Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: EA/05999/2017

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 24 June 2019	**On 10 July 2019**
Extempore	

Before

UPPER TRIBUNAL JUDGE RINTOUL

Between

MR MOHAMED SADEK
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Ms K Joshi (Counsel)
For the Respondent: Ms K Pal (Home Office Presenting Officer)

DECISION AND REASONS

1. The appellant appeals with permission against the decision of First-tier Tribunal Judge Randall dismissing his appeal under the Immigration (European Economic Area) Regulations 2016 against the decision of the respondent to refuse him a card confirming his permanent right of residence.

2. The appellant is an Algerian national who was married to a Portuguese national who at all material times, and at least since 2008, has worked for the NHS. A large

number of documents were put in both with regard to her employment and also to the subsistence and genuineness of their marriage.

3. The Secretary of State refused the application for grounds on the basis which appear, to say the least, confused. The refusal notice itself states:

> "You have applied for Permanent Residence on the basis that you are the family member of an EEA national and you have resided in the UK with that EEA national in accordance with the EEA Regulations for a continuous period of 5 years. However you have not provided evidence that the EEA national resided in the UK in accordance with those Regulations during that 5 year period."

There is no mention in that of the allegation which appears in the refusal letter (also dated 1 June 2018) in which no issue is taken with the spouse's employment history. It is recorded that she had produced pay slips from 2008 to 2015, numbers of P60s, P45 and so on, but no issue was taken with that. Instead the bulk of the reasoning is that this was a marriage of convenience.

4. The appellant was represented before the First-tier Tribunal by Ms Joshi who appears also today.

5. There was a substantial amount of evidence put before the judge as to the nature of the marriage, and he was persuaded that this was not a marriage of convenience.

6. It is of note that although the judge does go into some detail in recording the submissions made on behalf of the respondent and the appellant, it does not appear that the Secretary of State took any point as to whether or not the sponsor was working or not. Despite that, the judge found that it had not been a marriage of convenience but was not satisfied by the evidence that the sponsor had been working for a continuous five year period.

7. At paragraph [16] of his decision the judge directs himself that the appellant succeeds if can show that his partner is exercising treaty rights as a worker for any five year period during the formal existence of their marriage, i.e. that between 24 February 2011 and 9 March 2017. If so the issue of a retained right of residence did not arise. Alternatively if the appellant wished to rely on the period after the divorce, then the issue of whether he has a retained right of residence may arise.

8. The judge directed himself at [17(a)] that income prior to the date of marriage was not relevant and at (b) noted that the appellant's wife had a combined income in the tax year 2010–2011 of £17,000. The judge then goes on at paragraph [18] to say why he does not accept the evidence; and, that he is not satisfied by the documents that the appellant is self-employed or was otherwise exercising treaty rights and therefore did not have a retained right of residence.

9. There are two principal grounds of appeal.

   (i) that the judge committed a procedural error in that he had not raised the issue properly with the parties as to whether or not, as appears to be the case, the

Secretary of State was not taking in issue as to whether the sponsor had been employed for a relevant period; and, in the alternative,

(ii) that the judge erred in not having proper regard to the evidence and the correct test when assessing that the appellant had not retained a right of residence.

10. Ms Pal conceded that there was an error of law. She did so having heard the submissions, and in the light of the documentary evidence; and, also in the light of my observations that the judge appeared to have misdirected himself in holding that the fact that the wife was working prior to the date of marriage was not relevant. It was relevant for this reason: if the wife had been working from 2008 onwards then she would herself have acquired a permanent right of residence by operation of law in 2013 and any requirement to show she was working after that would not be relevant because she was resident under the Regulations lawfully as a person who had acquired the permanent right of residence. It appears also that the judge then misdirected himself in excluding evidence which was relevant.

11. Having announced that I was going to set aside the decision the parties were in agreement that there was sufficient evidence before the Tribunal to show that the appellant's ex-wife had been exercising treaty rights for the relevant period and that accordingly the appellant was entitled to a card and had acquired the permanent right of residence as he had been resident in the United Kingdom with his now ex-wife and for these reasons he met the requirements of the Immigration (European Economic Area) Regulations. Accordingly I will allow the appeal on that basis.

12. In summary, the decision of the First-tier Tribunal did involve the making of an error of law and I set it aside. I remake it by allowing the appeal under the EEA Regulations 2016.

Notice of Decision

1. The decision of the First-tier Tribunal involved the making of an error of law and I set it aside.

2. I remake the appeal by allowing it under the Immigration (EEA) Regulations 2016.

Signed Date 4 July 2019

Upper Tribunal Judge Rintoul