



**Upper Tribunal
(Immigration and Asylum Chamber)
EA/07324/2016**

Appeal Number:

THE IMMIGRATION ACTS

**Heard at Columbus House Decision & Reasons Promulgated
Newport On 30 November 2018 On 14 January 2019**

Before

DEPUTY UPPER TRIBUNAL JUDGE M A HALL

Between

**SALVADOR CASTILLO SOTO
(ANONYMITY DIRECTION NOT MADE)**

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: No Representation
For the Respondent: Mr C Howells Senior Home Office Presenting Officer

DECISION AND REASONS

Introduction and Background

1. The appellant appeals against a decision of Judge Holder (the judge) promulgated on 11 October 2017.
2. The appellant is a citizen of Mexico born 31 October 1975. On 16 December 2015 he applied for permanent residence in the UK as the former spouse of an EEA national who had been exercising Treaty Rights. His former spouse is a Spanish citizen.

3. The application was refused on 6 June 2016. The respondent considered regulation 15 (1) (b) of The Immigration (European Economic Area) Regulations 2006 which provides that a person shall acquire the right to reside in the UK permanently if they are a family member of an EEA national who has resided in the UK with the EEA national in accordance with the Regulations for a continuous period of five years.
4. The respondent accepted that the appellant's former spouse had been exercising treaty rights as an EEA citizen for a continuous period of at least five years between 1997 and 2008.
5. The application was refused with reference to regulation 15 (2) which provides that the right of permanent residence shall be lost only through absence from the UK for a period exceeding two consecutive years. The respondent noted that the appellant and his former wife had left the UK in 2009 to live in Spain. There was no evidence to prove that the appellant had returned to the UK until May 2011. The respondent decided that as the appellant had been absent from the UK for a period in excess of two years, he had lost the right of permanent residence.
6. The appeal against the respondent's decision was heard on 14 August 2017. The judge heard evidence from the appellant noting that he had previously been granted a residence card as the spouse of an EEA national valid between 7 November 2002 and 7 November 2007. The judge found that the appellant had been absent from the UK for a period in excess of two years from some time in 2009, until approximately 13 May 2011. Therefore he had lost the right of permanent residence. He had divorced in 2011. His wife and children had remained in Spain and not returned to the UK.
7. The judge dismissed the appeal in relation to the EEA Regulations. The judge did not consider article 8 of the 1950 European Convention, following the guidance in Amirteymour [2017] EWCA Civ 353 because no notice had been served under section 120 of the Nationality Immigration and Asylum Act 2002 and no removal decision had been made.
8. The appellant applied for permission to appeal to the Upper Tribunal. In summary he submitted that the judge had been wrong in law to dismiss his appeal as there are exceptions to the two year rule that were not taken into consideration. The appellant did not deny that he had been absent from the UK for in excess of two years. He explained that he had always worked in the UK and is of good character and that he has friends including a girlfriend in the UK and he did not want to return to Mexico.
9. Permission to appeal was initially refused by Judge Nightingale of the First-tier Tribunal who found that the grounds disclosed no arguable error of law. The application was renewed to the Upper Tribunal and permission to appeal was granted by Upper Tribunal Judge Storey who noted that the appellant's former spouse had exercised treaty rights from the date of marriage in October 2002 until 7 November 2007 and it was therefore arguable that the appeal should have been allowed.

10. Following the grant of permission the respondent lodged a response pursuant to rule 24 of The Tribunal Procedure (Upper Tribunal) Rules 2008 contending that the judge had not erred in law as it had been found that the appellant had been absent from the UK for in excess of two years and even if he had acquired permanent residence in 2007 his subsequent absence for more than two years meant that he lost permanent resident status in accordance with regulation 15 (2).
11. Directions were issued that there should be an oral hearing before the Upper Tribunal to ascertain whether the First-tier Tribunal had erred in law such that the decision should be set aside.

The Upper Tribunal Hearing

12. The appellant attended the hearing without legal representation. He had no difficulty in speaking and understanding English. The appellant confirmed that he wished to proceed without legal representation. I explained to him the procedure that would be adopted at the hearing, the purpose of the hearing, and the independence of my role. The appellant confirmed that he was aware of the issues in the appeal. He was provided with a copy of the respondent's rule 24 response which was the only relevant document he had not previously seen.
13. The appellant submitted that the judge had been wrong in law to dismiss his appeal because he had acquired permanent residence between 2002 and 2007 because at that time he was residing with his former spouse who was exercising treaty rights. The appellant accepted that he was unable to remember exact dates but accepted that he, his former spouse and his daughter left the UK in 2009. At that time his former spouse was pregnant and she gave birth to their second daughter in Spain on 18 September 2009. The appellant was unable to say exactly when he and his family had left the UK in 2009. He does not have his passport that was valid at that time. His current passport was issued on 26 November 2015. He could not remember whether he returned to the UK in 2010 or 2011.
14. The appellant said that his former spouse divorced him. He produced a translated copy of the divorce certificate dated 20 December 2011. At that time the appellant said his former spouse was in Spain with his daughters and he was in the UK. He also produced at the hearing three wage slips issued in the UK dated 21 October 2011, 30 December 2011 and 6 April 2012.
15. The appellant explained that he had travelled to Mexico in either 2012 or 2013. He was unsure as to how long he had stayed but said it was possibly a year, and he then travelled to Spain, and from Spain he travelled to the UK.
16. The appellant did not dispute that he had been absent from the UK for in excess of two years between 2009 and 2011, but explained that he could not remember exact dates and did not have documentary evidence to confirm exactly when he left and returned.

17. I then heard submissions from Mr Howells on behalf of the respondent. He relied upon the rule 24 response and submitted that the judge had not erred in law and had been entitled to find that the appellant had been absent from the UK for a period in excess of two years thereby losing any right of permanent residence that he had acquired. Mr Howells pointed out that if the appellant was able to produce further evidence he could make a further application for permanent residence. It was submitted that the appellant's appeal should be dismissed.
18. I asked the appellant whether he wished to respond to what had been said on behalf of the respondent. He said that there were some exceptions to regulation 15 (2) and he fell within one of those exceptions because his wife wanted to have her baby in Spain. He reiterated that he had spent half his life in the UK, that he is a hard-working person, not a criminal, and he enjoyed living in the UK and wished to remain here.
19. I reserved my decision.

My Conclusions and Reasons

20. I find no material error of law in the First-tier Tribunal decision. The judge correctly set out the law in paragraphs 17 and 18, noting in paragraph 16 that the respondent accepted that the appellant's former spouse had been exercising treaty rights in the UK between 1997 and 2008 but not thereafter, and she had left the UK in 2009.
21. The judge assessed all the evidence before him and made findings which were open to him to make on that evidence. The issue in the appeal related to regulation 15 (2) and whether the appellant had been absent from the UK for a period in excess of two years. The judge concluded at paragraph 20 that the evidence demonstrated that the appellant had in fact been absent from the UK for a period in excess of two years between 2009 and 2011 and therefore lost any permanent residence status that had been acquired pursuant to regulation 15 (2). The appellant did not demonstrate before the judge or before me that there were any exceptions to the two-year rule or that he fell within those exceptions. The appellant accepted that he had been absent from the UK for more than two years because his wife wanted to have her baby in Spain, and after the birth in September 2009 the family remained in Spain.
22. The judge gave adequate reasons for his conclusion and it could not be said that his decision was irrational or perverse. The judge did not err in law in declining to consider article 8 of the 1950 Convention as he correctly followed guidance from the Court of Appeal in Amirteymour.
23. The appeal of the appellant must therefore be dismissed. If he discovers further evidence then it is open to him to make a fresh application. It is also open to him to make an application for leave to remain if he wishes to rely upon article 8 of the 1950 Convention, based upon any family and private life he has established in the UK. Any such application would have to be made to the Home Office.

Notice of Decision

The decision of the First-tier Tribunal does not disclose an error of law. I do not set aside the decision and I dismiss the appeal.

There has been no application for anonymity and no anonymity direction is made.



Signed
2018

Date 12 December

Deputy Upper Tribunal Judge M A Hall

**TO THE RESPONDENT
FEE AWARD**

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



Signed
2018

Date 12 December

Deputy Upper Tribunal Judge M A Hall