Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: UI-2022-001488
(EA/06826/2018)

THE IMMIGRATION ACTS

Heard at: Field House
On: 17 October 2022

Decision & Reasons Promulgated
On: 27 November 2022

Before

UPPER TRIBUNAL JUDGE KEBEDE

Between

JEHANGIR KHAN
(no anonymity order made)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Ms G Brown, instructed by Farani Javid Taylor Solicitors
For the Respondent: Ms A Ahmed, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellant is a national of Pakistan, born on 21 March 1979. He 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 as the former family member of an EEA national who had retained a right of residence following the end of his marriage to Estela Sugue.

Background

2. The appellant first entered the UK on a Tier 4 student visa valid from 5 August 2011 until 11 January 2013. On 21 December 2012 he applied for leave to remain as a Tier 4 student and was granted leave on 1 March 2013, until 30 November 2013. On 23 August 2013 he applied for an EEA residence card as the spouse of Estela Sugue Verginisa, but his application was refused on 2 January 2014 on the basis that it was not accepted that the sponsor was a qualified person exercising treaty rights at the relevant time. The appellant appealed against that decision and his appeal was dismissed on 29 May 2014. The respondent reconsidered the decision but maintained the decision on 5 June 2014.

3. On 31 July 2014 the appellant made another application for an EEA residence card on the same basis as previously and he and his wife attended a marriage interview at the Home Office on 4 November 2014. Following the interview, the application was refused, and the appellant was detained and served with a removal decision, with removal directions set for 13 November 2014. The respondent, in the refusal decision of 10 November 2014, noted various discrepancies in the evidence and did not accept that the appellant was in a genuine and subsisting relationship with the sponsor, concluding that the marriage was one of convenience.

4. The appellant appealed against the decision and also challenged the removal directions by way of a judicial review claim which was refused on 12 June 2015. His appeal was heard on 15 January 2015 and was dismissed on 26 January 2015 by First-tier Tribunal Judge Manyarara who found the marriage to be one of convenience, owing to inconsistencies in the appellant's and sponsor's evidence at the marriage interview and at the hearing. The judge considered that the arrangement was one of separate households living under the same roof. She found the requirements of the EEA Regulations were not met and that the decision was not in breach of Article 8 of the ECHR. Permission to appeal to the Upper Tribunal was refused and the appellant became appeal rights exhausted on 7 September 2015.

5. The appellant applied once again for an EEA residence card on 28 September 2015 and again his application was refused, on 22 March 2016. The appellant appealed against that decision on 11 April 2016. On 25 April 2017 he was detained when reporting to the immigration services. He was released from detention on 9 May 2017 after lodging a judicial review claim and his judicial review claim was refused on 8 September 2017. He was detained again on 9 May 2018 but was released on bail on 11 May 2018. He later withdrew his appeal on 21 September 2017 and, in the meantime, on 25 April 2017, he made an Article 8 human rights claim which was refused on 26 April 2017.

Current Application and Appeal

6. The current appeal arises out of a further application made by the appellant on 25 June 2018 for an EEA residence on the basis of retained rights as the former spouse of an EEA national, the couple having divorced on 13 April 2018. In that application it was stated that he had married Estela Sugue Verginisa, a Spanish national, on 24 July 2013, after meeting her in January 2013. They had

moved in together in May 2013 and lived together with his wife's daughter Paula from a previous relationship, as husband and wife. In 2015 the appellant's wife fell pregnant with his child but decided to have an abortion since he was facing removal from the UK, and she felt that she could not cope alone. The relationship started to break down in January 2017 and there were arguments between them. The appellant was detained by the immigration authorities and released on 9 May 2017, returning home to find his wife with another man. His wife left the family home in May 2017 with her daughter and the other man. The appellant filed for a divorce on 15 September 2017 and the divorce was made absolute on 13 April 2018.

7. It was stated further in that application that the appellant was currently unemployed since being detained and issued with a removal notice in April 2017. Prior to that he had received a certificate of application to enable him to work and he had therefore been employed before April 2017. The appellant's wife had been a qualified person throughout the relevant period and was working as a housekeeper/ nanny at the time she left the family home in May 2017. Evidence was enclosed of her employment. It was submitted that the appellant therefore met the requirements under regulation 10 of the EEA Regulations 2016 and a residence card was requested.

8. The appellant's application was refused by the respondent on 28 September 2018. In the refusal decision the respondent accepted that the appellant and his former spouse were married for three years prior to their divorce and that they had lived in the UK for over a year whilst married. However, it was not accepted that they were in a genuine and subsisting relationship or that the appellant had exercised treaty rights since his divorce and the submission of the application. The respondent relied on the findings and conclusions of First-tier Tribunal Judge Manyarara in the appellant's previous appeal and maintained the view that the marriage was one of convenience. The respondent considered the evidence provided in regard to the appellant's employment history and concluded that he was not exercising treaty rights at the time of the divorce and could not meet the requirements of the EEA Regulations.

9. The appellant appealed against that decision and his appeal came before First-tier Tribunal Judge Kudhail on 16 February 2021. Judge Kudhail noted that the appeal had previously been adjourned on several occasions as a result of voluminous amounts of documentary evidence being submitted by the appellant and she refused to adjourn again when it was evident that a USB stick containing further evidence was missing. She was ultimately satisfied that the necessary evidence was available to enable the appeal to proceed. The relevant issues before the judge were identified as being whether the appellant and the sponsor were in a genuine and subsisting relationship, whether the appellant's former spouse was exercising treaty rights at the time of the initiation of the divorce and whether the appellant was exercising treaty rights during the initiation of the divorce and since the termination of the divorce.

10. The appellant gave oral evidence before the judge, stating that he had not worked in 2017 and after March 2019 because he was detained and when

released was told that he was not permitted to work. He claimed that after being given permission to work he had started working again in September 2018 and had been working since then, although it was noted by the judge that his payslips commenced in December 2018. He stated that he had had two jobs in September 2019 and claimed that he would have worked throughout but had been without permission to work so was unable to.

11. Having viewed Whatsapp chats between the appellant and his former spouse and other evidence which had not been produced before Judge Munyarara, and for other reasons given, Judge Kudhail accepted that the appellant's relationship with his former spouse was a genuine one and that the marriage was not one of convenience. Judge Kudhail also accepted that the appellant's former spouse had been exercising treaty rights at the time the appellant ceased to be a family member. However, she did not accept that the evidence showed that the appellant was a worker, a self-employed person or a self-sufficient person at the time of his divorce on 13 April 2018 until November 2018 and from March 2019 to May 2019. The judge noted that, at the time of the decree absolute, the appellant was prevented from working as he did not have permission from the respondent and that the appellant was arguing that he should be viewed as a jobseeker at the time because he was willing to work if he had had permission to do so. However she noted that he did have permission to work from July 2018 until November 2018 and, in any event, in the absence of any evidence that he was looking for work at the relevant time, she found that he could not be considered as a jobseeker as per regulation 6 and that he had failed to show that he was exercising treaty rights at the time he ceased to be a family member. She accordingly dismissed the appeal on EU grounds under the EEA Regulations.

12. The appellant sought permission to appeal to the Upper Tribunal on the following three grounds (page 67 of the bundle). Firstly, that the judge had made a material mistake of fact in respect of whether the appellant was exercising treaty rights at the date of the divorce as there was evidence that he was a jobseeker at the relevant time (albeit that that evidence was not before the First-tier Tribunal); secondly, that the judge had made a material mistake in respect of whether the appellant was exercising treaty rights between March 2019 and May 2019 as there was evidence that he was a jobseeker at the relevant time (albeit that that evidence was not before the First-tier Tribunal); and thirdly, that there was a failure by the judge to consider the consequential impact of the appellant's marriage not being one of convenience, and that the judge had erred by failing to consider whether, in the circumstances of the appellant's case, there was compelling evidence that he was seeking employment beyond the 'relevant period' as per regulation 6(7) of the EEA Regulations 2016.

13. The application for permission was accompanied by a 53-page bundle of documentary evidence containing a witness statement from the appellant and various job alerts.

14. Permission was refused by First-tier Tribunal Judge Saffer in a decision dated 13 April 2021 and sent out on 20 April 2021. In the absence of any

further appeal the appellant was considered as appeal rights exhausted on 5 May 2021.

15. However an out of time application for permission to appeal to the Upper Tribunal was made on 11 April 2022 (a year out of time), in which it was claimed by the appellant's solicitors that neither they nor the appellant had ever received the decision of 13 April 2021 and that they only became aware of the fact that permission had been refused in the First-tier Tribunal when the appellant was refused a new certificate of application giving him continued permission to work in the UK. An application was made for an extension of time to file the renewed grounds, further to Judge Saffer's decision being re-served on the appellant on 31 March 2022.

16. Permission was granted by Upper Tribunal Judge O'Callaghan on 10 July 2022 on all grounds, but with particular reference to grounds 1 and 2.

Hearing and Submissions

17. The matter came before me for a hearing.

18. I raised the timeliness of the application for permission to the Upper Tribunal as a preliminary matter, as Upper Tribunal Judge O'Callaghan had not addressed that in his decision when he granted permission. Ms Ahmed was neutral on the matter, confirming that no rule 24 had been produced by the respondent and no written objection had been made in that regard. I noted that, whilst it was claimed by the appellant and his representatives that neither had received Judge Saffer's decision, the Tribunal's records stated that the decision had been emailed to both on 20 April 2021. Nevertheless, in the interests of fairness, and considering the lack of prior objection by the respondent, I accepted the explanation provided and agreed to admit the application despite the lengthy period of delay.

19. I also raised the matter of the voluminous number of documents and bundles sent in 25 separate emails for this appeal, which I considered to be particularly unhelpful. Ms Brown advised me that the appellant had provided her with a further USB stick containing additional documentary evidence which had not been before the First-tier Tribunal and which she wished to have admitted. Ms Ahmed objected to it being admitted.

20. Both parties made submissions.

21. Ms Brown submitted that the primary issue arising from the respondent's decision, and therefore before the First-tier Tribunal, was the genuineness of the appellant's relationship and his spouse's exercise of treaty rights, and not whether the appellant was exercising treaty rights himself. It was because of that that the appellant had not produced the evidence upon which he was now seeking to rely. The issue to be decided, therefore, was whether that evidence was admissible in relation to the error of law matter. Ms Brown submitted that the evidence was admissible and was capable of demonstrating that there was an error of law in the First-tier Tribunal's decision pursuant to section 12 of the

Tribunals, Court and Enforcement Act 2007. The error did not have to be the fault of the judge and there was no suggestion that Judge Kudhail was at fault, but it was a matter of fairness, as set out in the case of MM (unfairness; E & R) Sudan [2014] UKUT 105. As for the evidence itself, there were two periods of concern to Judge Kudhail, namely 13 April 2018 to July 2018 and March to May 2019 where she found the appellant was not working and was not a job seeker. With regard to the first period, Ms Brown referred to the appellant's witness statement in the bundle of documents submitted with the application for permission made in March 2021 where he stated that he was not permitted to work at the time of his divorce but had nevertheless been searching for work from March 2018. She also submitted that the new evidence in the USB stick showed the results of an application for a job made by the appellant in June 2018 and she applied for the USB stick to be admitted into evidence. That was in addition to the evidence of job searches in the bundle of documents submitted with the application for permission made in March 2021. With regard to the second period, Ms Brown referred to the evidence submitted after the judge's decision of job searches, registration for work and interviews. She submitted that the documents provided evidence that the appellant was a job seeker at the relevant time and that it was unfair for that evidence not to be admitted when it demonstrated that the appellant could qualify for an EEA residence card.

22. Ms Ahmed submitted that it was inaccurate to claim that the issue of the appellant exercising treaty rights himself was not a focus of the refusal decision when it clearly was. The appellant had not given proper reasons for providing the evidence to the First-tier Tribunal. The case had been adjourned several times and he was legally represented. It was clear what was required by way of evidence. Given the voluminous evidence his solicitors had seen fit to submit it could not be said that he had overlooked the relevance of such evidence. The evidence now produced did not meet the test in Ladd v Marshall [1954] EWCA Civ 1, as discussed in R (Iran) & Ors v Secretary of State for the Home Department [2005] EWCA Civ 982 at [32] and E v Secretary of State for Home Department [2004] EWCA Civ 49. The evidence had not been submitted to the Tribunal at all despite there having been ample opportunity to do so and no proper reason had been given for that. Fairness had to be considered for both sides and the protracted history of this case was relevant in that respect. The new evidence should not be admitted. However even if the evidence was admitted, it did not show that the appellant was an active jobseeker until 23 May 2019 when he made an application to McDonalds. The evidence produced in the bundle with the application for permission made in March 2021 consisted simply of automated job alerts which could relate back to entries made by the appellant at any time. Receiving job alerts did not make him a job seeker, as per the guidance in Gauswami (Retained right of residence, Jobseekers) [2018] UKUT 275. There was no evidence to show that the appellant was a jobseeker from the date of the divorce to November 2018 or from March to May 2019 prior to 23 May 2019. The fact that he was not permitted to work did not assist him as he could have applied to vary his bail conditions, if that was what was preventing him from working, or for permission to work. The refusal of

permission to work was for public interest reasons and did not assist in itself in showing that he was a jobseeker.

23. In response, Ms Brown reiterated the points previously made and asked that Judge Kudhail's decision be set aside by reason of an error of law and the case listed for the matter to be reheard with the benefit of the new evidence upon which the appellant wished to rely.

Discussion

24. As discussed above, Judge Kudhail accepted that the appellant's marriage to his spouse was genuine and subsisting and that his wife had been exercising treaty rights at the time of the divorce but did not accept that the appellant himself was exercising treaty rights at the time of the divorce and thereafter. She did not accept that he was working during the period from his divorce in April 2018 until November 2018 or from March 2019 to May 2019, or that he was a jobseeker during those periods. It was on that basis that she dismissed the appeal, finding that the appellant was unable to meet the requirements of the EEA Regulations 2016. The Secretary of State has not challenged the first two findings made by the judge, but the appellant challenges the third finding.

25. It is not disputed by the appellant that if he was not a worker or jobseeker during the relevant periods stated by the judge, he could not succeed under the EEA Regulations 2016. What he argues, however, is that he was a jobseeker during those periods, and he does so on the basis of evidence which he has sought to produce subsequent to the hearing before the judge, accepting that that evidence was not before the judge when she made her decision. That evidence is contained in a bundle of documents submitted with his application for permission to appeal to the First-tier Tribunal and in a USB stick which he now seeks to have admitted.

26. Permission was initially refused in the First-tier Tribunal on the basis that the judge could not be faulted for not considering evidence not put before her. The appellant's response to that is that Rule 15(2A) of The Tribunal Procedure (Upper Tribunal) Rules 2008 permits the Upper Tribunal to consider evidence that was not before the First-tier Tribunal, that it is apparent from sections 11 and 12 of the Tribunals, Court and Enforcement Act 2007 that no fault is required on the part of the judge in order for an error of law to be established and that the relevant issue is one of fairness as established in MM.

27. However, I do not consider that any of the authorities relied upon by the appellant provide a basis for concluding that unfairness has arisen or would arise by not permitting the new evidence to be considered, such as to give rise to an error of law requiring the judge's decision to be set aside. In MM the Upper Tribunal was specifically concerned with appeals raising issues of international protection, and in so far as it relied upon the principles in E & R, it was relevant that the Court of Appeal in that case, when considering mistakes of fact giving rise to an error of law, considered the admission of new evidence to be subject to Ladd v Marshall principles. The first of those principles was that the fresh evidence could not have been obtained with reasonable diligence for

use at the trial. Whilst those cases allowed for the possibility of unfairness being corrected on the basis of problems arising through no fault of the Tribunal itself, it seems to me that none of them provides authority for there being unfairness arising in circumstances such as those in the appellant's case.

28. In this case, as Ms Ahmed submitted, it could not possibly be argued that the appellant was not aware of the lack of such evidence being a relevant issue or that he lacked an opportunity to produce such evidence for his appeal in the First-tier Tribunal. I reject entirely Ms Brown's submission that the appellant was justified in considering the issue of his exercise of treaty rights not to have been a focal point of the respondent's decision. There can be no doubt from the decision of 28 September 2018 that the absence of evidence demonstrating that the appellant was exercising treaty rights at the time of his divorce was a significant reason for his application having been refused. There was a whole section of the refusal devoted to that refusal reason, under a heading underlined and in bold stating "Your Treaty Rights following your divorce". The appellant was represented by experienced legal representatives who had lodged the appeal for him with detailed grounds and would have been fully aware of the need to address all areas of the refusal decision. As the judge's decision states at [13], the respondent's review made it clear that that issue was one of the three issues in the appeal and indeed Ms Brown's own grounds of appeal to the First-tier Tribunal confirm the same in the introduction at [1]. The appeal had, furthermore, been adjourned six times before it came before Judge Kudhail owing to the voluminous amount of evidence submitted by the appellant, and there was therefore more than ample opportunity for relevant evidence to be submitted to address the issue. As is clear from the judge's decision at [17], there were over 4000 pages of evidence produced for the appeal before her, some of which, as can be seen from [55] of the judge's decision, included evidence of employment held by the appellant from December 2018 to February 2019 and from June 2019 to January 2021.

29. In the circumstances there was simply no reason for the appellant not to have provided evidence of being a worker or jobseeker at that time, if such evidence was available, and no excuse for the delay in seeking to produce such evidence when he did and as he now does. There is no merit in the suggestion that the judge's finding, that there was no evidence to show that the appellant was exercising treaty rights at the time of the divorce and during the periods stated, amounted to a mistake of fact constituting an error of law. Neither is there any unfairness in refusing to accept the evidence subsequently provided, either in the bundle produced in March 2021 with the permission application or in the USB stick produced now, over a year and a half after the appeal before Judge Kudhail, as a reason to set aside her decision. Any request to admit that evidence plainly stands to be refused under 15(2A)(b) of the Procedure Rules.

30. In any event I agree with Ms Ahmed that the evidence subsequently produced by the appellant with his grounds seeking permission is not determinative of the matter, such that to exclude it would be unfair, and that it does not demonstrate that he was an active jobseeker at the relevant time. As Ms Ahmed submitted the evidence largely consists simply of job alerts. It cannot be ascertained from those job alerts when the appellant registered his

details, and I reject the suggestion that receiving automated job alerts is sufficient to constitute evidence of him being an active jobseeker in the terms expressed in Gauswami. Even if the confirmation of a job application submission on 12 March 2019 (page 16 of the bundle) and the confirmation of applications made to McDonalds and other companies on and after 23 May 2019 (from page 21) was sufficient to show that the appellant was a job seeker at that time, there was still no evidence for the relevant period at the time of the divorce and up until November 2018, as the judge found.

31. Ms Brown did not make any submissions on the third ground of appeal, and I do not consider that that ground identifies any error of law on the part of the judge in any event. I note that Upper Tribunal Judge O'Callaghan, when granting permission in the Upper Tribunal found both parts of the ground to be weak. I reject the suggestion that the effect of the judge's finding, that the appellant's marriage was not one of convenience, was that his application for a residence card was wrongly refused by the respondent on 4 November 2014 and thereafter. Judge Kudhail's findings and conclusions were specifically based on the evidence before her, such evidence not having been submitted previously, as she made clear at [39] of her decision. The respondent had raised various concerns about the credibility of the appellant's evidence in regard to his relationship, all of which were maintained by Judge Manyarara in her decision in which she detailed the many inconsistencies arising in the evidence. The respondent was clearly justified in maintaining the refusal on such grounds and it was only when the appellant produced further evidence before Judge Kudhail that she was persuaded that the relationship was a genuine one. There was therefore no reason for Judge Kudhail to have to consider the effect of her positive findings on the previous refusal of a residence card.

32. Neither is there any merit in the second part of the third ground which asserts that the judge failed to consider whether there was compelling evidence that the appellant was seeking employment beyond the relevant period for the purposes of regulation 6(7) of the EEA Regulations. I fail to see the relevance of that provision to the appellant's circumstances, given the judge's finding that the appellant was not a jobseeker at the relevant time, namely from the time of the divorce and for the period until November 2018, both at a time when he was not permitted to work and for a period thereafter.

33. For all of these reasons I do not consider that any error of law arises from Judge Kudhail's decision. The judge had full and careful regard to all relevant matters, she undertook a detailed assessment of the evidence, she had regard to the relevant caselaw and guiding principles therein and she made cogently reasoned findings on the evidence before her. She was fully and properly entitled to dismiss the appeal on the basis that she did. I reject the suggestion that evidence submitted subsequent to the appeal gave rise to material mistakes of fact in the judge's decision and I likewise reject the suggestion that refusing to consider that evidence now gives rise to unfairness amounting to an error of law or to unlawfulness on the part of the Upper Tribunal. Judge Kudhail's decision is accordingly upheld, and the appellant's appeal is dismissed.

DECISION

34. The making of the decision of the First-tier Tribunal did not involve an error on a point of law. I do not set aside the decision. The decision to dismiss the appeal stands.

Signed: S Kebede

Upper Tribunal Judge Kebede Dated: 19 October 2022