



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: IA/06809/2014

THE IMMIGRATION ACTS

Heard at Field House
On 9 June 2015

Decision & Reasons Promulgated
On 27 July 2015

Before

DEPUTY UPPER TRIBUNAL JUDGE RIMINGTON

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

and

Appellant

MUHAMMAD USMAN IDREES
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:

For the Appellant: Miss A Muzira, Solomon Solicitors
For the Respondent: Mr I Jarvis, Home Office Presenting Officer

DECISION AND REASONS

The Appellant

1. The application for permission to appeal was made by the Secretary of State but for the purposes of this appeal I will refer to the parties as they were described by the First Tier Tribunal.

2. The appellant is a citizen of Pakistan born on 15 April 1982 and on 5 October 2013 he applied under the Immigration (European Economic Area) Regulations 2006 for a permanent residence card as a confirmation of his right to reside in the UK. This was refused by the respondent on the basis that the appellant had failed to submit a divorce certificate and thus his marriage had been terminated.
3. The appeal was heard by Judge of the First-tier Tribunal Amin who allowed his appeal, finding that the only issue in the appeal was whether the marriage to the EEA national was no longer subsisting. He found that the appellant had by the date of the hearing provided the divorce certificate to the respondent on 27 February 2014.
4. He found the respondent had not challenged any of the other requirements of Regulation 10(5) such that the EEA spouse was exercising free movement rights in the UK at the time of the divorce, that the appellant's marriage had lasted for three years and that the appellant and his former spouse resided in the UK for at least one year during their marriage and that the appellant was currently in employment, self-employment or economically self-sufficient. The respondent was also satisfied that the appellant had resided in the UK for a continuous period of five years and that his former spouse exercised treaty rights until the date of divorce.
5. An application for permission to appeal by the Secretary of State was initially refused by the First-tier Tribunal but allowed on renewal by Upper Tribunal Judge Kebede.
6. The Secretary of State challenged the decision of Judge Amin, pointing out that the appeal was considered on the papers on 9 October 2014. It was accepted that the had application had been refused by the respondent because of the absence of the decree absolute but the judge allowed the appeal on the basis that the reasons for refusal only raised one issue and that it had been answered.
7. The most significant issue was the requirement that the EEA national was exercising treaty rights on the date of the termination of the marriage and the judge had assumed this was not in dispute because the judge did not mention it. That was not the case. There was no reason for the decision maker to consider whether the EEA national was working at the date of termination as there was no evidence that the marriage had been terminated. As the evidence now showed the marriage was not terminated until after the decision.
8. The judge was not entitled to allow the appeal without being satisfied that the EEA national was a qualified person in terms of Regulation 6 on January 29th 2014 and the judge referred to no evidence before him that would prove this to be the case on the balance of probabilities.

The Hearing

9. At the hearing Mr Jarvis made detailed submissions, pointing out that the judge had to make a finding as to whether the wife was an EEA national exercising her treaty rights in the UK. When the Secretary of State made the decision the appellant had not supplied evidence that his marriage had terminated but had subsequently done

so. If that was the judge's finding the most he should have done was allowed it to the limited extent.

10. Miss Muzira submitted that the sole issue taken by the respondent to challenge the application of the right of residence was the termination of the marriage and this had been supplied.

Conclusions

11. The judge at paragraph 12 set out the following:

"The respondent had not challenged any of the other requirements of Regulation 10(5), the respondent having been satisfied, on the documents produced the appellant (see page 1 of refusal letter for list of documents), that the EEA spouse was exercising free movement rights in the UK at time of divorce; that the appellant's marriage lasted for at least three years and that the appellant and his former spouse resided in the UK for at least one year during the marriage; that the appellant was currently employment, self-employed or economically self-sufficient. The respondent was also satisfied that the appellant had resided in the UK for a continuous period of five years and that his former spouse exercised treaty rights until the date of divorce."

12. In other words the judge covered the requirements that needed to be shown but made no findings in that respect. That these elements were not challenged by the Secretary of State does not mean that the Judge does not have to find that all the elements of the requirements of the EEA Regulations have been met albeit that they can be shown to be met as at the date of the hearing.

13. As set out in Regulation 10(1) and 10(5):

"10(1) In these Regulations, 'family member who has retained the right or residence' means, subject to paragraph (8), a person who satisfies the conditions in paragraph (2), (3), (4) or (5).

10(5) A person satisfies the conditions in this paragraph if

- (a) he ceases to be a family member of a qualified person on the termination of the marriage or civil partnership of the qualified person;*
- (b) he was residing in the United Kingdom in accordance with these Regulations at the date of the termination;*
- (c) he satisfies the conditions in paragraph (6) and*
- (d) either –*
 - (i) prior to the imitiation of the proceedings for the termination of the marriage or the civil partnership had lasted for at least three years and the parties to the marriage or civil partnership had resided in the United Kingdom for at least one year during its duration;*

- (ii) *the former spouse or civil partner of the qualified person has custody of the qualified person.*
- (iii) *the former spouse or civil partner of the qualified person has the right of access to a child of the qualified person under the age of 18 and a court has ordered that such access must take place in the United Kingdom; or*
- (iv) *the continued right of residence in the United Kingdom of the person is warranted by particularly difficult circumstances , such as he or another family member having been a victim of domestic violence while the marriage or civil partnership was subsisting."*

14. The judge had not made a finding in respect of the relevant requirements under 10(5) and therefore there was an error of law and I set aside the determination.
15. At the hearing before me Mr Jarvis conceded that the evidence showed that the marriage had lasted for three years and the appellant and his spouse had resided in the UK for one year. The divorce certificate had been produced. The decree absolute was issued on the 14th January 2014. There were in fact two points in issue which is whether the appellant's wife at the date of the divorce was exercising treaty rights and whether he needed to show this. I am aware that this is a point which has now been referred to the CJEU but the fact is that the appellant's case was that he could show evidence to the effect that his wife was exercising treaty rights at the date of divorce.
16. The question before me is whether the appellant had retained rights of residence. There was some discussion as to whether the appellant could show that he had been living in accordance with the Regulations for five years further to paragraph 15(1)(f) of the EEA Regulations. As Miss Muzira conceded, the appellant had only been married for four years and four months by the date of the termination of the marriage. Thus, the question of the retained rights of residence and whether the appellant's ex-wife was exercising treaty rights was a key point. It was not the appellant's contention that the matter should be stayed because he could show in fact that his wife was exercising rights at the date of determination.
17. Mr Jarvis cross-examined the appellant as to how he obtained the tax records of his ex-wife and the appellant confirmed that they were still friends and he merely asked her for the tax record which she had to hand because she had applied for a passport for her new baby. Miss Muzira produced the original tax documentation in respect of the wife which was in the form of a letter dated 18 February 2015 and showed that she had been in employment in every year continuously to date since 2009 but particularly for the tax year ended 5 April 2009 during which year she earned £9,500.89. I accept this evidence. It is not always the case that ex-spouses are warring to the extent that they will not produce documentation or assist their ex-spouse.
18. I also consider whether at the date of divorce that the appellant was able to fulfil the requirement of 10(6) as follows:

“The condition in this paragraph is that the person –

- (a) is not an EEA national but would, if he were an EEA national, be a worker, self-employed person or a self-sufficient person under Regulation 6; or*
- (b) is the family member of a person who falls within paragraph (a).”*

19. His annual tax summary of 2013-14 was produced showing that he had a taxable income of £9,611.34. The appellant also confirmed that he continued to be in employment and demonstrated through his bank accounts the receipt of income from Ashley Noble and that he was working as a taxi driver.
20. I accept that the appellant has shown that he can fulfil the requirements of the EEA Regulations for the grant of a permanent right of residence under Regulation 15(1)(f).
21. The Judge erred materially for the reasons identified. I set aside the decision pursuant to Section 12(2)(a) of the Tribunals Courts and Enforcement Act 2007 (TCE 2007) and remake the decision under section 12(2) (b) (ii) of the TCE 2007.

Notice of Decision

Mr Muhammad Usman Idrees’ appeal against the Secretary of State's decision is allowed.

No anonymity direction is made.

Signed

Date 21st July 2015

Deputy Upper Tribunal Judge Rimington