Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/45655/2014

THE IMMIGRATION ACTS

Heard at the Royal Courts of Justice	**Determination Promulgated**
On 14 December 2015	**On 15 January 2016**

Before

UPPER TRIBUNAL JUDGE FREEMAN
UPPER TRIBUNAL JUDGE MARKUS QC

Between

DRITON ZHEGROVA

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr M Symes, Counsel
For the Appellant: Mrs Willocks-Briscoe

DETERMINATION AND REASONS

1. This is an appeal from a decision of the First-tier Tribunal dated 20 April 2015, upholding a decision by the Secretary of State dated 30 October 2014 refusing the Appellant's application for a residence card.

2. The Appellant had married a Slovakian national on 17 August 2007. He was granted entry clearance to the UK as a spouse of an EEA national, from 10 October 2007 to 15 April 2008 and subsequently extended to 26 August 2014. On 25 August 2014 the Appellant applied for a further residence card. By then he and his spouse had separated, having done so less than

one year after he entered the UK. They subsequently divorced on 28 October 2014. The Respondent refused the application on 30 October 2014. Amongst other grounds for refusal, the Respondent was not satisfied that the Appellant's former spouse had been exercising Treaty rights in the UK at the relevant time because the Appellant had not provided any evidence that she had been working (this was the only basis on which it was contended that she was exercising Treaty rights).

3. At the hearing before the First-tier Tribunal, the Appellant's representative sought a direction that the Respondent make enquiries as to whether she had been working at the relevant time and to adjourn the hearing. The First-tier Tribunal refused to do so, because the Judge decided that the Appellant should have made the application earlier.

4. The First-tier Tribunal dismissed the Appellant's appeal. The tribunal concluded that it was unclear whether the Appellant and his former spouse had ever lived together but that, even if they had, the marriage had broken down less than one year after he came to the UK and so he had not resided with her in the UK for at least one year after their marriage. In any event, the Appellant had failed to prove that his former wife was exercising her Treaty rights in the UK at the time of the divorce.

5. Permission to appeal was given by a judge of the First-tier Tribunal. An appeal hearing took place before Upper Tribunal Judges Freeman and Markus QC on 6 August 2015. Issues arose upon which further submissions were required, and so the appeal was adjourned with directions identifying the further issues as follows:

> "a. EEA law Was the judge right to hold, in effect, that the appellant needed to establish at least one year's residence in this country with his former wife, as a condition precedent to getting a retained right of residence? (see Immigration (European Economic Area) Regulations 2006 [the EEA Regulations] reg. 10 (5)(d)(i)); and
>
> b. Article 8 Was the judge right to hold that refusal of a residence card gave the appellant no right of appeal under Article 8, without any removal decision?"

6. The adjourned hearing took place before Judges Freeman and Markus QC at the Royal Courts of Justice on 14 December 2015. Certain issues were by then agreed as follows:

   a) The Respondent conceded the one year's residence issue.

   b) The Appellant conceded that the decision of the Court of Appeal in TY (Sri Lanka) v Secretary of State for the Home Department [2015] EWCA Civ 1233 resolved the Article 8 issue against him.

7. In the light of the Respondent's concession the Appellant's appeal would succeed if, and only if, the First-tier Tribunal had made a material error of law in refusing to adjourn the hearing in order to require the Respondent to make further inquiries as to whether the Appellant's former spouse had

been economically active at the time of their divorce. If there had been no error in that respect, the tribunal's conclusion that she had not been economically active meant that the Appellant could not establish entitlement to a residence card because his former wife was not at the relevant time a qualified person as required by regulation 10(5)(a).

8. We therefore set out in a little more detail the factual background to that aspect of this appeal.

9. In the letter dated 21 August 2014 in support of the Appellant's application for a residence card, the Appellant's solicitor had written that the Appellant's former wife had worked in the UK at the time their marriage and continued to do so, but that they were not on good terms and he could not produce any evidence regarding her employment. The Respondent was referred to the decision of the Court of Appeal in Amos v Secretary of State for the Home Department [2011] EWCA Civ 552 which was said to be authority for the proposition that the Respondent would "have to consider assisting a retained rights of residence applicant to establish whether their estranged EEA spouse had been and remained a qualified person. Reference is made in Amos to the power under s.40 of the UK Borders Act 2007 to obtain information from other government departments, such as the Department of Work and Pensions." The letter then referred to Home Office policy, which was to make enquiries of other government departments in order to assist in establishing a right of residence, where the applicant has provided evidence that they were the victim of domestic violence, and cannot provide evidence relating to their sponsor's nationality or treaty rights; or where the relationship has ended acrimoniously, but the applicant has provided evidence to show that they have made every effort to provide the required documents. The Appellant's solicitor requested the Respondent to make enquiries regarding his former wife's employment, as he had been unable to get the required evidence.

10. In the refusal letter, dated 30 October 2014, the Respondent wrote "Whilst every attempt has been made by the UK Border Agency to establish your EEA family member's employment the burden of proof rests with the applicant to provide such evidence and you have failed to do so."

11. The First-tier Tribunal hearing took place on 10 April 2015. For the first time, at the hearing, the Appellant sought a direction that the Respondent make enquiries of other government departments as to his former wife's employment. The First-tier Tribunal refused to make a direction, for the following reasons:

> "The Application was made in August 2014, the decision on 30 October 2014. The Appellant was still represented when he submitted his Grounds of Appeal on 12.11.14 when he made no mention of a challenge to the Respondent's assertion that she had made every attempt to establish his former wife's employment situation. If he did not accept that assertion, that was the appropriate time to challenge the Respondent on it and/or ask for evidence of efforts made. The Appellant had nearly 6 months since the

> Refusal to raise this issue with the Respondent and he had known of the Hearing Date for 3 months. No prior application to the Tribunal was made for an adjournment, or for a direction to be made to the Respondent, the issue being realised for the first time on the day of the Hearing itself. In these circumstances I concluded that fairness and justice did not demand that I make Directions and adjourn the case."

12. The tribunal proceeded to make its findings, including that the Appellant's former wife was not exercising her Treaty rights in the UK at the time of the divorce.

13. In Amos the applicant, seeking to establish a retained right of residence, had been unable to obtain evidence that her husband had been exercising Treaty rights at the time of divorce. The Court of Appeal rejected her contention that the Secretary of State was required to assist her to establish her case, saying at paragraph [34]:

> "The procedure in appeals before the tribunal are essentially adversarial; the applicant seeks to show that the decision of the Secretary of State was unlawful or otherwise wrong. The Secretary of State must present the facts as known to her fairly, and seek a decision of the tribunal that accords with the law, but to go beyond those requirements would be irrational; it would be wrong to require the Secretary of State to take steps to prove that her own decision was wrong."

14. In concluding that the tribunal had not erred in law the Court of Appeal took into account that the applicant could have applied for a witness summons requiring her ex-husband to attend to give evidence, or could have sought a direction from the tribunal requiring the Secretary of State to provide information, but she had done neither.

15. The Court of Appeal rejected the applicant's submission that the decision of the House of Lords in Kerr v Department of Social Development [2004] 1 WLR 1372 was authority for the proposition that it was for the Home Secretary to produce documentation available to HMRC and the Department for Work and Pensions which would establish that her former husband had worked. Kerr concerned a social security appeal which, as Baroness Hale said in her speech, was not truly analogous to a *lis inter partes* and required investigation by the Secretary of State to determine entitlement. In any event, the judgment in Kerr was not authority for the proposition that one department is under a duty to obtain information from a different department or authority.

16. Amos does not assist the Appellant in this appeal. On the contrary it establishes that there is no duty on the Respondent to obtain information from other government departments to establish whether an applicant's former spouse had worked. The Respondent was not under an obligation to make enquiries of other government departments in order to discover whether the Appellant's former spouse had been working at the relevant time.

17. It is true that the Respondent's policy was to seek such information in certain circumstances, but the refusal letter in the present states that the Respondent had made efforts to establish the Appellant's former spouse's employment. The Appellant's complaint is that the Respondent had not provided detail of the efforts and that should have been taken into account by the First-tier Tribunal in deciding whether to make the direction sought. The Appellant relies on the Respondent's obligation under rule 24(1)(d) of the Tribunal Procedure (First-tier Tribunal)(Immigration and Asylum Chamber) Rules 2014 to provide the Tribunal with "any other unpublished document which is referred to in a document mentioned in sub-paragraph (a) or which is relied upon by the respondent". The documents mentioned in sub-paragraph (a) are the notice of decision and reasons.

18. We reject this submission. The refusal letter did not mention any other unpublished document regarding the Respondent's attempts to obtain information about the Appellant's former spouse's employment nor did the Respondent otherwise rely upon any such document. In any event, the First-tier Tribunal's reasons make it clear that it was simply too late to complain about any failure by the Respondent or to seek a direction. It does not matter that the tribunal failed to mention the specific rule under which information should have been provided. That was a decision which was open to the tribunal and it did not err in law in refusing to make a direction or adjourn the hearing.

19. It follows that this appeal is dismissed.

Signed: Date 13 January 2016
Upper Tribunal Judge Kate Markus QC