



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: EA/01673/2017

THE IMMIGRATION ACTS

Heard at Field House
On 6 September 2018

Decision & Reasons Promulgated
On 13 September 2018

Before

UPPER TRIBUNAL JUDGE KEKIĆ

Between

KAMRAN AWAN
(ANONYMITY ORDER NOT MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr S Tariq of West London Solicitors

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

DETERMINATION AND REASONS

1. The appellant challenges the determination of First-tier Tribunal Judge Pacey promulgated on 16 March 2018 dismissing his appeal against the respondent's decision of 19 January 2017 to refuse to issue him with a permanent residence card under reg. 15(1)(b) of the EEA Regulations.
2. The appellant is a national of Pakistan, born on 4 December 1986. He arrived in the UK for studies in May 2009 and on 27 April 2011 he married a Lithuanian

national and subsequently obtained a residence card on 2 August 2011, valid for five years. A subsequent application for a permanent residence card made on 16 April 2015 was refused on 18 September 2015. Although the appellant lodged an appeal against that decision, he later withdrew it and made a further application on 9 June 2016 on the basis of retained rights of residence following his divorce on 9 January 2015; the refusal of that application gives rise to these proceedings. It would appear that a further application was made on 19 October 2017 but had been refused on 22 January 2018 because the appellant had not enrolled his biometric data. The appellant maintained this was because the respondent had sent correspondence to his representatives at the wrong address. According to the skeleton argument prepared for the First-tier Tribunal hearing, that application has been re-submitted. I am not told whether a decision has been made.

3. The respondent was not satisfied that any official documentary evidence had been provided to show that the appellant's spouse had been exercising treaty rights up to the point of divorce.
4. Judge Pacey considered the evidence but whilst accepting that the appellant had had a right of residence prior to the divorce, was not satisfied that he had retained it. Accordingly, she dismissed the appeal.
5. The appellant sought permission to appeal. He argued that the respondent had acted perversely and had failed to follow her own policy in failing to acknowledge that where marriages had broken down, an appellant may find it difficult to obtain the required evidence. It is argued that the respondent's guidance gave her the option of making enquiries with HMRC where such evidence had not been provided.
6. Permission to appeal was granted by First-tier Tribunal Judge Nightingale on 10 July 2018 on the basis that the judge arguably fell into error in deciding that an Amos direction was not applicable. More importantly, although this was not raised by the appellant at all, it was considered that the judge wrongly considered the position as at the date of the divorce rather than the date of the commencement of divorce proceedings.
7. I have not had sight of a Rule 24 response from the Secretary of State.
8. The matter then came before me on 6 September 2018.
9. **The Hearing**
10. The appellant attended the hearing.
11. For the appellant, Mr Tariq referred me to the evidence and submitted that the divorce proceedings commenced on 19 September 2014 and that there was correspondence from HMRC to the sponsor at that time. He submitted that the evidence established that the sponsor had been a qualified person when divorce

proceedings were initiated. Mr Tariq then turned to the respondent's guidance and submitted that the respondent accepted therein that there may be cases when a person would be unable to produce evidence of a sponsor's employment. The guidance showed that in such cases a caseworker was required to make enquiries of HMRC to gather information. He also relied on the judgment of Amos [2011] EWCA Civ 552 where the court held that the respondent should assist a claimant if requested to do so. Mr Tariq argued, however, that it was not necessary for a claimant to request directions under Rule 45 from a court as the respondent was already under a duty to obtain information. He submitted that the decision should be set aside, re-made and the appeal should be allowed.

12. In response, Mr Whitwell submitted that the appellant had already submitted some evidence in respect of the sponsor's employment and so there had been no reason for the respondent to make his own enquiries of HMRC as there was no reason why he should have taken the view that the appellant was unable to obtain evidence himself. He argued that the policy did not suggest that the respondent was under a duty to obtain evidence in all cases and it did not go as far as the appellant suggested. He submitted that no submissions had been made on why the judge is said to have erred in respect of her conclusions on the evidence.
13. Mr Tariq submitted that the judge had focused on the date of the divorce and had not considered the other evidence. Her findings were therefore flawed. The appellant had been working and this was accepted so Mr Tariq questioned why he would suddenly stop. He submitted that a pragmatic approach should be taken. The appellant had asked the respondent to contact HMRC and the respondent should have inferred from that request that there had been a problem in obtaining evidence.
14. At the conclusion of the hearing I reserved my determination which I now give with reasons.

15. Findings and Conclusions

16. Reg. 10 (5) states:

"The condition in this paragraph is that the person ("A") –

(a) ceased to be a family member of a qualified person or an EEA national with a right of permanent residence on the termination of the marriage or civil partnership of A;

(b) was residing in the United Kingdom in accordance with these Regulations at the date of the termination;

(c) satisfies the condition in paragraph (6); and

(d) either –

(i) prior to the initiation of the proceedings for the termination of the marriage or the civil partnership, the marriage or civil partnership had

lasted for at least three years and the parties to the marriage or civil partnership had resided in the United Kingdom for at least one year during its duration; ..."

17. Reg. 6 states:

"The condition in this paragraph is that the person –

(a) is not an EEA national but would, if the person were an EEA national, be a worker, a self-employed person or a self-sufficient person under regulation 6..."
(added emphasis).

18. Whilst there does appear to be a lack of clarity as to whether it is the date of the termination of the marriage that should be taken into account or the commencement of the divorce proceedings, this matter was clarified by the Court of Appeal in Baigazieva v Secretary of State for the Home Department [2018] EWCA Civ 1088 so that the right to reside is only retained on the termination of the marriage, but the criteria for retention are to be considered at the time of the initiation of divorce proceedings.
19. As pointed out by Mr Tariq, and not disputed by Mr Whitwell, the appellant's rights of residence were recognised by the Secretary of State on 2 August 2011 when he was issued with a five year residence card. He had thus to show whether he met the criteria for retention of those rights at the date divorce proceedings were initiated; i.e. 10 September 2014. It follows that Judge Pacey erred when she found that the relevant date was that of the divorce; i.e. 9 January 2015. However, that is not the end of the matter as I must consider whether her error was material.
20. Before I consider the materiality of the judge's error, I would make the following observations.
21. There has been an attempt by the appellant to rely on matters in connection with his recent re-made application, which is not the subject of this appeal, and to argue that matters raised after the decision in the present matter should have been considered with respect to this application/appeal. Plainly the respondent could not have taken account of the appellant's request to make enquiries of HMRC when he reached the decision which gave rise to this appeal as this was made after the decision was taken (confirmed at paragraph 11 of the skeleton argument of 9 March 2017 and at paragraphs 6-7 of the determination). It is difficult to see, therefore, how it can be argued that the respondent was wrong not to have taken this into account. The judge was entitled to make similar observations at paragraph 12. No doubt it is, however, a matter that will be considered in any decision made in respect of the pending application.
22. I also note that contrary to Mr Tariq's submission that Judge Pacey had made a finding that the appellant continued to be a worker himself, no such finding was made, and Mr Tariq conceded that was the case when this was pointed out to him. Although he rhetorically questioned why the appellant should stop working when there had been earlier evidence of his employment, the answer is

provided in the skeleton argument itself (at paragraph 24) when it is stated that the appellant ceased employment as he no longer had the right to work.

23. I also find Amos to be of limited assistance in this case. It was a judgment made before the respondent's guidance on retained rights of residence was issued and I have not been referred to any part of it which supports the submissions now made. At paragraph 19, the court was unable to accept the contentions of the appellants. There was some criticism of the Tribunal's failure to investigate matters (at paragraph 33) but the court rejected the contention that the respondent was required to assist the appellants and take steps to prove that his own decision was wrong (at 34). The citation from Kerr [2004] UKHL 23 cited at paragraph 41 of Amos and relied on emphatically by Mr Tariq is rejected at paragraph 42 where the court held that it was not authority for the proposition that the Home Secretary was bound to make enquiries of other government departments for information. At best Amos provides some support for the option of an appellant making an application to the Tribunal for a witness summons under Reg. 50 requiring the EEA spouse to attend and give evidence or a direction under Rule 45 requiring the Secretary of State to provide any information necessary for the appeal. However, no formal application under either provision was made to the First-tier Tribunal Judge. In any event, the respondent produced guidance on this issue on 19 February 2015 which was in force when the decision was made on the appellant's application. That may have been more helpful to the current issue but it does not appear to have been brought to the judge's attention.
24. I now turn to whether Judge Pacey's error of the date of consideration is material. I note that the appeal was presented to her on the basis that the appellant had established that his sponsor was a qualified person (at paragraph 8) and Mr Whitwell used that as support for his submission that the respondent had no reason to believe that evidence would not have been forthcoming.
25. Mr Tariq submitted that the judge restricted herself to documents at the date of the divorce. I, therefore, consider the documents she took into account as well as any others which were included in the evidence before her. Regrettably no schedule of documents has been provided to assist the Tribunal. In such cases where there is a random array of documents covering various time periods, a schedule would be good practice.
26. The judge refers to "*a number of financial documents relating to, inter alia, her pay slips and accounts*" (at 15) but there is no further discussion of these other than a brief reference to P60s and letters from the sponsor's accountant dated 22 October 2015 and 24 April 2017 both relating to her self-employment for the tax years 2014-2015. The judge concludes that the post- divorce letters demonstrate that, contrary to what the appellant asserts, his former spouse has co-operated with him and has produced evidence. That is a valid finding and no submissions were made to counter it but it does not preclude the judge from then going on to consider that evidence. I note that a large amount of additional documentary

evidence was contained in the appellant's appeal's bundle. Whilst no explanation was offered as to how the appellant had been able to adduce further documentary evidence if he was no longer on speaking terms with his sponsor, the judge was obliged to consider it. Other than making the comments above, she did not proceed to analyse any of it. On that basis, therefore, I find that her error was material and a full consideration of all the evidence adduced may have led to a different outcome. I, therefore, set aside her decision.

27. Mr Tariq asked that I re-make the decision on the basis of the available evidence. I now turn to consider it. The evidence consists of a letter dated December 2012 from HMRC requesting that the sponsor complete a self-assessment form.
28. There are HMRC statements in respect of tax paid for the year ending 2012, 2013 and 2014. There are statements showing National Insurance contributions due for April – October 2013, October 2013 - April 2014, April 2014 - August 2014. There are tax returns for 2011-2012, 2012-2013 and 2013 –2014. I also have tax calculations for 2012, 2013 and 2014.
29. Several letters from the sponsor's accountants have been adduced. I have seen letters dated 13 March 2017 x 3 (for April 2011- April 2012, April 2012 – 2013 and April 2013 - April 2014), 2 February 2014 x 2 (for January 2012 - April 2012 and April 2012 – April 2013), 5 May 2014 (for April 2013 – April 2014), 24 April 2017 (for April 2014 – April 2015). There are tax invoices for 2015 and one for 2014. Finally, there are accountants' reports for years ending April 2014 and 2015.
30. This seems to me to be adequate evidence that the sponsor was exercising treaty rights up until the date that divorce proceedings commenced. Specifically, as the judge herself noted (at paragraph 18), there was evidence of effective self - employment covering the relevant period as now agreed. Mr Tariq pointed out that no issue was raised about the authenticity of any of this evidence and so I accept it at face value. It may be completely manufactured but the respondent did not argue that, nor did he raise any issues about the genuineness of the marriage. I have seen no evidence of the appellant's employment but that was not raised as an issue. I am satisfied that the appellant has adduced adequate documentary evidence to show that his sponsor was a qualified person at the time the divorce proceedings commenced. It follows that in the absence of any other issue being raised, he is entitled to retain his rights of residence.
31. As I have found in the appellant's favour on the basis of the documentary evidence, there is no need for me to consider the respondent's guidance with regard to her role in the procurement of missing evidence.
32. **Decision**
33. The First-tier Tribunal made errors of law and I set aside that decision. I re-make the decision and allow the appeal under the EEA Regulations.

34. Anonymity

35. I was not asked to make an anonymity order and there is no reason to make one.

Signed

A handwritten signature in black ink, appearing to read "R. Keir". The signature is written in a cursive style with a period at the end.

Upper Tribunal Judge

Date: 10 September 2018