[2018] AACR 10

Arthur v Her Majesty's Revenues and Customs
[2017] EWCA Civ 1756

CA (Longmore, Newey, Asplin LJJ) **CTC/3869/2014**
03 November 2017

Tax credits – joint and single claims – section 3(3)(a) Tax Credits Act 2002 - meaning of ordinary residence in the United Kingdom

The appellant, a permanent UK resident, had a husband who held a Ghanaian passport. For much of their marriage they had lived separately in different countries. From November 2010 to July 2011 and again from October 2011 to March 2012 they lived together in the UK, for some of this time the husband had been in paid employment, he was on the electoral roll in April 2011 and from October 2011 the couple were joint tenants. In March 2012 the husband returned to Ghana. The appellant claimed tax credits for the 2011/2012 tax year as a single claimant. The Tax Credits Act 2002 provides for a claim to be made jointly by members of a couple if they are both in the UK and where someone is eligible to make a joint claim they cannot claim as a single claimant. Under the Tax Credits (Residence) Regulations 2003 (SI 2003/654) a person shall not be treated as being in the UK for Tax Credits purposes if he is not ordinarily resident in the UK. On reviewing the claim at the end of the tax year Her Majesty's Revenues and Customs decided that the appellant had not been entitled to claim as a single claimant. The appellant appealed, arguing that her husband was only ever in the UK on a temporary basis and should not be treated as being in the UK for the purpose of the regulations. The First-tier Tribunal (F-tT) dismissed the appeal, deciding that in April 2011 the couple were living in the same household and the husband was ordinarily resident in the UK. The Upper Tribunal upheld that decision. The question before the Court of Appeal was whether the appellant was entitled to make a claim for tax credits jointly with her husband and, hence, unable to claim individually. It was argued on behalf of the appellant that it was not apparent that the F-tT had applied the correct legal test when considering whether her husband was "ordinarily resident", that the conclusion that he was "ordinarily resident" in the UK was not one that was open to the F-tT on the facts because his residence was occasional (not ordinary residence) and the tribunal had wrongly had regard to events subsequent to the key date of 6 April 2011 when making its decision.

Held, dismissing the appeal, that:

1. the F-tT did not misdirect itself as to the test it had to apply, it made specific reference to the appellant's skeleton argument which included a summary of the relevant legal principles, had adjourned the matter to obtain further submissions and had sought to apply the guidance as to the present law (paragraphs 26 to 27);

2. the conclusion that the husband was ordinarily resident in the UK on 6 April 2011 was clearly open to the F-tT on the materials before it - he had been living with the appellant for several months, had paid work and was on the electoral roll. There was evidence that he maintained strong links with Ghana but it was possible to be ordinarily resident in the UK and another country and it was open to the F-tT to decide that he was resident "for settled purposes as part of the regular order of his life for the time being, whether of short or long duration": *R (Shah) v Barnet LBC* [1983] 2 AC 309 (paragraphs 28 to 33);

3. the F-tT was entitled to consider events after 6 April 2011 in order to decide whether the husband was ordinarily resident on 6 April 2011. The focus must be on the position on the particular date but subsequent events are capable of being relevant, as they may cast light on what the position was on the key day: *Levene v Inland Revenue Commissioners* [1928] A.C. 217 followed (paragraph 35).

DECISION OF THE COURT OF APPEAL

Miss Rebecca Murray (instructed through the Bar Pro Bono Unit) appeared for the Appellant

Miss Julia Smyth (instructed by the General Counsel and Solicitor to HM Revenue and Customs) appeared for the Respondents

Judgment Approved

LORD JUSTICE NEWEY:

1. Section 3(3) of the Tax Credits Act 2002 ("the 2002 Act") states:

> "A claim for a tax credit may be made—
>
> (a) jointly by the members of a couple both of whom are aged at least sixteen and are in the United Kingdom, or
>
> (b) by a person who is aged at least sixteen and is in the United Kingdom but is not entitled to make a claim under paragraph (a) (jointly with another)."

2. A distinction is thus drawn between joint and single claimants. A person who is eligible to make a claim jointly with someone else as a member of a couple under section 3(3)(a) cannot claim on an individual basis.

3. The question raised by the present case is whether the appellant, Mrs Henrietta Arthur, was entitled to make a claim for tax credits jointly with her husband, Mr Eric Arthur, for the tax year 2011-2012 and, hence, unable to claim individually. It is not now in dispute that that depends on whether Mr Arthur was "in the United Kingdom" within the meaning of section 3(3)(a) of the 2002 Act on 6 April 2011, the start of the relevant tax year.

4. Circumstances in which someone is to be treated as being "in the United Kingdom" in this context are prescribed by the Tax Credits (Residence) Regulations 2003 SI 2003/654 ("the 2003 Regulations"). Regulation 3(1) of those Regulations provides that a person "shall be treated as not being in the United Kingdom for the purposes of Part 1 of the [2002] Act if he is not ordinarily resident in the United Kingdom".

5. In the present case, Mrs Arthur contends that her husband was not "ordinarily resident" in the United Kingdom on 6 April 2011 and, accordingly, that he was not "in" the United Kingdom for the purposes of section 3(3)(a) of the 2002 Act and that she was not entitled to claim tax credits jointly with him. The First-tier Tribunal (Mrs L. Collopy) ("the F-tT"), however, concluded that Mr Arthur was "ordinarily resident" in the United Kingdom on 6 April 2011, with the result that Mrs Arthur was not entitled to tax credits as a single claimant. That decision was upheld by the Upper Tribunal (Judge M. R. Hemingway), but Mrs Arthur now challenges it in this Court.

The facts

6. Mr and Mrs Arthur married in Ghana in 2008. At the time, Mrs Arthur was living in Runcorn, Cheshire, and her husband in Ghana. Mrs Arthur hoped that her husband would join her in Cheshire. In the event, he remained in Ghana, but she visited him there in August 2009 and became pregnant with their first child, Emily, who was born on 23 April 2010.

7. Mr Arthur joined his wife in Runcorn a few weeks before Emily's birth. However, he returned to Ghana in June or July 2010, once Mrs Arthur's mother had arrived to help her.

8. The F-tT referred to Mr Arthur having obtained "indefinite leave to remain" in the United Kingdom in August 2010. Mrs Arthur used the same words in a letter dated 9 October 2012 which she later confirmed in a witness statement. For his part, Mr Arthur said in a witness statement:

> "18. I have a Family Member of an EEA National resident document.
>
> 19. I obtained my leave to remain in the UK document in August 2010."

9. Mr Arthur's remarks led Judge Hemingway, in the Upper Tribunal, to consider whether Mr Arthur "did not have indefinite leave to remain at all but, rather, had a residence card as a family member of an EEA national exercising treaty rights in the UK" (paragraph 41 of the Upper Tribunal decision). He concluded, however, that it had been open to the F-tT on the material before it to decide that Mr Arthur had a grant of indefinite leave to remain and that, in any event, it would not have made very much difference to the F-tT's reasoning (paragraph 42 of the Upper Tribunal decision).

10. In October 2010, Mr Arthur came back to the United Kingdom. He then lived with his wife and daughter in Runcorn and, from 10 November 2010 until 31 May 2011, when he was made redundant, worked for Interhealth Care Services (UK) Limited at a hospital there.

11. Mrs Arthur said this in her October 2012 letter about her husband's return to the United Kingdom:

> "I persuaded him to stay over for some time to help me take care of the little girl and the unborn one since I had nobody at all to help me."

Mr Arthur's witness statement included this:

> "15. I came back to the UK in October 2010 to assist my Wife in moving to London. She became pregnant again at this time, with our second child, Nathan.
>
> 16. I later got a job in Runcorn but I was made redundant on 31st May 2011…."

12. On 4 June 2011, Mr and Mrs Arthur's second child, Nathan, was born. Mr Arthur went back to Ghana on 16 July 2011, but he was in this country again from the beginning of October. In the middle of that month, the family moved to London, entering into a 12-month tenancy agreement in the joint names of Mr and Mrs Arthur from 15 October. Mr Arthur spoke in his witness statement of having come back to the United Kingdom at this stage "to assist [his wife] in moving to London". Mrs Arthur referred in her October 2012 letter to her husband having "helped us relocate to London in October 2011 and also assisted us in looking for a nursery for the kids".

13. Mr Arthur continued to live with Mrs Arthur in London into 2012, claiming Jobseeker's Allowance between January and March. On 3 March 2012, however, he returned to Ghana. He explained in his witness statement that this was "after months of job searching without success".

14. It appears that Mr Arthur has not been to the United Kingdom since March 2012. Further, he explained in his witness statement that he had been renting an apartment in Ghana since 2004 and that he had had a job there. He exhibited a letter from a company in Ghana stating that he had been "permanently employed … since September 2009, albeit on an on-and-off basis, sometimes taking some unpaid leave days off to visit his family in the UK".

15. The F-tT recorded that Mr Arthur was on the voters' roll as at 6 April 2011. In that regard, HM Revenue and Customs ("HMRC") had stated in a document filed with the F-tT:

"Tribunal are asked to note that Mr Eric Arthur is currently shown as being registered to vote at [the Runcorn address] from October 2010 to the current register and at [the London address] from October 2011 to the current register."

"Ordinary residence": legal principles

16. Guidance on the meaning of "ordinarily resident" can be found in three decisions of the House of Lords: *Levene v Inland Revenue Commissioners* [1928] AC 217, *Inland Revenue Commissioners v Lysaght* [1928] AC 234 and *R v Barnet LBC ex parte Shah* [1983] 2 AC 309. Those cases provide authority for the following propositions:

i) The expression "ordinary residence" "connotes residence in a place with some degree of continuity and apart from accidental or temporary absences" (*Levene*, at 225, per Viscount Cave LC);

ii) "[T]he converse to 'ordinarily' is 'extraordinarily' and … part of the regular order of a man's life, adopted voluntarily and for settled purposes, is not 'extraordinary'" (*Lysaght*, at 243, per Viscount Sumner). Consistently with this, "ordinarily resident" "refers to a man's abode in a particular place or country which he has adopted voluntarily and for settled purposes as part of the regular order of his life for the time being, whether of short or long duration" (*Shah*, at 343, per Lord Scarman);

iii) "Ordinary residence" differs little from "residence" (*Levene*, at 225, per Viscount Cave LC). "Ordinarily resident" means "no more than that the residence is not casual and uncertain but that the person held to reside does so in the ordinary course of his life" (*Lysaght*, at 248, per Lord Buckmaster);

iv) A person can be resident in a place even though "from time to time he leaves it for the purpose of business or pleasure" and, conversely, "a person who has his home abroad and visits the United Kingdom from time to time for temporary purposes without setting up an establishment in this country is not considered to be resident here" (*Levene*, at 222-223, per Viscount Cave LC);

v) A person can also be resident in a place even though he would prefer to be elsewhere. In *Lysaght*, Lord Buckmaster said (at 248):

> "A man might well be compelled to reside here completely against his will; the exigencies of business often forbid the choice of residence, and though a man may make his home elsewhere and stay in this country only because business compels him, yet none the less, if the periods for which and the conditions under which he stays are such that they may be regarded as constituting residence, as in my opinion they were in this case, it is open to the Commissioners to find that in fact he does so reside";

vi) A person may reside in more than one place (*Levene*, at 223, per Viscount Cave LC);

vii) "Ordinary residence" is not synonymous with "domicile" or "permanent home" (*Shah*, at 342-343 and 345, per Lord Scarman);

viii) "Immigration status" "may or may not be a guide to a person's intention in establishing a residence in this country" (*Shah*, 348, per Lord Scarman); and

ix) "There are two, and no more than two, respects in which the mind of the 'propositus' is important in determining ordinary residence": "[t]he residence must be voluntarily adopted" and "there must be a degree of settled purpose", which could potentially be "a specific limited purpose" (*Shah*, at 344 and 348, per Lord Scarman). Lord Scarman explained in *Shah* (at 344):

> "The purpose may be one; or there may be several. It may be specific or general. All that the law requires is that there is a settled purpose. This is not to say that the 'propositus' intends to stay where he is indefinitely; indeed his purpose, while settled, may be for a limited period. Education, business or profession, employment, health, family, or merely love of the place spring to mind as common reasons for a choice of regular abode. and there may well be many others. All that is necessary is that the purpose of living where one does has a sufficient degree of continuity to be properly described as settled."

Challenging F-tT decisions about residence

17. To succeed in an appeal from an F-tT decision on residence or ordinary residence, it must be shown (to quote from Lloyd LJ's judgment in *Grace v Her Majesty's Revenue and Customs Commissioners* [2009] EWCA Civ 1082, [2009] STC 2707, at paragraph 4):

> "(1) that the decision is one which 'no person acting judicially and properly instructed as to the relevant law could have come'; or (2) that the reasoning for the decision contains something which is on its face bad law and which bears on the determination".

The F-tT's decision in this case

18. In the decision notice issued to the parties on 11 April 2014 ("the Decision Notice"), the F-tT said this about whether Mr Arthur was "ordinarily resident" in the United Kingdom on 6 April 2011:

> "The Tribunal also finds that as at 6 April 2011 Mr Arthur was ordinarily resident in the UK. At that time he was working for Interhealth Care Services (UK) Ltd and had been in this employment since 10 November 2010. This employment continued until 31 May 2011 …. He had obtained indefinite leave to remain in the UK in August 2010. He was included on the voters roll. He was the father of Emily who was born on 23 April 2010 and he was living with his pregnant wife, Mrs Arthur, who would give birth to their son Nathan on 4 June 2011. Mr Arthur remained in the UK until 16 July 2011 when he returned to Ghana for the period until 1 October 2011. From October 2011 until 3 March 2012 Mr Arthur was in the UK living with Mrs Arthur at her addresses during that period. From January 2012 to March 2012 Mr Arthur claimed Jobseeker's Allowance in the UK. For all these reasons the Tribunal finds as a fact, on the balance of probabilities, that Mr Arthur was ordinarily resident in the UK as at 6 April 2017."

19. The F-tT's fuller "Statement of Reasons for Decision" ("the Statement of Reasons"), dated 14 May 2014, contained, in the sub-paragraphs of paragraph 3, a series of factual findings, ending (at paragraph 3(p)) with this:

> "The Tribunal also finds that Mr Arthur was ordinarily resident in the UK as at 6 April 2011."

20. Returning later in the Statement of Reasons to the issue of whether Mr Arthur was "ordinarily resident" in the United Kingdom, the F-tT said this (in paragraph 8):

> "The Tribunal finds that Mr Arthur's actions in obtaining indefinite leave to remain in the UK and working in the UK seem to be inconsistent with the actions of someone who was not ordinarily resident in the UK at that time. The Tribunal accepts that Mr Arthur did return to Ghana between July and October 2011. However, upon his return to the UK Mr Arthur lived with Mrs Arthur and moved with her from the address in Runcorn to the London address. He then claimed Jobseeker's Allowance from January 2012 until he returned to Ghana in March 2012. Again these actions would on a balance of probabilities appear to be those of a person who considered himself to be ordinarily resident in the UK notwithstanding what was said in the witness statement from him which was before the Tribunal."

21. In the next paragraph of the Statement of Reasons, the F-tT said:

> "The Secretary of State has set out the law at pages D-F of the appeal papers. The Tribunal also had the benefit of a skeleton argument from Counsel for Mrs Arthur …."

22. The skeleton argument in question was prepared by Miss Rebecca Murray, who also appeared for Mrs Arthur before us. Paragraphs 28-34 dealt with whether Mr Arthur was "ordinarily resident" and so "in" the United Kingdom. Among other things, they quoted in full the summary of the relevant legal principles given by Special Commissioner Dr Brice in *Shepherd v Revenue and Customs Commissioners* [2005] STC (SCD) 644 (at paragraph 58).

The parties' case in outline

23. Miss Murray argued that it is not apparent from either the Decision Notice or the Statement of Reasons that the F-tT applied the correct legal test when considering whether Mr Arthur was "ordinarily resident". She further submitted that the F-tT's conclusion (viz. that he was "ordinarily resident" in the United Kingdom on 6 April 2011) was not one that was open to it on the facts: Mr Arthur, she said, was only ever in the United Kingdom for specific, occasional and temporary purposes, and not as part of the regular order of his life, so that his residence in the United Kingdom was occasional residence and not ordinary residence. Miss Murray also criticised the F-tT for having regard to events subsequent to the key date (6 April 2011) when making its decision.

24. In contrast, Miss Julia Smyth, who appeared for HMRC, maintained that the F-tT can be seen to have had the relevant legal principles in mind and that its decision was anything but perverse. She contended, too, that, if it is the case that the F-tT considered events after 6 April 2011, it was entitled to do so.

Did the F-tT apply the correct legal test?

25. Miss Murray pointed out that neither the Decision Notice nor the Statement of Reasons quoted or even mentioned the test that should be applied when deciding whether someone was "ordinarily resident". More than that, she said, the Decision Notice and Statement of Reasons did not contain any express consideration of whether Mr Arthur was

resident in the United Kingdom "for settled purposes as part of the regular order of his life for the time being".

26. However, decisions of Tribunals "rarely benefit from copious citation of authority" (*Secretary of State for the Home Department v EJA* [2017] EWCA Civ 10, at paragraph 27, per Burnett LJ) and "reasons should be read on the assumption that, unless he has demonstrated the contrary, the judge knew how he should perform his functions and which matters he should take into account" (*Piglowska v Piglowski* [1999] 1 WLR 1360, at 1372, per Lord Hoffmann). In the present case, as I have already said, the F-tT referred in terms to having had the benefit of a skeleton argument from Miss Murray which included a summary of the relevant legal principles. On top of that, I can see nothing in the way the F-tT expressed itself in the Decision Notice or Statement of Reasons to indicate that, contrary to the impression given by paragraph 9 of the Statement of Reasons, it did not have in mind the principles set out in Miss Murray's skeleton argument. It is perhaps also worth mentioning that the F-tT judge had adjourned the matter on 19 July 2013 specifically because (as can be seen from the directions notice) counsel had raised the "issue of whether or not Mr Arthur was ordinarily resident in the UK" so that "further evidence and legal submissions were required to decide this case fairly and justly". That might be thought to make it the more unlikely that the judge would not have paid due regard to the legal submissions that Miss Murray was subsequently to advance.

27. In the circumstances, I agree with Judge Hemingway that the F-tT did not misdirect itself as to the legal test it had to apply. It is fair, I think, to conclude that the F-tT had in mind, and sought to apply, the guidance as to the law that was to be found in Miss Murray's skeleton argument.

Was the F-tT's conclusion open to it on the facts?

28. By 6 April 2011, Mr Arthur had been living with his wife and daughter in Runcorn for about six months. For most of that time, he had also had a job in Runcorn and, although he was in the event made redundant a couple of months later, there is no evidence that he knew that that was in prospect on 6 April.

29. The F-tT also noted that, by 6 April 2011, Mr Arthur had "obtained indefinite leave to remain in the UK" and was "included on the voters roll". Miss Murray queried whether Mr Arthur had been entered on the electoral register for the Runcorn address (as opposed to that in London), but it appears to me that the materials before the F-tT bore that out. Nor, in my view, can it have been wrong of the F-tT to record that Mr Arthur had "obtained indefinite leave to remain", albeit that regulation 3(5) of the 2003 Regulations provides for a person who does not have a right to reside in the United Kingdom to be treated as not being in the United Kingdom in the context of a claim for child tax credit. In fact, the existence of regulation 3(5) might itself be thought to call for reference to whether Mr Arthur had a right to reside in the United Kingdom. In any case, the passage from the *Shah* case quoted in paragraph 16(viii) above implies that immigration status can potentially be a relevant consideration.

30. It is fair to say that there was evidence before the F-tT indicating that Mr Arthur retained strong links with Ghana and, in particular, had an apartment and employment there. However, it is perfectly possible for a person to be "ordinarily resident" in both the United Kingdom and another country and, moreover, for that to be the case even though he has his domicile and "permanent home" in the other country (see paragraph 16(vi) and (vii) above).

31. Further, the contrast that Miss Murray tried to draw between "ordinary" and "occasional" residence is not a sound one. The question for the F-tT was not whether Mr Arthur was "ordinarily" resident as opposed to "occasionally" so, but whether he was resident "for settled purposes as part of the regular order of his life for the time being, whether of short or long duration" (see paragraph 16(ii) above). It is enough that the residence "is not casual and uncertain but that the person held to reside does so in the ordinary course of his life" (paragraph 16(iii) above).

32. Miss Murray suggested that Mr Arthur's visits to the United Kingdom were for special occasions (the birth of his daughter, helping his wife to move house, the birth of his son), but Mrs Arthur herself said that she persuaded her husband to stay in this country to help her to take care of their daughter and "the unborn one" (see paragraph 11 above) and, while Mr Arthur spoke of having come back to the United Kingdom to assist his wife in moving to London, achieving the move took another year and Mr Arthur thought it worth taking a job in the meantime. Since a "settled purpose" can be "a specific limited purpose", for "a limited period" and adopted "for the time being, whether of short or long duration" (paragraph 16(ii) and (ix) above), it seems to me that the F-tT was fully entitled to consider that a "settled purpose" existed.

33. In all the circumstances, I consider that the conclusion that Mr Arthur was "ordinarily resident" in the United Kingdom on 6 April 2011 was clearly open to the F-tT on the materials before it.

The significance of events after 6 April 2011

34. Miss Murray's criticisms of the F-tT for having regard to events after 6 April 2011 find an echo in a submission made to the House of Lords in the *Levene* case. There, it was suggested that the Special Commissioners had "misdirected themselves in point of law, because they took into account, with regard to the earlier years, conduct, which only occurred subsequently" (see [1928] AC 217, at 226). As to this, Viscount Sumner said (at 226-227):

> "I agree that the taxpayer's chargeability in each year of charge constitutes a separate issue, even though several years are included in one appeal, but I do not think any error of law is committed if the facts applicable to the whole of the time are found in one continuous story. Light may be thrown on the purpose, with which the first departure from the United Kingdom took place, by looking at his proceedings in a series of subsequent years. They go to show method and system and so remove doubt, which might be entertained if the years were examined in isolation from one another."

35. When assessing whether an individual was "ordinarily resident" somewhere on a particular date, the focus must of course be on the position then, not at any later time. On the other hand, it is apparent from *Levene* that subsequent events are capable of being relevant: they may cast light on what the position was on the key day. That being so, I do not think the F-tT can be criticised for referring, to the extent that it did, to events after 6 April 2011. It was entitled to consider them when deciding whether Mr Arthur was "ordinarily resident" on the date that mattered, 6 April.

Conclusion

36. I would dismiss this appeal. In my view, the F-tT was fully justified in concluding that Mr Arthur was "ordinarily resident" in the United Kingdom on 6 April 2011.

37. I should like, finally, to thank Miss Murray for the help she has provided on a pro bono basis.

Lady Justice Asplin:

38. I agree.

Lord Justice Longmore:

39. I also agree.