Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: EA/01677/2016**

THE IMMIGRATION ACTS

Heard at Field House **Decision & Reasons Promulgated**
On 26 April 2018 **On 11 May 2018**

Before

UPPER TRIBUNAL JUDGE GLEESON

Between

RAJUMUHAN THAMP VILANGUPARA
(NO ANONYMITY ORDER)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr Amir Fouladvand, Legal Representative instructed by Migrant Advisory & Advocacy Service (MAAS)
For the Respondent: Mr David Clarke, a Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellant appeals with permission against the decision of the First-tier Tribunal dismissing his appeal against the refusal of the respondent to grant him a permanent right of residence in the United Kingdom as a family member with retained rights of residence pursuant to Regulation 10(6) of the Immigration (European Economic Area) Regulations 2016 (as amended).

2. The appellant was married to an EEA national from 29 November 2010 to 29 November 2013 when the marriage ended. He has ischaemic heart disease and was not able to work very much in 2012/2013 or 2013/2014, on the evidence before me.

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3. This appeal came before me on 9 February 2018 and was adjourned to give the appellant an opportunity to produce evidence showing that he was temporarily unable to work on the date of termination of the marriage, 29 November 2013. The appellant was able to produce further HMRC records and sicknotes which are considered below.

Background

4. The appellant came to the United Kingdom on 22 June 2003 with a student visa , which was extended to expire on 31 July 2009. On 4 August 2008, he was served with form IS 151A for removal on the basis that he was no longer pursuing his studies at Life Line Learning Centre. An application on 4 September 2009 to remain in the United Kingdom as a Tier 4 (Student) Migrant was refused on 12 March 2010 with no right of appeal.

5. In the meantime, the appellant had met his former wife, an EEA national who was present in the United Kingdom. On 8 April 2009 he applied for a certificate of approval to marry her, and was granted approval on 7 October 2009. The parties married on 29 November 2009. On 2 March 2010, the appellant applied for an EEA spouse residence card, which was issued on 27 August 2010, valid to 27 August 2015.

6. Unfortunately, the marriage failed. The appellant says this was because he was the victim of domestic violence at his wife's hands. He has produced a risk assessment created by the Independent Domestic Violence Advocacy Project, but no police reports or other corroborative evidence of the alleged domestic violence. The marriage was dissolved by decree absolute on 29 November 2013. It had lasted exactly 4 years.

First-tier Tribunal decision

7. The First-tier Tribunal found the appellant credible. The Judge accepted that the marriage had terminated 'in circumstances of some abuse' but made no finding whether the circumstances amounted to domestic violence. He accepted the oral evidence of the appellant that his marriage 'was attended by circumstances of verbal abuse, abusive accusations of infidelity, violent argument and occasional petty violence, including pushing'. The appellant submitted to this 'with a resigned and patient mien' until he left the marital home in 2013. The Judge found that even if the appellant was able to meet Regulation 10(5)(d)(iv) on domestic violence grounds, it would not avail him if he could not meet the other requirements of Regulation 10(5)(a), (b) and 10(5)(c) with reference to 10(6)(a) or (b).

8. Paragraphs [12]-[13] of the decision contain the core of the Judge's reasoning:

> "12. The principle here is that in order to qualify as a worker, the alleged employment must be genuine and effective and not pursued on such a small scale as to be only marginal or ancillary. There is no lower limit on earnings specified in [the Regulations]. It is necessary, in deciding the issue whether employment is effective, to consider all circumstances, including value to the employer. The earnings of the appellant during the two years covering the relevant period are to my mind so low that

> they do not give rise to any ability whatever to be self-supporting. The annual income received in the last year under consideration is the equivalent of £33 weekly. …This is work at less than an hour every day. It is employment at a very low level of earning and responsibility. In my view, the employment of the appellant was not effective, it was marginal. This is perhaps affirmed by his own evidence, which I think is truthful throughout, that he otherwise subsists on housing benefits and from the charitable donations of food, cloting and other material from his Church congregation.
>
> 13. I come to the conclusion that the appellant's account, genuine and reliable as it is, does not serve to prove effective employment at the material time, or any time. It does not show that he was a worker, other than in a marginal and ancillary capacity, in his own right, as if he were an EEA national. This means that the appellant does not qualify for a right of a permanent right of residence as a non-EEA national family member who has retained a right of residence. "

9. The appellant appealed to the Upper Tribunal.

Permission to appeal

10. The grounds of appeal are largely a recital of relevant jurisprudence. The core of the appellant's argument is that the First-tier Tribunal failed to engage with evidence that 'in what was deemed the remaining relevant period of time [between the date of divorce 29 November 2013 and the end of the 5-year period being 29 November 2013]' the appellant had been found unfit for work on 17 separate occasions between 9 December 2013 and 1 October 2014, including seven hospital admissions, which affected his working hours and his income. The appellant contended that insufficient weight had been placed on his long service (14 years with Ladbrokes) or with his 10 years' service Certificate of Appreciation. He argued that before his October 2010 surgery, he had earned much higher amounts, just under £9000 in 2007-2008 and over £11000 in 2008-2009.

11. Permission to appeal was granted for the following reasons:

> "It is arguable that First-tier Tribunal Judge Gillespie failed to engage properly with the question of whether the appellant's work between November 2013 and November 2014 was genuine and effective or marginal and ancillary because it is not clear that the judge took account of the appellant's ill health evidenced by medical records which reduced his ability to work even though he remained employed and thereby affected his earnings. In particular, there appears to have been no consideration of Regulation 6(2) which indicates that a person may retain worker status during periods of illness. As a result it is arguable that Judge Gillespie's findings in relation to Regulation 10(6) of the 2006 EEA Regulations are not sustainable. Therefore permission is granted".

12. There is no Rule 24 reply in this appeal. That is the basis on which the appeal comes before the Upper Tribunal.

The EEA Regulations 2016

13. Regulation 10(6) so far as relevant to this appeal says this:

> "10. (1) In these Regulations, 'family member who has retained the right of residence' means, subject to paragraphs (8) and (9), a person who satisfies a condition in paragraph (2), (3), (4) or (5). …
>
> (5) The condition in this paragraph is that the person (A) –
> (a) ceased to be a family member of a qualified person or an EEA national with a right of permanent residence on the termination of the marriage or civil partnership of A;
> (b) was residing in the United Kingdom in accordance with these Regulations at the date of termination;
> (c) satisfies the condition in paragraph (6); and
> (d) either—
> (i) prior to the initiation of the proceedings for the termination of the marriage or the civil partnership, the marriage or civil partnership had lasted for at least three years and the parties to the marriage or civil partnership had resided in the United Kingdom for at least one year during its duration; … or
> (iv) the continued right of residence in the United Kingdom of A is warranted by particularly difficult circumstances, such as where A or another family member has been a victim of domestic violence whilst the marriage or civil partnership was subsisting.
>
> (6) The condition in this paragraph is that the person –
> (a) is not an EEA national but would, if the person were an EEA national, be a worker, a self-employed person or a self-sufficient person under Regulation 6; or
> (b) is the family member of a person who falls within paragraph (a)".

14. Regulation 6(2) of the 2016 Regulations is identical with the 2006 Regulations:

> "6.(2) A person who is no longer working must continue to be treated as a worker provided that the person –
> (a) is temporarily unable to work as the result of an illness or accident".

Upper Tribunal hearing

15. In order to qualify for a permanent right of residence based on a retained right of residence, the appellant must be able to show that his right of residence continued because on the date of dissolution of the marriage, either his former wife was still exercising Treaty rights in the United Kingdom or he was entitled to be treated as an EEA Regulations worker in his own right.

16. The grounds of appeal focus on Regulation 10(6)(a). The appellant does not contend that he can meet Regulation 10(6)(b) and so we are not concerned with his wife's status as a qualified person or acquisition of a permanent right of residence on the date of the decree absolute, 29 November 2013. The appellant's grounds of appeal did not challenge the judge's finding that his employment was ancillary. There is no engagement with the reasoning at [13] of the decision. At the beginning of the hearing, Mr Fouladvand for the appellant conceded that the judge had been entitled to find that the appellant worked only in a marginal and ancillary capacity. Later

during his submissions, he submitted to the contrary, but for the reasons I now give, I was not persuaded by that submission.

17. Mr Fouladvand relied on the judgments of the Court of Justice of the European Union in *D.M. Levin v Staatsecretaris van Justitie* [1982] EUECJ R-53/81 and *Deborah Lawrie-Blum v Land Baden-Württemberg* [1986] EUECJ R-66/68. Both decisions were considered and taken into account by the Court of Appeal in *Barry v London Borough of Southwark* [2008] EWCA Civ 1440 and the Upper Tribunal's guidance in *Begum* (EEA – worker – jobseeker) Pakistan [2011] UKUT 00275(IAC), which summarised the guidance thus:

> "*(1) When deciding whether an EEA national is a worker for the purposes of the EEA Regulations, regard must be had to the fact that the term has a meaning in EU law, that it must be interpreted broadly and that it is not conditioned by the type of employment or the amount of income derived. But a person who does not pursue effective and genuine activities, or pursues activities on such a small scale as to be regarded as purely marginal and ancillary or which have no economic value to an employer, is not a worker. In this context, regard must be given to the nature of the employment relationship and the rights and duties of the person concerned to decide if work activities are effective and genuine. ...*"

18. The appellant has now produced HMRC records of his tax returns. For the year April 2013 to April 2014 he is recorded as working for Ladbrokes Betting and Gaming Limited and earned £1,785.09 (about £34 a week) for the entire year, paying no tax or National Insurance. The other new documents produced show that he continued to have health difficulties in January and March 2018, that he received a certificate of long service from Ladbrokes in 2014 and participated in a share scheme in 2017, and that because of his low income he received housing benefit in the years 2011, 2012, 2013, 2014 and 2015.

19. The grounds of appeal however err in treating the whole of the year from 29 November 2013 to 29 November 2014 as the relevant period: while that period is relevant for a permanent right of residence, the appellant can be considered for that only if his right of residence continued beyond the date of termination of his marriage on 29 November 2013, and for that, he must meet all the conditions of Regulation 10. He must show:

    (i) that he ceased to be a family member of a qualified person on 29 November 2013 (Regulation 10(5)(a));
    (ii) that he was in the United Kingdom 'in accordance with the Regulations' on the date of dissolution (Regulation 10(5)(b));
    (iii) that he would, had he been an EEA national, have been a worker on 29 November 2013 (Regulation 10(5)(c) with Regulation 10(6)); and either
    (iv) that before the divorce proceedings were begun the marriage had lasted at least 3 years (Regulation 10(5)(d)(i)) or that he was a victim of domestic violence (Regulation 10(5)(d)(iv)).

20. This appeal falls at the first hurdle. The appellant cannot show that he was a family member of a qualified person on 29 November 2013 because he lacks the relevant information about his former spouse's presence in the United Kingdom, or her

exercise of Treaty rights on that date. If she was not exercising Treaty rights, then he was not in the United Kingdom 'in accordance with the Regulations' and the appeal falls also at the second hurdle. Nor is there satisfactory evidence that he was entitled to be treated as a 'worker' on 29 November 2013: his sick notes had not yet begun and there is no evidence that he received pay covering that period. Regulation 10(5)(d) is not reached.

21. I am satisfied, on the evidence before the First-tier Tribunal Judge, even with the addition of the new evidence before me, that it was open to the First-tier Tribunal to find that the appellant had not demonstrated as at 29 November 2013 either that his wife was exercising Treaty rights or had acquired a permanent right of residence, or that he was employed in a manner which was more than purely marginal and ancillary, or that he was temporarily unable to work for reasons of ill health. Unless he can meet one of those three qualifications, the appellant cannot show that he is a family member who has retained the right of residence and accordingly, his appeal was bound to fail.

22. The First-tier Judge did not err in law in dismissing this appeal for the reasons given. There is no material error of law in the decision of the First-tier Tribunal.

DECISION

23. For the foregoing reasons, my decision is as follows:

The making of the previous decision involved the making of no error on a point of law.
I do not set aside the decision but order that it shall stand.

Date: 8 May 2018 Signed *Judith AJC Gleeson*
Upper Tribunal Judge Gleeson