



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: EA/04297/2017

THE IMMIGRATION ACTS

Heard at Field House
On Friday 31 August 2018

Determination Promulgated
On Monday 17 September 2018

Before

UPPER TRIBUNAL JUDGE SMITH

Between

MR RAHCHANSINGH BILTA

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr P Turner, Counsel instructed by Raj Law solicitors

For the Respondent: Mr S Walker, Senior Home Office Presenting Officer

DECISION AND REASONS

BACKGROUND

1. The Appellant appeals against a decision of First-Tier Tribunal Judge Young-Harry promulgated on 12 March 2018 ("the Decision") dismissing his appeal against the Respondent's decision dated 5 February 2017 refusing him a residence card on either a permanent or retained basis as the former family member of an EEA national exercising Treaty rights in the UK, Miss [M C], who is a Czech national. Both parties are agreed that, due to the timing of the Appellant's application to the Respondent and the relevant transitional arrangements, the governing regulations are the Immigration (European Economic Area) Regulations 2006 ("the Regulations"). The Judge concluded that the Appellant could not satisfy the Regulations either in relation to permanent residence or a retained right of residence and therefore dismissed the appeal.

2. The Appellant challenges the Decision on three grounds. First, he says that the Judge has erred by failing to consider a document from HMRC relating to Ms [C]'s employment. Second, he says that the Judge applied the wrong date when assessing whether the Appellant could satisfy the requirements for a retained right of residence. The Judge applied the date of termination of the marriage; the Appellant says it should have been the date when divorce proceedings were initiated (which he says was on 4 November 2015). Third, he says that, due to the Judge's failure to take into account the HMRC evidence, the Judge has wrongly concluded that Ms [C] had not been exercising Treaty rights for a period of five years (which might then impact on the Appellant's entitlement to permanent residence).
3. Permission to appeal was refused by First-tier Tribunal Judge Simpson on 15 May 2018 but granted by Upper Tribunal Judge Pitt on 11 July 2018 in the following terms (so far as relevant):

“...2. The grounds are arguable where the file shows HMRC evidence from 23 January 2018 was before the First-Tier Tribunal and the case of Baigazieva v SSHD [2018] EWCA Civ 1088 indicates that the wrong date for assessing the employment of the ex-spouse may have been applied.”

4. The matter comes before me to decide whether the Decision contains a material error of law and, if so, to re-make the decision or remit the appeal for rehearing to the First-Tier Tribunal.

ERROR OF LAW DECISION

5. Mr Walker for the Respondent conceded that the Decision contained an error of law on all grounds. Following discussion, I accepted that the errors were material. The reasons for the concession and my acceptance of it are as follows.
6. First, there is a document dated 23 January 2018 which is a witness statement of Robert Evans of HMRC who provides information about Ms [C]'s employment in the period 2011 to 2017 (“the HMRC Statement”). That is not mentioned and not considered by the Judge. Ground one is made out. I will turn to the impact on Ms [C]'s entitlement to permanent residence and the Appellant's own rights in that regard when I come to re-making. I do not therefore need to deal with ground three.
7. Second, as the Court of Appeal set out in Baigazieva v Secretary of State for the Home Department [2018] EWCA Civ 1088, it is now conceded by the Respondent (which concession was accepted by the Court of Appeal) that the relevant date for assessing whether a former spouse has been exercising Treaty rights under Regulation 10(5) of the Regulations is the date of initiation of divorce proceedings and not the date of termination of the marriage. There is therefore an error at [15] of the Decision where the Judge relies on the evidence as at date of termination of

the marriage. I will explain when re-making the decision, the impact on the Appellant's case.

8. For those reasons, I set aside the Decision. Both representatives agreed that, having so concluded, I could re-make the decision based on the evidence before me which of course includes the HMRC Statement.

RE-MAKING OF DECISION

Legal Framework

9. The relevant provisions of the Regulations read as follows:

"Family member who has retained the right of residence"

10.- (1) In these Regulations, "family member who has retained the right of residence" means, subject to paragraph (8), a person who satisfies the conditions in paragraph (2), (3), (4) or (5).

...

(5) A person satisfies the conditions in this paragraph if –

(a) he ceased to be a family member of a qualified person or of an EEA national with a permanent right of residence on the termination of the marriage or civil partnership of that person;

(b) he was residing in the United Kingdom in accordance with these Regulations at the date of the termination;

(c) he 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;

(ii)

(6) The condition in this paragraph is that the person –

(a) is not an EEA national but would, if he 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).

....

(8) A person with a permanent right of residence under regulation 15 shall not become a family member who has retained the right of residence on the death or departure from the United Kingdom of the qualified person or the EEA national with a permanent right of residence or the termination of the marriage or civil partnership, as the case may be, and a family member who has retained the right of residence shall cease to have that status on acquiring a permanent right of residence under regulation 15."

“Permanent right of residence

15.—(1) The following persons shall acquire the right to reside in the United Kingdom permanently –

(a) ...;

(b) a family member of an EEA national who is not himself an EEA national but who has resided in the United Kingdom with the EEA national in accordance with these Regulations for a continuous period of five years;

...

(f) a person who –

(i) has resided in the United Kingdom in accordance with these Regulations for a continuous period of five years; and

(ii) was, at the end of that period, a family member who has retained the right of residence.

....”

10. I begin with the evidence of the exercise of Treaty rights by Ms [C]. The Appellant married Ms [C] on 27 November 2010 and I therefore begin with the tax year 2010-2011. The evidence before me is as follows:

2010-2011 and 2011-2012

A bill addressed to Ms [C] for national insurance contributions for the period 9 January 2011 to 9 April 2011 shows contributions owed of £31.20. A document for a prior period shows arrears of £12 before 9 January 2011. There is also a letter dated 14 February 2011 from HMRC informing Ms [C] that she should be completing tax returns and a notification dated 6 April 2011 requiring completion of a tax return. According to the HMRC Statement, there is no self-assessment tax record for Ms [C] for these years nor indeed for any other year. There is no information provided of PAYE payments for these tax years.

2012-2013

There are three pay slips showing employment with Thanet Earth. Those pay slips are dated 29 June 2013, 6 July 2013 and 13 July 2013. The last of those pay slips shows earnings in the year to date of £716.01 which, when one adds up those pay slips suggests that she may have worked for a period of four weeks, earning between £170 and £200 per week. There is a further pay slip dated 31 August 2013 showing gross earnings to date of £2031.84 to that date which suggests that Ms [C] may have worked between those dates earning roughly the same figure per week. There is though no evidence that she worked beyond that date. There is no information in the HMRC Statement about earnings for that year. Given the very low figure for PAYE in the latter pay slip, that may be due to earnings falling below the threshold for that year. On balance, the evidence shows that Ms [C] was working for about two months mid-June to end of August but no more.

2013-14

The HMRC Statement shows earnings of nil from employer Mr R Burt and £2701.53 gross earnings from NL Recruitment Ltd. There are no other

corroborating documents showing for how long Ms [C] worked for NL Recruitment or whether she worked for Mr Burt but that her earnings were below the relevant threshold. On balance, the evidence shows that Ms [C] worked for part of the year but, given the level of earnings, not the entire year.

2014-15

There are pay slips for weeks ending 20 December 2014 through to 14 March 2015 showing that Ms [C] was working for HR Go plc. The HMRC Statement shows that her gross earnings for that company were £3210.96. That is about £400 higher than the earnings shown on the last pay slip in that year which would be consistent with Ms [C] having continued to work for that company to the end of that tax year. The figure on the first of the pay slips shows gross earnings to date and the earnings in the week ending 20 December 2014 as the same figure. There is therefore evidence that Ms [C] worked from 20 December 2014 to end of that tax year but not before 20 December 2014.

2015-16

There is one pay slip from HR Go plc dated 1 May 2015 for the week ending 25 April 2015. That shows gross earnings of £958.75 in the tax year to date and £256.85 for that period. That is consistent with Ms [C] having worked from the beginning of that tax year to that date. A P45 provides evidence that Ms [C] left HR Go plc on 19 September 2015. Her earnings are shown as £4225.56. However, the HMRC Statement provides evidence that Ms [C] worked for three periods for HR Go plc in 2015-16 earning respectively £4225.56, £110.40 and £3604.39. Based on the average earnings shown on the pay slips which I do have, the total of those earnings suggest that Ms [C] was working for just over half of that year.

2016-17

There is one pay slip from Steadfast Cleaning Co Ltd in the bundle dated 5 August 2016 which shows earnings of £72 for one week. There is also a P45 from Manpower UK Ltd which shows that Ms [C] left their employment on 7 August 2016. Her earnings at that date are shown as £1119.36. The HMRC Statement confirms those earnings. It also shows that she earned £1749.60 from Steadfast Cleaning Co. Based on the payslip in the bundle, that equates to over twenty weeks' work. She also earned £717.20 from HR Go plc. Although I accept that there is no evidence as to the average earnings for Ms [C]'s employment with Manpower or when she was working for HR Go plc, given her previous average earnings, and the order in which the employment is shown in the HMRC Statement, the evidence supports Ms [C] having worked prior to 7 August 2016 for a combination of HR Go plc and Manpower plc and from August 2016 for at least twenty further weeks which would be most of that tax year.

10. I begin by considering whether the Appellant can show an entitlement to permanent residence. As noted above, the Appellant's ground three in his challenge to the Decision is that the Judge had failed to take into account evidence which showed that Ms [C] had exercised Treaty rights for a continuous period of five years.

11. I take into account what is said in the Tribunal's decision in Begum (EEA - worker - jobseeker) Pakistan [2011] UKUT 00275 (IAC) the relevant part of the headnote to which reads as follows:

“(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.”

12. I do not base my findings simply on the level of the income which Ms [C] is said to have earned. However, based on the evidence and for the reasons which I have given, there are gaps in that evidence which, when it is considered as a whole, does not show that she was working for a period of five years between 2010 and the date of divorce on 23 December 2016. There is no evidence as to benefits claimed which may plug some of those gaps. However, on the evidence before me, at best, the Appellant can show that Ms [C] was working from mid-June to end August 2013 and then from 20 December 2014. Even thereafter, the evidence includes gaps which may suggest that Ms [C] was not exercising Treaty rights for a continuous period.
13. There is no dispute as to the Appellant having worked as if he were an EEA national exercising Treaty rights at all relevant times. However, due to the lack of evidence that his former spouse was exercising Treaty rights for a continuous period prior to 20 December 2014 at the earliest, the Appellant cannot satisfy paragraph 15(1) (f) of the Regulations. Indeed, Mr Turner conceded as much.
14. However, Mr Turner pointed out that, although the covering letter to the application made refers to consideration of the Appellant's entitlement to a permanent right of residence, the covering letter goes on to indicate that the application is made under Regulation 10(5) for a retained right of residence. I therefore go on to consider whether the Appellant can satisfy that criteria.
15. There is no dispute that the marriage lasted for three years. The couple married on 27 November 2010 and the divorce was made final on 23 December 2016. There is also no dispute that the couple lived together for at least one year. Nor, as I have already indicated, is there any dispute about the Appellant having worked as if he were an EEA national exercising Treaty rights since the divorce and indeed before it.
16. The only dispute previously was whether Ms [C] was exercising Treaty rights at the relevant date in relation to the breakdown of the marriage. As is now made clear in Bagaizieva, although the marriage is not brought to an end prior to the

decree absolute, the point when the Appellant needs to show that he meets the criteria for retained rights is at the date of initiation of the divorce proceedings. Although the Appellant's skeleton argument and grounds of appeal suggests that this was on 4 November 2015, that assertion is inconsistent with the decree nisi which states that the petition was issued on 25 May 2016. That inconsistency may be explained by the Appellant having sent the petition for issue (according to his chronology) on the former date but the decree nisi makes clear that it was not issued until the latter date. That is the date when the proceedings for divorce were instituted and therefore the relevant date for the purpose of assessing whether Ms [C] was exercising Treaty rights.

17. Based on the evidence which I set out at [10] above, I accept that the evidence shows that it is likely that Ms [C] was working at that date. Indeed, Mr Walker accepted as much.
18. For those reasons, I conclude that the Appellant satisfies the criteria under regulation 10(5) of the Regulations for a retained right of residence but does not qualify for a permanent right of residence. The Appellant's appeal is allowed on the basis that he is entitled to a retained right of residence.

DECISION

I am satisfied that the Decision contains a material error of law. The decision of First-tier Tribunal Judge Young-Harry promulgated on 12 March 2018 is set aside. I re-make the decision. I allow the Appellant's appeal on the basis set out at [19] above.



Signed
Upper Tribunal Judge Smith

Dated: 17 September 2018