



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: EA/07257/2016

THE IMMIGRATION ACTS

Heard at Field House
On 6 September 2018

Decision & Reasons Promulgated
On 27 September 2018

Before

UPPER TRIBUNAL JUDGE GLEESON

Between

ALAIN CLAUDE LEON TAVARES
(NO ANONYMITY ORDER)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr K Shoye, instructed by CW Law Solicitors
For the Respondent: Ms L Kenny, a Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellant has permission to appeal against the decision of First-tier Tribunal, dismissing his appeal against the respondent's refusal to grant him a residence card pursuant to Regulation 10(5) of the Immigration (European Economic Area) Regulations 2016, as the former spouse of a French national and therefore an EEA national exercising Treaty rights in the United Kingdom.
2. The basis of the appellant's permitted challenge to the First-tier Judge's decision is twofold, first, that the Judge applied too narrow a view in relation to the definition of 'work' in the Regulations, and second, in relation to his finding that the appellant and sponsor could not show joint residence in the United Kingdom for at least 1 year during the marriage. In relation to joint residence, the appellant contended that documents which he sent to the hearing centre (some water bills and a revised skeleton

argument), but which were not taken into account by the First-tier Tribunal, were capable of leading to a different outcome.

First-tier Tribunal hearing

3. This appeal was considered by the First-tier Tribunal on the papers following several adjournments. Mr Shoye, the appellant's solicitor, wrote to the First-tier Tribunal by email on 25 January 2018 in the following terms:-

"REQUEST TO CONVERT ORAL HEARING TO PAPER HEARING

We continue to act for the Appellant in the above Appeal.

The Appellant has instructed us to make a request to the Tribunal on his behalf for a conversion of his oral immigration appeal to a paper hearing instead. The appeal was supposed to have been heard on Friday, 27 October 2017, but was later adjourned and to be heard at a future date which has not yet been communicated.

The Appellant and Respondent's Bundles which included witness statements have already been filed and served, as well as the Appellant's Representative's skeleton argument.

We hope this request would be positively considered, while we await the judge's response in due course."

That request was actioned and this file was considered solely on the documents filed. The appellant cannot now be heard to say that any oral evidence or argument which he might have advanced would have led to a different outcome. Since the appeal was considered on the papers alone, I am in the same position as the First-tier Tribunal and am able to consider whether, if the additional documents are taken into account, the outcome would be different.

Permission to appeal

4. Permission to appeal was granted by First-tier Judge P J M Hollingworth on the basis that the First-tier Tribunal had arguably fallen into error in construing the scope, nature and quality of the meaning of 'work' and the available evidence in relation to the receipt of income from the sponsor's limited company Calcol, of which she was the sole director.
5. There was a second arguable error in that a revised skeleton argument and some water bills, sent to the First-tier Tribunal on 8 March 2018, were not taken into account. They may not have been before the First-tier Judge when he made his decision. However, applying the guidance of the Court of Appeal in *E v Secretary of State for Home Department* [2004] EWCA Civ 49 (*E & R*), the First-tier Judge is taken to be on notice of anything which had arrived at the Hearing Centre even if (as it seems probable) the documents were not linked to the file.

Upper Tribunal hearing

6. There are two issues before the Upper Tribunal: the first is whether at the material times (the sponsor when the divorce proceedings were issued, and the appellant when

the application for retained rights was made), each of them was a ‘worker’ under the EEA Regulations. The second question is whether the parties can show cohabitation in the United Kingdom during the marriage for a period of at least a year.

7. On the evidence considered by the First-tier Judge, neither of these questions was answered in the affirmative. Both must be answered in the affirmative with the help of the additional documents, before this appeal can succeed.

The “worker” issue

8. Applying *Baigazieva v the Secretary of State for the Home Department* [2018] EWCA Civ 1088, the correct date for the assessment of whether the sponsor was a worker for EEA purposes was the date of issue of the divorce proceedings, 6 May 2015. The First-tier Tribunal did not have the benefit of *Baigazieva* when reaching its decision and so focused, erroneously, on the date of decree absolute.
9. In the bundle which the Judge did not take into account, there is evidence from Companies House demonstrating that the sponsor’s cleaning company Calcol Limited (Calcol) was set up on 29 June 2011, filed its last return on 28 May 2015 and was dissolved on 15 November 2016, that the sponsor was the sole director and the company’s registered office was the address at which the parties are said to have been living. The Judge’s decision set out financial transfers to the sponsor from Calcol: there is a transfer on 12 May 2015. That was arguably sufficient material to indicate that on 6 May 2015, the sponsor was a ‘worker’ because she was running her cleaning company on that date.
10. The appellant was required under Regulation 10(6) to show that he was a worker for the period between the end of the marriage (6 May 2015) and the application under Regulation 10(5) (see *Guaswami` (Retained rights of residence: Jobseekers) India* [2018] UKUT 275 at [30] to [35]). This was accepted as proved in the refusal letter and is not in issue before me.

The 1-year cohabitation issue

11. The remaining problem is whether the evidence which was before the judge was sufficient to show that the sponsor and the appellant had lived together in the United Kingdom for one year during the course of their marriage. The appellant’s witness statement (the only evidence from him on the point) said this:

“We got married in Senegal on 9 October 1999 and returned to the UK after the wedding.

However, our relationship developed problems and put more strain in our marriage and I subsequently decided to remain in the UK. But I would say that I was living off and on in the relationship, we eventually reconciled at the intervention of friends and family.”

There is nothing beyond the appellant’s bare assertion to confirm that the sponsor spent any time in the United Kingdom in that early part of their marriage.

12. In 2008, the appellant applied for a residence card, but as a dependant of somebody different. The appellant asserts that on 13 September 2010 the relationship “came back

stronger than before” and an EEA residence card application was granted, valid for five years, expiring 5 January 2016.

13. There is only limited evidence of the parties both being in the United Kingdom during that 5-year period: there are bank statements for the former partner which appear at [72]-[104] of the bundle, but they do not cover one full year. The judge’s conclusions on the residence question are set out at [16] in his decision:

“A further issue is whether in fact the Sponsor had resided in the UK for 1 year during the marriage. The couple married in 1999. The Appellant was granted a residence permit in January 2011 based on his relationship with the sponsor. But the only evidence before me of her residence in the 16 years of their marriage is her bank statements for some months in 2015 and her company directorship, neither of which prove her residence here for in excess of a year, during this marriage. It may be that that material exists. But I have not been shown it. Thus, in addition to my conclusion in the previous paragraph, I am not satisfied on the balance of probabilities, on the material present before me, (and recognising that this may be demonstrated by better evidence) that the Sponsor has lived in the UK for a year since the marriage. This element of the Regulations is therefore not met.”

[Emphasis added]

14. Amongst the documents not considered by the First-tier Tribunal there are water bills for 24 October 2014, 13 March 2013 and for the period 2011 to 2012. Some of the bills are unpaid. This evidence may arguably be more consistent with the accommodation being let to somebody else and the bills not being paid. There is no other evidence of residence, such as council tax bills or HMRC records, nor any other evidence to indicate that the sponsor was in the United Kingdom in 2011, 2012, 2013 or 2014.
15. I have considered whether if the judge had seen this information he would have reached a different conclusion on the one-year residence question. I do not find that he would have. The evidence is too sparse and vague for that, and the new documents do not materially improve matters. I am satisfied on the basis of the evidence before me that the appellant has not discharged the burden upon him of showing, even with the new documents, that the parties lived together in the United Kingdom for a period of at least one year before the marriage ended.
16. The decision of the First-tier Tribunal contains no material error of law in this decision and I dismiss this appeal.

Conclusions

The making of the decision of the First-tier Tribunal did not involve the making of an error on a point of law.

I do not set aside the decision. The decision of the First-tier Tribunal stands.

Signed: *Judith A J C Gleeson*
Upper Tribunal Judge Gleeson

Date: 25 September 2018