Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/04127/2013

THE IMMIGRATION ACTS

Heard at : Field House
On : 10th October 2013

Determination Sent
On : 11th October 2013

Before

Upper Tribunal Judge McKee

Between

OMER MAQSOOD CHAUDHRY

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr Rashid Ahmed, instructed by SBM Solicitors LLP
For the Respondent: Mr Nigel Bramble of the Specialist Appeals Team

DETERMINATION AND REASONS

1. On 24th July 2012 an application was lodged on behalf of Mr Chaudhry for a permanent residence card, for which he was said to qualify under regulations 10 and 15 of the EEA Regulations 2006. The application was refused, and an appeal came before the First-tier Tribunal on 28th June 2013. Judge Rastogi dismissed the appeal for two reasons. She was not satisfied that Mr Chaudhry's former wife, Liliana

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Neves, was exercising 'Treaty rights' on the date when their marriage was terminated by a decree absolute : 2nd July 2012. This was because the only evidence before her that this was so comprised a report by an accountancy firm, A.T.A. Khan & Co., supposedly showing Mrs Neves' income and expenditure for the period 6th April to 2nd July 2012, yielding a net profit for tax purposes of £1,845. This document, thought the judge, was not to be relied on. The other reason was one that had not featured in the Reasons for Refusal Letter, but was flagged up by the Presenting Officer at the hearing, namely that, counting from the date when Mr Chaudhry married Liliana Neves and became the 'family member' of an EEA national ~ 15th July 2008 ~ the appellant needed to have resided for a continuous period of five years in accordance with the Regulations, before he could qualify for a right of permanent residence. The five-year point had not yet been reached. Judge Rastogi did not accept a submission that the appellant could be regarded as the dependant of an EEA national before the wedding.

2. Permission to appeal was only sought in respect of the first of those reasons (as well as on Article 8 grounds, which Mr Ahmed very sensibly did not pursue). When the matter came before me today, I pointed out that the second reason had not been challenged. Mr Ahmed observed that, by the time the First-tier determination was promulgated on 16th July this year, the five-year point had been passed. Indeed, if he satisfied the other requirements of the Regulations, the appellant would now have acquired a right of permanent residence in the UK. But was it an error of law for Judge Rastogi to find that he had not yet passed the five-year mark when she heard the appeal on 28th June, and when she signed off her determination on 13th July? Mr Ahmed's contention, that the appeal should have been allowed on the basis that, by the time the determination was promulgated, the five years had elapsed, falls to be rejected, I think, for reasons of principle. Although in the present case the determination was signed off just before the five-year period was due to expire, the might be other cases where the end point was further off, and yet a delay in promulgating the determination would cause the end point to have been reached before promulgation. That would not, in my view, make the determination wrong in law.

3. In any event, I do not think the judge erred in law by dismissing the appeal for the other reason she gave. It turns out that the figures for income and expenditure in the accountants' report for the period 6th April to 2nd July 2012 were there all along, but somehow got covered over when the report was photocopied. But no one drew that to Judge Rastogi's attention when she saw that the right-hand side of the page was blank. In cross-examination the appellant was asked why there were no figures for income and expenditure in the report, and he replied that he did not know. He was not an accountant. In her closing submissions, the Presenting Officer relied on the omission of these figures from the calculation as casting doubt on the accounts. Counsel for the appellant, in her response, did not attempt to explain the omission, save to observe that the period in question was not a full year, whereas the reports for the financial years ending on 5th April 2010, 2011 and 2012 did have all the necessary figures for income and expenditure.

4. In other words, nobody at the hearing ~ not the appellant, not his counsel, not the Presenting Officer, and not the judge ~ had any idea that the income and expenditure page of the report had been partly blanked out. It was suggested today that the

appellant handed a full copy of the report to the Presenting Officer, but that cannot be right. It is inconsistent with his answer in cross-examination. The solicitors attached a full copy of the accountants' report to the application for leave to appeal to the Upper Tribunal, and today Mr Ahmed tried to persuade me that it should have been obvious to the judge that the figures had been accidentally blanked out, rather than being deliberately omitted. But since neither the appellant nor his counsel could suggest a reason why the figures did not appear on the sheet, it cannot be an error of law that the judge failed to work out for herself that it must be an accident.

5. That was not the only thing that struck then judge as odd about the report. There was no mention of the accounts for 6th April to 2nd July in the letter from the accountants to Ms Neves dated 16th July 2012, referring to the financial year ending on 5th April 2012. All in all, the judge was not satisfied that "*the accounts are reliable documents to which I can properly attach weight*." That finding was rationally open to her on the evidence, and was not therefore erroneous in law.

6. Mr Bramble sensibly suggested that the best course for Mr Chaudhry would be to make a fresh application. The appellant had produced a recent letter from HM Revenue & Customs to Ms Neves' accountants, indicating that she was in business during the financial year 2012-2013. This letter could not be considered at the 'error of law' stage, but could be adduced as part of a fresh application. The appellant says that the letter was given to him by his ex-wife, and that she also agreed to the accountants preparing a report for the period ending at the date of her divorce ~ obviously, not something needed by Revenue & Customs. There is no confirmation of this from Liliana Neves herself, another omission which it might be as well for the appellant to rectify.

DECISION

The appeal is dismissed.

Richard McKee
Judge of the Upper Tribunal

10th October 2013