



Upper Tier Tribunal
(Immigration and Asylum Chamber)

Appeal Number: EA/04441/2017

THE IMMIGRATION ACTS

Heard at Field House
On 8 May 2019

Decision and Reasons Promulgated
On 10 May 2019

Before

Upper Tribunal Judge McWilliam
Deputy Upper Tribunal Judge Pickup

Between

Andrew Anthony Akajoiyi
[Anonymity direction not made]

Appellant

And
Between

Secretary of State for the Home Department

Respondent

Representation:

For the appellant: Mr M Ntochukwu, instructed by Voice for the Voiceless UK
For the respondent: Mr J Whitwell, Senior Home Office Presenting Officer

DECISION AND REASONS

1. This is a decision to which both judges have contributed.
2. This is the appellant's appeal against the decision of First-tier Tribunal Judge Steer promulgated 24.5.18, dismissing his appeal against the decision of the Secretary of

State, dated 24.4.17, to refuse his application made on 25.10.16 for an EEA Permanent Residence Card, pursuant to a retained right of residence as the former spouse of an EEA national following termination of marriage, pursuant to regulations 10 and 15 of the Immigration (EEA) Regulations 2016.

3. First-tier Tribunal Judge Alis granted permission to appeal on 31.7.18.
4. The appeal was listed in the Upper Tribunal before Deputy Upper Tribunal Judge O’Ryan, who in the decision promulgated 27.11.18 found such error of law in the decision of the First-tier Tribunal as to require it to be set aside and remade in the Upper Tribunal. For that purpose directions were given for the provision of a replacement, consolidated bundle of all materials relied on by the appellant in support of the appeal, as set out in Judge O’Ryan’s decision.
5. Judge O’Ryan clearly intended the resumed appeal hearing to be listed before him but, as that has not been practically possible without undue delay, the Principle Resident Judge made a transfer order on 28.2.19 for the appeal to be heard by a differently constituted tribunal.
6. At the hearing before us, Mr Ntochukwu submitted the following documents to which we have given careful consideration:
 - (a) The revised bundle, comprising 78 pages;
 - (b) The skeleton argument;
 - (c) A copy of the Home Office Guidance on retained rights of residence, dated February 2019;
 - (d) The following case law: NA (Pakistan) [2014] EWCA Civ 995; OA (EEA - retained rights of residence) Nigeria [2010] UKAIT 00003; and Baigazieva [2018] EWCA Civ 1088.
7. It was common ground that the appellant was previously married to NM, a Spanish national. We were assisted by Judge O’Ryan’s summary of the factual issues, set out at [11] of his decision, of which both representatives agreed the following were relevant in light of the concessions previously made and the current case law:
 - (a) What was the date of the commencement of the divorce proceedings which led to the termination of the marriage by decree absolute on 16.11.16 (applying Baigazieva);
 - (b) Whether the appellant’s former spouse (NM) was a qualified person at that date;
8. Judge O’Ryan had recorded that whether the appellant met the requirements of regulation 10(6) so that he would, if an EEA national, be a qualified person under the regulations was not in dispute. Applying Gauswami (retained right residence – jobseekers) India [2018] UKUT 295, the relevant date for that is the date of the decree

absolute, at which point the appellant was no longer the family member of the EEA national. Mr Whitwell confirmed that on the unchallenged evidence that the appellant has been lawfully employed as a manager by Tesco for several years this requirement was met. It follows that this is not an issue requiring resolution in this appeal.

9. On that basis it was also not in contention that if the appellant can bring himself within regulation 10(5) he would not only have a retained right of residence but a right to permanent residence under regulation 15, having resided in the UK in accordance with the regulations for a continuous period of five years. However, Mr Whitwell challenged whether the evidence available was sufficient to demonstrate that regulation 10(5) is met.

Findings and Reasons

10. On the evidence and for the reasons summarised below, we were not satisfied that the appellant has demonstrated on the balance of probabilities that NM was a qualified person at the date of commencement of divorce and thus find that regulation 10(5) is not met and the appeal must fail.

The Relevant Date

11. Baigazieva records the concession of the respondent that in order to meet the requirement for a retained right of residence arising from regulation 10(5) a third country national does not need to demonstrate that the former EEA spouse exercised Treaty rights as a 'qualified person' until the divorce itself. Rather, it is sufficient to show that the former EEA spouse exercised Treaty rights "until divorce proceedings were commenced."
12. From the documentary evidence we find that the petition for divorce at [30] in the appellant's bundle bears a signature dated 23.2.15. However, it was received by the court on 8.4.15 and the proceedings were not issued until 22.4.15.
13. Mr Ntochukwu argued, relying on Article 13(2) of the Directive on which regulation 10(5) is based, that the relevant date for the termination of marriage was the date on which the appellant signed his divorce petition. However, we reject that argument as the document could be signed at any time prior to issue, in theory months if not years in advance. The date at which the legal proceedings for divorce commenced is that of the formal issue of the divorce proceedings, 22.4.15. We considered but in the light of the evidence as a whole and the matters set out below, we rejected as not credible the appellant's claim that he had provided the signed document to his legal representatives and fully expected the petition to have been lodged immediately. There is no evidence of any legal representative involvement in the divorce proceedings. The address given for service is that of the appellant. It would have been open to the appellant to support his factual claim of the history of lodging the petition by adducing evidence from his legal representative or some other documentation that shows he had instructed legal representation at that time. No such evidence was adduced.

14. In the circumstances, we find that the relevant date for the commencement of divorce proceedings is that of 22.4.15 and we have considered the evidence overall on that basis.

The Appellant's Oral and Documentary Evidence

15. Mr Ntochukwu chose to present his case by calling the appellant as a witness, relying on his new statement of 5.4.19. Further questions were asked in chief and he was cross-examined by Mr Whitwell. A full note of the oral evidence and subsequent submissions of the two representatives is with the tribunal's case file and need not be recited here.
16. However, we found the appellant a poor and inconsistent witness in his own cause. His evidence was at times internally inconsistent and at other times inconsistent with the documentation he relies on.
17. We note, for example, that the divorce petition asserts that the appellant and his former spouse last lived together at an address in Peckham which is the address given for service on the respondent to the petition. The basis of the petition is that the parties had lived apart for a continuous period of at least two years immediately preceding the presentation of the petition; see page 33. The narrative statement of case at 34 claims that the appellant moved out of the matrimonial home on 7.1.13 and they had lived apart since then. However, the appellant's oral evidence was somewhat different. He told the tribunal that he and his wife separated a week before the signing of the petition, i.e. in February 2015. However, he told Mr Whitwell that he only spoke to his wife once in 2015 and that was over the phone sometime, he thought, in January, but was not sure of the month. When the statement of case in the divorce petition was put to him he had no answer other than to repeat that he was trying to work things out with his wife. He said repeatedly that he followed after her and tried to make it work, but failed to provide any clear answer as to whether they had cohabited since January 2013. In re-examination he confirmed that he only spoke to his wife once in 2015. Asked if they had lived together after filing the divorce petition he said he tried but it didn't work. Specifically asked again if they had lived together at any time or place after January 2013, he said they did but when asked for details said only that he tried to meet her but it didn't work. It appeared to us that the appellant was being vague and evasive, perhaps because of the inconsistency between his account and the documentary evidence. We were not satisfied that the appellant was stating clearly that had had any contact with his wife since separating in January 2013, other than a single phone call some time before signing the divorce petition in February 2015. There was no explanation for the inconsistency in his account, telling the tribunal that he and his wife separated a week before he signed the petition.
18. Given that there is no challenge to the fact of marriage or that it is other than genuine, and given the specific requirements of the regulations as clarified by the case law referred to above, we accept that whether and when and for how long the appellant and his wife were cohabiting is not directly relevant to the question

whether she was a qualified person at the date of the commencement of the divorce proceedings. However, this issue bears on not only the appellant's overall credibility but also directly on the reliability of his claim that he knew that his former wife was working as a self-employed hairdresser and 'general house assistant' at the date of commencement of the divorce proceedings. Asked repeatedly how he knew she was working at that time, his answers were unsatisfactory and vague. Mr Whitwell submitted in closing that it came down to no more than the appellant saying that he knew because he knew. He told the tribunal he had not discussed her employment in the one phone call they had in early 2015. He also made it clear that he had not asked her at any time for evidence of her continuing employment for the purpose of his EEA application.

19. The appellant has been unable to produce any documentary evidence to support the claim that his former spouse was working at the date of commencement of divorce proceedings, which we have found must be taken as 22.4.15, other than the HMRC document at page 27 of the bundle. This only covers the period to the end of the tax year 5.4.15 and does not extend to the date the divorce petition was issued by the court. Mr Whitwell made the point that there is no indication from this document as to when the claimed self-employed earnings of £10,313 were made; suggesting it could have been during the previous year, after 6.4.14. We make clear that we do not take as a point against the appellant the submission of Mr Whitwell that as other documents were found to be suspect, such as the HMRC document at page 7 of the bundle which bears a Santander logo, the other documents should be regarded as likewise suspect. However, we were left far from satisfied as to credibility of the appellant's explanation as to how he came into possession of the HMRC document at page 27 for the 2014/15 tax year. The document purports to have been created on 6.8.16, long after the appellant separated from his former spouse on any of the various versions of events, either in 2013 or 2015. He initially said he obtained this in 2015, which cannot be correct. Then he said he couldn't remember. Eventually, in response to the leading questions of Mr Ntochukwu, pointing him to the date shown on the document, he said he got it in 2016. He claimed he received it from Maria, a friend who was trying to mediate between his former wife and himself. There was no supporting evidence for this account which is not mentioned in his statement or any other documentation. Further, there were no invoices, receipts, bank statements, or other evidence of the claimed employment. We note that whilst there are some relevant HMRC and other documents suggesting that the former wife was working in earlier years, including 2010-11, the documentation submitted to the respondent in support of the application had significant gaps of years. Whilst it is not necessary for the appellant to demonstrate a continuity of self-employment, or her being a qualified person over a period of five years, which was one of the errors of law found to have infected the First-tier Tribunal decision, the intermittent and somewhat unsatisfactory nature of the evidence tends to undermine the reliability of the claim that he knows that his former wife was working at the date of commencement of divorce proceedings.
20. We accept that it can be difficult to obtain necessary documents in relation to a former spouse's employment, particularly when the ongoing relationship may be

less than cordial. However, we note that not only was the appellant's evidence to the effect that he did not ask his former wife for documents to prove her employment, and did not mention her employment in their 2015 phone call, but he has not asked the respondent for assistance, or applied to the court for an Amos direction for production of documents, or for the former wife to be summoned to court as a witness.

21. Mr Ntochukwu's submission was that it was safe for the Tribunal to assume that if the former wife was qualified by working as a self-employed person up to 5.4.15, which he submitted was adequately demonstrated by the HMRC document, she must have equally been qualified a short time later, on either 8.4.15, when the petition was received by the court, or even 22.4.15, when divorce proceedings were formally issued. He suggested the difference was *de minimis*. In light of the inconsistent and unreliable evidence of the appellant as to his last contact with his former wife and the unsatisfactory explanation for coming into possession of her HMRC record in 2016, as well as the generally unsatisfactory nature of the evidence as a whole, we find we cannot make the assumption or inference suggested by Mr Ntochukwu. We remain far from satisfied that the HMRC document is reliable evidence of the former spouse being a qualified period at any time in 2015, and do not accept that it can properly be interpreted to cover the date at which divorce proceedings were commenced, namely 22.4.15 or even 23.2.15, when he signed the petition.
22. Considering the evidence as a whole, we were far from satisfied that the appellant does have any reliable knowledge as to whether his former wife was working at the date of commencement of divorce proceedings. On one of the versions of events, he has had only one telephone contact with her since he left the matrimonial home in 2013, and in that call he did not ask her about her employment at all. Some parts of his evidence are so mutually inconsistent that we are satisfied that it cannot be true that he and his former spouse separated to go their own ways in February 2015, as he told the tribunal. This, together with the other difficulties in the evidence highlighted above, substantially undermines the reliability we can place on the remainder of his evidence, including the claim that he 'knows' that she was working at the relevant time of the commencement of divorce proceedings.
23. In the circumstances, and for the reasons set out above, we find that the appellant has failed to demonstrate that the requirements of regulation 10(5) have been met. Specifically, we find that the appellant has failed to demonstrate on the balance of probabilities that his former spouse was a qualified person at the date of commencement of divorce proceedings. It follows that he is not entitled to a retained right of residence and in consequence the claim for recognition of a permanent right of residence must also fail.

Decision

24. The making of the decision of the First-tier Tribunal did involve the making of an error on a point of law such that the decision should be set aside.

We set aside the decision.

We remake the decision in the appeal by dismissing it.

Signed

DNU Pickup

Deputy Upper Tribunal Judge Pickup

Dated

Anonymity

We have considered whether any parties require the protection of any anonymity direction. No submissions were made on the issue. The First-tier Tribunal did not make an order pursuant to rule 13(1) of the Tribunal Procedure Rules 2014.

Given the circumstances, we make no anonymity order.

Fee Award

Note: this is not part of the determination.

We make no fee award.

Reasons: As the appeal has been dismissed there can be no fee award.

Signed

DNU Pickup

Deputy Upper Tribunal Judge Pickup

Dated