Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: EA/03568/2015

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
Heard on 22nd of January 2018	**On 13th of February 2018**
Prepared on 8th of February 2018	

Before

DEPUTY UPPER TRIBUNAL JUDGE WOODCRAFT

Between

MR ASIM ASHRAF
(Anonymity order not made)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr A Charma of Counsel
For the Respondent: Ms J Isherwood, Home Office Presenting Officer

DECISION AND REASONS

The Proceedings

1. The Appellant is a citizen of Pakistan born on 25th of August 1977. He appeals against a decision of Judge of the First-tier Tribunal Harris sitting at Hatton Cross on 2nd of March 2017 in which the Judge dismissed the Appellant's appeal against a decision of the Respondent dated 28th of November 2015. That decision was to refuse to issue the Appellant with a residence card pursuant to the Immigration (European Economic Area)

Regulations 2006 ("the 2006 Regulations"). This followed an application made by the Appellant on 8th of June 2015 for leave to remain on the basis of his EEA national sponsor, [KL] a Hungarian citizen ("the sponsor").

The Appellant's Case

2. The Appellant's case was that he was the spouse of an EEA citizen, his sponsor, who was exercising treaty rights in this country. He and his wife were in the process of divorcing but at the time of the hearing before the Judge there had not been either a decree nisi or a decree absolute. According to the Appellant's application form he had met his sponsor on 2nd of November 2012 and their relationship began the following month. They married in March 2013 and as at the date of the application form, June 2015, was still existing. He told the Judge that the relationship subsequently broke down in 2016.

3. The Respondent did not accept that the marriage of the Appellant and sponsor was genuine and subsisting relying on the evidence of immigration officers who visited the Appellant's home address in Southall on 12th of November 2015 and found no evidence that the sponsor resided at that address. When interviewed the Appellant told the officers that the sponsor was not present at the property because she had returned to Hungary taking everything that she owned with her. The Respondent did not accept that the couple had lived together.

The Decision at First Instance

4. At the hearing the Appellant applied for an adjournment on the basis that he was presently obtaining a divorce from his sponsor. He had been advised that a decree nisi was likely to be granted in around 3 months' time (which would have been around May 2017). The Appellant argued that an adjournment would assist the Tribunal as it would enable the Respondent to comment on whether the Appellant had a claim under the retained rights provisions arising in the event of the termination of the marriage.

5. The Judge decided to refuse the application to adjourn as there was no clear date provided to him when a decree nisi would be made. Some gaps in the Appellant's divorce papers had been identified by the Family court which needed to be corrected before the application could be taken further. The Judge had seen no evidence that these gaps had been corrected. The Appellant had had a great deal of time already to prepare his case.

6. The case proceeded and in his determination the Judge noted the Respondent's argument that the Appellant's marriage had not been genuine and subsisting but rather one of convenience. At [12] et seq the Judge wrote: "even if I take the Appellant's case at its highest that he should be treated as a spouse under the 2006 Regulations, in order to qualify for a residence card it is still for the Appellant to demonstrate on the balance of probabilities that as of the date of the appeal hearing [the sponsor] was exercising treaty rights in this country. The difficulty for the

Appellant is that even on his account since she moved from the claimed marital home to an address in Southall he has not maintained contact with his wife and at present does not know her whereabouts. The Appellant cannot himself clarify what his wife is doing at present or where she is. He is not in a position to show that she remains in the United Kingdom or if she is here what her status is in this country. I am not satisfied that the matter can be demonstrated on the documentary evidence before me because that only concerns evidence up to the financial year ending in April 2016. On the evidence before me I consider sufficient doubt arises about whether there is current exercise of treaty rights by [the sponsor] that I find I am not satisfied this is demonstrated". He dismissed the appeal.

The Onward Appeal

7. The Appellant appealed against this decision arguing that there had been procedural unfairness in the refusal to adjourn the appeal. The Judge should have granted an adjournment based upon the fact that the Appellant was waiting for his divorce to be finalised. The Judge had made findings against the Appellant's evidence without giving the Appellant the opportunity to address the issue.

8. The application for permission to appeal came on the papers before Judge of the First-tier Tribunal Hollingworth on 8th of November 2017. He found it arguable that the decision to refuse the application was unfair and appeared to be unfair given the absence of analysis by the Judge in refusing the adjournment as to the potential relationship between the benefits to be obtained by the Appellant from such an adjournment and the lacunae identified by the Judge in respect of the ambit of the available evidence in respect of the issues to be demonstrated by the Appellant. The Judge set out those difficulties at [13] and [14] of the decision.

9. The Respondent replied to the grant of permission by letter dated 6th of December 2017 opposing the Appellant's appeal submitting that the Judge had directed himself appropriately. The refusal of the adjournment request was fair in all of the circumstances. It did not prevent the Appellant from making a new application on the basis of his retained rights once he had resolved the divorce. Given that the divorce proceedings could have taken any length of time it was fair in the circumstances for the Judge to proceed. The representatives may have been hopeful that the proceedings would be completed in 90 days but this at best was speculation given there was no evidence the application had even been properly lodged.

10. The Appellant was aware of the refusal against him and as such had had ample time to prepare his case. The issues which were the subject of the appeal would be relevant [whether the marriage was genuine and subsisting in the past] even if the Appellant became divorced. The Appellant did not challenge the findings that the Appellant had failed to demonstrate the sponsor was in the United Kingdom or that she was exercising treaty rights. The Appellant adduced no reason why he was not

in a position to deal with the actual decision before the Judge rather than a potential retained rights application.

The Hearing Before Me

11. In consequence of the grant of permission the matter came before me to determine whether there was a material error of law in the determination such that it fell to be set aside and the matter re-determined. If there was not the decision would stand. Counsel for the Appellant argued that he was only proceeding with the argument as to the failure to grant the adjournment (there had been a 2nd argument in relation to Article 8 but this was not pursued).

12. The divorce changed the complexion of the case, it was submitted, as the Judge was aware. The divorce was finalised on 26th of May 2017 after the hearing. An adjournment would have enabled the Appellant to obtain a divorce and request the Tribunal to make an **Amos** direction that is for the Respondent to approach HMRC for information as to whether the sponsor was exercising treaty rights. The Judge had failed to apply the fairness test.

13. In response the Presenting Officer argued there had been no material error of law. What was being argued was that there should have been an adjournment so that the Appellant could put his case on a different basis to the one before the Judge. The Respondent's case had been that there was no evidence that the sponsor was exercising treaty rights as she had returned to Hungary. This was a marriage of convenience. The Judge had given adequate reasons for refusing the adjournment request. The Appellant could not rely on the claim that the divorce had gone through in May 2017, there was no application to adduce post hearing evidence.

14. It was not for the Tribunal to give an open-ended adjournment. It was not clear at the time of the hearing before the Judge when the Appellant's divorce proceedings would be concluded. Before an Amos direction could be made the burden was on the Appellant to show that all reasonable steps had been taken to obtain the necessary information. The Appellant could not show that.

15. In conclusion counsel referred to the Respondent's claim that on the enforcement visit in 2015 the Respondent had seen no evidence to suggest the Appellant was living with the sponsor. The Judge had not addressed the issue of whether it was a genuine marriage that would be open to another Tribunal to make a decision on. The Appellant had put forward the only evidence he had which was that his family law solicitor had said the Family court would take 90 days to finalise the divorce. That should have been sufficient for the Judge. Although there was nothing from the Family court to say when the divorce would be finalised counsel representing the Appellant at first instance had been able to give a reasonable date to cover the period of an adjournment. It was open to the Appellant to make another EEA application but the issue in this case was whether it had been fair to refuse the adjournment request. The First-tier decision should be set aside.

Findings

16. The difficulty for the Appellant in this case is that his application for an adjournment was to enable him to put his case on a completely different basis. Once the divorce went through he would no longer be a member of the sponsor's family under Regulation 7 of the 2006 Regulations. That had been the basis of the application form he submitted to the Respondent in June 2015. What the Appellant wanted was an adjournment so that he could make a different application but in the same appeal proceedings this time under Regulation 10 as a family member who has retained the right of residence.

17. Appealing on that new ground was not simply a matter for the Appellant to produce a decree absolute of divorce. He would still have to adduce evidence as to the length of time the sponsor had been exercising treaty rights which he was not in a position to put forward to the Judge at the hearing as the Judge pointed out. The evidence of employment had stopped some time before.

18. The Judge did not make a finding on whether the Appellant's marriage to the sponsor was one of convenience. It is not a fair criticism of the Appellant to say that he would also have needed to produce evidence that the marriage had been genuine and subsisting until the moment it broke down. The case had not reached that far. However, there was a good deal of speculation in the Appellant's application for an adjournment. There was no evidence before the Judge that the sponsor was in the United Kingdom. The divorce papers had to be served somewhere but the Judge was not told what address the Appellant had for service of the divorce proceedings.

19. The test of whether to adjourn the proceedings was one of fairness. Fairness might require an adjournment where for example the appeal was already being run on the basis of a retained right of residence but the Appellant for good reason did not have access to the documentation to show that his former spouse was exercising treaty rights. That however was not the situation here. The application had not been proceeding on the basis of retained rights of residence but on the basis of a genuine and subsisting marriage. In those circumstances fairness did not require that the Appellant to be given even more time than he had had already to put together a different case to the one which had been argued up until then. I do not agree with the grant of permission to appeal in this case that the issue was even arguable.

20. There was very little evidence before the Judge as to how long the period of adjournment would need to be. As matters transpired the divorce proceedings were completed within three months but the Judge was not to know that and it was not unfair of the Judge to proceed on the basis of what he did know about the case rather than speculate on what he did not know.

21. It is still open to the Appellant to make an application on the basis of retained rights. He will of course have to show that his marriage to the

sponsor was genuine and subsisting until it broke down. That matter has not yet been determined. It is however worth reflecting that when the immigration officers paid an enforcement visit to the Appellant's home in November 2015 the Appellant told them that the sponsor had already left the country and was now in Hungary. The Appellant's application form dated June 2015 indicated that the Appellant and sponsor were still living together at the same address. The Appellant would need to clarify when he and the sponsor in fact separated. He told the Judge at first instance that the marriage had broken down in 2016 but that is inconsistent with what he told the immigration officers at the time of the enforcement visit.

22. As I have indicated I do not need to make findings on these points because the case did not reach that far but they are difficulties which the Appellant will have to address if he seeks to make a further application to the Respondent, this time under Regulation 10, retained rights of residence. In the meantime, what I can say is that there was no unfairness on the part of the Judge in refusing the application for an adjournment. That is the only basis on which an error of law has been argued. Since it was fair for the Judge to proceed and since the Judge did not have sufficient evidence before him to show that the Appellant could meet the requirements of Regulation 7 that he was married to a qualified person the Judge was correct to dismiss the appeal and no material error of law is disclosed in the determination. I dismiss the Appellant's onward appeal against the decision of the First-tier Tribunal. I make no anonymity order as none was requested.

Notice of Decision

The decision of the First-tier Tribunal did not involve the making of an error of law and I uphold the decision to dismiss the Appellant's appeal

Appellant's appeal dismissed

Signed this 8th of February 2018

.....
Judge Woodcraft
Deputy Upper Tribunal Judge

TO THE RESPONDENT
FEE AWARD

I have dismissed the appeal and therefore there can be no fee award.

Signed this 8th of February 2018

.....
Judge Woodcraft
Deputy Upper Tribunal Judge