Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: EA/01959/2016**

THE IMMIGRATION ACTS

Heard at Field House
On 4th of April 2018

Decision & Reasons Promulgated
On 13th April 2018

Before

DEPUTY UPPER TRIBUNAL JUDGE WOODCRAFT

Between

ME RAFAQAT ALI CHOUDRY
(ANONYMITY ORDER NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr J Gajjar of Counsel
For the Respondent: Mr L Tarlow, Home Office Presenting Officer

DECISION AND REASONS

The Appellant

1. The Appellant is a citizen of Pakistan born on 12th of October 1987. He appeals against a decision of Judge of the First-tier Tribunal Paul sitting at Taylor house on 1st of June 2017 in which the Judge dismissed the Appellant's appeal against a decision of the Respondent dated 28th of January 2016. That decision was to refuse to grant the Appellant a permanent residence card as a confirmation of a right to reside in the United Kingdom following the Appellant's divorce from an EEA national, Ms Kinga Czajkowska, ("the Sponsor"). The Appellant originally arrived in the United Kingdom in 2006 on a student visa which was subsequently extended until 30th of September 2011. He then applied for a certificate of approval to marry the Sponsor on

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16th of March 2009, the marriage taking place on 6th of May 2009. The Appellant was issued with a residence card dated 3rd of November 2011 valid until 22nd of October 2015. There were two children of the marriage. The marriage subsequently broke down and the Willesden Family Court pronounced a decree absolute of divorce on 13th of May 2015.

The Appellant's Case

2. The Appellant argued that the Sponsor had been exercising treaty rights because she had been self-employed since November 2014 as a beauty therapist. She had commenced employment with a company called Everyday Snacks Ltd from 1st of February 2013 until 31st of December 2013 and recommenced her employment with them in June 2014 lasting until 19th of May 2015. The Appellant produced 2 payslips from that company dated 31st of August 2014 and another dated 30th of September 2014. This showed that the Sponsor was paid in cash but there was no other evidence that wages had been paid. Further no tax or national insurance was paid. A P45 stated that the Sponsor had left this employment on 30th of September 2014 (as opposed to 19th of May 2015 as claimed).

3. HMRC national insurance contribution letters dated 14th of November 2014 and 28th of March 2015 were provided as was a unique taxpayer reference number for the Sponsor. The Appellant argued that the Sponsor was being uncooperative regarding his application but the Respondent noted in the refusal letter that the Appellant had been able to provide the Sponsor's full bank statements from 2009 to 2014, her HMRC employment record in a letter dated 7th of July 2014, payslips and P 45's. She had also written a letter of support in which she had said "things never got sour" between the couple after they separated and that she did not want her children "to grow up without the presence of their father".

4. The Respondent decided that the Appellant could not bring himself within the requirements of Regulation 15(1)(f) of the 2006 regulations and had not retained a permanent right of residence following divorce. Regulation 15(1)(f) provides that a permanent right to reside will be acquired where the applicant has resided in accordance with the Regulations for at least five years and was at the end of that period a family member who had retained the right of residence. The Appellant could not show that he was residing in accordance with the Regulations at the point of divorce because he could not show that the Sponsor was exercising treaty rights.

The Decision at First Instance

5. At the hearing at first instance the Appellant applied to the Judge for an adjournment in order to obtain an "Amos" direction directing the Home Office to investigate the material that had just been provided concerning the Sponsor's employment. This investigation the Appellant argued would show that the Sponsor was working at the relevant time. The further documentation was described by the Judge, at [6] of the determination as a calculation result for the years 2015 and 2016 for the Sponsor and an income tax return for the Sponsor. The Respondent's decision was made on 28th

of January 2016 but these further documents to support the Appellant's case were only provided the day before the hearing on 31st of May 2017.

6. When pressed as to why this was so the Appellant's representative said he had instructions that the Sponsor had been uncooperative until relatively recently when further documents were provided. By contrast, the Appellant's statement in his bundle maintained that the Sponsor had been uncooperative (with no indication of any assistance she had given). The Judge held at [8] that there was no sensible explanation within the witness statement as to how the further documents were obtained or how obtaining any further documents could be consistent with the Sponsor's so-called lack of co-operation.

7. The Judge rejected the request for an adjournment at [9] as there was no reason to believe that the Respondent would consider herself bound to make any of the enquiries sought by the Appellant. Further there had been a period of 18 months for the Appellant to get his case in order and the submission of these materials at the door of the court was unsatisfactory. The Judge had doubts as to the further documentation provided by the Appellant not least because the Sponsor was referred to as Mr instead of Miss in an HMRC document. If the Sponsor had been filling in the forms herself she would not have described herself as a male.

8. There were discrepancies between the calculation results which appeared to show that the pay from all employments for the year 2015/16 was £3608 with a net profit of £902 whereas the actual tax return for the period showed that the turnover amounted to no more than £1182. Very little reliance could be placed on the documents. They did not include any evidence of any payments in to the Sponsor's account in respect of any work done by her. The Appellant argued that the statements provided were a personal account not the Sponsor's business account but the Judge found it strange that only the personal accounts had been produced. The Respondent's decision was not wrong and the Judge dismissed the appeal. In doing so he made it clear he was not making a final ruling as to whether or not the Sponsor was indeed exercising treaty rights at the point of divorce simply concluding that on the evidence before him that had not been demonstrated to the requisite standard.

The Onward Appeal

9. The Appellant appealed against this decision arguing that the Respondent had a duty under section 40 of the UK Borders Act 2007 to carry out checks on whether an EU Sponsor was exercising her treaty rights where the couple were divorcing. I pause to note here that in fact section 40 states that HMRC and the Respondent may supply each other with information for the purposes of immigration control and other purposes mentioned in the section. The section does not impose an obligation on the Respondent and the grounds were misconceived. The grounds also argued that the Judge had made no proper findings on whether the Sponsor was exercising her treaty rights at the point of divorce. They reiterated that the Sponsor was unwilling to cooperate with the Appellant.

10. The application for permission to appeal came on the papers before Judge of the First-tier Tribunal Osborne on 29th of January 2018. In granting permission to appeal he wrote that it was arguable that the Judge should have adjourned the appeal hearing and directed that the Respondent should provide work/income tax records for the Sponsor to establish whether she was exercising treaty rights at the material time. All of the issues raised in the grounds were arguable.

The Hearing Before Me

11. As a result of the grant of permission the matter came before me to determine in the 1st place whether there was a material error of law in the determination of the First-tier Tribunal such that it fell to be set aside. If there was not then the decision of the First-tier Tribunal would stand.

12. For the Appellant counsel submitted that the issue in the case was a narrow one, whether the Sponsor was exercising treaty rights at the time of the divorce. The Judge had left open the issue at [14] of the determination where he had written that he was not making a final ruling as to whether or not the Sponsor was exercising treaty rights at the point of divorce. The main complaint the Appellant made in this case was that it was perverse and irrational not to adjourn the hearing for a direction to be made in accordance with **Amos [2011] EWCA Civ 552**. The Appellant accepted that **Amos** was not authority for the proposition that the Respondent was compelled to make enquiries of the HMRC but the reason the Judge gave at [9] for refusing the adjournment was wrong. It was not a late issue being raised that the Sponsor was failing to cooperate with the Appellant about her working history. The relationship post-divorce had fluctuated for example there were now difficult issues between the parties involving contact to the two children of the family.

13. The Appellant had made it clear in his application form at section 2.13 that he was unable to provide the Sponsor's passport because she would not cooperate. The Respondent had the option at that stage not to proceed further with the application. The fact that the Respondent did proceed to consider it meant that the Respondent was accepting that the Appellant could not provide the Sponsor's passport but that would not be held against the Appellant. The Sponsor had provided a letter of support (see paragraph 3 above) but that had not indicated she was willing to give documents it just said she was willing to permit contact.

14. The purpose of an Amos direction was not for the Respondent to make the Appellant's case for him but the Appellant had provided whatever evidence he could. It was obvious the Sponsor would not come to the hearing. Counsel was unable to say when the further documents that were supplied at the hearing came into the possession of the Appellant other than to say it was close to the hearing. Leaving the matter open (and not making a final decision on) whether the Sponsor was or was not working at the date of divorce was generous of the Judge but a successful application by the Appellant would only succeed if help came from HMRC. The pragmatic step was for the application to succeed and an Amos direction would have to be made.

15. In response the Presenting Officer argued that the Judge was entirely right not to grant an adjournment. The Respondent was not bound to make enquiries of HMRC. The Judge's finding at [9], that the Appellant had had a period of 18 months to get his case in order but had not done so, was open to the Judge who had left the matter open for the Appellant were the latter to be able to produce further documents. The grounds of appeal were merely a disagreement with the result. The decision should stand.

16. In conclusion counsel argued that there was more than a disagreement, there were no findings as to whether the Sponsor was exercising treaty rights, the matter was left in a vacuum. The final paragraph of **Amos** was narrower than the Respondent was suggesting (see below). Submissions had been made in **Amos** that it was open to an Appellant to have sought directions, the problem was that the Appellant in that case had not done that.

17. I note here that at paragraph 40 of **Amos** that the appeal of another Appellant, Ms Theophilus was criticised thus: "[She] could have applied under regulation 50 for a witness summons requiring her ex-husband to attend and give evidence as to whether or not he was and had been working. She did not do so. Nor did she seek a direction under rule 45 requiring the Secretary of State to provide any information necessary for the determination of her appeal. Indeed, she made no relevant application to the Tribunal."

18. An earlier decision of **Kerr [2004] UKHL 23** cited in **Amos,** held that: "The department is the one which knows what questions it needs to ask and what information it needs to have in order to determine whether the conditions of entitlement have been met. The claimant is the one who generally speaking can and must supply that information. But where the information is available to the department rather than the claimant, then the department must take the necessary steps to enable it to be traced." The Court of Appeal in **Amos** made clear that **Kerr** "was not authority for the proposition that the Home Secretary is bound to make enquiries of other government departments for evidence they may or may not have concerning issues before the Tribunal".

Findings

19. The difficulty for the Appellant in this case was that he did not have sufficient evidence to show that as at May 2015 when the decree absolute was pronounced his former wife was exercising treaty rights by working. There was some evidence before the Judge which he rejected for the reasons he gave which I have summarised above, see paragraphs 7 and 8. What the Appellant wanted in this case was a further opportunity to obtain more information by adjourning the hearing at 1st instance and obtaining a direction from the Tribunal that the Respondent should use her best endeavours to obtain documentation of the Sponsor's employment. The Judge was not prepared to make such a direction or adjourn the case for that to be done.

20. The test of whether to adjourn is one of fairness, see the Upper Tribunal authority of **Nwaigwe [2014] UKUT 418**. The Appellant had been able to obtain some documents but could not explain how those documents had been obtained against the background of an alleged failure to cooperate by the Sponsor, who seemed far from uncooperative according to her letter of support. No explanation was given to the Judge why the further papers that were produced, which had not been before the Respondent at the time of the decision, had not been disclosed earlier than the day before the hearing. I queried that with counsel and I too was not told when the Appellant had come into possession of the further documents that is the calculation results and income tax returns.

21. This was an important point in the determination because it was part of the reasons why the Judge was not prepared to adjourn the hearing. At the very least it could be expected that the Appellant would be able to deal with that point but no such explanation was forthcoming. In those circumstances it is difficult to criticise the Judge for being reluctant to adjourn the hearing on a purely speculative exercise with no real prospects that an adjournment would secure the result the Appellant requested.

22. The Respondent could not be compelled to make enquiries but the Appellant also had to play his part in the process as the House of Lords put it in **Kerr**. A reason for refusing the adjournment was the issue of the delay in lodging the extra documents the Appellant had and the lack of explanation how he was able to obtain those. For the Appellant to demonstrate that it was unfair to refuse the adjournment he needed to be able to deal with those points but they were not dealt with in front of the First-tier Tribunal and I was not able to obtain any further explanation either. The Judge was entitled to proceed as he did on the basis of what he had in front of him. What he had was not enough to show that the Sponsor was exercising treaty rights at the relevant time.

23. I do not accept the argument that because the Appellant had put in his application form that he could not obtain the Sponsor's passport that the Respondent necessarily accepted that position and would not hold against the Appellant that he was not producing sufficient documentary evidence of the Sponsor's employment. If the Respondent had rejected the application at that stage because of a failure to produce the Sponsors passport, it would drive a coach and horses through the provisions relating to retained rights of residents following divorce. The Appellant had to be given his chance to show what he had in relation to the Sponsor's employment.

24. The issue was why if the Appellant could not produce the Sponsors passport he was able to produce tax returns, bank statements and other documents. That was what the Appellant needed to explain clearly and that was what he failed to do. An **Amos** direction would not have dealt with the problem that the Sponsor's personal bank statements the Appellant produced did not assist him. The Appellant had the Sponsor's address but no request for a witness summons was ever made. Yet the Appellant was prepared to take the Sponsor to court in relation to contact matters.

25. In any event there were difficulties with the documents such as the description of the Sponsor as male. The important point was that before the Tribunal gave a case management direction to the Respondent to obtain documents relating to the Sponsor, some good reason needed to be shown why the Respondent should do this and that the Appellant had done all he could. The evidence for a lack of co-operation by the Sponsor was distinctly lacking. The Appellant was unable to show that fairness required an adjournment.

26. The Judge did leave one matter open in the sense that if the Appellant could produce further and better documents which tended to show the Sponsor was working at the relevant time, the Appellant would be able to make a fresh application under the 2016 Regulations for a permanent residence card. Had the Judge decided finally that the Sponsor was not working at the relevant time that might have created severe difficulties for the Appellant in the future. The burden of proof of establishing that the Sponsor was exercising treaty rights at the relevant time rested on the Appellant. If the Appellant could not prove that it was more likely than not that the Sponsor was working his application would fail. It was not for the Judge to go on to make a definite finding that Sponsor was not working unless the evidence clearly pointed in that direction. The problem for the Appellant was that the evidence did not point clearly in any direction and since the burden was on him he could not show he was entitled to the grant of a permanent residence card.

27. Although there was reference in submissions and on the papers to outstanding issues between the Appellant and the Sponsor relating to the children of the marriage, this was not a case where Article 8 arose because it was a purely EEA case with no removal directions or section 120 notice. I do not consider there was any material error of law in the Judge's decision to refuse the adjournment and proceed to deal with the matter. The Appellant's remedy is to make fresh application if he is able to with further documentation. It is not for the Respondent to make the Appellant's case for him particularly where, as the Judge found, the Appellant has not done all that could reasonably be expected of him. I therefore dismiss the Appellant's appeal.

Notice of Decision

The decision of the First-tier Tribunal did not involve the making of an error of law and I uphold the decision to dismiss the Appellant's appeal

Appellant's appeal dismissed

I make no anonymity order as there is no public policy reason for so doing.

Signed this 5th of April 2018

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Judge Woodcraft
Deputy Upper Tribunal Judge

TO THE RESPONDENT
FEE AWARD

No fee was payable and I have dismissed the appeal and therefore there can be no fee award.

Signed this 5th of April 2018

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Judge Woodcraft
Deputy Upper Tribunal Judge