



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: EA/00812/2017

THE IMMIGRATION ACTS

Heard at Field House
On 8 June 2018

Decision & Reasons Promulgated
On 14 June 2018

Before

DEPUTY UPPER TRIBUNAL JUDGE JORDAN

Between

AMDADUL KARIM CHOWDHURY

Applicant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the appellant: Mr J. Sarker, Counsel, instructed by Adam Bernard Solicitors
For the respondent: Ms J. Isherwood Home Office Presenting Officer

DECISION AND REASONS

1. The appellant is a citizen of Bangladesh who was born on 20 April 1989. He appeals against the decision of First-tier Tribunal Judge Norris promulgated on 29 November 2017 dismissing his appeal against the decision of the Secretary of State made on 12 January 2017 refusing to issue him with a residence card acknowledging his entitlement to a retained right of residence.
2. The appellant entered the United Kingdom on 15 October 2008 as a student with valid leave until April 2012. In 2009 he met Ms Juarte Zelekiene. The couple were married on 7 January 2011. Unfortunately, they were separated in 2012. Ms Zelekiene told him that she had met someone else. On the following day she told him that she intended to divorce him. Thereafter he was unable to contact her by telephone. She obtained a decree absolute on 10

May 2016 which the appellant discovered through his own solicitors. By then, the couple had been separated for a period of approximately four years during which time the appellant had had no further contact with her.

3. Ms Zelekiene is a Lithuanian citizen. The rights that the appellant seeks to engage are those contained in the Citizens Directive as incorporated into UK domestic law by the Immigration (European Economic Area) Regulations 2006. Regulation 10(5) and (6) permit a non-national once lawfully married to a Union citizen to acquire a retained right of residence notwithstanding his divorce provided the marriage had lasted for at least three years and the parties had resided in the United Kingdom for at least one year during its duration. Additionally, the applicant must, at the material time, be a worker or self-employed or self-sufficient within the meaning of reg. 6. There is no issue that the appellant met these requirements.
4. However, and crucially, the burden is placed upon the appellant to establish that he ceased to be a family member of a qualified person on 10 May 2016. This required him to establish that his wife was exercising Treaty rights by working in the United Kingdom on 10 May 2016.
5. The evidence, however, that the appellant was able to advance ended in 2012 at the time the couple separated. At that time, the appellant knew that his wife had left the employment of Kebabish Original. Although he visited that establishment, it is unsurprising that the company was unable to provide information about her current whereabouts or employment. It is difficult to understand why the appellant approached them as he knew she no longer worked there. He knew that she had commenced work at Adelie Foods but, in the course of a telephone conversation, he was told they would not (or could not) disclose any information. The appellant visited the old address but, once again unsurprisingly, no-one there was able to speak of her present location. Nor could it reasonably have been expected that they were able to do so. His wife had left him and he had then moved away.
6. On this material it was obvious to the respondent and to the First-tier Judge that the appellant could not establish his former wife was working at the time of the divorce. The most up-to-date information that the appellant was able to provide was that a former colleague had met his wife whilst shopping and that she had had a child a few months before. This said nothing about the material issue, namely whether she was working in May 2016.
7. Notwithstanding this, the appellant has sought to argue that there was a legal obligation upon the Secretary of State to provide the appellant with the information that would establish (or fail to establish) her position as a worker in May 2016. In doing so Mr Sarker sought to rely upon the decision of the Court of Appeal in *Amos v Secretary of State for the Home Department* [2011] EWCA Civ 552. In paragraph 34 of the judgment of Stanley Burnton LJ (with whom the other members of the Court of Appeal agreed), he said:

I would reject Miss Theophilus' contention that the Secretary of State was required to assist her to establish her case. The procedure in appeals before the Tribunal are essentially adversarial: the appellant seeks to show that the decision of the Secretary of State was unlawful or otherwise wrong. The Secretary of State must present the facts as known to her fairly, and seek a decision of the Tribunal that accords with the law, but to go beyond those requirements would be irrational: it would be to require the Secretary of State to take steps to prove that her own decision was wrong.

8. The Court of Appeal acknowledged the difficulties in which an appellant might be placed to ascertain the relevant facts after a long period of separation. However, the procedural rules as Stanley Burnton LJ pointed out in paragraph 40 permitted evidential flexibility to the extent that hearsay evidence was admissible and that an appellant advocate was in a position to apply under Rule 50 of the Procedure Rules for a witness summons. A party to an appeal might also seek a direction under Rule 45 requiring the Secretary of State to provide relevant information.
9. The Secretary of State has himself addressed this issue in his own policy statements. On 4 August 2011 the respondent provided a revised document entitled '*Pragmatic approach in cases where an applicant is unable to provide required evidence*'. The purpose of the Notice was to clarify the process that caseworkers were required to follow when a family member of a Union citizen applied for documentation under the 2006 Regulations but was unable to demonstrate that he met all of the requirements '*due to the exceptional circumstances of the application*'. Caseworkers were enjoined to adopt a pragmatic approach where there had been a breakdown in the relationship between the applicant and his EEA national spouse. Exceptional cases were identified as being where the applicant provided proof of being the victim of domestic violence or where the relationship had ended acrimoniously and the applicant provided evidence to show that he had made every effort to provide the required documents. By way of an example, it was suggested that attempts might be made to make contact with the spouse during divorce proceedings. The note continues:

Caseworkers must look at each case according to its individual merits and where they are satisfied that there is a valid reason why the applicant is unable to get the required evidence, enquiries must be made on behalf of the applicant where possible. Caseworkers must get the agreement of their senior caseworker before making any such enquiries.

10. There is a clear implication upon the resources of the Home Office and the Inland Revenue if it were to become a routine requirement imposing upon the respondent a duty to obtain evidence from HMRC. Accordingly, a quota system has been introduced which effectively limits the number of cases in which such a tracing exercise is to be conducted to cases where the applicant has exhausted all reasonable lines of enquiry.

11. The First-tier Tribunal Judge concluded, as a matter of fact, that the appellant had not taken reasonable steps to attempt to gain such evidence. The appellant merely relied upon the fact that the marriage had broken down acrimoniously. However, the evidence of this was only that the appellant's wife had left the matrimonial home because she had found someone else. Those circumstances alone would not amount to a reason why attempts at tracing could not be conducted. Importantly, the appellant provided evidence that he had solicitors acting for him at the time of his divorce. It is to be inferred that the appellant's spouse also instructed solicitors to petition for divorce. Inevitably, they would have had material which related to the petitioner's whereabouts and current circumstances. There is no reason to assume that those solicitors would refuse to reveal information reasonably sought by the appellant's solicitors as to their client's current circumstances. The fact that they may have been able to rely upon principles of professional privilege does not mean that they would not have answered enquiries that did not prejudice their client. Indeed, it would have been possible to elicit from them information that their client was working but that they were unable to provide the particular information about the location or nature of her work. There was no evidence to suggest such a level of animosity between the appellant and his former wife that not even the most meagre information would have been provided. If necessary, it would have been open to the appellant's representative to require the solicitor to attend by way of a witness summons to explain why basic evidence about their client's circumstances (without identifying them in detail) could not have been provided. Even evidence from the solicitor that he knew those circumstances but refused to reveal them would have been material.
12. There was nothing in my judgement that gave rise to an obligation upon the Secretary of State to approach HMRC in order to elicit information which may establish the working practice of the appellant's former spouse. Absent such an obligation, the appellant's case was bound to fail because he could not establish the requirements of the 2006 Regulations had been met.

DECISION

The decision of the First-tier Tribunal Judge reveals no error of law and his determination shall stand.

ANDREW JORDAN
DEPUTY UPPER TRIBUNAL JUDGE

Date: 13 June 2018