



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: EA/03184/2018

THE IMMIGRATION ACTS

Heard at Bradford
On 17 September 2019

Decision & Reasons Promulgated
On 19 September 2019

Before

UPPER TRIBUNAL JUDGE HANSON
UPPER TRIBUNAL JUDGE BRUCE

Between

JORGE PABLO FERREYRA OLIVERA
(anonymity direction not made)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr J Dingley of Ison Harrison Solicitors.

For the Respondent: Mrs Pettersen – Senior Home Office Presenting Officer.

ERROR OF LAW FINDING AND REASONS

1. The appellant appeals a decision of First-Tier Tribunal Judge Roblin promulgated on 4 April 2019, following consideration of the merits of the appeal on the papers, who dismissed the appeal pursuant to the Immigration (EEA) Regulations 2016 against the respondent's refusal to issue the appellant a residence card in recognition of a right to permanently reside in the United Kingdom.

Background

2. The appellant is a citizen of Uruguay born on 23 August 1982. The appellant's sponsor is a [NP], a British citizen, who the appellant stated commenced her employment in Tenerife in Spain in March 2004. The appellant claims they met in May 2004 and married on 30 January 2006. The sponsor remained employed in Spain until December 2011.
3. The Judge sets out a chronology of the sponsors employment in Spain at [5] as follows:
 5. It is suggested the appellant's sponsor obtained employment in Spain as follows:
 - (a) On 28 March 2004 until November 2004 with Thomas Cooke as a holiday representation
 - (b) From 19 January 2005 to July 2011 as a waitress with Snappys Bistro.
 - (c) From July 2007 to January 2010 as a receptionist and telemarketer at Palm Beach Club.
 - (d) From March 2010 until June 2011 on maternity leave.
 - (e) From July 2011 to December 2011 as an administrator for the Eze Group.
4. The appellant states the sponsor was employed following her return to the United Kingdom and commenced maternity leave in August 2017 after the birth of their second child
5. The Judge sets out findings of fact from [23].
6. The Judge notes it is not disputed the appellant is a family member of his sponsor or that he was issued with a residence card on 23 May 2013 valid to 14 May 2018.
7. The Judge accepts the sponsor worked for Eze Group from January 2011 to December 2011 [27] but finds he had not been provided with documentary evidence of the sponsors employment in Spain although does refer to a number of documents in the appellant's bundle including evidence the appellant and his sponsor purchased a property in Spain in 2006 - 2007.
8. At [29 - 33] the Judge finds:
 29. I accept that I do have within the appellant's bundle details of his sponsor's bank accounts and information from the sponsor's employer which supports the appellant's position that the sponsor was working in the United Kingdom since 27 February 2012. I have no evidence to confirm that the appellant and his sponsor were residing in Spain, Tenerife prior to January 2011 the date confirmed in the letter from Eze group dated 29 August 2012 that the Appellant's sponsor commenced employment in Tenerife with them. However the Appellant claims his sponsor was employed by various companies in Tenerife before 2011 namely by Thomas Cooke in 2004, Snappy Bistro 2005 - 2011 and the Palm Beach Club 2007 - 2010. No evidence in support of these periods employment has been provided.
 30. I accept that the appellant has been issued with a residence card under Regulation 18(1) such card. Paragraph 18(6) specifies that a residence card is issued for a period of 5 years.
 31. Thus I have found that the appellant's sponsor was working in Tenerife from January 2011 to December 2011. However by reference to Regulation 9 while I

accept that the appellant and his sponsor purchased the property in Tenerife in 2006 which was registered in 2007 I have no evidence other than proof of purchase of the property that this was the location of the appellant's principal residence nor that of his sponsor. Although it is suggested that the sponsor worked in Spain for various organisations from 2004 until January 2011 I have no documentary evidence of that employment. The only information is that set out in the appellant solicitors letter. Furthermore I have no utility bills, wage slips or bank statements for that period other than those few documents which are provided in Spanish.

32. Having regard to the factors I have outlined I am not satisfied on the balance of probabilities that the sponsor moved the centre of life to Tenerife and that the appellant and his sponsor integrated significantly in Tenerife.
33. I find the appellant was in a position to obtain the evidence and due to the fact he did not do so I find the appellant does not meet the Regulations and the appeal is dismissed.

9. The appellant sought permission to appeal which was granted by another judge of the First-tier Tribunal, the operative part of the grant being in the following terms:

3. On 16 November 2011 the Appellant was granted admission to the UK on the basis he was a spouse of a British citizen who had been exercising treaty rights by working in Spain. Thus the Surinder Singh route was accepted as applying to him.
4. When the Appellant's 2017 application for a permanent residence card was refused, no objection was taken by the Respondent to whether the sponsor had genuinely moved the centre of her life to Spain. Since she had provided evidence that she had worked there for many years, had purchased property in Spain, had married the Appellant there, had conceived and borne the Appellant's child there, and had been granted Spanish residency that stance was unsurprising. Arguably, it was not open to the Judge to take the point for himself, and to resolve it against the Appellant, in the course of considering an appeal on the papers that concern the single issue of whether documents submitted in support of the application contained a mere typographical error. Having resolved that single issue in the Appellant's favour [27] the Appellant was arguably entitled either to have his appeal allowed, or if the Judge had real concerns that the Appellant had deceived the Respondent in 2011, to have the appeal listed for an oral hearing at which he might be given the opportunity to address those concerns.

Error of law

10. The Judge specifically finds the sponsor had not moved the centre of her life to Tenerife and that the appellant and sponsor had not significantly integrated into Tenerife.
11. A key concept within regulation 9 is the "centre of life" test. There does not appear, however, to be any reference to Case Law where such a phrase arises; although its origin appears to be in domestic jurisprudence of *Rosa v Secretary of State the Home Department* [2016] EWCA Civ 14 which refers to non-binding guidance issued by the European Commission on the Directive which at [4] provides:

There is no abuse where EU citizens and their family members obtain a right of residence under Community law in a Member State other than that of the EU

citizens nationality as they are benefiting from an advantage inherent in the exercise of the right of free movement protected by the Treaty, regardless of the purpose of their move to that State. By the same token, Community law protects EU citizens who return home after having exercised their free movement rights.

....

When necessary, Member States may define a set of indicative criteria to assess whether residence in the host Member State was genuine and effective. National authorities may in particular take into account the following factors....

12. The facts before the Judge showed the EEA national, the sponsor, travelled to Spain and took employment. The right of residence necessary to enable the sponsor to undertake such employment is that she exercised. The intention of the sponsor is not relevant, and in any event there is no indication in this appeal of evidence before the Judge to support an argument that the sponsor's actions amounted to an abuse of rights. The doctrine of abuse of rights can apply only where it is shown by the respondent that there was no genuine exercise of treaty rights to free movement and where there was an intention to use an artificial construct arrangement, neither of which was arguably established before the Judge. Regulation 9(4)(a) must be interpreted as it being for the respondent to establish there had been abuse of rights which was not arguably made out on the evidence: see ZA (Reg 9. EEA Regs; abuse of rights) Afghanistan [2019] UKUT 00281 (IAC).
13. It appears on the basis of the evidence before the Judge, especially in light of the finding in the appellant's favour regarding the single issue on which the appeal arose, that the Judge erred in proceeding to reconsider the merits of other aspects of the case without adequate notice to either party, in a case that was determined on the papers, and particularly without giving the appellant the opportunity to address any concerns the Judge may have had. It appears the Judge may also have erred in arriving at negative conclusions that the sponsor had not moved the centre of her life to Tenerife and had not significantly integrated where it is not made out these are formal requirements of the Directive. It is noted in the grant of permission to appeal the appellant was granted admission to the UK on the basis he is the spouse of a British citizen who had been exercising treaty rights by working in Spain, indicating the matters referred to in the decision were not a concern to the respondent at that time.
14. The reasons for refusal letter dated the 27 February 2018 asserts the appellant had not provided sufficient evidence to confirm the sponsor was a worker in Spain from 2004 and 2011 as the decision-maker was unable to accept a letter submitted by the EZE Group dated 11 September 2017 was genuine as the information therein contradicted the other evidence provided which stated the appellant was living in the UK from December 2011. No weight was attached to this letter and it found the appellant had not satisfied the decision maker the sponsor was working abroad for the requisite period. The finding of the Judge at [27] was that on the basis of a letter dated 2018 from the EZE Group the letter of 29 August 2012 was factually accurate and that the sponsor worked for that

company from January 2011 to December 2011 and that the later letter of 11 September 2017, relied upon by the decision-maker, contained a clerical error in that the date of 2012 was incorrect. The Judge had also a letter from Lowal Group dated 18 July 2017 confirming the sponsor had been employed with their company since 27 February 2012 in the UK.

15. The decision-maker raises no specific challenge to the claim the sponsor was employed from 2004 to July 2011 and the specific finding of the Judge establishes employment from 28 March 2004 to December 2011. As the only basis on which the application was refused has been shown to have been resolved in the appellant's favour it is arguable the Judge has erred in law in dismissing the appeal for the reasons stated.
16. We find it was unfair to raise new issues, an error to do so without giving the appellant an opportunity to respond, and moreover an error to apply the centre of life test in that way that the First-tier Tribunal has.
17. We set aside the decision of the Judge and substitute a decision to allow the appeal under the Regulations.

Decision

18. **The First-tier Tribunal Judge materially erred in law. We set aside the decision of the original Judge. We remake the decision as follows. This appeal is allowed.**

Anonymity.

19. The First-tier Tribunal did not make an order pursuant to rule 45(4)(i) of the Asylum and Immigration Tribunal (Procedure) Rules 2005.

We make no such order pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008.

Signed.....

Upper Tribunal Judge Hanson

Dated the 17 September 2019