Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: EA/01425/2019

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 11th November 2019	**On 29 November 2019**

Before

UPPER TRIBUNAL JUDGE RIMINGTON

Between

MR HENRY FERNANDO AREQUIPA CANDO
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr S Naqvi instructed by Irvine Thanvi Natas Solicitors
For the Respondent: Ms R Bassi, Home Office Presenting Officer

DECISION AND REASONS

1. The appellant appeals, with permission, the determination of First-tier Tribunal Judge Hussain dated 4th July 2019 which dismissed his appeal against the respondent's decision of 4th March 2019 to refuse his application for retained rights of residence following the end of his marriage to an EEA Spanish national, Ms Monica [J].

2. The reasons for refusal letter noted that the EEA national sponsor left the UK on 7th November 2015 and the appellant was unaware when divorce

proceedings began. The documents provided did not confirm the date. In the absence of this information the Secretary of State required evidence that the appellant's sponsor was a qualified person on the date of divorce which was 13th November 2017. It was accepted that the sponsor was a qualified person between September 2013 to October 2015 but not that the sponsor continued to exercise treaty rights to the date of divorce. The application was refused under Regulation 10 of the Immigration (European Economic Area) Regulations 2016.

3. The application for permission to appeal asserted the First-tier Tribunal decision was vitiated by material errors of law.

   (i) the judge referred at [15] referred to an extract which stated that those eligible to obtain a divorce in Spain included someone who was a national of Spain and living there. There was no consideration whatsoever in the determination as to the possibility that the appellant's sponsor could have misled the Spanish courts about her residence when she petitioned the Spanish courts for divorce (in the summer of 2015 if the appellant's belief was correct).

   (ii) there was no reference anywhere in the determination to the evidence of the appellant's sister who provided a witness statement in support of the appellant's appeal as follows "I also recall speaking to Monica (a sponsor) at the time in order to persuade her to withdraw the divorce proceedings however talking to her was futile as she appeared to have already made up her mind". The appellant's sister's evidence was not challenged but there was no mention of this in the determination.

4. The judge recorded the following evidence

   (i) the application was refused because the appellant had not provided adequate evidence that his EEA former spouse was a qualified person or had a right of permanent residence on the date of termination of the marriage or civil partnership. The appellant had claimed that his sponsor left the UK on 7th November 2015 and that he was told by his then wife she had started proceedings in summer 2015 but he did not believe her [5]

   (ii) at paragraph 5 the judge recorded in his application at 8.17 the appellant stated he did not know when the legal proceedings began. [5];

   (iii) in oral evidence the appellant stated that he discovered he was divorced in March 2018, had visited the court in Spain, and had been shown a document which confirmed that he was already divorced;

   (iv) the judge recorded in oral evidence that the appellant was asked to clarify when his wife went to Spain and he stated that he thought it was in August 2015 despite paragraph 14 of his statement saying that it was 7th November 2015 [9];

5. The judge directed himself correctly at paragraph 13 that an applicant claiming to have a retained right of residence had to prove that at the initiation of

divorce proceedings resulting in the termination of the marriage, that his sponsor was exercising treaty rights. *Baigazieva and the Secretary of State [2018] EWCA Civ 1088* confirms that at the very latest the ex-wife must have been exercising treaty rights when she initiated divorce proceedings. The judge noted that the appellant was told by his partner that she had instructed a lawyer in Spain to start divorce proceedings which he tried to talk her out of and she then came back to this country but finally left in November 2015 or alternatively August 2015 if the appellant's oral evidence was correct. The judge, however, made a specific finding at paragraph 13

> *'whether it is the date of initiation of the divorce or the divorce itself which, in this case took place on 13th November 2017, in my view there simply is not any evidence that the sponsor was exercising treaty rights in this country'*

6. Bearing in mind the contradictions and vagueness in the appellant's evidence (oral and written) and the absence of any objective evidence, that finding in paragraph 13 was open to the judge.

7. As the judge observed

> *"17 In my view, the appellant has not helped his case by not making greater efforts to obtain a copy of the divorce petition, which may well have had an indication on its face as to the day it was lodged with the court or a separate confirmation from the court as to when commencement began. The appellant, personally went to the court in Barcelona, from where he obtained a copy of the divorce certificate. He could have asked for more.*
>
> *18 Sympathy for the appellant is not sufficient to discharge the burden of proof on him. The respondent was right to expect evidence of the sponsor's exercise of treaty rights, when the divorce was initiated. The appellant has not been able to provide that evidence and accordingly, it seems to me that if the refusal of his application was inevitable. I find that the respondent was justified in refusing the appellant's application."*

8. At the hearing before me Mr Naqvi submitted that the appellant's sponsor may have had to be domiciled in Spain to obtain a divorce which would place her outside the United Kingdom when divorce proceedings were initiated but she may have given misleading information to the court. Be that as it may, as the judge noted, there was simply no objective or firm evidence as to when the divorce proceedings were commenced or where the sponsor was at that time. As the judge recorded in [15] the appellant as at a loss to explain how divorce proceedings could have been initiated in Spain in the summer of 2015 when it was not until much later that the appellant's partner went to live there'. It is not for a judge to speculate as to whether misleading information was given regarding the provision of misleading information and, I have read the skeleton argument before the First-tier Tribunal and there was no indication that that issue was specifically raised before the First-tier Tribunal Judge. The

explanation for the three-year gap between filing for divorce and obtaining a divorce was owed to the 'perpetual delays of the Spanish legal system'. Those defects in the evidence were present whether or not the ex-wife had failed to proceed in accordance with Spanish divorce law.

9. Mr Naqvi also submitted that the appellant had made an application for the residence card in January 2019 and by then had no passport and could not go to Spain to obtain the relevant evidence. He submitted that a solicitor could not write to a Spanish court, which I do not accept, and that the respondent should have done so and the respondent should have made inquiries. The appellant went to the courts at the time in March 2018 and discovered that he was divorced. It is, however, clearly open to solicitors on the appellant's instructions to write to Spanish court to obtain information. The appellant made the application in January of this year and had ample time to pursue documentary evidence.

10. Turning to the second ground, the appellant's sister did not give live evidence and even if her evidence was not referred to it is not material given the nature of the case because it does not take the case further. There was a reference to the divorce being finalised on 23rd November 2017 at paragraph 11 of Miss Cando's statement and that "he was hoping that she had abandoned the divorce procedure that she informed me that she had commenced in the summer of 2015 however she had not" but that was the extent of the statement. The statement gives no definitive answer as to when the proceedings were initiated. The statement also refers to the ex-wife departing from the 'UK for Spain in 2015' without any more detail. The statement gives no clear information as to where the EEA national was residing when divorce proceedings were commenced.

11. The ex-wife, EEA national, was last recorded as being employed with Mayfair Cleaning on 31st October 2015 but overall there was no documentary evidence as to when the divorce proceedings were in fact instituted, contradictory information as to when the ex-wife departed the UK and an unhelpful extract concerning the technicalities of a Spanish divorce. It is for the appellant to prove his case. The judge made findings which were open to him and any absence of detailed reference to the sister's evidence was, owing to its vagueness, not material. As the judge found at paragraph 18, the appellant had not provided sufficient evidence to prove his case.

12. I find there is no error in the decision of First-tier Tribunal Judge M B Husain and the decision will stand.

No anonymity direction is made.

Signed *Helen Rimington* Date 27th November 2019

Upper Tribunal Judge Rimington