Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: EA/00580/2016**

THE IMMIGRATION ACTS

Heard at Taylor House	**Decision & Reasons Promulgated**
On 4 October 2017	**On 18 October 2017**

Before

DEPUTY UPPER TRIBUNAL JUDGE MONSON

Between

QADEER AHMED KIYANI
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr R Layne, Counsel instructed by Kabir Ahmed & Co Solicitors
For the Respondent: Mr E Tufan, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellant appeals from the decision of the First-tier Tribunal (Designated Judge Woodcraft sitting at Hatton Cross on 3 April 2017) dismissing his appeal against the Secretary of State to refuse to issue him with a residence card as confirmation that he had an obtained right of residence or a permanent right of residence as the former spouse of an EEA national. 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 10 August 2017 Upper Tribunal Judge Blum granted the appellant permission to appeal for the following reasons:

> (1) Despite the fact that the application for the First-tier Tribunal to adjourn the hearing and issue an "AMOS" direction (AMOS and Another -v- SSHD [2011] EWCA Civ 552), was made extremely late in the day (during closing submissions), it is arguable that the FTJ failed to adequately consider the reasons why no such application was made at an earlier time. Although the FTJ directed himself according to **Nwaigwe (Adjournment: fairness) [2014] UKUT 00418 (IAC),** any evidence obtained from HMRC may well have been determinative one way or another of the single issue in contention, and the likelihood of the estranged and divorced partner having worked in the UK for the necessary period prior the divorce (which would not necessarily have to be two years) is arguably not wholly speculative given the appellant's belief that his ex-wife had been working at Sainsbury's and Primark, and that she worked for an agency.
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> (2) Permission is granted on this ground only. There is no arguable merit in ground 1, given that the FtTJ did not hold any of the evidence in the respondent's bundle against the appellant.

Relevant Background Facts

3. The appellant is a national of Pakistan, whose date of birth is 20 May 1978. Following his divorce from his ex-spouse, a Portuguese national, in 2013, he was issued with a residence card on 23 May 2013 as it was accepted that he had demonstrated that he met the requirements of Regulation 10(5).

4. On 2 August 2015, the appellant applied for a permanent residence card under Regulation 15(1)(f). The application was refused on 5 January 2016. The reasoning of the respondent was that in order to qualify for permanent residence, the appellant had to demonstrate that he had resided in accordance with the Regulations for a continuous 5-year period, which would mean that his former EEA national spouse continually exercised free movement rights up to the point of divorce, and that he had been employed, self-employed or self-sufficient since the divorce. Collectively this evidence has to cover a continuous 5-year period to meet the requirements of 15(1)(f).

5. He had supplied his decree absolute, which was dated 28 January 2013. This meant that he had to demonstrate that his former spouse was exercising Treaty rights continuously up to 28 January 2013. He had shown that he had been continuously employed for three years since the date of the divorce. So, to qualify for permanent residence, he was required to provide evidence that his former spouse was exercising Treaty rights for two continuous years up until the point of divorce. He had failed to provide such evidence.

The Hearing before, and the Decision of, the First-tier Tribunal

6. Mr Layne of Counsel appeared on behalf of the appellant at the hearing on 3 April 2017. There was no appearance on behalf of the respondent. In his subsequent decision at paragraph [2], the Judge noted the relevant chronology. The appellant applied for a residence card on 22 September 2009, and this was issued to him on 10 October 2009. In 2011, the appellant and sponsor separated, and the appellant presented a divorce petition at the Slough County Court. On 10 December 2012, the decree nisi was pronounced, and the decree absolute followed on 28 January 2013.

7. The Judge noted at paragraph [7] that the documentary evidence provided by the appellant relating to the exercise of Treaty rights by his ex-spouse comprised her P60 for the year ending 2009; and her bank statements for the period March 2010 to September 2010. He had also provided a CV that she had written which he relied on as confirming the various employments she had held until January 2011.

8. In his witness statement, the appellant said that he had exhausted all options to attempt to obtain further documents from the sponsor. He had tried to contact her on the telephone and he had sent a message to her. She had refused to provide him with the documents required to demonstrate that she was exercising Treaty rights for two years preceding the divorce. He complained that the respondent could have sought clarification from HMRC on whether the sponsor was employed for the two years preceding the date of the decree absolute.

9. In his oral evidence, he was asked if he knew where the sponsor had been working during the two years leading up to the decree absolute. He said he thought that she was working at Sainsbury's and Primark. When they had moved from Newcastle, she had applied for a job in London. She had always been working. She got work through an agency. He could not remember the name of the agency.

10. In his closing submissions, Mr Layne submitted that the appellant had exhausted all avenues, and there was only one avenue left that he could go down - and that was to apply for directions that the respondent should make enquiries of HMRC. He cited paragraph 5 of the Tribunal Procedure Rules 2014. The Judge asked Counsel whether in effect he was asking at this late stage of the proceedings for an adjournment, because that was not how the case had been presented at the beginning of the hearing. Counsel indicated that he would leave the matter in the Tribunal's hands. The Judge indicated that he would give his written reasons for his decision in the usual way.

11. The Judge's findings are set out at paragraphs [19]-[26]. At paragraph [24], he found that the appellant and his representatives had known from the refusal notice for over a year what the problem in the case was, and they had had over 5 months to prepare for the appeal. Very late in the day, a somewhat *'lukewarm'* application for an adjournment had been

made. It appeared to him to be wholly speculative with very uncertain prospects of a successful outcome in terms of information about the sponsor being obtainable from HMRC. If it was likely that information might be forthcoming from HMRC, he considered that the appellant via his legal representatives would have asked for an AMOS direction somewhat earlier than in closing submissions.

12. At paragraph [36], he said that the suggestion that the marriage between the appellant and the sponsor might have been bogus arose from the evidence put forward by the appellant himself in his bundle. But he bore in mind that the respondent issued the appellant with a residence card and thus must have been satisfied at an earlier date that the marriage was genuine. In the absence of a Presenting Officer, he could not take that issue any further. What he was concerned about was whether there was any possibility that an adjournment might produce evidence of assistance to the Tribunal in deciding this appeal. It was clear to him that there was no such prospect: and the appellant knew that: and that was why he and his representatives had not applied at an earlier stage for an AMOS direction.

The Hearing in the Upper Tribunal

13. At the hearing before me to determine whether an error of law was made out, Mr Layne developed the case pleaded in ground 2, which was the sole ground on which permission to appeal had been granted by the Upper Tribunal. In reply, Mr Tufan adhered to the Rule 24 response opposing the appeal settled by a colleague in the Specialist Appeals Team.

Discussion

14. Permission to appeal was granted on ground 2 on the basis that it was arguable that the Judge had failed adequately to consider the reasons why the appellant had not made an AMOS application in advance of the hearing of his appeal, rather than Counsel making what the Judge characterised as a lukewarm application for an AMOS direction in his closing submissions.

15. However, I consider that the Judge has made it very clear why he considers that the application was not made earlier. The Judge makes a clear finding that the appellant *knew* that there was no possibility that an AMOS direction might produce evidence of assistance to him in his appeal. This is a stark finding, which effectively imputes bad faith to the appellant.

16. Having carefully reviewed the Judge's findings leading up to this conclusion, I consider that the conclusion was one which was open to him.

17. At paragraph [19], he found that the appellant's witness statement was remarkably lacking in detail about the relationship between him and the sponsor: when it began, when and why it ended, etc.

18. At paragraph [21], he found that the appellant's representatives had given 5 months' notice of the hearing, and they appeared to be aware of the

possibility of applying to the Tribunal for an AMOS order directing the respondent to apply to HMRC for any details there might be of the sponsor's employment. He continued: "*What there is not is an explanation why no application was made to the Tribunal for such a direction until the conclusion of the hearing.*"

19. The Judge summarised the content of the text messages on Whatsapp that had been exchanged between the appellant and the sponsor after a period of 5 years. At paragraph [22], the Judge observed as follows: "*The appellant himself did not ask the sponsor in terms what he wanted or needed in support of his application. He referred vaguely to her helping him with papers which she, without more information, was understandably reluctant to assist.*"

20. In the circumstances, it was open to the Judge to find the appellant not credible in his assertion that, in the two-year period after January 2011 (the last date on which there was evidence of her exercising Treaty rights) she was working at Sainsbury's and Primark and/or that she had got work through an agency, whose name he could not recall. It was open to the Judge to find that, if the appellant genuinely believed that the sponsor had been working for the two-year period leading up to the point of divorce, he would have applied for an AMOS direction much earlier.

21. Mr Layne submitted to me that it was reasonable to delay making an application for an AMOS direction until the conclusion of the hearing for two reasons: firstly, because paragraph 5 of the Procedure Rules permits an application to be made during the course of the hearing; and, secondly, because the appellant had to put before the Tribunal evidence of his efforts to obtain the evidence himself, which is a condition precedent of an application for an AMOS direction being successful.

22. However, as the Judge indicated, the appellant did not credibly demonstrate that he had genuinely tried to obtain the necessary documents from the ex-spouse. His request was so vague that the ex-spouse was understandably reluctant to assist.

23. Although this was not raised in oral argument before me, there is an obvious additional weakness in the appellant's case which reinforces the Judge's stark conclusion that the appellant *knew* that an AMOS direction would not be of assistance.

24. The appellant must have had documentary evidence of his ex-spouse exercising Treaty rights at the point of divorce, as without such evidence he would not have been recognised as satisfying all the relevant requirements of Regulation 10(5). However, in order to obtain such evidence, he would have needed to have been in contact with the sponsor at the point of divorce or shortly thereafter. Yet, as the Judge noted from the text exchange, the sponsor expressed surprise as to why the appellant was contacting her after a period of 5 years.

25. Nonetheless, if the appellant had been in contact with the sponsor at the point of divorce, and she had cooperated with him by providing

documentary evidence of the exercise of Treaty rights at the point of divorce, it is reasonable to question why her cooperation would not have extended to cover the two-year period from January 2011 to January 2013: and that if she was continuously exercising Treaty rights in this period, she would have provided the documents to show this; and if she was not continuously exercising Treaty rights over this period, she would have told him.

26. However, for the avoidance of doubt, the conclusion of the Judge is sustainable for the reasons he gave, which did not include the additional consideration set out above.

Notice of Decision

The decision of the First-tier Tribunal did not contain an error of law, and accordingly the decision stands. This appeal to the Upper Tribunal is dismissed.

I make no anonymity direction.

Signed Date 8 October 2017

Judge Monson

Deputy Upper Tribunal Judge