Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: EA/06179/2017**

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 31 January 2019	**On 06 February 2019**

Before

UPPER TRIBUNAL JUDGE FINCH

Between

RAJIVNATH CHEEKHOORY

(anonymity direction not made)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms K. Anifowoshe of counsel, instructed by Raj Law Solicitors

For the Respondent: Mr. M. Kotas, Home Office Presenting Officer

DECISION AND REASONS

BACKGROUND TO THE APPEAL

1. The Appellant is a national of Mauritius. On 2 November 2010 he married a Polish national and on 12 December 2011 he was granted a residence card as her husband, which was valid until 12 December 2016. They lived together until in or around December 2012 but no

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petition to end the marriage was filed until 5 December 2016 and their divorce has not yet been made absolute.

2. On 9 December 2016 the Appellant applied for a retained right of residence. This application was refused on 22 June 2017 on the basis that no evidence had been provided to confirm that they had divorced and no sufficient evidence had been submitted to show that his wife had been exercising her Treaty rights for a continuous five-year period.

3. On 20 April 2018 the Appellant's solicitors requested the First-tier Tribunal to make directions that the Respondent obtain information from HMRC in relation to his wife's employment history. The Tribunal made directions on 1 May 2018 requiring the Appellant to outline the steps that he had taken to obtain details of his wife's employment history. His solicitors replied on 18 May 2018 stating that the Appellant had been unable to contact his ex-wife over the telephone or Facebook and stating that she was still employed at [E H] Care in Chelsea.

4. The Tribunal wrote to the Appellant's solicitors on 22 May 2018 stating the reply provided by them was inadequate. Therefore, on 23 and 30 May 2018, the Appellant's solicitors wrote to his wife at her workplace., asking that she provide her employment history from 2010 onwards or a P60 for the relevant five years. They also asked her to confirm her current employment status. She did not reply to the Appellant's solicitors but telephoned the Appellant to tell him not to contact her at work.

5. The Appellant's appeal was listed before First-tier Tribunal Judge Farmer on 11 June 2018 and the Appellant's counsel applied for an adjournment and for directions to be made requiring the Respondent to obtain the necessary information from HMRC. The First-tier Tribunal Judge refused to grant an adjournment or to make any such directions and proceeded with the hearing.

6. In a decision, promulgated on 25 June 2018, First-tier Tribunal Judge Farmer dismissed the Appellant's appeal and on 12 December 2018 Upper Tribunal Judge Grubb granted him permission to appeal.

ERROR OF LAW HEARING

7. At the start of the hearing, the Home Office Presenting Officer conceded that the First-tier Tribunal Judge had erred in law when in paragraph 12 of her decision, she found that Regulation 15(1)(b) of the Immigration (European Economic Area) Regulations 2016 required the Appellant to show that he had lived with his EEA wife for five years before he could qualify for indefinite leave to remain on the basis of the time that he had been resident here. In *PM (EEA – spouse – "residing with") Turkey* [2011] UKUT 89 (IAC) the Upper Tribunal found that:

> "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".

8. However, the Home Office Presenting Officer submitted that First-tier Tribunal Judge Farmer had not erred in law when she refused to grant an adjournment of the hearing which had been listed before her. Both counsel for the Appellant and the Home Office Presenting Officer made oral submissions and I have referred to the content of these submissions, where relevant, in my decision below.

ERROR OF LAW DECISION

9. It is possible for an Appellant to request the Respondent to obtain details about a partner from the HMRC and the necessary directions have become known as Amos directions after the case of *Amos v Secretary of State for the Home Department* [2011] EWCA Civ 552. The Home Office Presenting Officer was correct to note that no obligation to obtain such documents can be derived from that case where proceedings are adversarial. However, if an appellant may have a right to reside under EU law, the Respondent will usually make such enquiries to ensure that EU law is upheld.

10. Counsel for the Applicant took me through the correspondence between the Appellant and the First-tier Tribunal in relation to obtaining such a direction. In response, the Home Officer

Presenting Officer submitted that the Appellant had not taken sufficient steps to obtain the evidence needed and had delayed in making any request to the Tribunal. As a consequence, he submitted that the First-tier Tribunal Judge was correct to refuse to grant the Appellant an adjournment for the reasons which she gave in paragraphs 6 and 7 of her decision.

11. In paragraph 7 of her decision, the First-tier Tribunal Judge stated that she had considered whether she could conduct a fair hearing and whether it was in the interests of justice and fairness to hear the appeal. She noted that the decision under appeal had been made nearly a year before and that the issues had been clear from that date. She also noted that the Appellant's solicitors had not written to the Appellant's wife before 23 May 2018.

12. However, I find that to ensure that the interests of justice were met, First-tier Tribunal Judge Farmer needed to consider the wider procedural history of the appeal. The notice setting a date for the appeal before the First-tier Tribunal was sent to the Appellant on 5 October 2017 but the evidence given by the Appellant indicated that he did take some steps on his own to obtain information from his wife hen he knew that his appeal had been set down for a hearing but without any success.

13. In addition, nearly three months before the hearing date, the Appellant's solicitors sought directions from the First-tier Tribunal in relation to obtaining information from HMRC. It was not the case that this was left to the date of the hearing. When the Tribunal said that it would not make an *Amos* direction until it knew more about his own efforts to obtain information, the Appellant's solicitors replied to letters from the Tribunal requesting more information on both 1 and 28 May 2018. They also sent two letters to the Appellant's wife at her workplace and it was the evidence of the Appellant that she then telephoned him telling him not to contact her at her workplace. These actions by the Appellant and his solicitors indicate that they were seriously attempting to obtain the necessary evidence to enable the Tribunal to have sufficient information on which to reach a sustainable decision.

14. In addition, the First-tier Tribunal Judge made an adverse finding of credibility against the Appellant on the basis that he had not tried to write to her at her home address when the Judge recognised that the Appellant had only recently been able to acquire her correct home address.

15. I have reminded myself that in *Nwaigwe (adjournment: fairness)* [2014] UKUT 00418 (IAC) the Upper Tribunal found that:

> "If a Tribunal refuses to accede to an adjournment request, such decision could, in principle, be erroneous in law in several respects: these include a failure to take into account all material considerations; permitting immaterial considerations to intrude; denying the party concerned a fair hearing; failing to apply the correct test; and acting irrationally. In practice, in most cases the question will be whether the refusal deprived the affected party of his right to a fair hearing. Where an adjournment refusal is challenged on fairness grounds, it is important to recognise that the question for the Upper Tribunal is not whether the FtT acted reasonably. Rather, the test to be applied is that of fairness: was there any deprivation of the affected party's right to a fair hearing? See SH (Afghanistan) v Secretary of State for the Home Department [2011] EWCA Civ 1284".

16. In the light of the fact that the Appellant had initiated a possible *Amos* procedure and had responded to directions given by the Tribunal in a timely manner and the unchallenged fact that his wife had told him not to contact her at work, the decision to refuse him an adjournment was arguably unfair. It has now also been conceded that he does not need to show that he and his wife have been living together for the necessary five-year period. It is not asserted that he cannot meet any other requirements of the relevant regulations. Therefore, evidence to show that the Appellant's wife has been exercising a Treaty right throughout that period has now become determinative of his appeal. It is also on this basis that the decision to refuse him an adjournment can be said to be unfair.

17. As a consequence, the decision under appeal contain arguable errors of law.

DECISION

(1) The Appellant's appeal is allowed.

(2) The appeal is remitted to the First-tier Tribunal to be heard *de novo* before a First-tier Tribunal Judge other than First-tier Tribunal Judge Farmer or Ford.

Nadine Finch

Signed Date 1 February 2019
Upper Tribunal Judge Finch