Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: EA/03002/2017

THE IMMIGRATION ACTS

Heard at Field House	**Decision sent to parties on**
On 22 January 2019	**On 11 March 2019**

Before

UPPER TRIBUNAL JUDGE GLEESON

Between

ALFRED OLUKAYODE OYE
(NO ANONYMITY ORDER)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr Stephen Vokes, Counsel instructed by Owens Solicitors
For the Respondent: Mr Nigel Bramble, a Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellant appeals with permission against the decision of the First-tier Tribunal on 18 August 2018 dismissing his appeal against the respondent's refusal to grant him a permanent residence card recognising a retained right of residence following divorce under Regulation 10(5) of the Immigration (European Economic Area) Regulations 2016.

2. The appellant was formerly married to an Austrian citizen who is therefore an EEA national and who was exercising Treaty rights for at least part of the time required to satisfy the provisions of Regulation 10(5).

3. The parties' marriage was entered into on 9 May 2009 and so the parties would have been married for five years on 9 May 2014. That is the period for which the applicant needs to show that his wife exercised Treaty rights in the United Kingdom.

4. The parties' marriage irretrievably broke down on 4 April 2015, due to the wife's infidelity. Following an argument, the wife took her possessions and moved out of the matrimonial home, leaving no forwarding address. Subsequently it is said she refused to take the appellant's calls to the extent that she is in fact unaware of the divorce proceedings and some sort of alternative service must have been approved by the divorce court. The solicitors undertaking the divorce are not Owens Solicitors who represented the appellant in these proceedings.

5. The *Baigazieva* date for the end of the marriage was 6 May 2015, when the divorce petition was presented by the appellant. Decree absolute was pronounced on 13 November 2015.

Evidence before the First-tier Tribunal

6. The appellant's case is that the sponsor was made redundant on some date in 2014 which the applicant could not precisely remember, but before the summer, but that she may have worked as a hairdresser for a time thereafter. In order to show that the applicant had five years of residence in the United Kingdom in accordance with the Regulations, the date of her redundancy would have had to have been no earlier than 9 May 2014 but the appellant was unable to give clear evidence to that effect or provide any corroborative documentary evidence.

7. The appellant told the First-tier Judge, at [12] that "he did not know if his solicitors had approached the [hairdressing] salon or HMRC to confirm that [his former wife] had been working". No representative of the solicitors attended at the First-tier Tribunal hearing and no evidence has been submitted which improves that position.

8. At [21] the judge recorded the evidential position before him:

> "In this case there is no suggestion that the appellant tried to contact the sponsor, her employers or HMRC. I am not therefore persuaded that the respondent has failed to implement [his] policy. The burden of proof remains on the appellant and it has not been discharged".

9. The First-tier Judge dismissed the appeal both under the Regulations and under the Immigration Rules related to Article 8 ECHR.

10. The appellant appealed to the Upper Tribunal.

Permission to appeal

11. Permission to appeal was granted, principally in reliance on the respondent's published policy *Free Movement Rights: Retained right of residence* (updated 7 February 2017), the appellant contending that the First-tier Judge erred in concluding that there was no onus on the respondent to undertake his own investigations with the sponsor's former employers or HMRC to help the appellant establishment whether on 6 May 2015, the sponsor was working in the United Kingdom. Judge Simpson noted that the appellant had made no application to the First-tier Tribunal for a direction that the respondent make such inquiries.

12. When granting permission, Judge Simpson observed that it was not the appellant's case that he had made any attempt to contact the sponsor, her employers, or HMRC, but she considered that it was arguable that he was prevented from doing so by the General Data Protection Regulation, implemented in the United Kingdom on 25 May 2018. She considered that the respondent had arguably failed to apply his Guidance, and that such failure was arguably material.

13. Judge Simpson further considered that Judge Broe erred in dismissing the appeal under the Immigration Rules, because it had been brought under the EEA Regulations and the Immigration Rules were therefore not applicable. That is quite right, and it means that paragraphs 22 to 28 of the First-tier Tribunal's decision are otiose and immaterial to the outcome of an EEA Regulations appeal. The Article 8 ECHR point was not relied upon in the Upper Tribunal hearing.

The respondent's policy

14. Mr Vokes provided me with a copy of the relevant page of the respondent's policy, as follows:

> "**No evidence of EEA sponsor**
> In cases where there has been a breakdown in the relationship between the applicant and their EEA national sponsor it may not always be possible for them to get the documents that are needed to support their application …
> Another example would be where the applicant's relationship has ended under difficult circumstances but *they have provided evidence to show that they have made every effort to provide the required documents. Such as attempting to make contact with the EEA national sponsor during divorce proceedings …*
> When dealing with these cases you must take a pragmatic approach and:
> • consider each case on its merits
> • *if you are satisfied the applicant cannot get the evidence themselves*, make enquiries on their behalf where possible, getting agreement from your senior caseworker before doing so.
>
> **Applications for Registration Certificates or Residence Cards**
> *Where it is agreed that you can make additional enquiries* the applicant must give you as much detail as they can about the EEA national sponsor. If they cannot provide proof of the EEA national sponsor's identity, nationality or proof of relationship then you

> must check existing records on CID to see if their identity has been established in any previous applications.
>
> If they can give the name of the EEA national sponsor's employer or place of study or existing records on CID hold such details you may contact the employer or educational establishment to enquire if the EEA national sponsor is working or studying there. You must decide whether to do so according to the facts of the individual case and with the agreement of your senior caseworker …
> If you decide not to get information directly from the EEA national's employer or educational establishment, for example because of the exceptional circumstances of the case or because the EEA national is self-employed, *then you must make enquiries with her Majesty's Revenue and Customs (HMRC) to try to gather the necessary information*."
>
> [*Emphasis added*]

Analysis

15. Mr Vokes contended that the final paragraph quoted above stands alone and is not governed by the rest of the Guidance. I disagree: such an interpretation would strain the language of the Guidance, and the final paragraph is plainly governed by what comes before, an explanation of the various circumstances in which an enquiry may be made.

16. A caseworker is only required to consider making enquiries of a former employer or HMRC where:

    (a) an appellant can show that they have made "every effort to provide the required documents",

    (b) the caseworker is satisfied that the appellant cannot get the evidence himself; and

    (c) the caseworker has obtained the agreement of a senior caseworker to proceed to make such enquiries of the former employer and/or HMRC.

17. The appellant accepts that he has made no attempt to obtain evidence to show that the EEA sponsor was exercising Treaty rights at the material times. It may be that the former employers or HMRC would have refused to provide such evidence, had the appellant sought it, but he did not try. It may equally be that the required evidence exists in the divorce proceedings, but no such evidence was not before the First-tier Tribunal or the Upper Tribunal.

18. On the evidence before the First-tier Tribunal, I am satisfied that the Judge did not err in law in concluding that the appellant had not discharged the burden upon him of showing that his wife was working on 6 May 2014, and that there was no onus on the respondent to make inquiries of the sponsor's former employers or HMRC in the absence of evidence, or effort to obtain such evidence, by the appellant.

19. It follows that it was open to the First-tier Tribunal to find that the appellant had not shown that on the date of termination of the marriage his former wife was still exercising Treaty rights in the United Kingdom and that he has no retained right of residence following the termination of his marriage.

20. This appeal is dismissed.

DECISION

21. 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: 26 February 2019

Upper Tribunal Judge Gleeson