Upper Tribunal
(Immigration and Asylum Chamber) Appeal Numbers: IA/22185/2015
IA/33868/2015

THE IMMIGRATION ACTS

Field House	**Decision & Reasons Promulgated**
On 12 May 2017	**On 19 May 2017**

Before

DEPUTY UPPER TRIBUNAL JUDGE MONSON

Between

MR AKRAM ASADOVE
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr Ojukotola, Law Lane Solicitors
For the Respondent: Mr N Bramble, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellant appeals from the decision of the First-tier Tribunal (Judge Samina Iqbal sitting at Hatton Cross on 28 September 2016) dismissing his appeal against the decision of the Secretary of State made on 16 October 2015 to refuse to grant him indefinite leave to remain on the grounds of long residence. The First-tier Tribunal did not make an anonymity

direction, and I do not consider that the appellant requires anonymity for these proceedings in the Upper Tribunal.

The Reasons for the Grant of Permission to Appeal

2. On 3 April 2017 First-tier Tribunal Judge Grimmett gave his reasons for granting the appellant permission to appeal. He noted that the appellant had also appealed against the decision to remove him under the EEA Regulations (this was in appeal number IA/33868/2015). It appeared that a confusion in the listing of the appeals might have led to the appellant being unaware of the hearing on 28 September 2016 - leading to the application for permission to appeal to the Upper Tribunal. It was arguable that there was an error in the Judge proceeding in the appellant's absence at the hearing, "*resulting in unfairness".*

Relevant Background Facts

3. The appellant is a national of Uzbekistan, whose date of birth is 25 July 1975. He entered the United Kingdom on 13 May 2004, and he has lived here ever since. Until 29 February 2012, the appellant had continuous leave under the Rules, apart from a period of approximately 129 days when he was without valid leave from 30 September 2007 until his next grant of leave to remain on 7 February 2008. Before the expiry of his last grant of leave to remain, he applied on 23 January 2012 for a residence card under the EEA Regulations. He was issued with an EEA residence card, valid from 22 June 2012 to 22 June 2017.

The Application for ILR in December 2014

4. On 1 December 2014, Khans Solicitors applied on the appellant's behalf for him to be granted ILR on the grounds of 10 years' continuous lawful residence in the United Kingdom. They acknowledged that there had been a break in the appellant's lawful residence in the period 2007 to 2008, but they submitted that this was due to circumstances beyond the appellant's control, as his sponsor had withdrawn her sponsorship due to the fact that she was moving to Scotland. So the respondent was invited to exercise discretion in accordance with her published policy set out in "Guidance Long Residence - version 2.0" dated 28 May 2012.

5. With regard to the appellant's period of residence since 29 February 2012, they acknowledged that, under the Home Office's policy guidance, the time spent as a family member of an EEA national did <u>not</u> count towards 10 years' lawful residence. However, the same policy enabled case workers to consider exercising discretion to count such time spent in the UK as lawful residence, if the applicant meets all the other requirements for long residence.

The enforcement visit on 7 June 2015

6. While the application was pending, there was an enforcement visit on 7 June 2015 at the address where the appellant had said he resided with his

EEA national spouse. According to a witness statement made by the appellant on 3 May 2017, the outcome of this enforcement visit was, firstly, that his residence card was revoked on the same day (as to which there is no documentary evidence) and, secondly, he was served on the same day with an IS15A notice informing him of his liability to removal under the EEA Regulations 2006. The notice said that his removal was justified on the grounds of abuse of rights in accordance with Regulation 21B(2) of the Regulations. The notice also stated that the decision was not appealable.

The purported EEA appeal against revocation and removal

7. By an appeal notice dated 11 June 2015, the appellant appealed against the decision of the Secretary of State to cancel his EEA residence card and to remove him from the United Kingdom.

8. The appellant says that this appeal was assigned the appeal number IA/22186/2015, and this is borne out by the notice of hearing dated 11 March 2016 for the hearing of appeal number IA/22185/2015 at Hatton Cross on 28 September 2016. This notice of hearing contains the reference number CEU/4869355 which corresponds to the reference number on the appeal notice of 11 June 2015.

The refusal of ILR in October 2015

9. On 16 October 2015 the Secretary of State gave her reasons for refusing the appellant's application for ILR which had been made in December 2014. With regard to the period following the expiry of his last grant of leave to remain, it was accepted that his EEA national spouse was exercising her Treaty rights in the United Kingdom during June 2012, when he was issued with a residence permit. But he had been unable to provide evidence to demonstrate that she had continued to reside in the United Kingdom in accordance with the Regulations thereafter. So the period for which he had been the spouse of an EEA national was not accepted to contribute to the 10-year legal leave period as a whole. The Secretary of State was not prepared to exercise discretion in his circumstances. Furthermore, it was noted that during the enforcement visit on 7 June 2015, he had stated that he had been separated from his EEA national spouse for a year. All the officers were in agreement that he was not in a genuine and subsisting relationship, and that he had used marriage to gain leave to remain in the United Kingdom. He could not answer details regarding his wife's circumstances, nor her current whereabouts.

The appeal against the refusal of ILR

10. Law Lane Solicitors settled the appellant's appeal against this refusal decision. They said that his residence card had been revoked on 3 September 2015. (There is no documentary evidence of this. It will be noted that the appellant had earlier said that his card was revoked on the day of the enforcement visit. Mr Ojukutola complained before me that the

respondent had not produced in evidence a notice of decision to revoke his residence card. But it is the appellant, not the respondent, who asserts that his card has been revoked.)

11. With regard to the reasons given for refusing ILR, they submitted that the appellant was genuinely married to his EEA national sponsor, and she had been exercising her Treaty rights as a worker during all the time that he had been with her. There was a gap in his lawful residence, but the respondent should have exercised her discretion to disregard it, as the appellant had not intended to remain in the United Kingdom in breach of the Immigration Rules - rather, he had made every effort to regularise his stay.

Subsequent developments

12. As is common ground, the appellant's appeal against the refusal of ILR was assigned the appeal number IA/33868/2015.

13. Regrettably, the appeals were not consolidated. As previously noted, the appellant and his solicitors were notified in March 2016 that his EEA appeal would be heard at Hatton Cross on 28 September 2016. On 3 August 2016 the appellant and his solicitors were notified that the hearing of appeal number IA/33868/2015 would take place at Hatton Cross on 5 January 2017.

14. As set out in a letter to the Tribunal at Hatton Cross dated 5 January 2017, the appellant's solicitors say that they erroneously overlooked the different appeal numbers on the respective hearing notices, and they wrongly assumed that the hearing due to take place on 28 September 2016 had been vacated so as to be heard on 5 January 2017. Also, they were aware that they had lodged two appeals for the same client, so they assumed that both appeals had been consolidated by the Tribunal.

The Decision of the First-tier Tribunal

15. Judge Iqbal proceeded with the hearing of appeal number IA/22185/2015 at Hatton Cross on 28 September 2016 in the absence of representation from either the appellant or the respondent. Her reasoning was that both parties had been given ample notice of the date of the hearing, pursuant to Rule 28 of the Procedure Rules 2014. She took into account all the documentation placed before her. This included the notice of refusal, the appellant's notices of appeal, and all the documentation submitted by the appellant in connection with the appeal. The respondent had submitted a bundle received on 12 May 2016.

16. In paragraph [23] of her subsequent decision, she said that there was an Immigration Report from the visit carried out at the appellant's residence, where the Immigration Officers concluded that the marriage was one of convenience. The Judge observed that there was nothing before her to demonstrate that this was a simple breakdown of a marriage rather than a

marriage of convenience. In any case, she said that it was irrelevant to the issues which she had to decide, as the appellant's EEA residence permit had been revoked on 3 September 2015, after the appellant had completed 10 years' residence.

17. At paragraphs [24]-[28], the Judge gave her reasons for holding that the appellant did not qualify under the Rules for ILR on the grounds of long residence. She also stated, at paragraph [28], that the appellant had failed to put forward any matters to establish a private life claim under Rule 276ADE and he had not highlighted any circumstances as to why the matter should be considered outside the Rules.

Discussion

18. There was no communication from the Tribunal which indicated to the appellant's solicitors that the two appeals had been consolidated, or that the hearing scheduled for 28 September 2016 had been adjourned to 5 January 2017. So, I find that the failure by the appellant and his legal representatives to attend the hearing before Judge Iqbal flows entirely from an error on the part of the appellant's solicitors.

19. However, the position for the appellant is salvaged by the fact that the Judge fortuitously disposed of the wrong appeal. The appeal which was supposed to have been heard on 28 September 2016 was the appeal against the EEA decision to remove the appellant for abuse of rights. While the Judge made a finding relevant to this appeal, she also addressed the subject matter of the other appeal, which the appellant had been informed would be heard on 5 January 2017.

20. It is entirely understandable that Judge Iqbal should believe that she was supposed to deal with the appeal against the refusal of ILR, as this can reasonably be characterised as the appellant's main appeal and the evidence lodged by the appellant's solicitors related to both appeals. It was not brought to the Judge's attention that there were two distinct appeals.

21. The upshot is that the appellant has been deprived of an oral hearing of his main appeal, which he was informed would not take place until 5 January 2017. So the decision of the First-tier Tribunal is vitiated by a procedural irregularity such that the decision must be set aside.

Future Disposal

22. I note that a Judge at Hatton Cross has queried whether the appellant has a right of appeal in respect of the EEA decision. I infer that the query arises from the fact that the decision is expressly stated to be not appealable. The issue can be addressed as a preliminary issue at a consolidated hearing of both appeals. There is a common question of fact arising in both appeals – whether the marriage is one of convenience and/or whether the estranged spouse was exercising treaty rights

throughout the remainder of the relevant ten year period, so as to trigger the potential exercise of discretion to count residence as the spouse of an EEA national towards the accrual of ten years' lawful residence – so the evidence bearing upon these matters will need to be deployed in any event whether there is a valid EEA appeal or not.

Conclusion

23. There was a defect of a procedural nature in the proceedings before the First-tier Tribunal which amounts to a material error of law requiring the decision of the First-tier Tribunal to be set aside, as the First-tier Tribunal Judge inadvertently decided the wrong appeal.

Directions

24. **Appeal number IA/33868/2015 shall be consolidated with appeal number IA/22185/2015.**

25. **Both appeals are remitted to the First-tier Tribunal at Hatton Cross for a *de novo* consolidated hearing of both appeals (Judge Iqbal not compatible), with none of the findings of fact made by Judge Iqbal being preserved.**

I make no anonymity direction.

Signed Date 18 May 2017

Judge Monson

Deputy Upper Tribunal Judge