Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: EA/00452/2018

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 17 January 2019	**On 11 February 2019**

Before

UPPER TRIBUNAL JUDGE KAMARA

Between

MR FAIZAN MAHMOOD
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr Harris, counsel instructed by Rainbow Solicitors
For the Respondent: Mr Melvin, Senior Home Office Presenting Officer

DECISION AND REASONS

Introduction

1. This is an appeal against the decision of First-tier Tribunal Judge Geraint Jones QC, promulgated on 24 September 2018. Permission to appeal was granted by Designated Judge of the First-tier Tribunal McClure on 7 November 2018.

Anonymity

2. No direction has been made previously, and there is no reason for one now

Background

3. The appellant married AK, a Polish citizen on 20 March 2013. A divorce petition was issued on 15 March 2017 and the decree absolute was pronounced on 15 August 2017. On 20 September 2017, the appellant sought confirmation that he was entitled to retained rights of residence as the former family member of a citizen of the European Economic Area following their divorce.

4. The said application was refused by virtue of a decision dated 20 December 2017 owing to the appellant's failure to provide an original valid identification document for his former spouse. The application was further refused because the appellant had not provided sufficient evidence that the former spouse was a qualified person or had a right of permanent residence at the date of the termination of the marriage; inadequate evidence was provided to show that the appellant was residing in the United Kingdom in accordance with the Regulations; insufficient evidence to show that the appellant was a self-employed taxi driver had been provided and the appellant had not provided adequate evidence that prior to the initiation of proceedings for the termination of the marriage, the marriage had lasted three years and that he and his former spouse had resided in the United Kingdom for at least one year. Thus, it was considered that the appellant failed to meet the requirements of Regulations 10 and 21(5).

The hearing before the First-tier Tribunal

5. At the hearing before the First-tier Tribunal, on 12 September 2018, an application for an adjournment was made for the respondent to contact HMRC in order to obtain the employment records of the appellant's former spouse. The judge deferred deciding the adjournment application until he had reached a conclusion on whether the appellant had provided the national identity card or passport for his former wife as required by Regulation 21(5) or satisfied the judge that he was residing with his former spouse for a period of three years. As the appellant was unable to satisfy the judge on these points, the adjournment request was refused as the judge was of the view that the appeal would fail in any event.

The grounds of appeal

6. The grounds of appeal argued that the judge had erred, firstly, in imposing a requirement that the appellant and his former spouse had to have lived together at the same address and secondly, in finding that there was a requirement that the appellant produce the original identity document of his former spouse. These errors had an adverse impact on his

treatment of the issue of whether the former spouse was exercising Treaty rights.

7. Permission to appeal was granted on the basis sought.

8. The respondent's Rule 24 response, received on 7 December 2018, stated that the decision of the First-tier Tribunal Judge had not been received. It was accepted that if the matters set out in the grant of permission were reflective of the approach of the judge, they would amount to material errors of law.

The hearing

9. At the outset, while unable to concede the appeal, Mr Melvin accepted that the error relating to Regulation 10(5)(d)(i) identified in the grounds as well as materiality appeared to be made out. He submitted that the judge placed emphasis on the living together point rather than concentrating on what was said in the reasons for refusal letter regarding the lack of evidence of the former spouse exercising Treaty rights. Nonetheless he found it difficult to defend the decision with vigour.

10. Mr Harris did not accept that there was no evidence before the judge regarding the former spouse's exercise of Treaty rights. There was an employer's letter from Lidl and bank statements, none of which were addressed directly. Central to the decision under challenge was a is mistake of law in that the judge analysed the appellant's documents for evidence of cohabitation and failing to find any, the judge concluded that Regulation 10(5)(d) not met. It was a fundamental error and it was material. It was unclear how the judge would have approached other aspects of case without this error. It was not clear what another judge would think of evidence of spouse working. Mr Harris argued that there was sufficient evidence of the former spouse working but, with reference to the reason for the adjournment request, it was in the appellant's interest to obtain as much evidence as he could. Regarding the second issue, there had been no consideration of Regulation 42. The question whether the Secretary of State was being unreasonable in insisting on the production of a passport or identity card when the appellant had been issued a Residence Card before, was not answered.

11. In reply, Mr Melvin stated that the Regulation 42 point was valid, albeit it was unclear what submissions were made on the point.

12. At the end of the hearing, I announced that the judge erred in his findings with respect to Regulation 10(5)(b) and 42 and that his decision was set aside with no findings preserved.

Decision on error of law

13. There were two bases upon which the judge dismissed the appellant's appeal. The first was that the appellant had not provided his former spouse's identity card or passport. That finding had no regard to the

following provision of the Immigration (European Economic Area) Regulations 2016;

> *'42. - (1) Subject to paragraph (2), where a provision of these Regulations requires a person to hold or produce a valid national identity card issued by an EEA State or a valid passport, the Secretary of State may accept alternative evidence of identity and nationality where the person is unable to obtain or produce the required document due to circumstances beyond the person's control.'*

14. The appellant had a ready explanation for his inability to provide the said identity documents, that being that he was divorced from his former sponsor and did not know her whereabouts. Furthermore, when he was granted a residence card, he produced his former spouse's identity documents. These issues were not considered.

15. The second issue was in relation to whether the appellant and his former spouse had been married for three years, including one year spent residing in the United Kingdom. The judge's findings demonstrate that he misdirected himself by assessing the documentary evidence for proof of cohabitation. Of relevance is the headnote in PM (EEA – spouse – "residing with") Turkey [2011] UKUT 89, which states as follows;

> *"Regulation 15(1)(b) of the Immigration (European Economic Area) Regulations 2006 applies to those who entered a genuine marriage where both parties have resided in the United Kingdom for five years since the marriage; the EEA national's spouse has resided as the family member of a qualified person or otherwise in accordance with the Regulations and the marriage has not been dissolved. The "residing with" requirement relates to presence in the UK; it does not require living in a common family home."*

16. Owing to the judge's errors, he gave no further consideration to the appellant's application for an adjournment for the respondent to request the employment records of his former spouse. The appellant still requires this search to be made and has yet to have any consideration by the First-tier Tribunal as to whether his former spouse was a qualified person during the relevant timescale. These errors were material to the outcome of the appeal. In these circumstances, it is appropriate that the matter be remitted to the First-tier Tribunal to be heard afresh, with no findings preserved.

Decision

The making of the decision of the First-tier Tribunal did involve the making of an error of on a point of law.

The decision of the First-tier Tribunal is set aside.

The appeal is remitted, de novo, to the First-tier Tribunal to be reheard at Hatton Cross, with a time estimate of two hours by any judge except First-tier Tribunal Judge Geraint Jones QC.

Signed Date: 11 March 2019

Upper Tribunal Judge Kamara