



**Upper Tribunal  
(Immigration and Asylum Chamber)**

Appeal Number: IA/43475/2013

**THE IMMIGRATION ACTS**

**Heard at Field House  
On 11 February 2015**

**Decision & Reasons  
Promulgated  
On 25 February 2015**

**Before**

**DEPUTY UPPER TRIBUNAL JUDGE MCWILLIAM**

**Between**

**ILLYA LIBERMAN  
(ANONYMITY DIRECTION NOT MADE)**

Appellant

**and**

**THE SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Respondent

**Representation:**

For the Appellant: Ms J Norman, Counsel instructed by Sterling & Law Associates LLP

For the Respondent: Mr S Whitwell, Home Office Presenting Officer

**DECISION AND REASONS**

1. The appellant is a citizen of Ukraine and his date of birth is 1 November 1976. He made an application for permanent right of residence pursuant to Regulation 15 of the Immigration (European Economic Area) Regulations 2006 on the basis that he is a family member who has retained the right of residence pursuant to Regulation 10 of the 2006 Regulations. His application was refused by the Secretary of State in a decision of 11 October 2013.

2. The reason the Secretary of State refused the application was twofold. First the appellant had failed to establish that the EEA national was a qualified person when the decree absolute was issued (16 August 2011) and second that she failed to provide evidence that since the date of his divorce he has been a worker, self-employed person or a self-sufficient person.
3. The appellant appealed against the decision of the Secretary of State and his appeal was dismissed by a Judge of the First-tier Tribunal in a decision that was promulgated on 1 August 2014 following a hearing on 16 July 2014. The appeal was dismissed because the Judge found that the appellant had not established that his ex-wife was at the time of the divorce exercising treaty rights.
4. The appellant appealed against the decision of the First-tier Tribunal and Designated Judge of the First-tier Tribunal JM Lewis a grant of permission on 20 August 2014.

### **The Decision of the First-tier Tribunal**

5. The Judge at [4] referred to the history of the case. She recorded that the appellant had requested an adjournment on 9 December 2013 having asked the Tribunal to make a direction pursuant to Rule 45 of the 2005 Rules requiring the secretary of state to provide any information that she has about the appellant's ex-wife's employment in August 2011. The application was refused. The matter was listed on 21 May 2014 when the representative on behalf of the secretary of state agreed to assist the appellant by providing any information held on the employment of the appellant's ex-wife in August 2011. The matter was adjourned for a period of eight weeks to enable the respondent to serve this information.
6. At the hearing before Judge Birk the respondent had not produced any further evidence and the representative for the secretary of state applied for an adjournment in order to obtain the necessary information. The Judge recorded that the appellant initially opposed the adjournment request but then agreed to it.
7. The Judge refused an adjournment and recorded the decision as follows:

“6. I refused the adjournment request having considered Rule 21 and the overriding objective under Rule 4 of the Asylum and Immigration Tribunal (Procedure) Rules 2005 which is for appeals to be dealt with ‘fairly, quickly and efficiently as possible;’. I considered that insufficiently good reasons had been given by the respondent for the adjournment. I find that the respondent has had sufficient time to produce the documents it has access to and I note that the request had not been sent straight away after the hearing but a month later. There is no good evidence or realistic indication as to when the response will be likely to be forthcoming and no earlier request for adjournment has been made by the respondent until this morning. I find that the point had been reached when the appeal had to be decided on the evidence that was available”.
8. The Judge made the following findings:-

- “17. I reject the argument set out in the skeleton argument at paragraphs 9 to 11 that there is an onus on the respondent to provide evidence to assist the appellant in his claim, even if willing agreed to by the respondent, and that in the absence of which I should find in the appellant’s favour because the appellant has done all that can be done by himself to establish the point. My view is that the Immigration Rules still have to be satisfied by the appellant.
18. However, the Immigration Rules require evidence and that does not necessarily mean documentary evidence although that would be the best form of evidence in regards to this type of point. I therefore can consider all the evidence before me.
19. There is a previous determination on the same issues that are before me. There is no new evidence or legal argument that was presented to me that means that I should not treat the findings in that determination on the relevant issues in this appeal as the starting point for my findings.
20. The issue as to the appellant’s employment has at paragraph 4 of the previous determination has already been determined in his favour in that he is working and I have been provided with very full evidence in the appellant’s bundle to confirm this to be the case.
21. The main issue that remains is that of the ex-wife and providing evidence that she was exercising her treaty rights at the date of the decree absolute.
22. The appellant has produced the divorce petition which is dated 17.7.10 and I find that there is no reason, evidence or argument to go behind the findings that have already been made in respect of this document as set out at paragraph 6 and 7 of that determination. The finding was that this was insufficient evidence to show that the appellant’s ex-wife was exercising her treaty rights at the relevant time.
23. I find that the appellant is a credible witness who has provided all the documentation that he could. He has done everything within his means to establish the evidence on the outstanding issue and some of his efforts have been detailed in paragraph 4 of the previous determination.
24. He has made further evidence by contacting the respondent and requesting their assistance. He has through his legal representatives tried to contact Ms Liberman by email but her response on the 5.2.13 was,
- ‘I would like to inform you that I do not wish to get involved in Mr Liberman’s immigration matters. I also do not want to be contacted by him either directly or indirectly. I trust you will relay this message onto Mr Liberman.’*
25. The appellant’s written and oral evidence was not challenged but as he states he was not in direct contact with her at the time of the divorce. His evidence is therefore from third parties rather than his direct knowledge. His written evidence did not set out what he knew about her from third parties. I find that his oral evidence did not provide the detail in terms of who these friends were and who was involved in these conversations, when the conversations took place, what period

of time was being spoken about etc. and so this is insufficient evidence to be reliable evidence of her working at the relevant time.

26. There is also a statement from Mr Pavel Burkov dated 8.2.13. He did not attend the appeal hearing and there was no application for an adjournment to secure his attendance.

27. He states that,

*'I last spoke to Victoria Liberman in person (face to face) a few months ago (2012) at her home in south London. To the best of my knowledge and believe (sic) Ms Victoria Liberman is residing in the UK. I can also confirm that on the basis of the information I am receiving from her Miss Liberman is currently working in the UK at one of the London prisons.'*

28. I find his written evidence also to be insufficient to establish whether she was exercising her treaty rights in August 2011 because it refers to a period well after August 2011."

### **The Grounds of Appeal and Oral Submissions**

9. Ground 1 argues that there is a material irregularity because of the Judge's decision in relation to the adjournment. There was a joint application for an adjournment. The appellant supported the respondent's application. The appellant's witness, Mr Burkov, had been compelled to fly abroad on business the previous day and the First-tier Tribunal Judge was wrong to record at [26] that there was no application to adjourn in order for Mr Burkov to attend.
10. The Judge failed to consider Rule 21 of the 2005 Procedure Rules and she did not consider whether the appeal could be justly determined without an adjournment.
11. The Judge found that the appellant was a credible witness who had made every effort to obtain relevant evidence. It is clear that the Judge was not prepared to allow the appeal on the basis of the appellant's evidence and in the circumstances she should have granted an adjournment to enable the appellant's witness to attend for the respondent to comply with directions of the Tribunal.
12. The second ground of appeal argues that the Judge applied the wrong standard of proof and that she did not accept evidence that was unchallenged. The Judge found that the appellant was a credible witness who had done all that he could to establish that his wife was working at HMP Bromfield at the date of the divorce. The appellant was not cross-examined on this point and the Judge was not entitled to reject his evidence. Ground 3 argues that the Judge did not make clear findings, the Judge did not reject the appellant's evidence however it was not suggested that the ex-wife was not working, the unchallenged evidence was that she was working at the relevant time. The sole issue was whether it was more likely than not on the balance of probabilities that the appellant's ex-wife had been working at the relevant time.
13. Ground 4 argues that the Judge failed to have regard to all of the evidence, she failed to have regard to all of Mr Burkov's evidence

contained in his witness statement and to consider this in conjunction with the divorce petition which showed that the appellant's ex-wife was working as a prison officer at HMP, Bromfield just before the decree absolute was issued. There was an affidavit submitted from another friend, Tatiana which was in the respondent's bundle and the Judge did not take this into consideration.

14. Ground 5 argues that this was an appeal under the 2006 Regulations and not the Immigration Rules. It is unclear what particular evidence required by the Immigration Rules the Judge had in mind however the conflation of the Rules with the Regulations has infected the First-tier Tribunal's attitude to the evidence.
15. Both parties made oral submissions. Ms Norman submitted that on 19 May 2014 when the matter first became before the First-tier Tribunal the Presenting Officer, Counsel Mr A Duncan, made an undertaking on behalf of the respondent to the court that the Home Office would make enquiries in relation to the appellant's ex-wife and whether she was working or not at the relevant time. Mr Whitwell submitted a note prepared by Mr Duncan from that hearing which appeared to accord with that which Ms Norman asserted in relation to an undertaking having been given. Mr Whitwell indicated that there was nothing on the file to indicate that any progress had been made in relation to the enquiries. Mr Whitwell submitted that the undertaking was to make enquiries and there was no guarantee of the outcome of these enquiries and in his view there was no agreement made by the respondent that contact would be made with a third party namely Her Majesty's Revenue & Customs.
16. Mr Whitwell submitted that the reference to the Rules is a typographical error. It was not clear whether Tatiana Vincent's evidence was before the First-tier Tribunal. Ms Norman argued that she was deeply unimpressed by the Home Office's position because it was clear that it was envisaged that the respondent would make contact with HMRC in relation to the appellant's ex-wife.

### **Error of Law**

17. There were no credibility issues. The Judge dismissed the appeal on the basis of there being insufficient evidence. The evidence before the First-tier Tribunal was the oral evidence of the appellant and that in his witness statement of 15 May 2014. He and Victoria Liberman married on 16 September 2004. He is now married to a British citizen and they have a daughter who is also a British citizen. The appellant made efforts in order to contact his ex-wife so that she would confirm her employment position, but she refused to give any information.
18. The appellant relied on the divorce petition issued by his wife in which it is stated that the petitioner (the appellant's ex-wife) is by occupation a prison officer. His oral evidence was documented by the Judge at [25]. There was a witness statement of Mr Burkov of 8 February 2013. His evidence is that he has known Victoria Liberman for six years and he has been in occasional contact with her since she separated from the

appellant. He last spoke to her (face to face) in Summer 2012 and she is currently working in the UK at one of the London prisons.

19. The relevant date is that of 11 August 2011. The evidence before the Judge was that the appellant's ex-wife was working at the time of the issue of the divorce petition. This is indicated on the divorce petition and was not challenged. The appellant's evidence is that he has not had direct contact with his ex-wife but he knows from third parties that she was in employment at the relevant time. It appears that the Judge considered his evidence to be lacking in detail but he was not cross-examined and his evidence was not challenged. There was the evidence of Mr Burkov which established that he had received information that the appellant was currently working (at the time of his witness statement 8 February 2013) and he goes on to say that he understands that she has been a prison officer since the divorce. There was a letter from Ms Vincent which was not in the appellant's bundle but was submitted with the application. This does not appear to have been brought to the Judge's attention and it is not clear to me that the Judge had regard to it.
20. The Judge required direct evidence of some kind or another. Whilst the burden of proof is on the appellant, by requiring direct evidence of the ex-wife's employment the Judge applied a two high standard of proof. The appellant's evidence as recorded by the Judge at [25] was not speculative and it was based on information that had been given to him by another. Considering the evidence as a whole in my view the Judge applied too high standard of proof and this is a material error of law.
21. In the circumstances I set aside the decision of the Judge to dismiss the appeal under the 2006 Regulations and remake the decision.
22. In my view the evidence before the First-tier Tribunal was sufficient to discharge the burden of proof that rests on the appellant to establish that at the date of the divorce (the decree absolute) the EEA national in this case Victoria Liberman was exercising treaty rights. On this basis the appeal is allowed under the 2006 Regulations.

### **Notice of Decision**

The appeal is allowed.

No anonymity direction is made.

Signed Joanna McWilliam

Date 23 February 2015

Deputy Upper Tribunal Judge McWilliam