



Upper Tribunal  
(Immigration and Asylum Chamber)

Appeal Number: EA/01291/2017

**THE IMMIGRATION ACTS**

Heard at Field House  
On 23<sup>rd</sup> April 2019

Decisions and Reasons Promulgated  
On 29<sup>th</sup> April 2019

Before

UPPER TRIBUNAL JUDGE COKER

Between

MILTON MANUEL BACA CORDOVA

Appellant

And

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

**Representation:**

For the Appellant: Mr P V Thoroee of Thoroee & Co solicitors

For the Respondent: Mr E Tufan, Senior Home Office Presenting Officer

**DETERMINATION AND REASONS**

1. By a decision promulgated on 11<sup>th</sup> January 2019 I set aside the First-tier Tribunal decision in the following terms:
  - i. The appellant, a Peruvian citizen, applied for Permanent Residence on the grounds that he had resided in the UK in accordance with the Immigration (European Economic Area) Regulations 2006 for a continuous period of five years and had retained a right of residence as the former spouse of an EEA national. That application was refused for reasons set out in a decision dated 18<sup>th</sup> January 2017. His appeal against that decision was dismissed by First-tier Tribunal Judge J Wyman for reasons set out in a decision promulgated on 23<sup>rd</sup> April 2018.

- ii. He sought and was granted permission to appeal on the grounds that:
  - 1. The First-tier Tribunal judge took the relevant date for calculation as the date of divorce (15<sup>th</sup> October 2010) as opposed to the date of initiation of divorce proceedings – see *Baigazieva* [2018] EWCA Civ 1088;
  - 2. That the judge referred to a lack of evidence that the appellant and his wife had ‘lived together’ for one year in the UK rather than the correct test which is that they have lived in the UK for one year exercising Treaty Rights – see *Diatta v Land Berlin* [1985] EUECJ R-267/83;
  - 3. The Tribunal should have noted and actioned the crucial point that the respondent failed in due diligence in seeking information for HMRC in relation to the spouse’s income and should have made an *Amos* direction.
- iii. Mr Tufan accepted that the judge had incorrectly stated that the relevant date was the date of divorce and not the date of initiation of divorce proceedings but that the error was immaterial. There was no evidence before the First-tier Tribunal as to the date of initiation of divorce proceedings; it was not possible to state the relevant date.
- iv. Mr Tufan submitted that the only evidence before the First-tier Tribunal regarding the former spouse’s residence in the UK was a P45 that stated that Ms Fekete left her employment with City University on 31<sup>st</sup> July 2010. Her gross pay is not noted on Part 1 (copy for employee) or Part 2 (copy for new employee). On Part 3 (for completion by new employer) her tax to date is recorded as £407.60. Her national insurance number is not recorded. Mr Tufan accepted that at the date of issue of the residence permit (actual date unknown but it seems sometime in 2007 or early 2008) the respondent would have been satisfied that his spouse was exercising Treaty Rights.
- v. The appellant married Ms Fekete on 11<sup>th</sup> August 2007. He was granted a family permit to enter the UK (no copy produced) in 2007 and thereafter was granted a 5 year residence permit which expired in 2012 (no copy produced). His evidence was that they separated about 2 ½ years after their marriage but that she continued to work in the UK. A child was born in Hungary on 3<sup>rd</sup> July 2009 – birth certificate produced noting him as the father. The decree nisi in the divorce proceedings was made on 25<sup>th</sup> June 2010 – information extracted from the decree absolute. A respondent in a divorce action (in this case the appellant) has 29 days from service of the divorce proceedings upon him to file an acknowledgement of service. Thereafter the petitioner (in this case Ms Fekete) can apply for decree nisi. At the latest, the divorce proceedings between Ms Fekete and the appellant were more than likely instituted no later than mid-May 2010.
- vi. The First-tier Tribunal judge could have reached a different conclusion as to whether the appellant’s former spouse was exercising Treaty Rights on the date of initiation of divorce proceedings given that it appears that she had paid tax of £407.60 in July 2010. The First-tier Tribunal judge erred in law such that the decision is set aside to be remade. The appellant did not

seek an Amos direction; there is no error of law by the First-tier Tribunal judge in that regard but given I have set aside the decision and the directions made, that point is covered in any event.

2. I made the following directions:
  - (i) The appellant to disclose all the divorce papers in his possession or he is to obtain them from Wandsworth County Court, including the child arrangements order;
  - (ii) The appellant to use his best endeavours to obtain such information as he is able in connection with Child Benefit for his daughter; in the absence of such information being forthcoming he is to disclose the efforts made by him to obtain such information.
  - (iii) The respondent to obtain such employment information as is available from HMRC, DWP and City University in connection with the appellant's former spouse, Rita Eva Fekete whose National Insurance number from the application form completed in 2008 appears to be SE471634C and whose date of birth from the same form appears to be 25 December 1977.
  - (iv) Both parties have leave to file and serve an indexed and paginated bundle of documents that they intend to rely upon no later than 14 days before the date of the resumed hearing.
3. The respondent produced a witness statement from an officer employed by HMRC which confirmed the appellant's former spouse had been employed from the tax years 2007/2008 until 2010/2011. No date of ceasing employment was set out in those documents.
4. The appellant produced a copy of a letter dated 5<sup>th</sup> January 2016 from City University London to the University of Pannonia, Hungary which confirmed she had been employed by City University until 31<sup>st</sup> July 2010. The respondent did not dispute the validity of that letter.
5. I am satisfied on the basis of the evidence produced that the appellant's former spouse was exercising Treaty Rights until 31<sup>st</sup> July 2010.
6. The appellant had been unable to obtain a copy of the divorce petition. As referred to in the error of Law decision, the decree nisi was pronounced on 25<sup>th</sup> June 2010. The proceedings would have been initiated prior to that date. I am satisfied on the balance of probabilities that the appellant's former wife was exercising Treaty Rights in the UK on the date of initiation of divorce proceedings.
7. It follows from these findings – the only issues that were in dispute and upon which the First-tier Tribunal had made findings which were the subject of appeal – that the appellant meets the Regulations for the grant of permanent residence.

Conclusions:

The making of the decision of the First-tier Tribunal did involve the making of an error on a point of law.

I set aside the decision.

I re-make the decision in the appeal by allowing it.

Date 23<sup>rd</sup> April 2019

A handwritten signature in blue ink, appearing to read 'Jane Coker', is written in a cursive style.

Upper Tribunal Judge Coker