Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: EA/00511/2018

THE IMMIGRATION ACTS

Heard at Manchester **Decision & Reasons Promulgated**
On 23 September 2019 **On 9 October 2019**

Before

UPPER TRIBUNAL JUDGE PICKUP

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT
Respondent

and

MR ZIBIN WU
(ANONYMITY DIRECTION NOT MADE)
Claimant

Representation:
For the Claimant: Mr C Timson
For the Respondent: Mr A McVeety, Senior Home Office Presenting Officer

DECISION AND REASONS

1. I make no anonymity direction. None was made in the First-tier Tribunal and there has been no request for such.

2. This is the Secretary of State's appeal against the decision of First-tier Tribunal Judge Thorne promulgated on 31 July 2019 allowing the Claimant's appeal against the decision of the Secretary of State dated 15 December 2017 rejecting his application made on 11 September 2017 for an EEA permanent residence card on the basis of a retained right of residence as the ex-husband of an EEA national formally exercising treaty rights in the UK.

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3. First-tier Tribunal Judge Parkes granted permission on 14 September 2018 suggesting it was arguable that the judge had erred as to the correct date for the termination of the marriage. The grounds state that the date of termination of marriage is the operative date and not when the relationship may have broken down. With respect to Judge Parkes the grant of permission was entirely flawed on that basis but at the same time the decision was itself flawed for a different reason. Judge Thorne found the claimant honest and reliable and accepted the essential facts of the case, but at paragraph 18 the judge stated "I therefore am satisfied that S was exercising treaty rights in the UK as at the time of the breakdown of the marriage". As is now clear that was an error. Under Regulation 10(5) and the current case law on this issue the relevant date is the date of institution of divorce proceedings not the date when the marriage broke down. To that end Judge Thorne's decision was entirely flawed and I set it aside.

4. In remaking the decision, I made the following factual findings from the documents and confirmed them with Mr Timson at the hearing before me. The spouse entered the UK in 2009 as an EEA national (Spain). She and the claimant met at university in 2010. They married on 5 December 2011 in the UK. Their relationship broke down in August 2013. It is now known that the petition for divorce was sealed on 7 August 2014 and the divorce was finalised by decree absolute on 19 August 2015.

5. Those facts create an immediate problem that does not appear to have been spotted by the claimant in either his appeal before the First-tier Tribunal or the Upper Tribunal, or indeed either the judges making the decision or granting permission. The problem is this, that under Regulation 10(5)(i) the requirements for a retained right of residence are that prior to the initiation of proceedings for the termination of the marriage the marriage must have lasted for at least three years and the parties had resided in the UK for at least one year during its duration. If the marriage took place on 5 December 2011 and the divorce proceedings were issued on 7 August 2014 the total period of marriage is less than three years and thus Regulation 10 does not apply.

6. Mr Timson asked for some time to take instructions on this matter, following which he conceded that could not defeat that primary difficulty with the application and the appeal in relation to retained right of residence. The point is fatal to the application, regardless of the errors of the First-tier Tribunal Judge.

7. In the circumstances I need not deal with the identity document issue in relation to Regulation 21(5). The application as made could not have succeeded and the appeal should not have been allowed.

8. At the hearing before me, Mr Timson pursued a further argument that as the claimant and the sponsor entered into a relationship prior to marriage they now wish to rely on Regulation 8 and the issue of a durable relationship for the purpose of becoming an extended family member.

However, as well as the fact no permission had been granted on such a ground never pleaded, it is clear that the provisions for a retained right of residence under Regulation 10 do not cover a durable relationship and no-one in or having had a durable relationship is entitled to claim a retained right of residence. It follows that Mr Timson's argument cannot succeed.

9. Mr Timson also raised the issue of whether the claimant may be able claim under the Brexit Settlement Scheme however that is not a matter for the Upper Tribunal at this stage.

10. In all the circumstances, as explained above, the application for a permanent residence card was doomed to failure from its outset and could not succeed. It may be that the applicant is not at fault; he may have received inaccurate legal advice. Be that as it may, I am satisfied on the respondent's application that the decision of Judge Thorne was entirely in error of law, based on a fallacious legal approach, and has to be set aside.

Decision

11. The making of the decision of the First-tier Tribunal did involve the making of an error on a point of law such as to require it be set aside.

I set aside the decision.

I remake the decision in the appeal by dismissing it.

Signed
Upper Tribunal Judge Pickup

Dated 27 September 2019

To the Respondent
Fee Award

I have dismissed the appeal and therefore there can be no fee award.

Signed
Upper Tribunal Judge Pickup

Dated 27 September 2019