Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: EA/02291/2017

THE IMMIGRATION ACTS

Heard at Birmingham	**Decision & Reasons Promulgated**
On 6th September 2017	**On 12th September 2017**

Before

UPPER TRIBUNAL JUDGE COKER

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

And

NATALIIA KRYVENKO

Respondent

Representation:
For the Appellant: Mr A McVeety, Senior Home Office Presenting Officer
For the Respondent: Mr M Bradshaw instructed by LS Legal solicitors

DECISION AND REASONS

1. The appellant's application for an EEA permit under retained rights of residence as the former spouse of an EEA national was refused by the respondent on 17th February 2017 on the basis that the appellant had failed to provide adequate evidence that the appellant's former spouse had been exercising Treaty Rights at the date of divorce or that she was exercising Treaty Rights from the date of divorce. The appellant appealed the decision.

2. First-tier Tribunal Judge Tully considered the appeal on the papers and found

   (i) The appellant's former spouse was exercising Treaty Rights on the date of the divorce and she therefore meets regulation 10(5)(b).

(ii) Although finely balanced, the appellant was employed at the date of her divorce.

The First-tier Tribunal judge therefore allowed the appeal.

3. Permission to appeal was sought on the grounds that the First-tier Tribunal judge had applied the wrong test in connection with regulation 10(6) because the evidence before the judge (covering the period May to July 2016 and a contract from an unobtainable company dated 31st January 2017) falls short of the requirement to show the appellant has been a worker, self-employed or self-sufficient *since* the date of divorce. The respondent submitted that the finding by the judge that she had been employed at the date of divorce was the wrong test and constitutes an error of law. The SSHD did not seek to challenge the finding of the judge that the former spouse had been exercising Treaty Rights at the date of divorce.

Error of law

4. Payslips for February and March 2017, a bank statement showing corresponding entries, her P60 for the year ended 5ht April 2017 were included in the bundle. There was no submission by the SSHD to the First-tier Tribunal that these documents could not be relied upon to support Ms Kryvenko's submission that she had been exercising treaty Rights since her divorce.

5. Although the First-tier Tribunal judge found that she was exercising Treaty Rights at the date of the divorce and did not make a finding that she had continued to exercise Treaty Rights, it is plain, as acknowledged by Mr McVeety, that there was evidence before the judge that supported the submission that she met regulation10(6)[1]; the failure of the First-tier Tribunal judge to make that specific finding, although an error, is not material given that had she expressed herself correctly the ultimate conclusion would have been the same, namely that the Ms Kryvenko meets the requirements of the Regulations for the issue of a residence permit on the basis of retained rights of residence

Conclusions:

The making of the decision of the First-tier Tribunal did not involve the making of an error on a point of law.

I do not set aside the decision

The decision of the First-tier Tribunal judge stands, namely the appeal is allowed.

Date 6th September 2017

[1] It is more than possible that the drafter of the grounds of appeal to the Upper Tribunal did not have all the documents before him and thus was not aware that there was evidence before the judge and that the judge appeared to have expressed herself incorrectly rather than making a fundamental material error of law.

Upper Tribunal Judge Coker