



Upper Tribunal  
(Immigration and Asylum Chamber)

Appeal Number: EA/03443/2016

THE IMMIGRATION ACTS

Heard at Field House  
On 10 July 2018

Decision and Reasons Promulgated  
On 30 July 2018

Before

DEPUTY UPPER TRIBUNAL JUDGE MURRAY

Between

ASIM SHAHZAD  
(ANONYMITY NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Miss Srindran, Solicitor of Crimson Phoenix Solicitors, Barking  
For the Respondent: Mr Kandola, Home Office Presenting Officer

DECISION AND REASONS

1. The appellant is a citizen of Pakistan born on 9 December 1984. He appealed the respondent's decision dated 4 March 2016 refusing his application for a residence card, to confirm that he retains a right to reside in the United Kingdom following his divorce from a qualified person. His appeal was heard by Judge of the First-Tier Tribunal Blundell and dismissed on community law grounds in a decision promulgated on 1 September 2017.
2. An application for permission to appeal was lodged and permission was granted by Upper Tribunal Judge Plimmer on 3 May 2018.
3. The permission states that the First-Tier Tribunal found that the appellant had acted dishonestly/fraudulently from paragraph 28 onwards, without the appellant being given a clear opportunity to address the serious concerns raised. The appellant has to

establish his case and in this case the appellant contends that these matters were not put to him and he did not have an opportunity to address them at the hearing. A direction was given that because of this claim the appellant must file and serve a witness statement to that effect and this must be filed and served within 21 days from the date of the decision. A statement has now been filed but it was not submitted to the Tribunal until 2 July 2018. I was told that the appellant had changed representatives and had not realised that this direction had been given at the previous hearing.

4. The reason this appeal was dismissed was that the Judge was not satisfied that the sponsor was exercising Treaty Rights up to the date of the divorce which was 9 July 2015. In the decision at paragraph 22 the Judge states that he finds the appellant thoroughly dishonest with regard to the way in which he came to be in possession of his ex-wife's tax return for the financial year 2014-2015 and that untruthfulness casts a long shadow over his ex-wife's, Ms Vitkauskaite's, economic activity in the United Kingdom. The appellant stated at the hearing that he had found mail addressed to him and his wife at his and his wife's former address and had used one of the letters he found, which consisted of three pages of Ms Vitkauskaite's 2014-2015 tax return as evidence for his first-tier hearing. These are at pages 150 to 152 of the appellant's bundle. These pages show his ex-wife's income as being much lower than the £10,000 personal allowance, which means that no tax was payable. The return was submitted shortly before midnight on 29 April 2015. The actual tax return was a 15-page document. The Judge did not believe the appellant's evidence as no reason was given as to why three pages of the appellant's wife's tax return would have been sent to a property which had been vacated by the appellant and his ex-wife in April 2015, three months earlier. The appellant did not have the envelope these pages were in and he stated that there was no covering letter. The Judge referred to there being two possibilities. One possibility is that the appellant's account is true and that his ex-wife or an accountant had submitted the tax return and these three pages were sent to his and his wife's previous address without a covering letter. The other possibility is that the appellant had submitted the tax return using his ex-wife's log in details and password. The judge found that these parts of the 2014-2015 tax return did not constitute reliable evidence of his ex-wife exercising Treaty Rights in the critical period of March to July 2015. There was no other reliable evidence to support this.

### **The Hearing**

5. I asked the appellant's representative if her client is stating that he had no opportunity to address this concern of the Judge and although there had been directions that a statement should be lodged by him within 21 days from the date of the hearing, he did not lodge it until 2 July 2018. She accepted that the only reason the appeal was refused was that the Judge did not believe that the appellant's wife was exercising Treaty Rights up to the date of the Decree Absolute. I put to her that there seems to be nothing else to corroborate that the appellant's ex-wife was exercising Treaty Rights at that time. I have a record of proceedings on file but neither the Presenting Officer nor the appellant's representative had a copy of their records of proceedings from the first-tier hearing. The appellant's representative submitted that the appeal should be reheard

because of unfairness, as her client had not had a chance to address this issue. I put to the representative that it is clear from the decision that the appellant was questioned on these three pages of his ex-wife's tax return at the hearing and the Judge had made it clear at the hearing that he was dubious about the truth of the appellant's evidence about this. The appellant's representative submitted that at no point was the appellant at the First-Tier hearing accused of being dishonest about how he had obtained the document.

6. The appellant's representative made her submissions, submitting that there were three points raised in the refusal letter and two were accepted by the Judge so there is only one which has to be considered and that is whether his wife was exercising Treaty Rights right up until 9 July 2015 in the United Kingdom. She submitted that the appellant provided documents from 2009 until 2015 and these included tax returns for 2011-2012 dated 28 May 2012 at page 144 of the appellant's bundle, for 2012-2013 on 8 June 2013 at page 146 of the appellant's bundle, for 2013-2014 on 23 April 2014 at page 148 of the bundle and then for 2014-2015 on 29 April 2015 at page 151 of the bundle. She submitted that the Judge only looked at the last tax return and made no comment about the previous ones and it is not clear how he could say the 2014-2015 return was dishonest without considering the previous tax returns. He submitted therefore that the judge was satisfied that the appellant's ex-wife was exercising Treaty Rights up until 2014 and the appellant did everything he could to discharge the burden of proof and he should be found to be eligible for permanent residence in the United Kingdom.
7. She submitted that the appellant was dissatisfied with his previous representative and that is why he changed representatives and he was unaware that he had to submit a statement within 28 days from the date of the decision. She submitted that instead of the Judge finding that the appellant had been dishonest he should have adjourned the case to enable the respondent to obtain HMRC documentation for the appellant's ex-wife so that this could be checked.
8. She submitted that the Judge had extensive evidence from the appellant before him and she referred to paragraph 28 of the decision about there being two possibilities about these three pages of the tax return:- (1) that the appellant's account was true and (2) that the appellant had submitted the tax return himself as he had been able to log in his ex-wife's details which had been available to him while he was married. He submitted that the Judge had insufficient evidence to reach the conclusion he did.
9. She submitted that the burden of proof was on the appellant but once dishonesty was brought into the equation the burden shifted to the respondent and the required HMRC documents could have been obtained by the respondent. She submitted that if HMRC are able to verify the 2014-2015 tax return then the appeal should be allowed and the Judge's decision at present is not safe.
10. She submitted that I should find that there is an error of law in the Judge's decision because of this and the respondent should be directed to produce the HMRC documents relevant up to the date of the Decree Absolute.

11. The Presenting Officer submitted that in this claim there was no procedural unfairness. Neither the appellant nor the respondent has a record of proceedings and at paragraphs 22, 23 and 24 of the decision the Judge had clear concerns about the credibility of the appellant, particularly how he came across his ex-wife's tax return. At paragraph 24 he states that even after questioning the appellant about the 2014-2015 tax return it was still not clear how he obtained the document.
12. He submitted that these doubts were relayed to the appellant and because of this and because he answered the questions he was asked about this, there was no unfairness. He submitted that the fact that the Judge failed to consider the other tax returns is irrelevant. He submitted that there was enough evidence before the Judge to come to the findings that he did. There was documentary evidence before the Judge as well as oral evidence and the appellant's representative could have asked for a direction that the Home Office should obtain HMRC records for the appellant's ex-wife up to the date of divorce but did not do so.
13. He submitted that the appellant in this case wants another bite of the cherry but there is no error of law in the Judge's decision and the decision must stand.
14. The appellant's representative submitted that the Judge should have directed that the respondent obtain HMRC records for the appellant's ex-wife up to the date of the divorce and because he did not do that his decision is unsafe, and this must be an error of law.

### **Decision and Reasons**

15. The only issue which had to be considered by the Judge in this case, as everything else was accepted, is whether the appellant's ex-wife was exercising Treaty Rights up to the date of the decree absolute of 9 July 2015. The three-month period before the date of the divorce is crucial.
16. The Judge considered the evidence carefully and he notes that the appellant obtained a residence card on 31 July 2012 for a five-year period. At paragraph 21 he states that there is no evidence to show that the appellant's ex-wife was exercising her Treaty Rights on the date of the Decree Absolute. The appellant relies in his witness statement, on a policy of the respondent which is, that when an applicant finds it difficult to submit all relevant evidence he should submit as much evidence as possible. The Judge notes that this does not serve to overcome the appellant's evidential difficulty and that the burden at this point is on him. The Judge refers to the case of *Amos* [2011] EWCA Civ 552 and the "*Amos* direction" which requires the respondent to produce the HMRC records of the appellant's ex-wife's economic activity in the tax year 2014-2015. It was not for the judge to help the appellant by requesting the respondent to obtain this HMRC evidence. The judge states that the appellant cannot say that his ex-wife was in self-employment after they separated. He does not know first-hand.

17. The Judge then goes on to state that he found the appellant thoroughly dishonest about the way in which he came to be in possession of his ex-wife's tax return for the financial year 2014/2015 and he explains carefully why he finds this. He considered the appellant's evidence and he questioned the appellant about this but he always comes back to the point: - why would the appellant find three pages of his wife's tax return in an envelope with no covering letter at the property he and his wife had not lived in for three months. There is also the fact that the return was submitted just before midnight on 29 April 2015. At this point the burden of proof was on the appellant and the appellant clearly made no enquiries about this to his ex-wife's accountant and was unable even to say whether these papers were sent by the accountant. The appellant said earlier in his evidence that he did not know if his ex-wife had an accountant but he then brought an accountant into the equation. If indeed his ex-wife did instruct an accountant it is not credible that her previous address would be on the tax return. She had signed the divorce petition on 29 April 2015. The Judge referred to the problem that if an accountant had submitted the tax return why would he send only three pages to the appellant's ex-wife.
18. At paragraph 28 of the decision the Judge refers to there being two possibilities as to how these documents are in the appellant's bundle and gives proper reasons for finding that the parts of the 2014-2015 tax return do not constitute reliable evidence of Ms Vitkauskaite exercising Treaty Rights in the critical period from March to July 2015. There is no other reliable evidence to support this. The Judge criticises the excerpts from bank statements in joint names as there is no transaction history and no evidence about the ex-wife's claimed income. There are no invoices or any documents from her previous customers relating to her self-employed cleaning business. Because of this lack of evidence, the Judge finds that there is not sufficient reliable evidence before him that she was exercising Treaty Rights up to 9 July 2015.
19. At paragraph 30 the Judge remarks that unaudited business accounts were prepared for Ugne Cleaning Services in 2011 and some NI contributions were made during the following years and tax returns were submitted, but because the Judge was dissatisfied with the evidence as a whole and he had doubts as to whether these three pages are genuine, he doubts whether it was the appellant's ex-wife who got the business accounts prepared or if she was the person who submitted the tax returns in previous years. In this paragraph the judge finds that there is a more likely explanation and that is that Ms Vitkauskaite stopped working as a cleaner shortly after the appellant's first appeal was allowed. This would mean that all the evidence of economic activity thereafter was a contrivance on the appellant's part to enable him to qualify for permanent residence.
20. All these issues can be seen as speculative but as stated in paragraph 21 of the decision there was no reliable evidence before the Judge to show that the appellant's ex-wife was actually exercising her Treaty Rights up to the date of the Decree Absolute and that is what matters.
21. I do not find that there has been any unfairness in this case. The appellant was given a chance to answer credibly the questions he was asked about his ex-wife's HMRC

papers and at no time did the appellant seek a witness summons nor did he apply for an Amos direction. There is no reliable evidence of Ms Vitkauskaite exercising her Treaty Rights at the point of divorce. The bank statements are not satisfactory, there is no paper work about her business for the relevant period apart from the 3 pages of her tax return which the judge was not satisfied with and which the appellant answered questions about at the first-tier hearing and I find that there is no error of law in the First-Tier Judge's decision.

**Notice of Decision**

22. There is no material error of law in First-Tier Judge Blundell's decision promulgated on 1 September 2017. That decision must stand.
23. Anonymity has not been directed.

Signed

Dated 20 July 2018

Deputy Upper Tribunal Judge Murray