Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/51139/2014

THE IMMIGRATION ACTS

Heard at Manchester	**Decision & Reasons Promulgated**
On 3rd September 2015	**On 1st October 2015**

Before

DEPUTY UPPER TRIBUNAL JUDGE LEVER

Between

MR VIPULKUMAR BHOGILAL PATEL
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr Demello
For the Respondent: Miss Johnstone

DECISION AND REASONS

Introduction

1. The Appellant born on 29th September 1980 is a citizen of India. The Appellant who was present was represented by Mr Demello of Counsel. The Respondent was represented by Miss Johnstone, a Home Office Presenting Officer.

Substantive Issues under Appeal

2. The Appellant on 24th September 2014 had applied for a permanent right of residence in the UK under the EEA Regulations 2006. The Respondent had refused that application on 11th December 2014. The Appellant had appealed that decision and

his appeal was heard by First-tier Tribunal Judge Levin sitting at Manchester on 22nd April 2015. The judge had dismissed the Appellant's appeal.

3. Application for permission to appeal was made on a number of grounds. Permission to appeal was granted by First-tier Tribunal Judge Grant-Hutchison on 13th July 2015 on the basis that the matters raised within the Grounds of Appeal disclosed arguably an error of law. The Respondent opposed the Appellant's appeal by a letter dated 17th July 2015. The matter comes before me firstly to decide whether an error of law was made or not, by the First-tier Tribunal.

Submissions on behalf of the Appellant

4. Mr Demello adopted the Grounds of Appeal within the application. He expanded upon those grounds in oral submissions. Firstly it was submitted that the judge had erred in holding that the Appellant was not a worker under the EEA Regulations. It was further said the judge had wrongly calculated the period of employment and should have found that the Appellant was working for over five years and would have qualified for permanent residence. It was further said the judge was wrong in requiring the Appellant to show at the date of hearing he was still in employment.

5. Secondly it was said the judge erred in holding that medical insurance did not assist the Appellant. Thirdly it was said that he erred in holding the Appellant did not meet the requirements of Regulation 15(1)(b) or Article 16(2). It was also submitted that the judge erred in holding that the First-tier Tribunal did not have the power to refer the case to the ECJ or to adjourn the appeal to await the decision in **NA v SSHD [2014] EWCA Civ 995**. It was submitted that was a practice being adopted by the Upper Tribunal. It was also said the judge should have invited the Respondent to make enquiries to see whether the Appellant's former wife was working as at the date of decree absolute and that the Appellant had not had a fair trial.

6. The submissions before me were somewhat lengthy and to assist in summary the main thrust of the submissions appear to be as follows. The essential Regulation to consider was Regulation 10(5). The Appellant would succeed if his ex-wife had been exercising treaty rights as at the date of the divorce namely 31st July 2014. In the absence of evidence that she was so exercising treaty rights it was submitted that firstly there was an obligation on the Respondent to make enquiries if she was still working or alternatively the judge should have remitted the case to the ECJ on the question of whether interpretively it was necessary for the wife to be working as at the day of the divorce or alternatively the case should have been adjourned to await the decision in the case referred to above.

Submissions on behalf of the Respondent

7. Miss Johnstone relied upon the Respondent's letter of 17th July 2015. It was said that the judge had dealt with the matters properly.

8. At the conclusion I reserved my decision to consider the submissions raised and the documents. I now present that decision with my reasons.

Decision and Reasons

9. The background and chronology in this case is largely undisputed and is as follows. The Appellant is a citizen of India and entered the UK lawfully in April 2007 as a working holidaymaker on a temporary visa valid until 23rd March 2009. Whilst in the UK he met an EEA national (Portuguese), Miss Serra, in June 2008. They married on 17th January 2009 in the UK. On 25th September 2009 he was granted an EEA residence card valid until 25th September 2014, as the family member of an EEA national. The marriage broke down around September/October 2013 and the decree absolute was granted on 31st July 2014.

10. The Appellant's right to remain in the UK since the end of his working holidaymaker visa in 2009 has been dependent upon his marriage to an EEA national. His application on 24th September 2014, some months after the end of his marriage was for a permanent right of residence in the UK.

11. The Respondent had correctly looked at the Appellant's case under Regulation 10 of the Immigration (EEA) Regulations 2006, being a family member who had retained the right of residence, and Regulation 15 permanent right of residence. It was necessary for the Appellant firstly to demonstrate he had a retained right of residence in accordance with Regulation 10 and secondly if he had a retained right of residence whether he qualified for permanent residence under Regulation 15.

12. Specifically given his circumstances the Appellant needed to satisfy the requirements of Regulation 10(5). In particular he needed to demonstrate:

    (a) He had ceased to be a family member of an EEA national with a permanent right of residence on the termination of the marriage.

    (b) He was residing in the UK in accordance with these Regulations at the date of termination.

    (c) The marriage had lasted for three years and that the Appellant and former spouse resided in the UK for at least one year during the course of that marriage.

    (d) Evidence that the Appellant was currently in employment, self-employed or self-sufficient as if he was an EEA national.

    (e) Further in order to satisfy Regulation 15 and this was an application for permanent residence the Appellant had to show that he had resided in the UK in accordance with the Regulations for a continuous period of five years and that meant he had to show his former spouse had been exercising treaty rights up to the point of divorce and thereafter the Appellant had been employed, self-employed or self-sufficient and that the collective period of time was a continuous period of at least five years.

13. The judge had correctly noted the legal requirements of the Regulations and at paragraph 5 had identified the central concern in this case, namely the Respondent

had not been satisfied that the ex-spouse had been exercising treaty rights as at the date of divorce.

14. The judge had concluded that some of the evidence was not in dispute and he found that the ex-spouse was an EEA national, they had validly married and the Appellant had therefore been a family member of an EEA national. He found that they had been married for a period in excess of three years and that at least one year had been resident in the UK. However having considered the evidence the judge found at paragraph 19 that the Appellant's ex-spouse had only been exercising treaty rights in one form or another from February 2009 until May 2013. He was entitled to reach that conclusion for the reasons provided.

15. The judge, it appears did make a mathematical error at paragraph 20. He accepted the Appellant had himself been working from 30th June 2009 until 31st August 2014 describing that as being a period of just over four years. In fact that is a period of just over five years. The judge gave clear reasons why he found the Appellant had been working for that period and why he did not accept that the Appellant had been in work beyond July 2014. However the question is whether that mathematical error constituted a material error of law in that had the judge correctly calculated that period as being five years would there have been any other conclusion reached.

16. It would not, if the judge was correct in concluding that there was no evidence of the ex-spouse exercising treaty rights as at the termination of the marriage and that was an essential requirement in proving retained right of residence under Regulation 10(5). As indicated above the judge gave proper reasons for concluding that it could not be shown to the required standard that the ex-spouse was exercising treaty rights beyond May 2013. In submissions it was conceded there had been no evidence produced to show she was working beyond that date. Whilst the ex-spouse had been working at the same firm as the Appellant, it was conceded she had left that firm. It was submitted that given the parties separated shortly thereafter in September 2013 it had proved difficult or impossible for the Appellant to produce evidence that she continued or not, to exercising treaty rights. Indeed it was conceded the Appellant did not even know if she remained within the UK.

17. The Grounds of Appeal essentially focussed on this aspect of the case in these ways:

    (a) It was not necessary to show she was working at the date of termination of marriage.

    (b) The Respondent should have undertaken enquiries himself to find out whether she was or not exercising treaty rights.

    (c) The judge should have adjourned the case to allow this and other cases concerning this issue to be resolved by the ECJ.

    (d) The judge should on his own volition have adjourned the matter and referred the case specifically and directly to the ECJ.

18. Before the First-tier Tribunal the submissions raised by Counsel appeared somewhat different and focussed on the EC directives and how it was said the EEA Regulations

were incompatible with the directives and how the Appellant succeeded under the directive. The judge dealt fully with those submissions and his reasons are contained at paragraphs 24 to 32. The judge dealt correctly with those submissions for the reasons provided. Submissions raised at paragraph 33 within the determination appeared to encapsulate the thrust of the matters in the Grounds of Appeal as summarised above. Those matters can be dealt with as follows.

19. Reference needs to be made to the following cases:

    (a) **Amos [2011] EWCA Civ 552**.

    (b) **LV June 2011**.

    (c) **Ziolkowski v Land Berlin C-424/10, C-425/10 CJEU February 2012**.

20. The Court of Appeal in **Amos** held that a divorced spouse had to establish that he had the right of residence before the question whether, notwithstanding the divorce, that right had been retained by Article 13 of the Citizen's Directive could be determined. That right was subject to Article 16(2) or Article 18 of the Citizen's Directive. The form of provision applied to family members of EEA nationals who must have resided with the EEA national in the host member state legally for a continuous five year period. The question of legality, meant by exercising treaty rights. The requirements of the Citizen's Directive were that at all times while residing in the UK, until divorce, the spouse had to be a worker, self-employed etc. The marriage needed to have lasted for three years including one year in the UK and satisfy the penultimate paragraph of Article 13(2). The 2006 Regulations were found to be consistent with those provisions. Provided that the conditions in Regulation 10(5) continued to be satisfied after five years' continuous residence in the UK a non-EEA national was entitled to a permanent right of residence under Regulation 15(1)(f). **OA (Nigeria)** had held that in those five years the EEA national must have been living in the UK for five years and exercising treaty rights at the point of divorce but also after divorce. The Court of Appeal held that on that last point (after divorce) **OA** was wrong. The EEA national must have been exercising treaty rights up to the point of divorce only. What is required is that after divorce the non-EEA national must be exercising treaty rights (Regulation 10(6)). If he does that up to the five year point then he is entitled to a permanent right of residence under Regulation 15(1)(f).

21. Lord Justice Burton rejected the argument that the Home Office should assist to obtain missing information concerning the ex-spouse (as suggested in this case). LJ Burton stressed the difference between adversarial nature of appeals as opposed to the inquisitorial nature of welfare benefit adjudications. Under EEA Regulations the Home Office could not be expected to ask HMRC, DWP etc. if an EEA national was still working. However he alluded to the possibility of the non-EEA national applying for a witness summons under Rule 50 of the Procedure Rules. That was not done so far as I can see by Counsel at the First-tier Tribunal. Further he ruled that applying to seek for directions under Rule 45 for the Home Office to provide information necessary to the appeal was no use as the Home Office could not be forced to obtain information from other government agencies.

22. In the case of **Ahmed [2013] UKUT 89** the spouse of an EEA national does not acquire a right of retained residence upon divorce unless the EEA national was exercising treaty rights at the date of divorce. That can also be seen in **Amos** above and **Jamsan [2011] UKUT 00165**. The law therefore appears clear on this crucial issue in this case. In terms of whether the judge should have adjourned sine die or referred the case himself to the ECJ the following could be said. Firstly it was conceded by Counsel there is no presidential note recommending such cases are adjourned. Secondly the practice of adjourning cases because potentially at some unknown date a superior court may change the law is a bad practice, not in the interests of justice, nor the overriding objective or the manner in which English courts generally operate. It runs the risk of almost no cases being decided particularly if that approach to justice was operated by both sides. Further the requirement for a spouse to be exercising treaty rights at the date of divorce to allow the non-EEA national to fulfil one requirement for retained rights is good sense. If the EEA national was exercising treaty rights as at that date, then but for the divorce the non-EEA national would be able to remain. Given that it would be undesirable and very difficult to apportion blame in divorce, the Rule fairly sympathises with the non-EEA national and takes the question of divorce out of the picture when looking at his position. However if at the date of the divorce the EEA national spouse was not exercising treaty rights then it is questionable whether she would have had a lawful basis for remaining in the UK in any event and thus the non-EEA national would also have a questionable basis.

23. In summary the judge dealt with all matters of evidence and law properly in this case save and except the mathematical error referred to above which in the circumstances of this case was not material given the proper findings that the Appellant did not fulfil the necessary requirements of Regulation 10(5) of the EEA Regulations.

Notice of Decision

24. There was no material error of law made by the judge in this case and I uphold the decision of the First-tier Tribunal.

25. No anonymity direction is made.

Signed Date

Deputy Upper Tribunal Judge Lever