



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: EA/07118/2016

THE IMMIGRATION ACTS

Heard at Field House
On 3 July 2018

Decision & Reasons Promulgated
On 21 September 2018

Before

UPPER TRIBUNAL JUDGE BRUCE

Between

AMILSON REIS GUIMARAES
(NO ANONYMITY DIRECTION MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mrs S.Ali, Counsel instructed by UK Law
For the Respondent: Mr D Clarke, Senior Home Office Presenting Officer

DECISION and REASONS

1. The Appellant is a national of Brazil born on the 9th July 1980. He appeals with permission the decision of the First-tier Tribunal (Judge Eldridge) to dismiss his appeal against the Secretary of State's decision to refuse to grant him a permit recognising his 'retained' right of residence as the former spouse of an EEA national exercising treaty rights in the United Kingdom.
2. The First-tier Tribunal begins its deliberations by noting the undisputed fact that the Appellant was formerly granted a residence card as the spouse of an EEA national, Portuguese national Mrs Liliana De Almeida Silva. They were married in Brazil on the 18th September 2010 and divorced in that country on the 5th December 2015. It was accepted that theirs had been a genuine marriage. What was in dispute was whether or not the couple had spent at least one year of their marriage living together in the United Kingdom. There was a paucity of evidence

relating to their lives in this country. The Tribunal was not satisfied that the Appellant had discharged the burden of proof on this point, noting that there was insufficient evidence to show that they had been living together here. Furthermore he had also failed to demonstrate that his former wife had been exercising treaty rights at the date that their marriage was terminated. The appeal was therefore dismissed.

3. Permission was granted by First-tier Tribunal Davies on the 24th April 2018, on two grounds. He considered it arguable that the Tribunal's findings about the length of time that the couple had resided in this United Kingdom was "at odds" with the Respondent's acceptance that the marriage had subsisted for five years. It was further considered arguable that the Tribunal had failed to have regard to the Secretary of State's obligations, as reflected in her published policy, in assisting persons in the position of the Appellant to obtain information about former spouses, for instance from the HMRC.

Discussion and Findings

4. The operative legal framework, it is agreed, is Regulation 10(5) of the Immigration (European Economic Area) Regulations 2006:

"Family member who has retained the right of residence"

10.

(1) In these Regulations, "family member who has retained the right of residence" means, subject to paragraph (8), a person who satisfies the conditions in paragraph (2), (3), (4) or (5).

...

(5) A person satisfies the conditions in this paragraph if –

(a) he ceased to be a family member of a qualified person on the termination of the marriage or civil partnership of the qualified person;

(b) he was residing in the United Kingdom in accordance with these Regulations at the date of the termination;

(c) he satisfies the condition in paragraph (6); and

(d) either –

(i) prior to the initiation of the proceedings for the termination of the marriage or the civil partnership the marriage or civil partnership had lasted for at least three years and the parties to the marriage or civil partnership had resided in the United Kingdom for at least one year during its duration;

(ii) the former spouse or civil partner of the qualified person has custody of a child of the qualified person;

(iii) the former spouse or civil partner of the qualified person has the right of access to a child of the qualified person under the age of 18 and a court has ordered that such access must take place in the United Kingdom; or

(iv) the continued right of residence in the United Kingdom of the person is warranted by particularly difficult circumstances, such as he or another family member having been a victim of domestic violence while the marriage or civil partnership was subsisting.

(6) The condition in this paragraph is that the person –

(a) **is not an EEA national but would, if he were an EEA national, be a worker, a self-employed person or a self-sufficient person under regulation 6;** or

(b) is the family member of a person who falls within paragraph (a).

5. Before me it was accepted by Mr Clarke that the Appellant could meet the requirements of Regulation 10(5)(d)(i). There was no dispute that the marriage had lasted five years, and that for at least one year of that marriage both parties were residing in the United Kingdom. The First-tier Tribunal had erred, at its paragraph 21, when it directed itself that the Appellant was required to show that he had been living *with* his wife during the year in question. It was enough that they had both resided in the United Kingdom. In PM (EEA – spouse – “residing with”) Turkey [2011] UKUT 89 (IAC) the Tribunal held:

Regulation 15(1)(b) of the Immigration (European Economic Area) Regulations 2006 applies to those who entered a genuine marriage where both parties have resided in the United Kingdom for five years since the marriage; the EEA national’s spouse has resided as the family member of a qualified person or otherwise in accordance with the Regulations and the marriage has not been dissolved. The “residing with” requirement relates to presence in the UK; it does not require living in a common family home.

6. The question remained whether the Appellant could demonstrate that his ex-wife had been, at the operative time, a ‘qualified person’ when he ceased to be her family member. The Tribunal had held, at its paragraph 21, that there was no evidence that Ms De Almeida Silva had been exercising treaty rights in the United Kingdom at any time during the marriage. The ground take issue with this conclusion on the grounds that the Tribunal had failed to consider the argument put that this had been an acrimonious divorce, and that Ms De Almeida Silva had refused to assist the Appellant by giving him any evidence at all. The decision to dismiss the appeal for a lack of evidence was therefore “wholly unfair and unjust”. Reliance was placed on s 50 of the United Kingdom Borders Act 2007:

40. Supply of Revenue and Customs information

- (1) Her Majesty's Revenue and Customs (HMRC) and the Crown Prosecution Service (the CPS) may each supply the Secretary of State with information for use for the purpose of –

...

- (j) doing anything else in connection with the exercise of immigration and nationality functions.

The grounds further place reliance on unspecified Home Office policy to submit that the onus was on the Secretary of State to request the relevant information from HMRC about whether Ms De Almeida Silva had been working.

7. I am not satisfied that this ground has been made out. Section 40 of the UK Borders Act 2007 does not impose any duty on the Secretary of State to conduct inter-departmental enquiries. It provides only that the HMRC *may* provide the Secretary of State with information for the purpose of exercising immigration control. The grounds do not specify what Home Office policy might suggest that it is for the Respondent to conduct, of her own volition, enquiries into the tax affairs of third parties. The only relevant policy that I can find is *Free movement rights: retained rights of residence* (Version 3.0). Under the heading “Applicants who are unable to provide all the evidence of their EEA sponsor” the guidance reads:

“Where a relationship has broken down due to domestic violence or other difficult circumstances it may not always be possible for the applicant to provide all of the necessary documents about the EEA national sponsor. In such circumstances, you can make further enquiries about the EEA national sponsor’s status but **only where the applicant has shown they have made every effort to provide the necessary evidence**”.

(emphasis added).

8. In this case there had been no request by the Appellant for an *Amos* direction¹. The Appellant had not satisfied either the Secretary of State for the Home Department or the First-tier Tribunal that he had made “every effort” to provide the necessary evidence: in fact the Tribunal had expressly found that he had failed to do so. In those circumstances it cannot be said that there was a failure to apply policy, and there was no statutory obligation as suggested by the grounds. The failure was on the part of the Appellant (or his representatives) to seek the appropriate order from the First-tier Tribunal prior to the appeal being listed. This ground of appeal is therefore without merit and it follows that the First-tier Tribunal’s error in respect of ground (i) is immaterial. Its decision must be upheld.

¹ *Amos and Ors v Secretary of State for the Home Department* [2011] EWCA Civ 55 in which the Court of Appeal held that there was no procedural obligation upon the Secretary of State for the Home Department to make enquiries, but that it remains open to appellants to make an application to the Tribunal for directions to that effect.

Decisions

9. The determination of the First-tier Tribunal is upheld.
10. I was not asked to make a direction for anonymity, and on the facts of the case saw no reason to do so.

Upper Tribunal Judge Bruce
8th September 2018