



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

Appeal Number: IA/43503/2014

THE IMMIGRATION ACTS

**Heard at Manchester
on 20 May 2016**

**Decision Promulgated
on 8 July 2016**

Before

UPPER TRIBUNAL JUDGE HANSON

Between

**BILAL QURESHI
(Anonymity direction not made)**

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mrs Zahoor

For the Respondent: Mr McVeety

DECISION AND REASONS

1. On 2 April 2015 First-tier Tribunal Judge Kempton dismissed the appellant's appeal against the respondent's decision of the 17 October 2014 refusing to issue a Residence Card in recognition of the appellant's entitlement to reside in the United Kingdom on the basis of a retained right of residence on divorce.
2. The respondent states that the appellant failed to present sufficient evidence to show he qualified under Regulation 10(5) of the Immigration

(European Economic area) Regulations 2006 ('the Regulations') by failing to show that his EEA family member was a qualified person at the point of divorce or that the appellant resided with her for at least one year during the marriage in the UK.

Background

3. At paragraph 19 of the determination the Judge refers to a written request having been made by the appellant's representative for an order against the Department of Works and Pensions (DWP) to disclose details of the sponsor's benefits in payment from the time of the separation/divorce. The Judge records that as the sponsor is not a party to the proceedings, and would have no notice of such a request, no such order could be made as it would be a gross invasion of the sponsor's privacy.
4. The Judge noted the appellant's evidence that his former wife was working at a company named Inventive when they were together and that a witness stated he dropped her off sometimes at this place. The appellant stated that in 2011 his wife became ill with epilepsy and claimed Disability Living Allowance (DLA) as a result of her illness [20].
5. The Judge did not dispute the fact the named company existed. The issue was the lack of any 'concrete' evidence of the appellant's former wife's circumstances in the period up to the divorce. The Judge analyses the evidence from HMRC referring to a benefits claim and the fact that Employment Support Allowance (ESA) for the former wife ended from 29 December 2010, meaning the ex-wife would have been required from this period to either claim Job Seekers Allowance (JSA) or find employment [25].
6. In paragraphs 26-28 the Judge finds:
 26. Accordingly, there is no evidence of economic activity from early 2011 onwards. There is no evidence that the sponsor was either working or made a fresh claim for ESA after it was refused at the end of 2010.
 27. Further evidence could have been obtained to assist the appellant. In particular a witness order could have been sought to cite the sponsor's brother and employer to give evidence. Other relatives of the couple could have been cited as witnesses to give evidence about the sponsor's financial circumstances.
 28. Regrettably in all the circumstances, I have no alternative but to refuse the appeal again on the basis of the information before me. However, it may be that the appellant will take legal advice in relation to what now requires to be done in order to make a successful application in the future."
7. Permission to appeal was granted by another judge of the First-tier Tribunal in the following terms:
 3. Arguably the Judge's approach [19] to the issue of whether the Appellant should be granted the order sought in relation to the DWP records of benefits paid was wrong. It is arguable that the judge did not

make any clear finding of fact as to whether or not she accepted that Appellant's assertion that he could not contact his former spouse, or, in that event consider whether she should exercise her powers under the Procedure Rules to require the Respondent to provide the information that might be necessary to determine the appeal, even if there was no primary obligation upon the Respondent to make enquiries of other government departments; Amos [2011] EWCA Civ 552 @ para 40-2."

Discussion

8. The application for disclose was not renewed to the Judge on the day, Mrs Zahoor stating to the Upper Tribunal that she just took it that the statement by Judge Kempton that there was no need to pursue the disclose application was the decision of the court. No further submissions were made as a result.
9. In relation to the application for disclosure the appellant relied upon rule 15 of the Tribunal Procedure (First-tier Tribunal) (Immigration and Asylum Chamber) Rules 2014 which states:

'Summoning or citation of witnesses and orders to answer questions or produce documents

15.—

 - (1) On the application of a party or on its own initiative, the Tribunal may—
 - (a) by summons (or, in Scotland, citation) require any person to attend as a witness at a hearing at the time and place specified in the summons or citation; or
 - (b) order any person to answer any questions or produce any documents in that person's possession or control which relate to any issue in the proceedings.
 - (2) A summons or citation under paragraph (1)(a) must—
 - (a) give the person required to attend 14 days' notice of the hearing or such shorter period as the Tribunal may direct; and
 - (b) where the person is not a party, make provision for the person's necessary expenses of attendance to be paid, and state who is to pay them.
 - (3) No person may be compelled to give any evidence or produce any document that the person could not be compelled to give or produce on a trial of an action in a court of law in the part of the United Kingdom where the proceedings are to be determined.
 - (4) A summons, citation or order under this rule must—
 - (a) state that the person on whom the requirement is imposed may apply to the Tribunal to vary or set aside the summons, citation or order, if they have not had an opportunity to object to it; and
 - (b) state the consequences of failure to comply with the summons, citation or order.'
10. One issue that arises is that the application is made to compel the DWP to disclose the information. The DWP is a department of State and not a person. It was not made out that the DWP has a separate legal persona in the same way as a limited company. The application did not seek the

order against any named official of the DWP or the Minister of State. It was not made out that rule 15 which applies to a person and the ability to compel them to provide evidence can be used to compel a government department. Mrs Zahoor accepted that it should have been an official of the DWP who was named in the application.

- 11.** Mrs Zahoor also submitted the tax documents provided at paged M1 and M2 of the respondents bundle were incorrect. This is a witness statement provided by a named official of HMRC in relation to Anisa Razaq, the appellants former spouse, in which the following information is provided:

Pay As You Earn (PAYE) Employment

Tax Year	Employers name	Pay	Tax deducted
2008/09	No employment record		
2009/10	No employment record		
2010/11	No employment record. Records show claim for benefits.		
2011/12	No employment record. Records show claim for benefits.		
2012/13	No employment record. Records show claim for benefits.		
2013/14	No employment record. Records show claim for benefits.		
Current Employers	Inventive UK Ltd. (commenced 23 June 2014)		

- 12.** The appellants claim is not made out as the witness statement shows the information held in the records of HMRC. If no income tax was paid there will be no record of employment or related tax receipts. The Judge was entitled to put weight upon this document from an official source in the absence of evidence rebutting the indication the EEA national was not employed until 23 June 2014.
- 13.** It was also submitted that Ms Razaq was a qualified person exercising treaty rights as she was not able to work following the diagnosis of epilepsy. She had worked in 2007 but ceased work in 2011. It was argued Ms Raza was a qualified person as a worker unable to work at the date of the decree absolute, said to be 18 January 2013. It was submitted the final finding in paragraph 25 is 'mere speculation'.

- 14.** The appellant has failed to establish any arguable legal error material to the decision to dismiss the appeal.
- 15.** If the point in relation to the status of the DPW is correct the application for disclosure was defective and no procedural error arises in the decision of the Judge in relation to this matter. The Judge refers in paragraph 27 to the option available to the appellant of calling family members to provide the required evidence which the appellant failed to do. HMRC provided details of the information they held to the respondent who disclosed it to the Tribunal. The Judge accepted the named company existed but the evidence was that for the majority of the relevant period there was no record of the EEA national having an employment record and to be in receipt of benefits and no evidence of the exercise of treaty rights at the date of divorce.
- 16.** There is no evidence of an application being made to summons the appellant's former wife either.
- 17.** In Amos v Secretary of State for the Home Department; Theophilus v Secretary of State for the Home Department [2011] EWCA Civ 552 the Court of Appeal held that a divorced spouse had to establish that he or she had the right of residence before the question whether, notwithstanding the divorce, the right had been retained by Article 13 of the Citizens Directive could be determined. In relation to evidential issues, it must be shown that the EEA national was working, or otherwise exercising Treaty rights, until the termination of the marriage. It is accepted that if the couple separated acrimoniously and have not stayed in touch with each other that can be difficult. Lord Justice Stanley Burnton rejected an argument that, in such a case, the Secretary of State should assist the third country national to obtain the missing information about the divorced EEA national. His Lordship stressed the "essentially adversarial" nature of immigration appeals, as opposed to the inquisitorial nature of welfare benefits adjudication. Even in a benefits case, there was no authority for the contention that the department concerned had a duty to obtain information from other government departments. Just so, in a case under the EEA Regulations, the Home Office could not be expected to ask HM Revenue & Customs or the Department for Work and Pensions whether the EEA national was working or was self-employed. His Lordship does allude, however, to the possibility of the non-EEA national former spouse asking the Tribunal, on an appeal against the refusal of a permanent residence card, to issue a witness summons for the attendance of the EEA national under rule 50 of the Procedure Rules 2005. This is a power which is very rarely exercised, but there is no reason why it should not be in a case such as this. Tim Eicke QC also mentioned the possibility of seeking a direction under rule 45 for the Secretary of State to provide any information necessary for the determination of the appeal. But as the Home Office cannot be forced to obtain information from other government departments, such a direction would only yield the information which the Home Office happens to have itself, and there might be nothing at all on the uncooperative former spouse.

18. The appellant has failed to establish any legal obligation upon the Secretary of State for the Home Department, who is a party to the proceedings, to approach the DWP for additional evidence. Mr McVeety also stated that he was unaware if the arrangement between HMRC and the Home Office, which provides a system for the Home Office to make a limited number of request for information held by HMRC, exists between the Home Office and DWP. It was also submitted by Mr McVeety that if the appellants had not taken all steps to secure the evidence himself there can be no duty upon the Secretary of State for the Home Department to help.
19. It has not been made out that the statement by the Judge in the concluding part of paragraph 25 of the decision is speculative. The evidence shows Ms Razaq was refused ESA meaning she has no income and no evidence of exercising treaty rights unless she claims JSA or works. That is factually correct. It is also noted that DLA is a non means contribution benefit which allows a person to meet their care and disability needs and still work.
20. Ms Razaq came off ESA in 2010 creating the need for her to prove she was a genuine jobseeker or had obtained a job. If no job had been secured it was necessary to show there was a reasonable prospect of employment. No evidence was provided of the same. If Ms Razaq was doing neither of these things, and doing nothing, she could not show she was a qualified person. On the basis of the evidence made available to the Judge the finding that it had not been shown Ms Razaq was exercising treaty rights for the relevant period is a decision that has been shown to be one reasonable open to the Judge on the evidence.
21. The submission in reply by Mrs Zahoor that the application should have been "treated pragmatically" is noted but there is no evidential burden upon the DWP to assist, steps could have been taken by the appellant but were not, and the claim the respondent should have assisted more than she did is not made out.
22. No legal error material to the decision is made out. The decision shall stand.

Decision

23. **There is no material error of law in the First-tier Tribunal Judge's decision. The determination shall stand.**

Anonymity.

24. The First-tier Tribunal did not make an order pursuant to rule 45(4)(i) of the Asylum and Immigration Tribunal (Procedure) Rules 2005.

I make no such order pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008.

Signed.....

Upper Tribunal Judge Hanson

Dated the 7 July 2016