Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: EA/09098/2016

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 1 May 2019	**On 21 May 2019**

Before

DEPUTY UPPER TRIBUNAL JUDGE NORTON-TAYLOR

Between

LOVEPREET SINGH DHILLON
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Ms K McCarthy, Counsel, instructed by OTS Solicitors
For the Respondent: Ms J Isherwood, Senior Home Office Presenting Officer

REMAKE DECISION AND REASONS

Background

1. This is the re-making of the decision in the Appellant's appeal following the error of law decision by Upper Tribunal Judge Kebede promulgated on 1 March 2019[1]. Judge Kebede concluded that the First-tier Tribunal had materially erred in law by impermissibly going behind a concession made by the Presenting Officer at the

[1] The error of law decision is annexed to this remake decision, below.

hearing. The concession was to the effect that the Appellant's ex-spouse had been exercising Treaty rights as at date of the initiation of divorce proceedings on 19 December 2014.

2. Having found the error of law and setting the decision of the First-tier Tribunal aside, Judge Kebede issued directions. The first of these was for the Respondent to state whether the concession made before the First-tier Tribunal was maintained or withdrawn in respect of the re-making of the decision. The second direction related to a potential issue of the nature of the Appellant's relationship with his ex-spouse given what was said in para. 2 on the second page of the reasons for refusal letter.

3. In advance of the hearing before me Ms Isherwood accepted, with her usual candour, that these directions had not been complied with (I make it clear that this was no fault of hers). She did her level best to provide some further information by way of an email dated 30 April 2019 (now on the Tribunal's file).

Discussion, findings, and conclusions

4. After a discussion at the hearing between myself and the representatives, the following matters were clarified. Although the minute of the relevant Presenting Officer before the First-tier Tribunal produced by Ms Isherwood was not perhaps in the clearest of terms, its contents, together with what was said in the Record of Proceedings, what was clearly the basis of the error of law decision (para. 9 of Judge Kebede's decision), and the nature of her first direction, all combine to satisfy me that a properly made concession had in fact been made before the First-tier Tribunal. Ms Isherwood confirmed that that concession was not being withdrawn and therefore I proceed on the basis that it is maintained in respect of the re-making of the decision in this appeal.

5. As to the potential issue with the Appellant's relationship with his ex-spouse, despite directions and notwithstanding what is said in para. 2 of the reasons for refusal letter, the Respondent has not stated that the marriage was one of convenience only. I proceed on the basis that it was not.

6. The acceptance in the reasons for refusal letter that the Appellant satisfies Regulation 10(6) of the Immigration (European Economic Area) Regulations 2006[2] ("the Regulations") was maintained before me.

7. In light of the above I reach the following findings. The Appellant married his ex-spouse, a Czech national, on 22 September 2010. That marriage was not one of convenience. The Appellant's ex-spouse was, as at 19 December 2014 (that being the commencement of divorce proceedings and the relevant date, see Baigazieva [2018] EWCA Civ 1088), exercising her Treaty rights in the United Kingdom. The Appellant's marriage to his ex-spouse had lasted for in excess of three years prior to the commencement of the divorce proceedings and it is clear that both parties had

[2] The 2006 Regulations applied because of the date of the Appellant's application, that being 28 August 2015.

been in the United Kingdom for in excess of a year. Whether or not the Appellant was living with his ex-spouse throughout the period is immaterial in light of PM (EEA – spouse – "residing with") Turkey [2011] UKUT 89 (IAC) and the guidance stated therein as to the meaning of the phrase "residing with".[3]

8. As mentioned previously, the Appellant's satisfaction of Regulation 10(6) has been accepted throughout and I find that this remained the case as at the termination of the marriage on 30 June 2015 and to date.

9. Therefore, the Appellant had a retained right of residence as at the termination of his marriage to the relevant EEA national, that being on 30 June 2015.

10. I conclude that it follows from this set of circumstances and the unchallenged evidence from HMRC contained in the Respondent's bundle that the Appellant has also acquired a permanent right of residence in the United Kingdom, pursuant to Regulation 15(1)(f) of the Regulations. The relevant historical five-year block ran from 22 September 2010 (that being the date of his marriage) to 22 September 2015, or alternatively any five-year period beginning after September 2010 and ending on the date of the hearing before me. In the period leading up to the termination of the marriage the Appellant was the family member of the EEA national and following that event he was able to rely on his retained right of residence to "clock-up" the remaining required time.

11. In light of these conclusions the Appellant is entitled to be issued with a document confirming his permanent right of residence in this country.

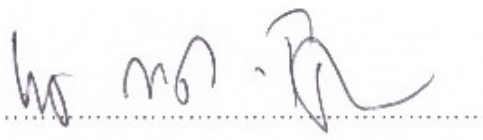
12. The Appellant's appeal against the Respondent's decision of 18 July 2016 is accordingly allowed.

NOTICE OF DECISION

The decision of the First-tier Tribunal contained a material error of law and has been set aside.

I remake the decision and allow the Appellant's appeal

No anonymity direction is made.

Signed  Date: 10 May 2019

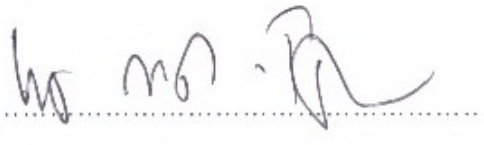
Deputy Upper Tribunal Judge Norton-Taylor

[3] Although PM concerned Regulation 15(1)(b) of the Regulations, Ms Isherwood expressly acknowledged that the underlying principle would apply to Regulation 10(5)(d)(i).

TO THE RESPONDENT

FEE AWARD

As I have allowed the appeal and because a fee has been paid or is payable, I have considered making a fee award and have decided to make a full fee award of £140.00. There is no sound reason to reduce the award in this case.

Signed  Date: 10 May 2019

Deputy Upper Tribunal Judge Norton-Taylor

ANNEX: ERROR OF LAW DECISION

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: EA/09098/2016

THE IMMIGRATION ACTS

Heard at: Field House
On: 18 February 2019

Decision Promulgated

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Before

UPPER TRIBUNAL JUDGE KEBEDE

Between

LOVEPREET SINGH DHILLON

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr M Sowerby, instructed by Sangat Advice Centre
For the Respondent: Ms S Cunha, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellant, a national of India born on 3 August 1983, appeals, with permission, against the decision of the First-tier Tribunal dismissing his appeal against the respondent's decision to refuse to issue him with a residence card under the Immigration

(European Economic Area) Regulations 2016 ("the EEA Regulations"), on the basis of having retained a right of residence as the former spouse of an EEA national.

2. The appellant entered the UK on 28 October 2009. On 22 September 2010 he married an EEA national, Anna Szitaiova. On 17 February 2011 he applied for a residence card as the family member of an EEA national and was issued with a residence card on 12 May 2011. He divorced his wife on 30 June 2015 and on 28 August 2015 he applied for a residence card on the basis of a retained right of residence.

3. The respondent, in his decision of 18 July 2016 refusing the application, considered that the appellant had not provided sufficient evidence that he had retained a right of residence following his divorce. In the reasons for refusal letter of 20 July 2016 the respondent accepted, from the appellant's decree absolute issued on 30 June 2015, that his marriage to the EEA national was dissolved. The respondent accepted that the appellant had been married for over four years but considered that the evidence raised the question of whether he and the sponsor had ever lived together. The respondent considered that the evidence showed that the sponsor's employment had ceased on 3 May 2015, confirming that she was not exercising treaty rights on the date of the divorce. There was no evidence that the sponsor was a qualified person at the time of the divorce. The respondent considered that the requirements of regulation 10(5) were not met and that the appellant had not retained a right of residence following divorce.

4. The appellant appealed that decision and his appeal was heard in the First-tier Tribunal by Judge Smith on 5 July 2018, together with the linked appeal HU/17027/2017 of his partner Amandeep Kaur Baath, a citizen of India, with whom he had twin daughters born on 25 May 2015.

5. Ms Baath was appealing the respondent's decision to refuse her application for leave to remain on the basis of her family life with the appellant and their children. Ms Baath's appeal had previously been adjourned due to her mental health problems, but a further adjournment request had been refused in writing and no further adjournment request was made before Judge Smith. Judge Smith noted that Ms Baath was represented by the same representatives as the appellant, but Counsel attending had been instructed only in relation to the appellant's appeal. The instructing representatives, when contacted, confirmed that they were not instructed to appear at the appeal hearing. Judge Smith decided to proceed in Ms Baath's absence. He dismissed her appeal, concluding that there was genuine family life between the appellant and Ms Baath but that she could not meet the requirements of Appendix FM or paragraph 276ADE(1) of the immigration rules and that her removal would not breach her Article 8 rights outside the rules.

6. There has been challenge to the judge's decision on Ms Baath's appeal.

7. With regard to the appellant, the judge noted that, further to the decision in Baigazieva v Secretary of State for the Home Department [2018] EWCA Civ 1088, the relevant date was the date of initiation of divorce proceedings, 19 December 2014. The judge did not accept that there was satisfactory evidence to show that the sponsor was

exercising treaty rights at the relevant time. Although he accepted that the HMRC tax returns produced were genuine, he did not accept that they were determinative of the sponsor's income. He noted discrepancies in the evidence and, although the presenting officer accepted that the appellant had demonstrated that the sponsor was exercising treaty rights at the relevant time, he did not consider that the Tribunal were bound by that acceptance and did not accept that the sponsor was exercising treaty rights in December 2014 when the divorce proceedings were initiated. The judge accordingly found that the appellant could not meet the requirements of regulation 10(5) and had not demonstrated that he was a family member who had retained a right of residence. He dismissed the appellant's appeal.

8. Permission to appeal that decision was sought by the appellant, and granted, on the grounds that the judge had arguably erred by going behind a concession made by the respondent and by failing to assess the evidence in the round and that the decision was arguably procedurally unfair.

9. At the hearing it was agreed by all parties that the judge had erred by going behind a concession without raising the matter with the parties and giving the appellant an opportunity to address the issue. Mr Sowerby helpfully confirmed that it was not asserted that the judge was not permitted to go behind the concession in any circumstances, but the assertion was that he had erred by doing so without putting the matter to the parties and inviting them to respond. Accordingly the judge's decision had to be set aside and the matter had to be reconsidered with the benefit of submissions from both parties, and a statement from the Presenting Officer Mr Hunt-Jackson, as to the status of the concession.

10. I pointed out to the parties that there was a further matter which had not been addressed, namely that there had been no consideration of the respondent's concerns at paragraph 2 of page 2 of the refusal letter in regard to the appellant and the EEA national having ever lived together. It appeared that the respondent had concerns about the genuineness of the relationship but no clear decision had been made in that regard.

11. There was some discussion as to the disposal of the appeal and an understanding that the matter would be remitted to the First-tier Tribunal. However, upon reflection it seems to me that the matter would best be resolved in the Upper Tribunal, given the issues arising and given that the appeal was linked with another appeal which has been finally determined in the First-tier Tribunal.

12. Accordingly I set aside Judge Smith's decision in the appellant's appeal. The matter will be listed for a resumed hearing at a date to be notified to the parties, for the decision to be re-made in the appellant's appeal.

13. I make the following directions for the resumed hearing:

Directions

Not later than 14 days before the resumed hearing:

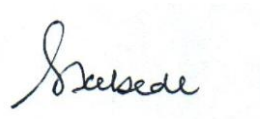
a. The respondent is to file with the Upper Tribunal and serve on the appellant written submissions addressing:

   - the nature of the concession made before the First-tier Tribunal, including whether the concession is maintained or withdrawn and including a statement from Mr Hunt-Jackson, the presenting officer who appeared in the First-tier Tribunal in relation to the concession.

   - the respondent's position on the matters raised at paragraph 2, page 2 of the refusal letter and whether the respondent challenges the relationship between the appellant and the EEA national, particularly given the evidence in the linked appeal of Ms Baath in regard to her relationship with the appellant.

b. The appellant is to file with the Upper Tribunal and serve on the respondent information about his relationship with Ms Baath, including the date he entered into a relationship with her and when he commenced cohabitation with her.

c. Any further evidence relied upon by either party is to be filed with the Upper Tribunal and served upon the other party in a consolidated, indexed and paginated bundle.

Signed: 
Upper Tribunal Judge Kebede

Dated: 19 February 2019