Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: EA/00644/2019

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 23 July 2019	**On 1 August 2019**

Before

UPPER TRIBUNAL JUDGE SMITH
DEPUTY UPPER TRIBUNAL JUDGE HOLMES

Between

MR MYKOLA KHOMA

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Ms P Solanki, Counsel instructed by L S Legal, solicitors
For the Respondent: Mr C Avery, Senior Home Office Presenting Officer

DECISION AND REASONS

BACKGROUND

1. The Appellant appeals against a decision of First-Tier Tribunal Judge O'Rourke promulgated on 15 May 2019 ("the Decision") dismissing his appeal against the Respondent's decision dated 23 January 2019 refusing to issue a document certifying his right to permanent

residence in the UK based on his retained right of residence following a dissolved marriage to an EEA national, Ms [A].

2. The Decision was made following a consideration on the papers. The Judge accepted that Ms [A] had been exercising Treaty rights at all relevant times, that the Appellant also had been working and that the marriage had subsisted for the necessary period ([6]). Those matters were not contested by the Respondent. However, although the Judge accepted that the Appellant had petitioned for divorce in July 2018, he did not accept that the marriage had come to an end as he said that there was no decree absolute before him ([10]).

3. The other issue taken by the Respondent was that the Appellant had not produced Ms [A]'s original passport or ID document. The Judge concluded at [11] of the Decision, that he did not need to decide whether the Appellant could rely on regulation 42(1) of the Immigration (European Economic Area) Regulations 2016 ("the EEA Regulations") as the Appellant could not show that he was entitled to a retained right of residence under regulation 10 in any event (due to the lack of a decree absolute).

4. The Appellant appealed on the basis that the Judge had wrongly failed to consider regulation 42(1) of the EEA Regulations and had failed to note that the decree absolute was in the bundle before the Judge ([AB/1046]).

5. Permission to appeal was granted by Designated Judge Shaerf on 17 June 2019 in the following terms so far as relevant:

> "…The Appellant's bundle at page 1046 contained a copy of the decree absolute of 26 March 2019. The Judge arguably erred in his findings at paragraph 10 of his decision in not taking this into account.
> The Judge has not addressed the fact that the Respondent's decision does not state that the Respondent has considered whether to exercise his discretion under Reg.17 of the Immigration (EEA) Regulations 2016 in relation to production of an original document to show his former wife is an EEA national in the light that it will have previously been produced when the Appellant was first issued with a residence card.
> These are arguable errors of law and permission to appeal is granted on both grounds."

6. The matter comes before us to decide whether there is a material error of law in the Decision and, if we so find, to either remit the appeal to the First-tier Tribunal or re-make the Decision in this Tribunal.

ERROR OF LAW

7. Mr Avery accepted that there is indeed a copy of the decree absolute in the Appellant's bundle at [AB/1046]. That shows that the Appellants' marriage was finally dissolved on 26 March 2019. The Appellant's

bundle runs to well over one thousand pages and there is no index. The Judge was expected to find a one-page document with very little assistance and on the papers without oral submissions (although we accept that the skeleton argument with the bundle does make reference to the document).

8. However, the failure to have regard to this document is clearly an error of law. The document is clearly relevant, indeed central to the Judge's finding as to whether regulation 10 of the EEA Regulations could be met.

9. That then brings us on to the other reason why the application was refused by the Respondent, namely the Appellant's failure to provide his ex-wife's original passport or ID document. The Judge did not deal with this issue as he did not consider it necessary to do so because of his finding in relation to the decree absolute. Since we have found an error of law in the latter regard, it follows that we also find an error of law in relation to what the Judge says about the failure to provide the identity document.

10. For those reasons, we set aside the Decision. We see no reason however to set aside the Judge's finding at [6] that, aside the failure to produce the decree absolute and identity document, the Appellant otherwise met the requirements for a retained right of residence. That finding was not put in issue by the Respondent. We therefore preserve that finding.

RE-MAKING OF DECISION

11. Mr Avery quite properly conceded the error of law in relation to the production of the decree absolute. He also accepted that he could not realistically argue that the Appellant should fail because he had not produced his ex-wife's identity document given what is said by this Tribunal in Rehman (EEA Regulations 2016 – specified evidence) [2019] UKUT 000195 (IAC), in particular at [20] of that decision referring to Barnett and Others (EEA Regulations; rights and documentation) [2012] UKUT 00142 concerning the proof required and whether the Respondent can refuse an application for that reason. As the Tribunal there made clear, in particular in a case where permanent residence is sought, it would be unlawful to refuse an application for failure to provide such documentation "given that there is likely to be relevant material relating to such documentation on file from a previous, successful, application". That is, as Mr Avery confirmed, the situation in this case.

12. Although Mr Avery submitted that the fact that the Respondent had not refused the application for any other reason did not necessarily mean that it was accepted that the Appellant met the other requirements of the relevant regulation, we have already pointed out

that the Judge made a finding that those requirements were met and the Respondent has not taken issue with that finding. Mr Avery did not make any submissions that the Appellant failed for any other reason.

13. As Ms Solanki pointed out, the application made by the Appellant was for permanent residence based on a retained right of residence and not simply for a retained right of residence. The Appellant was given a residence card on 4 December 2013 valid until 4 December 2018. He made the application leading to the Respondent's decision under appeal on 5 December 2018 by which time he had completed five years' residence in accordance with the EEA Regulations.

14. For the above reasons, the Appellant is entitled to a residence card certifying his right to permanent residence under regulation 15(1)(f) of the EEA Regulations 2016. Accordingly, we re-make the decision and we allow this appeal.

DECISION

We are satisfied that the Decision contains a material error of law. We set aside the decision of First-tier Tribunal Judge C H O'Rourke promulgated on 15 May 2019.

We re-make the decision. We allow the Appellant's appeal on the basis that he is entitled to a residence card certifying his right to permanent residence under regulation 15 of the EEA Regulations 2016.

The appeal is allowed.

Signed Dated: 23 July 2019

Upper Tribunal Judge Smith