IAC-BH-PMP-V1

Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: IA/38283/2014

THE IMMIGRATION ACTS

Heard at Bennett House, Stoke
On 5th August 2015

Decision & Reasons Promulgated
On 27th August 2015

Before

DEPUTY UPPER TRIBUNAL JUDGE GARRATT

Between

QASIM MASOOD
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Ms S Saeed of Counsel, instructed by Aman Solicitors
For the Respondent: Mr A McVeety, Senior Home Office Presenting Officer

DECISION AND REASONS

1. On 13th April 2015 Judge of the First-tier Tribunal Levin gave permission to the appellant to appeal against the decision of Judge of the First-tier Tribunal I F Taylor in which he dismissed the appeal against the decision of the respondent to revoke the appellant's residence card issued as the family member of an EEA national in accordance with the provisions of paragraph 20(2) of the Immigration (European Economic Area) Regulations 2006.

2. Judge Levin granted permission because he thought it arguable that, in line with the Court of Appeal's decision in *NA* [2014] EWCA Civ 995, national law does not impose a requirement that an EEA national spouse should have been exercising treaty rights

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on the termination of marriage. Further, he thought the judge's conclusion that the respondent's responsibility to request information from HMRC about the former spouse's employment did not render the refusal decision unlawful was arguable wrong. However, Judge Levin did not find other grounds in the application to have merit.

3. At the hearing before me Ms Saeed submitted that the judge's conclusion in paragraph 18 assumed that the respondent had done all necessary under the policy but she had not. She explained that the appellant's residence card had been revoked after the appellant's wife had written to the respondent about the breakdown in the relationship. It was therefore difficult for the appellant to obtain the employment information about his wife without assistance from the respondent.

4. Mr McVeety did not disagree with the contention that the judge should have taken into account the respondent's policy about obtaining information. He thought it appropriate that the decision should have been remitted back to the respondent for consideration in line with the policy. He also added that, if the decision was returned in that way, it would also be possible for the respondent to take into consideration the Court of Appeal conclusion in *NA* and there was also the possibility that the reference to the Court of Justice of the European Union by the Court of Appeal would have resulted in a decision.

5. After hearing submissions I announced that I was satisfied that the decision showed an error on a point of law and proceeded to re-make the decision. My reasons and conclusions at each stage are set out, below.

Error on a Point of Law

6. In paragraph 18 of the decision the judge reaches the conclusion that, following the acrimonious termination of his marriage, the appellant had shown that he had made every reasonable effort to provide documents required to show that his former wife was exercising her treaty rights at the date of divorce. The judge then acknowledges that the respondent's policy in relation to obtaining such information might apply to the extent that employment information from HMRC might be obtained. However, the judge considers that, despite the existence of the respondent's policy, that would not render the respondent's decision unlawful. The judge gives no reasons for that conclusion. My attention was drawn to the policy in question which is to be found at Annex A of the "European Operational Policy Note 10/2011 Pragmatic Approach (revised)". At paragraph 2 the policy requires caseworkers to take a pragmatic approach to cases where there has been a breakdown in a matrimonial relationship. In particular where:

> "The applicant's relationship has ended acrimoniously but they have provided evidence to show that they have made every effort to provide the required documents. For example, attempts to make contact with the EEA national sponsor during divorce proceedings."

Caseworkers are asked to look at each case on its individual merits. And where there is a valid reason for an applicant being unable to get the required evidence the caseworker must make enquiries on behalf of the applicant where possible.

7. As the judge had decided that the appellant had made "every reasonable effort" to provide the required documents following the "acrimonious termination of his marriage" the judge should have considered that the respondent had not applied the policy to which I have referred before refusing the application. The refusal letter of 14th September 2014 gives no indication that any consideration was given to the policy but simply states that the appellant had failed to present evidence that his EEA sponsor was a qualified person at the time of divorce. On the basis that the respondent's decision failed to make any reference to the policy or to implement it the judge should have considered that the decision was not in accordance with the law. The decision should then have been remitted back to the respondent for reconsideration applying the stated policy. For this reason the decision shows an error on a point of law such that it should be set aside and re-made.

Re-making the Decision

8. For the reasons I have already given I am able to allow the appeal but to the limited extent that the refusal decision of 14th September 2014 is remitted back to the respondent for reconsideration applying the respondent's policy in relation to cases of claimed retained rights of residence where an applicant's relationship has ended acrimoniously and the applicant has made every effort to provide the required documents to show the qualified status of the EEA national.

9. I also make the point that, in reconsidering her decision, the respondent may be able to draw upon any decision from the Court of Justice of the European Union following the referral to it by the Court of Appeal in *NA*. That decision may clarify whether or not it is a requirement, in relation to the right of retained residence, for the third country national and ex-spouse of a Union citizen to show that the former spouse was exercising treaty rights at the time of divorce.

Notice of Decision

The decision of the First-tier Tribunal shows an error on a point of law such that it should be set aside. I re-make the decision by allowing the appeal to the limited extent that the respondent's refusal decision is remitted back for reconsideration on the basis set out above.

Signed Date

Deputy Upper Tribunal Judge Garratt