Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: EA/00789/2019

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 16 September 2019	**On 18 September 2019**

Before

UPPER TRIBUNAL JUDGE GLEESON

Between

WASEEM ASLAM MINHAS
[NO ANONYMITY ORDER]

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the appellant: Mr Mazhar Ilahi of Counsel, instructed by with Ashton Ross Law, solicitors
For the respondent: Mr David Clark, a Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellant appeals with permission against the decision of the First-tier Tribunal dismissing his appeal against the respondent's decision to refuse him a permanent right of residence under the Immigration (European Economic Area) Regulations 2016 as the former spouse of an EEA national exercising Treaty rights in the United Kingdom. The appellant is a citizen of Pakistan.

Background

2. The appellant is 32 years old. He came to the United Kingdom almost nine years ago, on 23 December 2010, as a Tier 4 student migrant. He had leave to remain on that basis until 15 June 2012. When it expired, he did not embark.

3. On 26 July 2012, five weeks after the expiry of his Tier 4 leave, the appellant married a Hungarian citizen and on 17 July 2013, he was granted an EEA residence card under the 2006 Regulations, as her spouse. The marriage was not successful: in June 2018, the appellant issued divorce proceedings. On 2 August 2018, the appellant applied for a permanent right of residence card, stating that he had separated from his wife. There was insufficient evidence of the spouse's passport or identity card, and the respondent refused the application.

4. On 14 November 2018, decree nisi was pronounced in the divorce proceedings, with decree absolute on 3 January 2019. That terminated the marriage.

5. On 5 December 2018, the appellant had made a second permanent residence application. That was refused on 30 January 2019.

Refusal letter

6. The respondent's reasons for refusing were that the appellant had been unable to provide sufficient evidence either of his spouse's exercise of Treaty rights up to the date of application for a divorce (June 2018), or of his own exercise of Treaty rights between June 2018 and 5 December 2019, when the appellant applied to the respondent for a permanent right of residence.

7. The refusal letter stated that the appellant had produced sufficient evidence to confirm the divorce proceedings and a copy of his Hungarian ex-wife's passport. The appellant had lived with his wife only since February 2013 and told the respondent he left his wife on 2 August 2018. However, there were gaps in the continuity of her employment. In 2011/2012, the spouse's income was recorded by HMRC as £0. The appellant produced evidence of her employment for three full tax years: 2013/14, 2014/15, 2017/18, and for the first three months of the 2018/2019 tax year but there was no evidence of exercise of Treaty rights by her from June 2018 – November 2018, when the divorce proceedings began.

8. The appellant had not produced evidence of residing himself in the United Kingdom in accordance with the Regulations for a continuous period of 5 years prior to his December 2018 application (so from December 2013 to December 2018).

9. The respondent refused to grant a permanent right of residence and the appellant appealed to the First-tier Tribunal. The appeal was listed on 29 March 2019 but then adjourned, following an application by the appellant's former solicitors, Law Lane Solicitors. On 3 May 2019, he instructed his present solicitors, Ashton Ross Law, and the First-tier Tribunal hearing was on 15 May 2019.

10. On 7 March 2019, Law Lane solicitors emailed the Presenting Officers Unit in Cardiff, asking them to search via HMRC to verify the spouse's exercise of Treaty rights in each of the years 2013/2014, 2014/2015, 2017/2018 and from June to November 2018. They gave her date of birth, nationality and National Insurance number. The respondent responded by email stating that the respondent's policy on HMRC requests was that 'this will only happen in exceptional cases, for example where domestic violence has taken place'. She relied on *Alarape and another* (Article 12, EC Regulation 1612/68) Nigeria [2011] UKUT 00413 which held at [20] that:

> "20. … We can appreciate that Mr Salama's leaving the matrimonial home in 2006/2007 may have made it more difficult than otherwise for the appellants to obtain evidence of his employment history. However, the appellants failed to produce credible evidence of having taken reasonable steps to obtain further and better particulars of Mr Salama's work history and they did not request the FTT to make an interlocutory order (under Rule 50 of the Asylum and Immigration Tribunal (Procedure) Rules 2005). The burden of proving Mr Salama had been exercising Treaty rights for the requisite period rested on them: see *Amos v Secretary of State for the Home Department* [2011] EWCA Civ 552. Hence the appellants had not been able to prove that Mr Salama was exercising Treaty rights except between (at best) February 2004 - April 2006. There was accordingly no material error of law on the part of the FTT in finding that the appellants failed to show they were entitled to permanent residence documentation on the basis of Mr Salama's exercise of Treaty rights. …"

11. The appellant was on notice of the need to apply for an *Amos* order from 3 April 2019 but made no such application at any time. Instead, soon after taking over the case, on 1 May 2019, Ashton Ross Law wrote again to the appellant's former spouse, asking her for the information. If she responded, her response is not in the First-tier Tribunal bundle.

Mr Jegede's skeleton argument

12. In Mr Jegede's skeleton argument dated 14 May 2019 for the First-tier Tribunal, he says that the appellant 'has done all that he can to acquire the relevant evidence from the EEA sponsor' and relied on *Amos.* He stated that the respondent 'must now make checks for the relevant period to confirm whether the EEA sponsor had been exercising Treaty rights…This can be directed upon by the Judge'. He still made no application for an *Amos* direction to the First-tier Tribunal.

13. Attached to the skeleton argument is evidence of the appellant's Tax Summary for the year 2017/2018 (so ending on 5 April 2018), a single bank statement for 13 July 2018 which shows money in and money out, but not what it was, and a bank statement for October 2017 showing various shopping purchases. None of these documents assists much with showing that between June 2018, when he commenced divorce proceedings, and December 2018, when the application for a permanent right of residence was made, the appellant was exercising Treaty rights in the United Kingdom in his own right.

First-tier Tribunal decision

14. The First-tier Judge found that the evidence adduced by the appellant did not demonstrate the exercise of Treaty rights by the appellant's former wife, or by him, at the material times. Mr Jegede conceded both those points at the hearing, according to the Presenting Officer's note of proceedings.

15. The respondent had declined to make enquiries directly with HMRC. No *Amos* direction (*Amos v Secretary of State for the Home Department* [2011] EWCA Civ 552) for production of evidence or for a witness summons under rule 4 of the Tribunal Procedure (First-tier Tribunal) (Immigration and Asylum Chamber) Rules 2014 had been sought, before or at the hearing. Rule 4 in the 2014 Procedure Rules replaced rule 45 of the Asylum and Immigration Tribunal (Procedure) Rules 2005, mentioned in the *Amos* judgment.

16. The appellant sought to adduce additional documents at the end of the hearing. The Judge did not proceed to make an *Amos* direction of his own motion, considering it inappropriate by reason of the vagueness of the evidence from the appellant, both about what his former wife was doing, and about his own employment. The appellant also had not explained why, having married his wife in July 2012, he did not begin to live with her until February 2013.

17. The appeal was dismissed and the appellant appealed to the Upper Tribunal.

Permission to appeal

18. First-tier Judge Alis granted permission to appeal on the basis that the First-tier Judge had arguably acted unfairly in not giving an *Amos* direction, nor permitting examination-in-chief.

19. There had been a request for the record of proceedings, which was not evident on the Tribunal file, and the decision itself was silent as to the question whether examination-in-chief was sought and/or refused.

Rule 24 Reply

20. The material part of the respondent's Rule 24 Reply is as follows:

> "3. **Ground One:** the appellant does not demonstrate that this is an appeal which is exceptional as to facts. It is not for the First-tier Judge to assume and/or to speculate as to the nature and content of the email (A1:20). First-tier Judge correctly adopts the natural meaning of the words contained.
>
> 4. **Ground Two:** the grounds imply that the relevant documents were available and could be produced and this amounted to procedure unfairness. Respectfully, it is common practice for all documents to be served in good time, in keeping with directions and evidence relied upon. It cannot be argued that it would be good practice for the First-tier Judge, firstly to allow further documents during cross-examination, and/or secondly at the conclusion of submissions allowing either party to produce documents to rebut points put forward.

> 5. The grounds do not suggest an application was made to submit further documents at the start of the hearing, nor give an indication as to why the documents were not served prior to the hearing and/or contained within the appellant's bundle. …."

21. In addition, the respondent attaches a note of proceedings from Matthew Williams, the Home Office Presenting Officer at the hearing:

> "It is a great pity that no enquiries were made concerning the spouse – [name] – with regard to her 2011/2012 involvement with [a different man] (see indicative criteria Directive 38/2004).
>
> This appeal against the refusal to grant a permanent residence card heard yesterday – 15 May 2019 – @ Harmondsworth before IJ Housego.
>
> Mr Jegede represented and conceded that the [appellant] could not meet Regulation 10(5) as there was a lack of evidence of [the spouse] exercising [Treaty rights] in/during the material period.
>
> Similarly, he eventually conceded that the [appellant] himself could not show that he had been resident in the United Kingdom in line with the Regulations for the requisite period.
>
> Matter heard on submissions only, relied on *Amos* and on irrationality in *Theophilus*.
>
> At this late stage, the representative requested an adjournment for the Tribunal to issue an *Amos* direction to the respondent regarding the spouse's alleged employment. The Immigration Judge, properly in my view, refused that application as clearly too late and obviously made in desperation given what had been said.
>
> Determination reserved."

22. That is the basis on which this appeal came before the Upper Tribunal.

Mr Kolade Jegede's witness statement

23. By a witness statement dated 27 June 2019, Mr Jegede disputed the account of the hearing in the First-tier Tribunal's decision and also in the Home Office Presenting Officer's note. He relied on his attendance note (which is not provided) and on his skeleton argument to the First-tier Tribunal, which he says set out the need for the respondent to make HMRC checks on the earnings of the appellant's former spouse.

24. He set out the discussion which then ensued, in which the Judge asked why there had been no application for an *Amos* direction before the hearing, and Mr Jegede said that 'in many hearings, as [sic] it was not uncommon for an *Amos* direction to be made at the point of hearing…an *Amos* direction can be made at any point in any event'. The Judge relied on *Amos* at [36] and [40], on Mr Jegede's account.

25. Following the discussion, the First-tier Judge 'took the view that no official request had been made'. Mr Jegede disagrees and considers that he had requested an *Amos* direction. The Judge refused to make an *Amos* direction, and then asked the Presenting Officer whether there was any dispute about the facts of the appeal. The

Presenting Officer said that there was not, and Mr Jegede says that the Judge went straight to submissions. He does not say whether he objected at the time.

26. Mr Jegede complained that the appellant was not given the chance to adopt his witness statement or to verify the documents which were before the Tribunal (excluding the late-produced documents, which were not admitted).

Rule 15(2A) application

27. By an email dated 10 September 2019 and sent at 11:46 AM, Mr Jegede made a rule 15(2A) application to adduce further documentary evidence, the forms P60 which the First-tier Judge refused to admit during his submissions on 15 May 2019. The evidence is not attached to his application. The basis of the application is that the appellant seeks to submit evidence illustrating his working history, 'covering five years as the non-EEA family member of his former spouse'. That evidence should have been submitted with his application for a permanent right of residence in December 2018.

28. Ashton Ross Law's letter says that the Forms P60 had 'only [been] gathered [by the appellant] a day before the hearing' due to late instructions given to Ashton Ross Law. The letter says that Ashton Ross Law were instructed on 5 May 2019 but their Notice of Change of Representative was dated 3 May 2019. The letter continues:

> "The documents which consisted of P60s was only gathered a day before the hearing, as we had cited the Judge that part of the delay was based on late instructions, as we were instructed on 5 May 2019, which is cited in the determination on page 5 at paragraph 21. We thus requested for the documents to be provided at the hearing by the appellant. Thus, the documents were prepared to be illustrated to the Judge. It is worth noting that the documents were not said to be refused to be accepted on the pure basis that they were not produced prior to the hearing, but has been noted particularly to be declined on the basis that the evidence was admitted at the conclusion of the hearing (paragraph 31 of determination).
>
> We have since disputed the context by which the Judge has reached this conclusion, which are highlighted within the initial grounds and witness statement of dated [sic] 27 June 2019. … "

Messrs Ashton Ross Law ask for the documents to be admitted 'in the interest of fairness and justice'. As they were not attached to the application, the Upper Tribunal was not able to form a view of these documents before the hearing. They are admissible only if there is a material error of law in the decision such that it should be set aside and remade.

Analysis

29. When considering whether there is an error of law by the First-tier Tribunal, still less a material error of law, I remind myself that this is a challenge to the respondent's decision made on the evidence which the appellant chose to put before her when he made his application on 5 December 2018. The burden of proof for Regulation 10(5) is on the appellant, and applying *Baigazieva v Secretary of State for the Home*

Department [2018] EWCA Civ 1088, he must be able to show that his former wife exercised Treaty rights until the commencement of the divorce proceedings, and that thereafter, he exercised Treaty rights himself until the date of application, such that there was a continuous period of 5 years residence in accordance with the Regulations.

30. Ashton Ross Law were not acting in December 2018. According to the notice of acting on the Upper Tribunal file, they began to act, at the latest, on 3 May 2019. However, documentary evidence of the spouse's exercise of Treaty rights until June 2018, and the appellant's exercise of it thereafter, should have been submitted with the application.

31. The First-tier Tribunal hearing took place on 15 May 2019, 12 days after Ashton Ross Law accepted instructions. Some documents, which Counsel Mr Ilahi has not seen, and nor has either Mr Clark or the Tribunal, were obtained by the appellant before the hearing but no attempt was made to adduce them until the end of Mr Jegede's submissions. No proper reason has been advanced for waiting until submissions in the First-tier Tribunal, at the end of the hearing, to seek to adduce them.

32. I am satisfied that the First-tier Judge did not err in law in refusing to admit those documents, which apparently were some forms P60. In any event, they would have been of little assistance, it seems to me: the appellant's forms P60 for the tax years up to and including 5 April 2018 would not have assisted, as that was the period in which he needed to show that his spouse was exercising Treaty rights. If there existed by 15 May 2019 a form P60 for the tax year 2018/2019, that was not a document which could have been placed before the respondent in December 2018.

33. I consider next the criticism of the First-tier Judge for not making an *Amos* direction of his own motion. I note that at [35-36] and [40] in *Amos,* Lord Justice Stanley Burnton, with whom Lord Justice Maurice Kay and the Master of the Rolls agreed, said this:

> "35. There is nothing in the Directive or the Regulations or in the decisions of the Court of Justice to detract from the general principle of Community Law that procedural matters are subject to the domestic law of the Member States. …
>
> 36. Similarly, in Case C-408/03 *Commission v Belgium*, the Court pointed out that:
>
> > "… as the right of residence under Article 18 EC is not unconditional, it is for the citizens of the Union to adduce the necessary evidence that they meet the conditions laid down in that regard by the relevant Community provisions."
>
> 40. … Ms Theophilus does not suggest that the procedural law of the Tribunal hindered her ability to prove her case. Rule 51 of the Asylum and Immigration Tribunal (Procedure) Rules 2005 authorises the Tribunal to "allow oral, documentary or other evidence to be given of any fact which appears to be relevant to an appeal" … even if that evidence would be inadmissible in a court of law. Furthermore, as Mr Eicke pointed out, Ms Theophilus could have applied under regulation 50 for a witness summons requiring her ex-husband to attend

> and give evidence as to whether or not he was and had been working. She did not do so. Nor did she seek a direction under rule 45 requiring the Secretary of State to provide any information necessary for the determination of her appeal. Indeed, she made no relevant application to the Tribunal. As Maurice Kay LJ pointed out in the course of argument, in these circumstances it is impossible to identify any error of law on the part of the Tribunal in this respect."

34. Mr Jegede acknowledged at the First-tier Tribunal hearing that the evidence of exercise of Treaty rights was inadequate, both in relation to the appellant and his spouse. Ashton Ross Law made no application for an *Amos* direction requiring the respondent to seek HMRC disclosure at any time before the First-tier Tribunal hearing, nor is it clear that they did so at the hearing: their argument is that the First-tier Judge should have made an *Amos* direction of his own motion.

35. That contention is unarguable: the responsibility was on the appellant to obtain the evidence to support his assertions with appropriate evidence and there was no error of law by the First-tier Judge in refusing to admit late-produced forms P60 which were not the subject of the respondent's decision and appear unlikely to have been determinative of the appeal in any event. The evidence of the appellant's own exercise of Treaty rights was always within his custody or control and has never been produced. The application could not succeed on that basis and the appeal was bound to fail.

36. The final question is whether the appellant should have been allowed to give evidence. Mr Jegede does not say that he challenged the decision to move directly to submissions. Nor does he challenge the note by the Home Office Presenting Officer recording that he conceded that the appellant could not meet the requirements of Regulation 10(5) because he could not show continuous exercise of Treaty rights by his spouse during his marriage, or by the appellant himself after the divorce proceedings were filed. Given that admission, oral evidence would not have improved the appellant's case: his evidence in his witness statement was not disputed and none of the documents he had submitted was treated as unreliable.

37. There is plainly no material error of law in this decision and I dismiss the appeal.

DECISION

38. For the foregoing reasons, my decision is as follows:

The making of the previous decision involved the making of no error on a point of law

I do not set aside the decision but order that it shall stand.

Signed *Judith AJC Gleeson* Date: 16 September 2019

Upper Tribunal Judge Gleeson