



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: EA/13081/2016

THE IMMIGRATION ACTS

Heard at Field House
On 11 June 2018

Decision & Reasons Promulgated
On 22 June 2018

Before

DEPUTY UPPER TRIBUNAL JUDGE NORTON-TAYLOR

Between

ROBERT THEODOSIUS MENSAH
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: In person
For the Respondent: Mr P Duffy, Senior Home Office Presenting Officer

DECISION AND REASONS

1. This is my remaking of a decision in the Appellant's appeal.
2. By a previous decision of mine promulgated on 29 November 2017, I concluded that the First-tier Tribunal had made material errors of law and that the judge's decision should be set aside. My error of law decision is annexed, below.
3. In summary, I concluded that the First-tier Tribunal had erred by failing to make a direction to the Respondent to obtain information from HMRC on the Appellant's ex-spouse. The core issue had been whether the ex-spouse (the EEA national) had

exercised Treaty rights in the United Kingdom for a continuous period between the marriage to the Appellant in July 2003 and the termination of that marriage in August 2008.

4. Following my decision on error of law I directed that a case management hearing should take place before me. This occurred on 5 February 2018. Unfortunately, at that stage the relevant information from HMRC had not been obtained. The matter was then set down for a resumed hearing. On 16 March 2018 the Respondent complied (at least in part) with my direction and produced evidence from HMRC on the ex-spouse's employment history in the United Kingdom. The evidence consisted of a witness statement from the relevant HMRC employee together with a table setting out the level of income and tax paid during the tax years 2003-2009. Whilst this information was served on the Upper Tribunal, it did not find its way through to the Appellant.

The resumed hearing before me

5. The Appellant attended in person (he has not been legally represented throughout these proceedings). At the outset I provided him with copies of the HMRC evidence, outlined the general legal issues in his case, and the position of the Respondent in light of the new evidence.
6. That position, as confirmed in a covering e-mail from Mr Duffy (sent in with the HMRC documents in March 2018) is as follows. In light of the levels of earnings attributable to the ex-spouse, it is not accepted that she was exercising Treaty rights as a worker during the tax years 2007/2008 and 2008/2009. It is said that the levels of income were so low that the work simply was not effective or genuine.
7. I paused the proceedings and asked the Appellant to leave the hearing room, read and consider the HMRC evidence, and think about any comments that he would wish to make to me in due course.
8. On resumption of the hearing the Appellant confirmed that he was happy to proceed. I then asked Mr Duffy to make his submissions first in order that the Appellant could make any notes he wished so that he was as informed and prepared as possible about the case against him.
9. Mr Duffy relied on the HMRC evidence and broadly accepted that the ex-spouse's earnings in the tax years 2003-2006 indicated that she had been engaged in effective and genuine work. The total earnings for the tax year 2003/2004 were £5,889.00; for 2004/2005 the total was £13,736.00; for 2005/2006 the total was £22,712.00 and the total for 2006/2007 was £7,780.00. However, Mr Duffy submitted that there had then been a dramatic fall in earnings. For the tax year 2007/2008 the total was only £1,683.00. For the final relevant tax year, that being 2008/2009, the total earnings were just £606.00. Mr Duffy confirmed that there was no evidence of the ex-spouse having made any benefit claims. He submitted that for whatever reason, the ex-spouse had ceased to be engaged in effective and genuine work from 2007 onwards.

He submitted that her earnings showed that any work undertaken had been marginal and/or ancillary.

10. The Appellant told me that in early 2008 his ex-spouse had fallen pregnant. Three weeks into the pregnancy she suffered a miscarriage. He indicated that she had been unwell after this and this had prevented her from working. When he was asked about her work in the time from April 2007 until she became pregnant and in the few months leading up to the divorce in August 2008, the Appellant said that he had been financially supporting her. He told me that she had worked "a bit", but that was all. He had no idea what she did after their divorce.
11. At the end of the hearing I reserved my decision.

My remake decision

Findings of primary facts

12. There is no dispute that the Appellant married his ex-spouse in July 2003 and that the marriage was terminated on 15 August 2008. I find this to be the case. I find that divorce proceedings were initiated in approximately October or November 2007. There was never any dispute that the Appellant himself has been working for many years. I find this to be so. I find that the HMRC evidence is reliable. There is nothing to contradict it either by way of alternative documentary evidence or challenge by the Appellant himself. I am willing to accept that his ex-spouse did fall pregnant in early 2008 and that she suffered a miscarriage some three weeks later. It may well be the case that it took some time for her to recover, but there is no documentary evidence to indicate that this continued for a significant time. The Appellant has provided no detail about any ongoing complications, and I find that there were none. In all the circumstances I find that the ex-spouse was potentially able to work again from March 2008 at the latest.
13. I find that the ex-spouse was working during the years 2003 to early 2007.

Conclusions

14. I now turn to my conclusions in this appeal. The core issue here is whether the Appellant's ex-spouse was exercising Treaty rights as a worker in the United Kingdom in the immediate run-up to the initiation of divorce proceedings in late 2007. It is this point in time which is relevant, and not the date of the termination of the marriage itself, because of the very recent judgment of the Court of Appeal in Baigazieva [2018] EWCA Civ 1088.
15. In assessing the issue of her status as a worker I make the following self-directions. First, the concept of being a worker is to be given a wide meaning. Second, the fact that a person may work for a number of employers, for short durations, or for low income, is not a reason to find against the existence of worker status. Third, I have

regard to the individual's circumstances as a whole, including their previous work history. Fourth, part-time work is to be taken into account. I have also had regard to a decision of the Administrative Appeals Chamber in DV [2017] UKUT 155 (AAC), in particular paragraphs 4 and 5. In essence, this simply summarises the approach I have just set out.

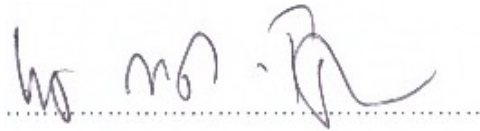
16. Having regard to the evidence as a whole and the points stated in the previous paragraph I regret to say that I conclude that the Appellant's ex-spouse was not exercising Treaty rights as a worker or in any other capacity during the period from the spring of 2007 onwards. She was not exercising Treaty rights as at the initiation of the divorce proceedings in October/November 2007 or as at the termination of the marriage in August 2008. My reasons for this conclusion are as follows.
17. I take into account the previous work record. The ex-spouse had been a worker between 2003 and the beginning of 2007. Whilst the earnings in 2003/2004 and 2006/2007 were fairly low they were sufficient to indicate genuine and effective employment. However, for one reason or another her circumstances changed in the tax year 2007/2008. Even taking into account the issue of the pregnancy, her work record, and all other relevant factors, I conclude that the total earnings in that whole tax year, being only £1,683.00, were so low as to be marginal or ancillary. During this period, the Appellant was supporting her financially. I conclude that his support was much more than simply a "top-up" to her own earnings. In reality the Appellant's contribution constituted the entirety of her living needs. She was entirely dependent upon the Appellant's earnings. In respect of the following tax year, 2008/2009 the earnings were even less, just £606.00. This is consistent with a decision by the ex-spouse, for whatever reason, to have stopped working the previous year and rely on the Appellant.
18. I have considered whether the ex-spouse somehow retained worker status or became a jobseeker, but conclude that this was not the case. The evidence before me simply does not in any way show that she satisfied any of the potentially relevant provisions under Regulations 5 or 6.
19. In light of the above, the ex-spouse had not herself acquired a permanent right of residence in the United Kingdom prior to the initiation of the divorce proceedings, nor was she a qualified person as at that date.
20. It follows from this that the Appellant could not have acquired a permanent right of residence in the United Kingdom prior to the initiation of divorce proceedings. It also follows that he did not, as at that point in time, retain a right of residence in the United Kingdom by virtue of Regulation 10(5) of the EEA Regulations 2006.
21. In consequence, the Appellant has no right of residence in this country and his appeal must be dismissed.

Notice of Decision

The decision of the First-tier Tribunal contained an error of law and has been set aside.

I re-make the decision by dismissing the Appellant's appeal.

No anonymity direction is made.



Signed

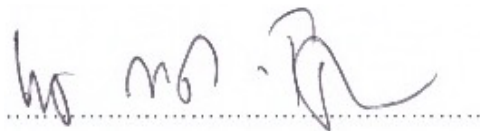
Date: 20 June 2018

Deputy Upper Tribunal Judge Norton-Taylor

TO THE RESPONDENT

FEE AWARD

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



Signed

Date: 20 June 2018

Deputy Upper Tribunal Judge Norton-Taylor

ANNEX: ERROR OF LAW DECISION



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

Appeal Number: EA/13081/2016

THE IMMIGRATION ACTS

**Heard at Field House
On 8 November 2017**

Decision & Reasons Promulgated

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Before

DEPUTY UPPER TRIBUNAL JUDGE NORTON-TAYLOR

Between

**MR ROBERT THEODOSIUS MENSAH
(ANONYMITY DIRECTION NOT MADE)**

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: The Appellant in person

For the Respondent: Mr D Clarke, Senior Home Office Presenting Officer

DECISION AND REASONS

22. This is a challenge by the Appellant to the decision of First-tier Tribunal Judge Myers (the judge), promulgated on 23 February 2017, in which she dismissed the Appellant's appeal against the Respondent's decision of 2 October 2016, refusing to issue a document confirming a right of permanent residence pursuant to the Immigration (European Economic Area) Regulations 2006.

23. The Appellant's application to the Respondent, made on 6 April 2017, had been based upon a retained right of residence under the Regulations. The Appellant had married a Dutch national in 2003. That marriage was terminated on 15 August 2008. The central issue taken by the Respondent against the Appellant was that he had failed to provide evidence that his ex-wife had been exercising Treaty rights as at the date of the termination of the marriage.

The judge's decision

24. The appeal was decided without an oral hearing pursuant to the Appellant's request. The judge considered the evidence before her on 13 February 2017. That evidence included a bundle from the Respondent together with a statement and other documentation provided by the Appellant in advance. The judge notes that there was what she described as a dearth of information on file in respect of the Appellant's former spouse and whether she was exercising Treaty rights as at the date of the divorce. The judge acknowledges the Appellant's attempts to have sought the employment history of his ex-wife from the HMRC. This request was declined on the basis that they could not disclose relevant information to a third party. The judge notes the decision of the Court of Appeal in Amos [2011] EWCA Civ 552.
25. The judge then notes that it is possible for an Appellant to apply for a direction from the Tribunal requiring the Respondent to obtain and then provide relevant information from HMRC. The judge observes that no such application had been made by the Appellant (who at all material times has been unrepresented). In light of the absence of an application for a direction, the judge found that there was insufficient evidence to show that the ex-spouse was exercising Treaty rights on the date of the termination of the marriage. The appeal was duly dismissed.

Grounds of appeal and grant of permission

26. The grounds (drafted by the Appellant himself) assert that he had done all he could to obtain relevant information, and that the Respondent herself should have made efforts to contact the HMRC. In granting permission on 6 September 2017 Deputy Upper Tribunal Judge Chapman (sitting as a Judge of the First-tier Tribunal) commented that the judge may have acted unreasonably in failing to make a direction of her own volition given the circumstances in this particular case.

The hearing before me

27. The Appellant attended the hearing. I explained the nature of the proceedings to him and ensured that both he and Mr Clarke had all relevant documents at the outset. Mr Clarke confirmed that the only live issue before the judge had been

whether or not the ex-spouse was exercising Treaty rights as at the date of the termination of the marriage. Mr Clarke suggested that the Respondent's guidance on what to do in cases such as at present amounted to a discretionary policy. He initially submitted that the Appellant had failed to provide any evidence which might have allowed the Respondent to have made enquiries with the HMRC.

28. However, during the course of argument it was pointed out that the Appellant had listed a brief summary of his ex-wife's employment history at page 47 of the application form. Mr Clarke suggested that even if a direction had been issued by the Tribunal it may not have been complied with. I indicated to Mr Clarke that in my experience sitting in the First-tier Tribunal, such directions were in fact often complied with.
29. Mr Mensah relied upon his own grounds.

Decision on error of law

30. As I informed the parties at the hearing, in all the particular circumstances of this case I conclude that the judge materially erred in law by failing to make a direction to the Respondent of her own volition, or alternatively that she failed to provide any reasons as to why she would not pursue that course.
31. It is clear to me that the Appellant had done all he could to have sought relevant information from HMRC. This much was acknowledged by the judge, and it is fully supported by correspondence to and from HMRC (on file). It is also clear that the Appellant had notified the Respondent as to his ex-wife's employment history, as best he could in all the circumstances, by completing the boxes at page 47 of the application form. The Respondent had not made any effort to seek information from the HMRC. When the matter came before the judge it was clear that the Appellant was in effect asking for the Secretary of State to obtain evidence from the HMRC, his attempts having been rebuffed (for legitimate reasons).
32. Given this fact and that the Appellant was unrepresented and cannot necessarily be expected to have known that he could have sought a direction from the Tribunal (pursuant to Rule 5 of the First-tier Tribunal's Procedure Rules), as a matter of fairness in my view it was incumbent upon the judge to have either issued a direction to the Respondent or at least considered the matter substantively and provided adequate reasons for a decision not to issue such a direction. In the event the judge simply stated that the Appellant had not made an application for a direction and left it at that. In the circumstances of this case this was inadequate.
33. As to whether the error is material, without a response from HMRC it is of course impossible to say for sure whether any information provided would be favourable to the Appellant or not. However, there is a realistic prospect that information obtained would be favourable. The error is material.
34. In light of the above I set aside the judge's decision.

Disposal

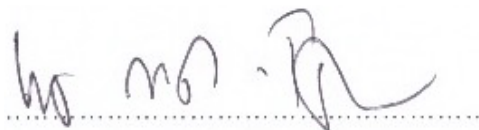
35. Mr Mensah and Mr Clarke were both agreed that in light of my decision on the error of law I could remake the decision myself. Before doing so it is in my view appropriate for me to issue a direction which the First-tier Tribunal should have, namely that the Respondent use her best endeavours to obtain the employment history of the Appellant's ex-wife from HMRC covering the period 2003 to at least 2009. All the relevant information relating to the ex-wife (which included full name, nationality and date of birth, but not her national insurance number) was provided to Mr Clarke at the hearing and there was no need for me to set it out here. I will issue this direction in written form as well (see below).
36. In terms of a resumed hearing, Mr Clarke suggested, and I agree, that it would be most appropriate for this matter to be relisted for an oral case management hearing before me in due course. At this hearing the appropriate final disposal of this appeal can be discussed. It may be that a further substantive hearing is unnecessary. That will all depend on what evidence comes to light.

Notice of Decision

The decision of the First-tier Tribunal contains a material error of law and I set it aside.

Having done so, I adjourn the appeal for it to be listed for a case management hearing before me in due course.

No anonymity direction is made.



Signed

Date: 22 November 2017

Deputy Upper Tribunal Judge Norton-Taylor

Directions to the parties

- 1. The Respondent shall use her best endeavours to obtain from HMRC the employment history of the Appellant's ex-wife between 2003 and 2009;**
- 2. If obtained, the information shall be served on the Appellant and filed with the Upper Tribunal no later than 14 working days before the case management hearing;**
- 3. If no such information is obtained, the Respondent shall inform the Appellant and Upper Tribunal of this in writing by the same deadline.**