



Upper Tribunal  
(Immigration and Asylum Chamber)

Appeal Number: EA/05520/2016

THE IMMIGRATION ACTS

Heard at Field House  
On 12<sup>th</sup> April 2018

Decision & Reasons Promulgated  
On 17<sup>th</sup> May 2018

Before

DEPUTY UPPER TRIBUNAL JUDGE JUSS

Between

MR RONALD KUMAR  
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr N O'Brian (Counsel), Edmans & Co  
For the Respondent: Mr I Jarvis (Senior Home Office Presenting Officer)

DETERMINATION AND REASONS

1. This is an appeal against the determination of First-tier Tribunal Judge Deborah Clapham, promulgated on 20<sup>th</sup> November 2017, following a hearing at Taylor House on 20<sup>th</sup> October 2017. In the determination, the judge dismissed the appeal of the Appellant, whereupon the Appellant subsequently applied for, and was granted, permission to appeal to the Upper Tribunal, and thus the matter comes before me.

The Appellant

2. The Appellant is a male, a citizen of India, who was born on 12<sup>th</sup> December 1985. He appealed against the decision of the Respondent Secretary of State, dated 21<sup>st</sup> April 2016, refusing his application for a permanent residence card, following his divorce

from his former EEA national spouse, on the basis that he had resided in the UK for a continuous period of five years under the EEA Regulations.

### **The Appellant's Claim**

3. The Appellant's claim in this matter was that he had been having difficulty obtaining information from his ex-wife, but that it was clear that she had been working for the same employer, namely, the Financial Ombudsman Service, continuously for six years, and before Judge Deborah Clapham below, submissions were made that there is a guidance issued by the Home Office which gives information about what to do when an applicant is unable to provide evidence of the EEA Sponsor to support that application, such that the Home Office itself can make further enquiries, where every effort has been made by the Applicant himself to provide the necessary information. The Appellant also claimed that he himself had been in employment since 7<sup>th</sup> April 2010, and the judge's attention was drawn to page 13 of the bundle and also page 59 which deals with the employment from 7<sup>th</sup> April 2010 until 13<sup>th</sup> March 2015. Moreover, there was also a tax calculation provided at page 59, which shows that the Appellant had overpaid tax. All in all, it was clear, it was submitted, that the Appellant had worked for the relevant five year period and accordingly was entitled to indefinite leave (see paragraph 17 and paragraph 15).

### **The Judge's Findings**

4. The judge recognised that the issue before the Tribunal was whether the Appellant had a retained right of residence, and there was no dispute that the marriage between the Appellant and his ex-wife, the EU Sponsor, had subsisted for three years (paragraph 14). The judge concluded, however, that she could not be satisfied that the wife's employment had been made out, and the Home Office guidance was discretionary, and not mandatory. He went on to record that,

"The Appellant has now produced an email trail between his ex-wife and his solicitors but as the Home Office representative pointed out to me this provides an explanation as to her reluctance to provide the documents, not the actual documents themselves or specific dates" (paragraph 19).

Moreover, it was observed by the judge that, "the letter from his ex-wife simply says that her employer for the last six years has been the Financial Services Ombudsman" (paragraph 19). On this basis, the judge went on to conclude that, "as no evidence of his ex-wife's employment has been provided" that he had no option but to dismiss the appeal (paragraph 19).

### **The Hearing**

5. At the hearing before me, Mr Jarvis, appearing on behalf of the Respondent Secretary of State conceded that the judge was wrong to have dismissed the appeal. This was a case where the Appellant's divorce occurred in May 2012. Therefore, he had retained rights from that period on. The five year period that one is concerned with has to relate to back to October 2012. Mr Jarvis submitted that the last sentence of the judge's determination (at paragraph 19) was wrong to have concluded that there was "no evidence of his ex-wife's employment" because the letter of 15<sup>th</sup> October 2015

confirmed that the employment for the last six years had been with the Financial Services Ombudsman.

6. Secondly, there has been an email exchange from the Appellant's solicitors with his ex-wife and she had made it quite clear that she was not prepared to assist any further. The judge, submitted Mr Jarvis, could not lawfully have come to the conclusion that there was no evidence, because there was, and the only question was whether it was reliable.
7. For his part, Mr O'Brian handed up the decisions in **Samson [2011] UKUT 165** and in **Amos [2011] EWCA Civ 552** and made the following submissions. First, as far as the case of **Amos** was concerned, this established that the Secretary of State was not required to assist an applicant with his or her case. This is because "the procedure in appearance before the Tribunal are essentially adversarial" (paragraph 34). The proposition that "it was for the Home Secretary to produce the documentation available to Her Majesties Revenue & Customs and the Department for Work and Pensions" (paragraph 41) was rejected in **Amos**.
8. Second, however, **Samson [2011] UKUT 165**, on the other hand, established the contrary. Mr O'Brian submitted that one could not escape the fact in this matter that the Home Office was not telling us what the status of the Appellant's ex-wife was. This was addressed in **Samson**. Their attention was drawn to the:

"The different question of the evidential value of the possession of a residence permit when a person seeks to renew it or obtain permanent residence on the strength of it. It is plain that if the facts revealed that a person was not exercising treaty rights then the existence of a residence card cannot assist. It is not conclusive proof. It may, however, be some evidence of past lawful status if there is some evidence to support the exercise of treaty rights, nothing to contradict historic position can longer be established with precision" (paragraph 29).

In relation to the Appellant's ex-wife, Mr O'Brian submitted that there was relevance in the suggestion that,

"Retaining the status of worker is not the same thing as actually working and there is no requirement on a person claiming a retained right of residence which respectively supply wage slips and related documentation throughout the marriage. If the Home Office have reason to believe that the wife has been voluntarily unemployed and not exercising other treaty right of residence in the United Kingdom and this was relevant to the grant of a residence card, then it can raise the issue from its own enquiries. There was no reason here to believe that the wife was not exercising treaty rights during the currency of the Appellant's residence card ..." (paragraph 45).

### **Error of Law**

9. I am satisfied that the making of the decision by the judge involved the making of an error on a point of law (see Section 12(1) of TCEA 2007) such that I should set aside the decision and remake the decision.

10. My reasons are that there was a letter dated 15<sup>th</sup> October 2015 between the Appellant's ex-wife and his current solicitors confirming her employment. The judge actually referred to the fact that the Appellant's ex-wife had stated that "her employer for the last six years has been Financial Services Ombudsman" (paragraph 19).
11. There is no reason, and no explanation given, as to why the Appellant's ex-wife's status should be any different in terms of her working here in accordance with the EEA Regulations.
12. The Appellant himself has been working for the relevant five year period back to October 2012. In the circumstances, the judge erred in stating that there was "no evidence of his ex-wife's employment" (paragraph 19).

### **Remaking the Decision**

13. I have remade the decision on the basis of the evidence before the original judge, the findings made by her, and the submissions that I have heard today. I am allowing this appeal for the reasons that I have set out above.

### **Notice of Decision**

The decision of the First-tier Tribunal involved the making of an error of law such that it falls to be set aside. I set aside the decision of the original judge. I remake the decision as follows. This appeal is allowed.

No anonymity direction is made.

Signed

Date

Deputy Upper Tribunal Judge Juss

14<sup>th</sup> May 2018