. It follows that a national of a Member State who has gone to another Member State in order to work there as an employed person pursuant to Article 48 of the Treaty and returns to establish himself in order to pursue an activity as a self-employed person in the territory of the Member State of which he is a national has the right, under Article 52 of the Treaty, to be accompanied in the territory of the latter State by his spouse, a national of a non-member country, under the same conditions as are laid down by Regulation No 1612/68, Directive 68/360 or Directive 73/148, cited above.
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> 22. Admittedly, as the United Kingdom submits, a national of a Member State enters and resides in the territory of that State by virtue of the rights attendant upon his nationality and not by virtue of those conferred on him by Community law. In particular, as is provided, moreover, by Article 3 of the Fourth Protocol to the European Convention on Human Rights, a State may not expel one of its own nationals or deny him entry to its territory.
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> 23. However, this case is concerned not with a right under national law but with the rights of movement and establishment granted to a Community national by Articles 48 and 52 of the Treaty. These rights cannot be fully effective if such a person may be deterred from exercising them by obstacles raised in his or her country of origin to the entry and residence of his or her spouse. Accordingly, when a Community national who has availed himself or herself of those rights returns to his or her country of origin, his or her spouse must enjoy at least the same rights of entry and residence as would be granted to him or her under Community law if his or her spouse chose to enter and reside in another Member State. Nevertheless, Articles 48 and 52 of the Treaty do not prevent Member States from applying to foreign spouses of their own nationals rules on entry and residence more favourable than those provided for by Community law.
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> 24. As regards the risk of fraud referred to by the United Kingdom, it is sufficient to note that, as the Court has consistently held (see in particular the judgments in Case 115/78 *Knoors v Secretary of State for Economic Affairs* [1979] ECR 399, paragraph 25, and Case C-61/89 *Bouchoucha* [1990] ECR I-3551, paragraph 14), the facilities created by the Treaty cannot have the effect of allowing the persons who benefit from them to evade the application of national legislation and of prohibiting Member States from taking the measures necessary to prevent such abuse."

9. In *Akrich* [2003] EUECJ C-109/01 the CJEU considered the scope of the judgment in *Singh* where the Member State concerned (the UK) had concerns that the couple moved to Ireland with the express purpose of establishing rights under European law to enable them to return to the UK. The court summarised the position at [39].

> "39. Having found as a fact, *inter alia*, that Mr and Mrs Akrich had moved to Ireland for the express purpose of subsequently exercising Community rights to enable them to return to the United Kingdom, the Immigration

> Adjudicator nevertheless concluded that, as a matter of law, there had been an effective exercise by Mrs Akrich of Community rights which had not been tainted by the intentions of the spouses, and that they had therefore not relied on Community law to evade the provisions of the United Kingdom's national legislation. He also found that Mr Akrich did not constitute such a genuine and sufficiently serious threat to public policy as to justify the continuation of the deportation order."

10. The CJEU went on to find:

> "55. As regards the question of abuse mentioned at paragraph 24 of the *Singh* judgment, cited above, it should be mentioned that the motives which may have prompted a worker of a Member State to seek employment in another Member State are of no account as regards his right to enter and reside in the territory of the latter State provided that he there pursues or wishes to pursue an effective and genuine activity (Case 53/81 *Levin* [1982] ECR 1035, paragraph 23).
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> 56. Nor are such motives relevant in assessing the legal situation of the couple at the time of their return to the Member State of which the worker is a national. Such conduct cannot constitute an abuse within the meaning of paragraph 24 of the *Singh* judgment even if the spouse did not, at the time when the couple installed itself in another Member State, have a right to remain in the Member State of which the worker is a national."

11. In *Minister voor Immigratie, Integratie en Asiel v O* [2013] EUECJ C-456/12 Advocate General Sharpston considered what is meant by 'residence' in another Member State.

> "100. In *Swaddling* the Court held that the definition of residence in Article 1(h) of Regulation No 1408/71 meant 'habitual residence' and suggested that it therefore had an EU-wide meaning. The Court interpreted the phrase 'the Member State in which they reside' as being the place 'where the habitual centre of their interests is to be found', which should be determined taking into account 'the employed person's family situation; the reasons which have led him to move; the length and continuity of his residence; the fact (where it is the case) that he is in stable employment; and his intention as it appears from all the circumstances'. In so saying, the Court has indicated that a proper understanding of whether a person is resident or not must be based, not on a single factor, but on a collection of elements that together enable the individual's situation to be assessed and categorised as residence or non-residence.
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> 101. In other areas of EU law, the Court has articulated a similar understanding of residence: it is where a person has his habitual or usual centre of interests and it must be determined in light of the facts at issue, which include both objective and subjective elements."

12. When the case came before the Grand Chamber of the CJEU (*Minister voor Immigratie, Integratie en Asiel v O & B* [2014] EUECJ C-456/12) no mention was made of a 'habitual residence' test. Instead, the Grand Chamber answered the questions in the following terms:

> "39. Accordingly, Directive 2004/38 establishes a derived right of residence for third-country nationals who are family members of a Union citizen, within

the meaning of Article 2(2) of that directive, only where that citizen has exercised his right of freedom of movement by becoming established in a Member State other than the Member State of which he is a national (see, to that effect, *Metock and Others*, paragraph 73; Case C-256/11 *Dereci and Others* [2011] ECR I-11315, paragraph 56; *Iida*, paragraph 51; and Joined Cases C-356/11 and C-357/11 *O. and Others* [2012] ECR, paragraph 41).

…

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

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

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

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

50. So far as concerns the conditions for granting, when a Union citizen returns to the Member State of which he is a national, a derived right of residence, based on Article 21(1) TFEU, to a third-country national who is a family member of that Union citizen with whom that citizen has resided, solely by virtue of his being a Union citizen, in the host Member State, those

conditions should not, in principle, be more strict than those provided for by Directive 2004/38 for the grant of such a right of residence to a third-country national who is a family member of a Union citizen in a case where that citizen has exercised his right of freedom of movement by becoming established in a Member State other than the Member State of which he is a national. Even though Directive 2004/38 does not cover such a return, it should be applied by analogy to the conditions for the residence of a Union citizen in a Member State other than that of which he is a national, given that in both cases it is the Union citizen who is the sponsor for the grant of a derived right of residence to a third-country national who is a member of his family.

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

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

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

"37. …

"In summary, the obligation on the English courts to construe domestic legislation consistently with Community law obligations is both broad and far-reaching. In particular:

(a) it is not constrained by conventional rules of construction (per Lord Oliver of Aylmerton in the *Pickstone* case, at p. 126B);

(b) it does not require ambiguity in the legislative language (per Lord Oliver in the *Pickstone* case, at p. 126B and Lord Nicholls of Birkenhead in *Ghaidan's* case, at para 32);

(c) it is not an exercise in semantics or linguistics (per Lord Nicholls in *Ghaidan's* case, at paras 31 and 35; per Lord Steyn, at paras 48–49; per Lord Rodger of Earlsferry, at paras 110–115);

(d) it permits departure from the strict and literal application of the words which the legislature has elected to use (per Lord Oliver in the *Litster* case, at p 577A; per Lord Nicholls in *Ghaidan's case,* at para 31);

(e) it permits the implication of words necessary to comply with Community law obligations (per Lord Templeman in the *Pickstone*

> case, at pp 120H–121A; per Lord Oliver in the *Litster* case, at p 577A); and
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> (f) the precise form of the words to be implied does not matter (per Lord Keith of Kinkel in the *Pickstone* case, at p 112D; per Lord Rodger in *Ghaidan's* case, at para 122; per Arden LJ in the *IDT Card Services* case, at para 114)
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> …
>
> "The only constraints on the broad and far-reaching nature of the interpretative obligation are that:
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> (a) the meaning should 'go with the grain of the legislation' and be compatible with the underlying thrust of the legislation being construed': see per Lord Nicholls in *Ghaidan v. Godin-Medoza* [2004] 2 AC 557, para 53; Dyson LJ in *Revenue and Customs v. EB Central Services Ltd* [2008] STC 2209, para 81. An interpretation should not be adopted which is inconsistent with a fundamental or cardinal feature of the legislation since this would cross the boundary between interpretation and amendment (see per Lord Nicholls, at para 33, Lord Rodger, at paras 110–113 in *Ghaidan's* case; per Arden LJ in *R (IDT Card Services Ireland Ltd) v. Customs and Excise Comrs* [2006] STC 1252, paras 82 and 113); and
>
> (b) the exercise of the interpretative obligation cannot require the courts to make decisions for which they are not equipped or give rise to important practical repercussions which the court is not equipped to evaluate: see the *Ghaidan* case, per Lord Nicholls, at para 33; per Lord Rodger, at para 115; per Arden LJ in the *IDT Card Services* case, at para 113.'"

15. In *Swift* the Supreme Court considered the Court of Justice of the European Union decision in *Schulte v Seutche Bausparkasse Badenia AG* (Case C-350/03) [2003] All ER (EC) 420, which summarised the core interpretative principle as follows.

> "When hearing a case between individuals, the national court is required, when applying the provisions of domestic law adopted for the purpose of transposing obligations laid down by a Directive, to consider the whole body of rules of national law and to interpret them, so far as possible, in the light of the wording and purpose of the Directive in order to achieve an outcome consistent with the objective pursued by the Directive."

Decision and reasons

Error of law

16. Having considered the grounds and submissions made by both parties I conclude that the First-tier Tribunal decision involved the making of an error of law and must be set aside.

17. First, the judge referred to the decision in *O & B* but failed to engage or apply the relevant principles.

18. Second, a proper approach to conforming interpretation of European law did not permit the judge to distinguish, or to disapply, the principles outlined in *Akrich* simply because it pre-dated the EEA Regulations 2016. The EEA Regulations 2016 do not override decisions of the CJEU and must be read to conform with relevant European law. The judge failed to engage with the argument that requirements contained in regulation 9(3) of the EEA Regulations 2016 did not conform with the current state of EU law in *Singh* cases. If aspects of the regulations did not conform with EU law the judge was obliged to read the regulations in a way that did conform, which might include ignoring non-conforming provisions.

19. Third, the judge failed, in any event, to give adequate reasons to explain which provision she was considering when she dismissed the appeal. At [19] she noted that the appellant's application for leave to remain in the UK was refused but came to no clear findings with reference to regulation 9(4). Although her findings at [26] appear to relate to issues outlined in regulation 9(3), again, it is unclear whether she found that their residence in Spain was 'genuine' or not given the respondent's concession noted at [21].

Remaking

20. The parties agreed that if I found an error of law in relation to the first ground of appeal it would be possible to remake the decision without a further hearing.

21. The appeal before the Upper Tribunal is brought on the ground that the decision breaches the appellant's rights under the EU Treaties in respect of entry to or residence in the United Kingdom. The fact that the only EU ground of appeal available to the appellant is phrased in these terms, and does not refer to a decision being "in accordance with the EEA Regulations 2016", is a reflection of the direct effect of European law.

22. The appellant's British citizen husband, as an EU citizen, has the right to move to and work in another EU Member State. It is apparent that the couple may have preferred to remain in the UK. The appellant made an application for leave to remain through the proper channels, which was refused. The appellant did not want to remain in breach of UK immigration law. The couple took the decision to move to Spain, where they have friends, so that they could continue their family life together rather than be separated. The respondent accepts that the appellant's husband, as an EU citizen, genuinely exercised his rights of free movement in Spain. The Spanish authorities were satisfied that he was exercising his rights of free movement. The appellant's husband was issued with a residence card and the appellant was issued with a residence card as his family member. There is no suggestion that the appellant's husband was not exercising his treaty rights in a genuine and effective way. The couple returned to the UK after six months.

23. In *Singh*, the CJEU outlined why there was an underlying right of an EU citizen to return to their country of origin with their family member under EU law. To refuse to allow a right of return with their family members might discourage an EU national from exercising rights of free movement in the first place. In *Akrich*, the CJEU noted the United Kingdom's concerns that family members may use EU law to evade the

provisions of the United Kingdom's immigration rules but found that the motives that prompted a worker of a Member State to seek employment in another Member State are of no account as long as the person wishes to pursue "an effective and genuine activity". This was consistent with the earlier decision in *Levin*. The court in *Akrich* made clear that the motives for returning to the Member State of origin are not relevant. Such conduct cannot constitute an abuse within the meaning discussed by the CJEU in *Singh* even if the spouse did not have a right to remain in the Member State of which the worker is a national.

24. The factors set out in regulation 9(3) of the EEA Regulations 2016 state that they are relevant to whether residence in the EEA State is or was genuine. However, it becomes clear from the summary of the relevant case law set out above that the test of whether the British citizen's centre of life had transferred to the EEA state and the other factors identified in regulation 9(3) were drawn from the opinion of Advocate General Sharpston in the case of *O*.

25. When the Grand Chamber went on to decide the case in *O & B* it did not follow or approve the test recommended by Advocate General Sharpston. The Grand Chamber emphasised that failure to confirm a derived right of residence on a family member on return to the Member State of nationality may create an obstacle to the exercise of rights of free movement. At [51] the only test laid out by the CJEU was that residence in the host Member State as been "sufficiently genuine to as to enable that citizen to create or strengthen family life in that Member State." In *O & B* the CJEU did not seek to lay down a strict set of criteria required to show that residence in the host Member State was 'genuine and effective'. Some of the factors outlined in regulation 9(3) might be relevant to that assessment, but they cannot be taken as strict requirements for the issue of a derivative residence card if the evidence shows that residence in the host Member State was a genuine exercise of free movement rights.

26. In this case there is no suggestion of abuse of the kind identified in *Singh*. Regulation 9(4) must be read only to conform with the prohibition on abuse. It cannot be applied solely on the ground that one motive for leaving the UK or returning was to establish derivative rights of residence if the evidence otherwise shows that the British national genuinely exercised rights of free movement in another Member State. To apply regulation 9(4) in such circumstances would not conform with European law as outlined in *Akrich*.

27. The appellant is in a genuine and subsisting relationship with her British citizen husband. Her husband had a right, as an EU citizen, to move to Spain to exercise his rights of free movement. It matters not that their motive was to continue their family in Spain because the appellant was refused leave to remain under the UK immigration rules. It is not an improper motive. It is a perfectly understandable one if the alternative was separation. It is not disputed that the appellants' husband obtained work and genuinely exercised his treaty rights in Spain. The fact that they were issued with residence cards indicates that the Spanish authorities were satisfied that the exercise of treaty rights was genuine and effective. The principles outlined in *Akrich* make clear that the motive for returning to the UK is not relevant either. Although they remained in Spain for a fairly short period of six months, it was not so

short to suggest that this was an act of abuse. The whole purpose of going to Spain was to continue their family life, which strengthened during their period of residence there.

28. I conclude it is not necessary to consider any of the factors outlined in regulation 9(3) because it is accepted that the appellant's husband genuinely exercised his rights of free movement in Spain albeit only for a period of six months. He exercised his rights of free movement immediately before returning to the United Kingdom, he resided together with the appellant in the EEA state, their residence was genuine and their family life was strengthened during their joint residence in the EEA state.

29. For these reasons I conclude that the decision to refuse the appellant a residence card as the family member of a British citizen who returned to the UK having exercised treaty rights in another Member State breaches her rights under the EU Treaties in respect of entry to or residence in the United Kingdom.

DECISION

The First-tier Tribunal decision involved the making of an error on a point of law

The decision is remade and the appeal is ALLOWED on EU law grounds

Signed  Date 21 March 2019
Upper Tribunal Judge Canavan