



**Upper Tribunal
(Immigration and Asylum Chamber)**

Appeal Number: EA/05738/2017

THE IMMIGRATION ACTS

**Heard at Field House
Oral decision given following hearing
On 15 October 2018**

**Decision & Reasons
Promulgated
On 9 January 2019**

Before

UPPER TRIBUNAL JUDGE CRAIG

Between

**TAMER AHMED ABDELAZIZ MOHAMADEN
(ANONYMITY DIRECTION NOT MADE)**

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr A Moran, Legal Representative

For the Respondent: Mr S Whitwell, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellant in this case is a national of Egypt who was born on 22 August 1982. He married Ms Najeeb, who is a British citizen on Christmas Day 2014 in Egypt and initially they lived together in Cairo. It is the appellant's case that subsequently he and his wife moved to Portugal where from September 2015 until September 2016 his wife was exercising treaty rights as an EEA national working in another EEA country such that when they then subsequently moved to the UK he was entitled to a

residence card as the spouse of an EEA national exercising treaty rights in the UK.

2. Although the application was made under Regulation 9 of the 2006 Regulations it is common ground between the parties that by the time the application was considered by the respondent it had to be considered under Regulation 9 of the 2016 Regulations which is slightly different. That Regulation has itself also subsequently been amended in that Regulation 9(2) now includes (d) and (e) which provides that an applicant had to be a member of the EEA national's family during all or part of their joint residence in the EEA state (not the UK) and that their "genuine family life" was "created or strengthened" during that period of residence.
3. The appellant's application for a residence card as the spouse of his wife was refused by the respondent who did not accept notwithstanding the evidence that had been provided that he had in fact ever been resident in Portugal.
4. The appellant appealed against this decision and he apparently initially attended the Tribunal (representing himself) where his case was adjourned after about five hours because of lack of court time. He subsequently decided that in light of the strength (as he believed it) of the evidence which had been adduced there was no reason why he should spend another day waiting in the Tribunal so he asked for his appeal to be considered on the papers which it was. The appeal was considered on the papers by First-tier Tribunal Judge A K Hussain sitting at Birmingham on 15 May 2018, but in the decision and reasons promulgated seven days later on 22 May 2018 Judge Hussain dismissed the appeal.
5. The appellant now appeals against this decision leave having been granted by Designated First-tier Tribunal Judge Macdonald on 22 August 2018.
6. There are essentially three grounds on which this appeal is made. The first is that the judge failed to take account of the considerable body of evidence which had been adduced on behalf of the appellant when deciding the appellant had not shown on the balance of probabilities that he had been resident in Portugal at all. The second is that given the strength of the evidence and the judge's failure to have regard to some of that evidence, his finding that the appellant had not established that he was living in Portugal was not adequately reasoned. It is fair to say although it is not so stated in terms, the effective argument certainly implicit within the appellant's grounds, is that in light of this evidence that finding was perverse. The third ground is that given that the appellant had in fact turned up with his wife originally at the first hearing the judge's apparent consideration as a factor against the appellant that he had not turned up to the hearing to have his evidence tested was not a finding properly open to him.

7. On behalf of the appellant, Mr Moran presented a consolidated bundle setting out the various pieces of evidence in a comprehensive fashion in order to assist the Tribunal, as this had not previously been done as the appellant had been representing himself. He essentially relied upon the grounds. On behalf of the respondent, Mr Whitwell briefly attempted to argue that the judge's decision was sustainable because he had considered the question of genuineness and had been entitled to have regard to the difficulties which the appellant and any appellant would have in establishing that the evidence he had adduced was reliable at a hearing where the evidence was not tested. For reasons which will appear below, I did not accept that that submission was well-founded.

Discussion

8. At paragraph 7 the judge set out that the basis of the respondent's decision was that "he [that is the Secretary of State] doubted the appellant's evidence and gave clear reasons for that decision". The judge considered that the Secretary of State "had provided cogent reasons for refusal which rather placed the onus on the appellant to prove otherwise on the balance of probabilities". The judge then remarked that

"A key feature of the refusal was that the appellant's credibility was clearly in issue, a matter that he could best address, one would have thought, by presenting himself for cross-examination and also to have his evidence on the various requirements of Regulation 9 tested".

The judge then noted that the appellant had discharged his solicitors and that "inevitably this affected the weight I could ... afford to his evidence".

9. I have already noted that the appellant had previously attended the Tribunal himself and it was not his fault that that hearing had not gone ahead. Also, in order for this finding to be sustainable, the judge needed to demonstrate that he had considered the evidence which was in fact before him, which is a matter to which I will turn below.
10. With regard to that evidence, the judge summarised it at paragraph 8 as follows:
 8. The appellant has presented an extensive and well presented bundle of evidence which meticulously seeks to answer each of the Secretary of State's concerns raised in his letter. There is extensive evidence from witnesses, photographs and social media messages as well as witness statements not only from the appellant and his wife but also witnesses from Portugal and friends and family who visited them in Portugal."
11. However, the judge then continues as follows:

"Whilst the evidence may have been supportive of his case, I could not be satisfied as to its veracity without it being tested given the doubts that had been raised by the Secretary of State about the appellant's credibility."

12. That finding might be arguably sustainable had that been the only evidence which the judge had had before him. However, there was other evidence which does not on the face of it fall within this category. That is first evidence that the sponsor the appellant's wife had indeed been working in Portugal and secondly the evidence that the appellant had himself been granted a residence card whilst in Portugal on the basis that he was the spouse of an EEA national exercising treaty rights within Portugal. That is not evidence which on its face could properly be challenged without more, and it is difficult to see, absent an allegation (which does not appear to have been made) that this document was not genuine, how the assertion made by the appellant that he had been present with his wife whilst she was exercising treaty rights in Portugal could properly be challenged. In my judgment, absent challenge to this document, that finding appears to be perverse. In any event I agree with the submission made within the grounds that it is not adequately reasoned.
13. The judge went on to find that in any event, he was not satisfied as to the genuineness of the move to Portugal because it may have been that the only reason for that move was in order to circumvent the Immigration Rules which otherwise would apply to non-EEA nationals on entry to the UK. The difficulty with this finding is first that it failed to take account of the respondent's own guidance and indeed the Directives of the EU and secondly that it does not follow the guidance given by the courts including the Tribunal. So far as the guidance is concerned, the appellant relies at paragraph 12 of the grounds on the respondent's guidance "Free Movement Rights: Family Members of British Citizens; 25 October 2017" which is as follows:
- "However, if one of the reasons for moving to another member state was to avoid the requirements of the Immigration Rules but the residence in that member state was in any event genuine...then the intention to avoid the requirements of the Immigration Rules is not in itself sufficient to refuse to issue a residence card".
14. At paragraph 15 of the grounds the appellant also relies on Articles 7(1) and (2) of Directive 2004/38/EC which states as follows:
- "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 members state for a period of longer than three months if they;
 - (a) are workers or self-employed persons in the host member state...
 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 citizens satisfies conditions referred to in paragraph 1(a), (b) or (c)..."

15. Reliance is also placed on the decision of the CJEU as to “true intention” in *Akrich v UK* (Case C - 109/01) which is said (at paragraph 11 of the grounds) to be as follows:

“Where the marriage between the national of a member state and the national of a non-member state is genuine [it is not suggested in this case that it is not] the fact that the spouses installed themselves in another member state in order, on their return to the member state 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 in the latter state.”

16. Very fairly and usefully at the hearing before me Mr Whitwell, representing the respondent provided the Tribunal with a copy of the decision of the Inner House Court of Sessions Scotland in *AA v SSHD* [2017] CSIH 38 in which the decision in *Akrich* was considered. Mr Whitwell in particular referred the Tribunal to what was said at paragraph 54 of this decision, as follows:

“It is entirely correct to say that the mere fact of moving to another country to take advantage of more favourable treatment will not itself constitute abuse of rights. However, that does not mean the intention is irrelevant to the question of a whether a genuine residence has been established. The appellant relied upon the following passage in *UPC*:

“Furthermore, the exercise of a fundamental freedom for the purpose of benefiting from the more favourable legislation of another member state does not in itself suffice to constitute abuse of that freedom (see, to that effect, Case C - 196/04 *Cadbury Schweppes and Cadbury Schweppes Overseas* EU: C: 2006:544, paragraph 37)”

A similar passage is found in *Torresi* (para 50). We do not disagree with this, as far as it goes. However, it is not at odds with the conclusion which we have reached. In *Torresi* (para 46) as in *O and B*, the subjective element indicative of abuse was described as being artificially creating the conditions required to obtain the right in question. That too reflects the concern with the genuineness of the activity undertaken: it is not the intention to benefit from a more favourable legislation in one country which constitutes abuse: it is that the conditions which must be satisfied to obtain that benefit have never genuinely existed which may do so. In determining whether they did genuinely exist, the intention of the individual will be one of several factors to be taken into account”.

17. In this case, I am entirely satisfied that there was an abundance of evidence before the judge, which he did not consider properly (and in particular that the appellant had himself been granted a residence card in Portugal) which may well have satisfied that judge, had he considered that evidence properly (as I will have to in a moment) that the EEA national (the sponsor) had been genuinely working within Portugal and that for that period of time the appellant was properly entitled to the residence card he had been granted and that during that period his family life was strengthened.

18. It follows that for the reasons I have set out above the decision of the First-tier Tribunal must be set aside and the decision must be remade.
19. On behalf of the respondent, Mr Whitwell did not seek to suggest that I could not remake the decision myself on the basis of the evidence which was now before the Tribunal and I propose to do so.
20. I have myself considered all the material which was before the Tribunal below and which is now before me, and I have also had the benefit of seeing further material in the form of bank statements which establishes that the appellant's wife is now exercising treaty rights in this country, in that she is now working for HSBC and is in receipt of regular monthly payments from them (as a matter of record, I would add that it appears that in any event she is earning above the level of income which would be necessary for her husband, who demonstrated during the hearing in front of me that he speaks excellent English, to be entitled to a spousal visa in any event). Mr Whitwell did not seek to challenge any of this evidence, and in these circumstances there is no need for a further hearing.
21. On the basis of the evidence before me I am satisfied that the appellant is entitled to a residence card as the spouse of an EEA national (his British citizen wife who has returned to this country having exercised treaty rights in Portugal, where the appellant had been with her). Accordingly this appeal must be allowed and I so order.

Decision

I set aside the decision of First-tier Tribunal Judge Hussain as containing a material error and substitute the following decision:

The appellant's appeal against the respondent's refusal to grant him a residence card is allowed under the EEA Regulations 2016.

No anonymity direction is made.

Signed:

A handwritten signature in black ink, appearing to read 'Ken Craig', written over a light blue rectangular stamp.

Upper Tribunal Judge Craig
December 2018

Date:

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