Mr and Mrs

Management of taxes | Personal tax

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Keith Gordon discusses a recent case which deals with practical issues relating to an individual's domicile

Key Points

What is the issue?

Historically, it has proven very difficult for a party to demonstrate that a domicile has changed (particularly when it involves displacing a domicile of origin with a

domicile of choice).

What does it mean to me?

The judgment in *U v J* might raise some eyebrows as it can be interpreted as supporting a slightly more fluid approach than has previously been adopted by the Courts.

What can I take away?

Given that an individual's domicile of origin is based upon the domicile of that individual's parents at the time of birth, a careful analysis of the facts will be as critical as it ever was and the *U v J* case is therefore worthy of further study.

My article in the July 2017 issue of *Tax Adviser* made reference to a recent decision of the Family Division concerning domicile. As that case provides good practical examples as to how an individual's domicile might be determined by reference to 21st (as opposed to 19th) century ways of living, I have decided to return to it for the purposes of this month's article.

It is worth emphasising that the law of domicile is not just a quaint aspect of UK tax law, but is a general legal concept that is still relevant to other areas of law, particularly family law. Indeed, the case (*U v J* [2017] EWHC 449 (Fam)) is a case concerning a proposed divorce. As is common in such cases, the identities of the individuals is to remain confidential and, therefore, the judgment refers to the parties simply as U (the petitioner wife) and J (the respondent husband).

The facts of the case

U and J are married. They both accept that their marriage has irretrievably broken down. U commenced divorce proceedings by petition dated 28 July 2015. For that petition to be within the jurisdiction of the English Courts, U needs to show that either she or J is domiciled in England and Wales (it having been conceded that other routes to jurisdiction do not apply).

Originally, U's petition sought only to assert her own domicile in England and Wales (as that would be sufficient to engage the Court's jurisdiction). However, J has not only contested that assertion but he has also positively denied that he is (and that

he has ever been) domiciled in England and Wales.

The Court therefore took a pragmatic decision to consider the domicile of both parties to the marriage, indicating that (should it transpire that J were domiciled in England and Wales), U would be likely to be permitted to amend her petition.

Although the facts of the case obviously intertwine, it is helpful to consider the parties' circumstances separately.

U

U's domicile of origin is in the Republic of Ireland, although she was born in England whilst her father (a doctor) had been on secondment here. The family returned to Ireland before her first birthday and she remained there throughout her school education and also her first degree. Her degree was undertaken in conjunction with the Erasmus scheme, meaning that she studied in Italy and Spain for parts of her course. In 1995, at the age of 23, U came to study for a master's degree in Manchester and applied for (and obtained) a British passport.

The longest continuous period that U has lived in England for is the 18 months for the duration of her masters course (until March 1997) following which she undertook an internship in Brussels where she then worked full time until October 2001. After a holiday in India with J, she returned to England at the end of the year where she was working on a fixed-term contract until October 2002. During that period, J and U lived together in Fulham. During that period, U collected all her personal items (which were then being stored at her parents' Irish home) and brought to them to the Fulham property before embarking upon a one-year EU post in Albania. In order to qualify for this post, U had applied to the Home Office in London for the relevant security check; she did not make a similar request of the Irish authorities.

U obtained diplomatic status in April 2005 and is recorded as showing London (the Fulham property) as her permanent address, which was also used for the purposes of recording U's fiscal country of origin, pensions calculations and flight entitlements.

U and J married in August 2005 in Italy, the reception being held in a farmhouse owned by J. Shortly before the wedding, J presented U with a pre-nuptial agreement which they both signed. Under that agreement, amongst other matters, both parties

acknowledged themselves to be British subjects, farmers and domiciled in Italy. As the Court later remarked, the decision of both parties to sign the agreement demonstrated ‘a rather casual regard’ and required the Court to proceed with caution.

About a year later, the couple’s first child was born. U returned to London for the birth (and, at most, spent a few weeks in England for this purpose). Shortly afterwards, mother and baby returned to Italy where U spent the rest of her maternity leave before resuming her duties in Albania. She moved to Sarajevo in 2009 where J was by then living.

Between 2003 and 2005, U was on the electoral roll in Hammersmith and Fulham and, more recently, registered as an overseas British voter. She applied for a postal vote for the EU Referendum in 2016.

J

J was born in Mumbai to Indian parents in the early 1940s. The family moved to London in around 1957 because J’s father considered the education opportunities to be better in the UK. The family liquidated all their assets in India and (J’s father at least) became a naturalised British citizen in 1960. J left school at an early age but then pursued further studies eventually leading to postgraduate qualifications. In 1972, J joined the Civil Service at the age of 28 where he remained for 23 years. At the age of 34, he purchased the Fulham property where U and J later lived.

The Court noted also that in the early 1970s, J purchased (originally with others) the Italian farmhouse where he and U later celebrated their marriage. Although J described the house as his ‘spiritual home’, the Court noted that it was used, albeit frequently, for annual holidays, the Court emphasising the word ‘holidays’.
In 1995, J became an administrator for the EU in Luxembourg and this is when J claims to have stopped living in England and Wales. He moved to Brussels in 1997 and (at some point in the next couple of years – the date is disputed) met and formed a relationship with U.

J’s role in Brussels came to an end in October 2001 and he was assigned to work at the Cabinet Office from early 2002. During this period, the couple lived at the Fulham property. However, J’s role in London did not last long and he started spending extended periods in Albania with U, obtaining part-time and later full-time

work there. Until 2005, U claimed that J spent any time when he was not in Albania in London. But this was disputed. In 2006, J took a post in Sarajevo and for the next few years, he and U conducted a long-distance relationship (between Albania and Bosnia Herzegovina) until U was able to join him in 2009.

The Court's decision

The complexity of the task facing the Court was not lost on the Judge (Mr Justice Cobb). In his analysis of the facts, he noted that:

- U's presence in England & Wales was not particularly long and approximately 20 years ago.
- Nevertheless, even short-term presence in the UK can be sufficient to establish a domicile.

The Judge commented that U demonstrated very little emotional warmth towards England and Wales, but, nevertheless, considered, on balance, that she had done enough to make England and Wales her permanent home (meaning that she had indeed acquired a domicile of choice). Furthermore, despite the considerable absences since, the Judge concluded that no overseas posting led to any reason to believe that a new permanent or indefinite home had been acquired.

So far as J was concerned, the Judge agreed with U's initial assessment that he was not domiciled in England and Wales. However, for completeness, it was the Judge's belief that J had at some earlier point acquired a domicile of choice in England and Wales, but that this had since been abandoned.

Commentary

Historically, it has proven very difficult for a party to demonstrate that a domicile has changed (particularly when it involves displacing a domicile of origin with a domicile of choice). As a result, the judgment in *U v J* might raise some eyebrows as it can be interpreted as supporting a slightly more fluid approach than has previously been adopted by the Courts.

On the other hand, the decision is very pragmatic and, given the increased ability for international travel and relocation compared with the time when many of the key principles were established, I consider it would be rash to dismiss this case out of

hand. Furthermore, it cannot be said that the Judge has overlooked any major principle or failed to apply a careful balancing exercise to the facts available to him.

The tax advantages of UK domicile have been considerably curtailed in recent years (and, depending on the fate of the clauses that were excised from the (first) Finance Bill of the year before the election, are likely to be reduced yet further). Nevertheless, it is often essential (particularly in the case of new arrivals to the UK) to understand where an individual is domiciled.

Furthermore, (as was proposed before the election) individuals who were born in the UK with a UK domicile could end up being taxed more harshly than their siblings who, by chance, were either born outside the UK or without a UK domicile. Given that an individual's domicile of origin is (except in adoption cases) based upon the domicile of that individual's parents at the time of birth, a careful analysis of the facts will be as critical as it ever was (if not more so) and the *U v J* case is therefore worthy of further study.