



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: EA/01493/2018

THE IMMIGRATION ACTS

Heard at Field House
On 3 August 2018

Decision & Reasons Promulgated
On 5 September 2018

Before

UPPER TRIBUNAL JUDGE KOPIECZEK

Between

MR MOHAMED ELAMINE ABDELHAFID
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Not represented

For the Respondent: Ms A Everett, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellant is a citizen of Algeria born in 1988. On 16 September 2017 he applied for a residence card as confirmation of his right to reside in the UK as the direct family member of a British citizen who had previously exercised Treaty rights in an EEA State.
2. That application was refused and his appeal against that refusal came before First-tier Tribunal Judge Bristow ("the FtJ") at a hearing on 5 April 2018 which resulted in his appeal being dismissed.

3. Permission to appeal against the FtJ's decision was granted on the basis that it was arguable that there was documentary evidence before the FtJ which was not considered by him and which may have affected the outcome of the appeal. In particular, the grant of permission refers to an arguable error on the part of the FtJ in terms of his conclusion that the evidence suggested that in France there was a third person living with the appellant and his spouse, namely one Pearl Nathalie Powell, whereas in fact that is the appellant's wife's maiden name.
4. In order to put my decision into context, it is necessary to refer to some aspects of the FtJ's decision.

The FtJ's decision

5. The FtJ dealt with the appeal on the papers, as requested by the appellant, and noted that the appellant needed to satisfy regulation 9 of the Immigration (European Economic Area) Regulations 2016 ("the EEA Regulations").
6. At [9] he identified the documentary evidence he had before him. He made a number of findings between [14] and [26] of his decision. He concluded that the appellant had adduced sufficient evidence to prove to the appropriate standard that his wife resided in France as a worker from May to November 2016 inclusive, that evidence consisting of rent receipts and payslips. He also noted that it was accepted by the respondent that whilst living in France she was employed.
7. At [15], in relation to the assertion by the appellant that he was living with his wife in France, he noted that rent receipts stated that the landlord had received money from Mr and Mrs Mohammed El amine Abdelhafid and Pearl Nathalie Powell, with the FtJ emphasising the additional name. He concluded that the words suggested that the appellant's wife was living there with the appellant but also with someone else. He also noted that of the six payslips provided, the appellant's wife's address was different from that on the rent receipts to which he had referred. He said that he had not seen any other evidence from the appellant to prove that he and his wife resided together in France. Thus, he concluded that the appellant had not established to the required standard that they resided together in France (as required by reg 9 of the EEA Regulations).
8. Next, he went on to consider whether the residence in France of the appellant and his wife was "genuine" according to the non-exhaustive list of considerations set out in reg 9(3). He concluded at [18] that the appellant had not adduced sufficient evidence to prove that the centre of his wife's life had transferred to France. He said that she had resided and worked there for about seven months but that did not go far enough to prove that the centre of her life moved there. He went on to state that that period of seven months was a fairly short period of time and he reiterated that he had not found it proved that they had resided together in France. Notwithstanding that the appellant's wife appears to have rented accommodation in France, he concluded that her principal residence appeared to have been in the UK which was the address from which the appellant appealed.

9. At [21] he found that the appellant's wife appeared to have integrated into France "to a degree", given that she had employment there and rented property. However, he found that insufficient evidence had been adduced to prove the degree to which *he* was integrated in France.
10. Further, he concluded that the appellant had not adduced sufficient evidence for him to be able to determine whether the appellant's first lawful residence in the EU was with his wife in France.
11. Thus, he was not satisfied that the appellant had proved to the appropriate standard that his residence in France with his wife was "genuine". He went on to conclude that he was not satisfied that the appellant had adduced sufficient evidence to prove that the residence in France was not a means to circumvent any immigration laws applying to him as a non-EU national to which he would otherwise be subject.
12. At [25] he said that he had borne in mind that the appellant and his wife appeared to be married and it would be expected that a married couple would reside together. He also found that it was established that the appellant's wife was now pregnant and that that lent credibility to the suggestion that they would have resided together. However, he found that he could not reconcile that with the inconsistent paperwork referring to the appellant's wife's address in France.
13. Lastly, at [26] he said that the appellant had made a number of assertions in his letter of 2 February 2018 but had not evidenced those assertions. Evidence would have been available to support what was said, he found. He said that the appellant had not supplied, for example, a statement from his wife or evidence from his wife's mother or in relation to what is said to have been her mother's ill health (relating to their reasons for return to the UK), other than the prescription dated 4 May 2017 (which he presumed was in relation to his wife's mother). Likewise, the appellant had not provided evidence of the holiday he asserted he and his wife had enjoyed in France.

The grounds and submissions

14. The appellant's grounds in support of the appeal take issue with various aspects of the FtJ's conclusions and seek to support the grounds with documentary evidence that was not before the FtJ. In relation to apparent discrepancy over the details of the address in France, the appellant's letter dated 3 May 2018 explains that his wife had changed addresses but the payslips from her employer did not change the address on the payslips. As regards what the FtJ said in terms of there apparently being a third person living with them, Pearl Nathalie Powell is in fact his wife's maiden name.
15. In relation to the conclusion that the centre of his wife's life had not been established as having been transferred to France, he relies on his own letter and a letter from his wife. Medical evidence in relation to his wife's mother is provided with the grounds of appeal, and he relies on photographs of him and his wife.
16. In her submissions, which I asked her to make first in order to assist the appellant with presenting his appeal, Ms Everett accepted that there was an error of fact on the part

of the FtJ in terms of the conclusion that there was a third person living with them. That was in relation to the fact that Pearl Nathalie Powell is the appellant's wife's maiden name. However, it was submitted that the evidence before the FtJ was insufficient to find that she had resided in France as a principal locus of her life. Although the appellant has sought to rely on further evidence not before the FtJ, the reasons for the respondent's decision were very clear.

17. Because the FtJ's decision was dealt with on the papers he was not able to elicit further evidence to clarify any particular matters. He dealt with the appeal on the basis of the evidence that was before him. The explanations provided in the grounds were not put before the FtJ.
18. It was submitted that the FtJ was entitled to find that their residence in France was not genuine. Although there was some evidence as to why they had returned from France, that did not show that they had genuinely relocated there in the first place.
19. In response, the appellant reiterated that there was no other person living with them, and that the name the FtJ referred to was his wife's maiden name. Further, he said that the reason that they came back from France was that his wife's mother was unwell. She suffers from schizophrenia. They had resided in France for six months. He wanted to be responsible for his wife and child and to look after them. He referred to the skills he had that would allow him to obtain employment.

Assessment and Conclusions

20. Regulation 9 of the EEA Regulations provides as follows:

"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).
- (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."

21. The FtJ assessed the appeal with reference to the requirements of reg 9. He resolved in favour of the appellant the issues of employment by his wife whilst in France.

22. I am satisfied that the FtJ made a mistake when he found that there was evidence to suggest that there was a third party living with the appellant and his wife. It is evident that Pearl Nathalie Powell is the appellant's wife's maiden name. That was also conceded in submissions before me.

23. By extension, it also seems to me that the FtJ erred in his conclusion that the appellant had not established that he and his wife were residing together in France. That conclusion appears to have been reached partly on the basis of the mistaken belief that there was an anomaly in terms of there being a third person living with them. In addition however, the rent receipts did show that the landlord had been receiving money from the appellant and his wife. Although payslips in relation to the

appellant's wife showed a different address, it is doubtful that the FtJ would have concluded that they were not residing together had he not mistakenly concluded that there was the anomaly in terms of who was living at the address seen on the rent receipts. Furthermore, there was evidence of a gas bill/contract in the appellant's and his wife's name to supply gas to that same address. The FtJ referred to it and took it into account but it cannot be said that his error in relation to the appellant's wife's maiden name could not have affected his assessment of their residence together. It is also to be remembered that at [25] he referred to the fact that they were married and that it would be expected that they would reside together. In addition, he also referred to the appellant's wife being pregnant which lent credibility to the claim that they resided together.

24. However, I am not satisfied that the error on the part of the FtJ in relation to the appellant's wife's maiden name, or the further error in terms of their having resided together in France, is material. That is because there were several other cogent reasons for his conclusion that the appellant had not established that he met the requirements of reg 9.
25. He noted that the period of time that the appellant's wife lived in France was only seven months and he was entitled to conclude that that did not go far enough to prove that the centre of her life moved there. That was relevant to the issue of whether the residence in France was "genuine" under reg 9.
26. Similarly, he noted that although the appellant's wife seems to have had rented accommodation in France, her principal residence appeared to have been in the UK. He took into account the degree of integration that there was on her part in France, in terms of employment and rented property, but found that the appellant himself had not adduced sufficient evidence to prove the degree to which *he* was integrated there. That was also a relevant consideration under reg 9 in terms of whether the residence was genuine.
27. A further relevant factor was whether the appellant's first lawful residence in the EU with his wife was in France. Insufficient evidence to that effect had been provided in support of the appeal.
28. The appellant's letter of 2 February 2018, which accompanied the grounds of appeal to the First-tier Tribunal, made a number of assertions, as the FtJ pointed out. However, he was entitled to conclude that those assertions, for example, in terms of his wife's mother's ill health (which is said to have been the reason for their return to the UK) had not been supported by evidence, other than a prescription dated 4 May 2017. Likewise, he was entitled to take into account that evidence had not been provided from the appellant's wife or mother.
29. The FtJ assessed the question of whether the residence in France was a means of circumventing UK immigration laws, and although the way the FtJ framed his conclusion in this respect was in the negative, he was entitled to find that that was indeed the purpose of the residence in France.

30. The appellant's reliance on documentary evidence, including letters or statements from him and his wife, submitted after the hearing that took place before the FtJ, are not capable in the circumstances of this appeal of demonstrating that the FtJ erred in law in his conclusions. The FtJ cannot be said to have erred in failing to take into account evidence that was not before him.
31. In all these circumstances, I am not satisfied that there is any error of law in the FtJ's decision. The mistake of fact to which I have referred is not a mistake of fact which amounts to an error of law, or if it does, that it is an error of law that is material to the outcome of the appeal.

Decision

The decision of the First-tier Tribunal did not involve the making of an error on a point of law. Its decision to dismiss the appeal therefore stands.

Upper Tribunal Judge Kopieczek

30/08/18