



**Upper Tribunal
(Immigration and Asylum Chamber)**

Appeal Number: IA/26532/2014

THE IMMIGRATION ACTS

**Heard at Field House
On 21st September 2016**

**Decision & Reasons
Promulgated
On 14 August 2017**

Before

DEPUTY UPPER TRIBUNAL JUDGE I A M MURRAY

Between

**DELORES PATRICIA BLACK
(ANONYMITY DIRECTION NOT MADE)**

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms Bustani, Counsel, for Lam & Meerabux, Croydon
For the Respondent: Mr Bramble, Home Office Presenting Officer

DECISION AND REASONS

1. The Appellant is a citizen of Jamaica born on 11th October 1975. She appealed against the decision of the Respondent dated 29th April 2014 refusing to issue her with a residence card as confirmation of her permanent residence as the former spouse of an EEA national. Her appeal was heard by Judge of the First-tier Tribunal Griffith on 13th November 2013 and dismissed under the Immigration (EEA) Regulations 2006 in a decision promulgated on 3rd December 2015.
2. An application for permission to appeal was made on behalf of the Appellant. This states that both parties at the appeal hearing along with the judge, made a mistake by considering whether the Appellant's ex-husband had been exercising his treaty rights up to 18th March 2013. The correct date is 7th May 2013, the date of the decree absolute. The judge realised this error while writing her decision. The permission states that

the Appellant's representatives should have been made aware of this so that they could adduce further evidence up to that date. The permission states that the judge did not positively find that Mr Fortes (the Appellant's ex-husband) had been exercising treaty rights up to the end of the 2012/2013 tax year but there was some evidence that he had been exercising treaty rights during that period. It states that the appellant's representatives could have made the argument that, if the judge accepted on the documents provided, taken together with the Appellant's evidence, Mr Fortes was exercising treaty rights right up to 6th April 2013 he was unlikely to have ceased self-employment in the next month.

3. There is Rule 24 response but the decision had not been attached to the Grounds of Application and the Respondent was unable to comment on a material error of law.

The Hearing

4. This is an application for a retained right of permanent residence. Counsel submitted that this Appellant previously had a five year permit from 21st April 2011 until 21st April 2016 and then applied for permanent residence under Regulation 15(1F). She submitted that it was accepted that the marriage had lasted for three years and that the Appellant's spouse had been exercising treaty rights and that the Appellant has been exercising treaty rights since the divorce. The issue is whether her ex-husband was exercising treaty rights up to 7th May 2013 which is the date of the decree absolute.
5. I was referred to paragraphs 24 and 25 of the decision. Paragraph 24 deals with Mr Fortes' employment with Heathfields Security. Counsel submitted that there is evidence that he started work on 21st September 2010 with them and this lasted until 27th January 2013. At paragraph 45 Mr Fortes' self-employment is dealt with and based on this the judge is satisfied that Mr Fortes was working until the end of the 2012/2013 tax year which is 6th April 2013. She submitted therefore that the period in dispute is from 6th April 2013 until 7th May 2013. She submitted that the judge, when writing her decision, discovered that the parties had been using the wrong date and the judge at that time should have called the matter back to court to enable the Appellant to put forward further evidence about this one month period. The last sentence in the decision is: "The Appellant has failed to establish to the required standard of proof that her former husband was a qualified person exercising treaty rights at the date of the divorce (the decree absolute)." This is the date of 7th May 2013. She submitted that as the Appellant was not given a chance to deal with this there must be an error of law. I was referred to the P60 which was attached to the grounds of application which makes it clear that Mr Fortes was exercising treaty rights up to 5th April 2014. She submitted that it is clear that he was economically active for the relevant period.

6. The Presenting Officer submitted that the issue is whether the judge had given the Appellant and the Respondent the opportunity to provide further evidence or make further submissions using the correct dates.
7. I was referred to paragraph 22 of the decision in which the judge states that the date of 18th March 2013, which is the date of the decree nisi, is the wrong date. He submitted that if the judge found that Mr Fortes was working up to 18th March 2013 there is an argument that the judge could have allowed the appeal based on the balance of probabilities for an additional one month period or she could have given the Appellant an opportunity to submit more evidence up to 7th May 2013.
8. The Presenting Officer referred to the two sources of income. With regard to Mr Fortes' salaried employment with Heathfields I was referred to paragraph 24 of the decision. The last payslip seen by the judge was dated 27th January 2013 and he submitted that even if the wrong date was used this is two months before 18th March 2013 and there was no P60 for the period between 27th January 2013 and the end of the tax year. He submitted that the judge took the Appellant's ex-husband's taxable income up to 27th January 2013 but he submitted that there was no evidence before the judge that Mr Fortes was working after that date.
9. I was referred to paragraphs 16 and 17 of the decision which deal with Counsel's submissions and he submitted that because Mr Fortes' salaried employment stopped in January 2013 there is no evidence that he was continuing to work for the security company until the end of that tax year. The judge states at paragraph 14 that the Appellant does not know how many hours her ex-husband was working. The appellant refers to HMRC papers which came through her door about her ex-husband but these do not refer to his salaried employment but his self-employment.
10. Counsel objected stating that this is a new issue and the Presenting Officer is not entitled to raise this.
11. The Presenting Officer then referred me to the Appellant's bundle, pages 57 to 64 which are self-assessment tax calculations. The Presenting Officer submitted that Mr Fortes' self-employment is dealt with at paragraph 25 of the decision. The judge has accepted that during the tax year 2012/2013 Mr Fortes was economically active in the United Kingdom. He then points out that during the next tax year there is no evidence that he was working up until 7th May 2013. He submitted that there must therefore be an error in the judge's decision. He submitted that the fact that the judge did not give the Appellant an opportunity to put further evidence forward for the extra period is an error but not a material error. He submitted that based on what was before the judge there was already a shortfall in the period he worked.
12. Counsel for the Appellant submitted that both parties referred to the relevant date being 18th March 2013. She submitted that as this was the wrong date there must be a material error of law in the judge's decision.

13. She submitted that the judge finds there to be evidence of economic activity by Mr Fortes for the year ending 2012/2013. The Respondent did not challenge this and she cannot challenge it now.
14. I was referred to the P60 attached to the grounds of application for permission to appeal and she submitted that it is now clear that Mr Fortes was economically active during the tax year ending in April 2014. She submitted that on the balance of probabilities he had been economically active for the additional month due to his self-employment and that the Appellant should have been given the chance to provide more evidence and/or submissions for the extra month.
15. I was asked to find that there is a material error of law in the judge's decision.

Decision and Reasons

16. There was an error throughout this hearing as both parties and the judge were dealing with the date of divorce as being 8th March 2013. The correct date is 7th May 2013.
17. When the judge was writing her decision she realised the mistake. She deals with this at paragraph 22. The judge was satisfied that the Appellant's ex-husband was exercising treaty rights up until April 2013. The reason she dismissed the appeal was that there is a lack of evidence of him working for the next month up until 7th May 2013 which is the date of the decree absolute.
18. The Appellant had no chance to make submissions or produce additional evidence about this and I find that the judge made a material error of law by not pointing this out to the Appellant's representative so that additional evidence could have been produced or further submissions made for the one month after 6th April 2013.

Notice of Decision

19. I find that there is a material error of law in this judge's decision for the above reasons.
20. I direct that the judge's decision, promulgated on 3rd December 2015 must be set aside.
21. No findings of the First-tier Tribunal can stand. Under Section 12(2)(b)(i) of the 2007 Act and Practice Statement 7.2 the nature and extent of judicial fact-finding necessary for the decision to be remade is such that it is appropriate to remit the case to the First-tier Tribunal. The members of the First-tier Tribunal chosen to reconsider the case are not to include Judge Griffith.
22. Anonymity has not been directed.

Signed

Date **6 October 2016**

Deputy Upper Tribunal Judge I A M Murray