Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: EA/03305/2017

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 5 November 2018	**On 15 November 2018**
Extempore	

Before

UPPER TRIBUNAL JUDGE DAWSON
UPPER TRIBUNAL JUDGE RINTOUL

Between

HASSAN [A]
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr R Claire, instructed by Legal Chambers Solicitors
For the Respondent: Mr J McGirr, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellant appeals with permission against the decision of First-tier Tribunal Judge R M Smith promulgated on 6 April 2018 dismissing his appeal against a decision made on 18 August 2016 to refuse him a residence card as confirmation of his right of residence in the United Kingdom pursuant to the Immigration (European Economic Area) Regulations 2016 ("the EEA Regulations").

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2. The appellant entered the United Kingdom in 2009 as a student and in 2010, whilst he had leave to remain, met a Spanish national with whom he lived and married on 5 August 2011. On 22 September 2012 they had a child, who is a Spanish national, and subsequent to that, the appellant applied for a residency card granted with leave until 15 August 2017.

3. The marriage unfortunately broke down on 13 October 2014 and the appellant commenced divorce proceedings on 2 March 2015. It is said that the appellant's now ex-wife was, at the point at which her divorce proceedings were commenced, exercising treaty rights though being self-employed, although it is now also said in submissions before us today that she had at some point been in receipt of job seeker's allowance.

4. The judge directed himself that he should consider the position with regard to the former wife as to whether she was exercising her treaty rights at the date of divorce. The judge concluded that there was insufficient evidence to show that she had in fact been earning the £3,000 declared in her tax return for the tax year 2015/2016, it being noted that that was well below the tax threshold and was unsupported by any other documentation. The judge also concluded that he was not satisfied by the appellant's explanation as to why he could not produce any further evidence from his wife.

5. On that basis, the appeal was dismissed, the judge concluding that the appellant had not established that his wife was exercising her treaty rights in the United Kingdom at the time their marriage was dissolved.

6. Permission to appeal against that decision was sought on a number of grounds, it being asserted in particular that the judge had erred in his assessment of the evidence and that it had been difficult for the appellant to obtain any evidence at all; and, that he had taken proper attempts to obtain the employment documents off the wife which had not been provided. It was argued also that the judge had not properly considered the weight to be attached to the letter from HM Revenue & Customs.

7. Permission was granted by Upper Tribunal Judge Plimmer on 25 September 2018. She concluded that it was arguable that the First-tier Tribunal erred in law in requiring evidence to particularise the claimed self-assessment, given all the evidence available when viewed in the round, also that it was difficult to identify the date, which the First-tier Tribunal considered appropriate, to address the issue of whether the sponsor was exercising treaty rights. It had now been clarified that the relevant date is the date of commencement of divorce proceedings. Permission was granted only on that ground.

8. We heard submissions from Mr Claire who we accept is entitled to amend his grounds to include the point raised by Judge Plimmer when granting permission. We accept in consequence and in light of Baigazieva [2018] EWCA Civ 1088, that the judge looked at the wrong date when assessing whether the appellant's wife was exercising Treaty Rights. It is now settled law that he should have looked at the date

on which proceedings commenced, 5 March 2015 and not the date of the decree absolute.

9. We do not however consider, in light of the matters to which we will now turn, that this was a material error. It was incumbent on the appellant to show that his now ex-wife had been exercising treaty rights, either as a worker or as a self-employed person at the relevant date. It is not contended that she was self-sufficient or a student.

10. We were helpfully taken through the evidence by Mr Claire as to the wife's income which he accepts was modest. The tax return for the year April 2014 to April 2015, which is the relevant period for assessing whether or not the ex-wife was exercising treaty rights, shows an income of £868 which is said to be by way of a pension but we are now told that this was a payment of Job Seeker's Allowance. There is also a declaration of self-employment showing an income of £647.

11. We were also taken to some receipts from eBay, it being said that the former wife had been making selling jewellery on eBay, but there are only two of these to which we were taken, one showing receipt of 99 pence, the other showing receipt of US$2.99. In addition, we were taken to the assessment of tax credits for the tax year 2014 to 2015 issued in July 2014. That assessment proceeds on the basis that the former wife was earning £1,560 per annum.

12. The difficulty that the appellant faces is not that he could not get further information and documentation from his wife, but that, taking the case at its highest, the total amount of income disclosed by the wife for the purposes of income tax is £647 by way of turnover, which is, in itself, unlikely to be the true earnings given that there must have been some expenses incurred in her making jewellery, buying the raw materials before making it and thus, £647 is the high point of any income. This is said to arise over an entire year. We consider that on no view could such an income at this level, demonstrated we accept by evidence of a small number of small transactions on eBay, be anything other than marginal or ancillary and thus would not be sufficient to show that the appellant's wife was self-employed.

13. We do not consider either that the sum of £868 by way of Job Seekers' Allowance, and this is not a matter properly raised in the grounds, could be seen as being evidence of exercising treaty rights. Further it is unclear to which period this relates and whilst receipt of job seeker's allowance is indicative that the recipient was actively seeking work, there are a number of other matters that would have needed to have been considered which could not be obtained except by evidence from the wife as to her intentions.

14. Further it does not appear to have been suggested at any point to the Secretary of State or, for that matter to the judge, that the former wife was in receipt of Job Seekers' Allowance nor any indication as to the period over which it was paid. Given the lack of evidence of prior status as a worker, or as self-employed, and given the very low level of income generated, there is no proper basis on which it could be said

that the former wife had retained any former status pursuant to reg 6 of the EEA Regulations as amended by the Immigration (European Economic Area) (Amendment) Regulations (SI 2018/801).

15. In the circumstances we consider that, even taking the case at its highest, there is simply no basis on which a judge could rationally have concluded on the material provided that the appellant's ex-wife had in fact been exercising treaty rights for the reasons given. That is because there is simply nothing more that could have been shown or could have been provided even had there been material disclosed by HM Revenue & Customs. It could not have shown any greater level of income than was already declared without it casting doubt on itself. The level of income is of such a nature and was generated in such a way as to be manifestly marginal and ancillary.

16. For these reasons we find that the decision of the First-tier Tribunal did not involve the making of an error of law capable of affecting the outcome and we dismiss the appeal accordingly.

SUMMARY OF CONCLUSIONS

1. The decision of the First-tier Tribunal did not involve the making of an error of law, and we uphold it.

2. No anonymity direction is made.

Signed Date 9 November 2018

Upper Tribunal Judge Rintoul