Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: EA/06622/2016

THE IMMIGRATION ACTS

Heard at Field House	**Decision and Reasons Promulgated**
On 2nd January 2018	**On 2nd March 2018**

Before

DEPUTY UPPER TRIBUNAL JUDGE JUSS

Between

MR ABDELHAMID MOHAMED ABDALLA NEGM
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: No legal representation
For the Respondent: Mr E Tufan (Senior HOPO)

DETERMINATION AND REASONS

1. This is an appeal against the determination of First-tier Tribunal Judge S D Lloyd, promulgated on 2nd October 2017, following a hearing at Sheldon Court on 18th August 2017. In the determination, the judge dismissed the appeal of the Appellant, who 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 national of Egypt, a male, and was born on 15th January 1980. He appealed against the decision of the Respondent dated 20th May 2016, refusing his application for an EEA residence card to confirm his right of residence in the UK on the basis of retained rights. The applicable provision is Regulation 10 of the Immigration (European Economic Area) Regulations 2006. The Appellant had been married in Egypt to Anna Wiecxorek (the Sponsor), who was a Polish citizen, and the marriage was by proxy on 3rd October 2000. There was a divorce certificate issued in Egypt on 27th April 2014 thereafter.

3. The issue before the Tribunal was the exercise of the Sponsor's treaty rights. The Respondent had accepted that the Appellant and his sponsoring former wife had been divorced. The Respondent also accepted that the marriage had lasted for three years. It was also accepted that for at least one year during the time of the marriage the Appellant and the Sponsor had resided together in the UK. The issue of the Sponsor's exercise of treaty rights was what provided the decision maker with difficulty. There were wage slips from four different employers, the latest of which was dated 3rd April 2011. There were bank statements showing payments between January 2011 and April 2011, and also from June 2011 to July 2011.

4. The Respondent did not accept that there was evidence of treaty rights being exercised from July 2011 onwards. In addition, a letter had been supplied from Agrofood MT Limited, which stated that the Sponsor was employed there earning £8,800 in the tax year 2014 to 2015, along with three pay slips for August, September and October 2015. These show that the wages were paid in cash. There was no corresponding bank statement. Accordingly, the Respondent was not satisfied that the evidence demonstrated that the Sponsor was exercising treaty rights at the date of the divorce (see paragraphs 9 to 10).

5. During the course of his determination, the judge had stated that,

> "The Sponsor had previously been granted a residence card, to obtain that he had to have produced evidence of the Sponsor exercising treaty rights. They would therefore have been aware of the importance of such documents. It was also asserted that the Sponsor obtained a permanent residence card. This assertion had been put forward in the letter from the Appellant's solicitors. However there was no evidence of a card in the papers" (paragraph 26).

6. The judge also noted (at paragraph 27) how the Appellant in evidence had stated that he did not know where his solicitors got the idea that the Sponsor had a permanent residence card. His explanation before the judge was that the Sponsor knew the same solicitors. She had known them since 2011. The Appellant gave evidence that the Sponsor must have shared this information. The judge did not accept this explanation. According to the judge, there was no reason why the Appellant could not produce evidence of the Sponsor's permanent residence card if the information was shared as claimed.

7. Finally, there was evidence before the judge (at paragraph 28) that his solicitors had signed a consent form from the Sponsor permitting them to obtain details from HMRC. In the documents there was a letter from HMRC detailing the Appellant's taxable earnings. There was, however, nothing with regard to the Sponsor, as the judge pointed out (paragraph 28).

8. Accordingly, the judge concluded that the Appellant had not been able to discharge the burden of proof that was upon him.

Grounds of Application

9. The grounds of application state that the judge erred in falsely confusing himself with the assertion that the Appellant's ex-wife had acquired permanent residence through working in the UK, and treating this as a claim that she had "obtained a permanent residence card". Secondly, there had been a delay by HMRC in responding to the requests for information in relation to the sponsoring ex-wife. The Respondent Secretary of State should have assisted herself in this regard. There is power in the Secretary of State to request these documents through the department itself. Thirdly, the judge had unreasonably held against the Appellant his lack of knowledge of the Sponsor's financial circumstances after the divorce when his contact with his ex-wife was limited.

10. On 6th November 2017, permission to appeal was granted by the First-tier Tribunal on the basis that it was entirely arguable that the judge's approach was based on a factual error as to what was asserted by the Appellant's representatives, and a legal error, since the Sponsor had no need to apply for confirmation of a right to reside permanently. She could not have applied for a "permanent residence card" as an EEA national. What she would have applied for was a "document certifying permanent residence" (see Regulation 18 of the 2006 Regulations). The First-tier Tribunal also held that the documents that were awaited from HMRC had now arrived, but at the date of the hearing, it was arguable that the judge erred in treating the policy as restricted to certain examples, rather than asserting the general point that it may be hard for applicants to get documents from an estranged partner. The outcome of the appeal could have turned on HMRC documents that had been requested, and as a routine matter the Tribunal could have issued directions to obtain such evidence, and adjourn to await its arrival. Thirdly, that an adverse credibility reasoning was unwarranted in relation to a line of cross-examination which resulted in the statement that it was not credible why the Appellant did not have knowledge of the Sponsor's financial circumstances, although he was estranged from her (at paragraph 31). Another adverse finding was made to the effect that if, it was the Appellant's contention that his ex-wife properly shared information with a solicitors about her legal status in the UK, that is what led them to suggest that she had a permanent residence card (at paragraph 27).

11. On 21st November 2017 a Rule 24 response was entered to the effect that there was insufficient evidence to demonstrate that the EEA national was exercising treaty

rights at the date of the decision. The judge set out the reasons at paragraphs 15 to 32.

The Hearing

12. At the hearing before me the Appellant was unrepresented and chose to make submissions before the Tribunal himself. The Respondent was represented by Mr E Tufan, a Senior Home Office Presenting Officer. The Appellant made two submissions. First, that, as his first Ground of Appeal made clear, as an EEA national, being a citizen of Poland, the Appellant's ex-wife could only qualify for a "document confirming permanent residence", and she would not have been issued with a "permanent residence card" to which the judge kept referring. Second, and in any event, there was now evidence from HMRC, which had arrived late, which does confirm from the period 2009 right the way down to 2015 that his ex-wife was exercising treaty rights in the UK. If only the judge had adjourned the appeal, to await arrival of this evidence, which had already been applied for, it would, as a matter of fairness, have allowed the judge to come to the correct decision.

13. For his part, Mr Tufan submitted that Regulation 15 of the said Regulations allow for recognition of permanent residence, whether this involves EEA nationals or non-EEA nationals, and the judge had made no material error of law in this respect. Second, the fact that there was, as of 19th August 2017, HMRC evidence confirming the sponsoring ex-wife to have been working, this could only mean that it was now open to the Appellant to make a fresh application, to include such evidence, such that a favourable decision could then be made for him. Mr Tufan also submitted that it was recognised in the well-established case of **Amos** that the Appellant can himself request the Home Office that it requests documents from the HMRC, and the failure of the Appellant to so do meant that he must now take the consequences of the late arrival of this evidence.

Error of Law

14. 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. My reasons are as follows.

15. First, it has been the Appellant's case that his ex-wife, a citizen of Poland, had only been issued with a "document confirming permanent residence", and had not been issued with a "permanent residence card". The judge, however, repeatedly refers to why, "there is no reason why the Appellant would not have been able to produce evidence of the Sponsor's permanent residence card" (paragraph 27), if that was indeed the case. The reason why this is material is because in so criticising the Appellant, his credibility is impugned on the crucial question of his wife exercising treaty rights for the requisite period in the UK. The reference to how "she had already obtained a permanent residence card and would have already have had to have collated that information" (paragraph 31) is replicated throughout the determination (see paragraphs 27, 31, and 26).

16. Second, whereas Mr Tufan is correct in his assertion that it is possible to request the Respondent Secretary of State to apply to the HMRC authorities for tax documents of an ex-partner, the fact that such an application had already been made by the Appellant himself, cannot go unnoticed. The judge observes how "his solicitors had signed a consent form from the Sponsor permitting them to obtain details from HMRC", and that although details had been provided by HMRC in relation to the Appellant's taxable earnings, none had been provided in relation to the Sponsor. Nevertheless, "it appears that a solicitor has continued to pursue HMRC after the date that he had already received his own information" (paragraph 28).

17. It is, of course, the case that such evidence has now been forthcoming, and was alluded to by the First-tier Tribunal in granting permission to appeal. Leaving that aside for a moment, however, it is clear that if the Appellant applied for Islamic divorce in February 2014, and the divorce was finalised under Islamic law on 27th April 2014, and thereafter it was registered in Egypt on 24th May 2015, that the Sponsor, who had previously been exercising treaty rights in the UK, was still doing so as a jobseeker and as a worker, so that the Appellant would retain rights of residence in the UK under Regulation 10 of the Immigration (EEA) Regulations 2016.

18. Since the documents from the HMRC now produced do demonstrate that the Appellant was correct arguably in the assertion that his ex-wife was still exercising treaty rights, as a matter of fairness, the hearing should have been adjourned to enable such documentation to arrive, particularly as the judge had recognised that "his solicitors continued to pursue HMRC after the date that he had already received his own information" (paragraph 28).

Notice of Decision

19. 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 to the extent that it is remitted back to the First-tier Tribunal, to be determined by a judge other than Judge S D Lloyd under practice statement 7.2(a) because the effect of the error has been to deprive a party before the First-tier Tribunal of a fair hearing or other opportunity for that party's case to be put to the First-tier Tribunal.

20. This appeal is allowed.

21. No anonymity direction is made.

Signed Dated

Deputy Upper Tribunal Judge Juss 26th February 2018