



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: EA/01270/2020

THE IMMIGRATION ACTS

Heard at Civil Justice Centre, Manchester
(remote hearing)
On the 1st October 2021

Decision & Reasons Promulgated
On the 15 November 2021

Before

UPPER TRIBUNAL JUDGE BRUCE

Between

Victor Onyema
(no anonymity direction made)

Appellant

and

Secretary of State for the Home Department

Respondent

For the Appellant: Mr Ahmad, Counsel instructed by Peer & Co Solicitors
For the Respondent: Mr McVeety, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The Appellant is a national of Nigeria born on the 20th October 1979. He asserts a retained right of residence under the Immigration (European Economic Area) Regulations 2016.

The Proceedings Below

2. The Appellant was, between the 8th November 2010 and the 8th November 2015, granted permission to reside in the UK as the family member of an EEA national exercising treaty rights. That family member was his then wife, French national Ms Salima Dounia Deredaidji. The marriage ended on the 24th November 2015.
3. On the 11th October 2019 the Appellant made an application for recognition of a 'retained' right of residence as the family member of an EEA national under Regulation 10(5) of the Regs:

"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 paragraphs (8) and (9), a person who satisfies a condition in paragraph (2), (3), (4) or (5).

...

- (5) The condition in this paragraph is that the person ("A")—
 - (a) ceased to be a family member of a qualified person or an EEA national with a right of permanent residence on the termination of the marriage or civil partnership of A;
 - (b) was residing in the United Kingdom in accordance with these Regulations at the date of the termination;
 - (c) 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 or the EEA national with a right of permanent residence has custody of a child of that qualified person or EEA national;
 - (iii) the former spouse or civil partner of the qualified person or the EEA national with a right of permanent residence has the right of access to a child of that qualified person or EEA national, where the child is under the age of 18 and where 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 A is warranted by particularly difficult circumstances, such as where A or another family member has been a victim of domestic violence whilst 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 the person 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).

...

(8) A person ("P") does not satisfy a condition in paragraph (2), (3), (4) or (5) if, at the first time P would otherwise have satisfied the relevant condition, P had a right of permanent residence under regulation 15.

(9) A family member who has retained the right of residence ceases to enjoy that status on acquiring a right of permanent residence under regulation 15.

4. The Respondent refused the application with reference to Reg 10(6)(a): it was not accepted that at the date of the termination of the marriage the Appellant had been a worker, a self-employed person or a self-sufficient person under Regulation 6.

5. The Appellant appealed to the First-tier Tribunal under Regulation 36(1) of the Regs. The grounds are not well drafted. They describe the decision of the Respondent as "haphazard" and "weak", refer to evidential flexibility and allege that the Respondent has misunderstood the Immigration (European Economic Area) Regulations 2016 without offering any particulars. They do however, identify that the Appellant pursues his appeal on two grounds: he claims a retained right of residence under Reg 10(5) but further relies on Regulation 15(1). Although this latter provision is described as providing for a 'family permit' it does in fact relate to permanent residence:

Right of permanent residence

15. –(1) The following persons acquire the right to reside in the United Kingdom permanently –

(b) a family member of an EEA national who is not an EEA national but who has resided in the United Kingdom with the EEA national in accordance with these Regulations for a continuous period of five years;

...

...

(f) a person who –

(i) has resided in the United Kingdom in accordance with these Regulations for a continuous period of five years; and

(ii) was, at the end of the period, a family member who has retained the right of residence.

...

6. On the 7th August 2020 the matter came before First-tier Tribunal Judge Gumsley, sitting 'remotely' in Newcastle in accordance with the restrictions then in place to control the spread of Covid-19. Judge Gumsley recorded the

Respondent's acceptance that the Appellant was "exercising treaty rights at the time of the application" but that there remained a dispute about whether he had "comprehensive sickness insurance at all relevant times". It was agreed that the appeal would be adjourned until the Appellant had had an opportunity to provide evidence about his health insurance, and until the Respondent had taken a view on that. Judge Gumsley gave directions that the parties were to inform the Tribunal of their respective positions by the 7th September 2020.

7. On the 20th August 2020 the Appellant's solicitors served and filed a copy of the Appellant's health insurance certificates and a skeleton argument which set out the Appellant's case as to why he said he qualified for permanent residence under Reg 15, or in the alternative retained his right of residence under Reg 10.
8. By the 7th September 2020 the Respondent had apparently indicated that she was not prepared to concede and the matter was transferred to Birmingham so that it could proceed as a face to face hearing. It came before Judge Aziz on the 28th September 2020 as a CMR. The Respondent indicated that she regarded the permanent residence point as a 'new matter' and that she would not consent to it being adjudicated by the Tribunal. This was a reference to the restriction on grounds of appeal introduced by s85 of the Nationality, Immigration and Asylum Act 2002 (as amended):

85 Matters to be considered

(1) An appeal under section 82(1) against a decision shall be treated by the Tribunal as including an appeal against any decision in respect of which the appellant has a right of appeal under section 82(1).

...

(4) On an appeal under section 82(1) against a decision the Tribunal may consider any matter which it thinks relevant to the substance of the decision, including a matter arising after the date of the decision.

(5) But the Tribunal must not consider a new matter unless the Secretary of State has given the Tribunal consent to do so.

(6) A matter is a "new matter" if –

- (a) it constitutes a ground of appeal of a kind listed in section 84, and
- (b) the Secretary of State has not previously considered the matter in the context of –
 - (i) the decision mentioned in section 82(1), or
 - (ii) a statement made by the appellant under section 120.

9. Section 85 has, on the face of the statute, absolutely nothing to do with EEA appeals which are brought under an entirely discrete regime, namely Reg 36(1). The Respondent was however entitled to raise the 'new matter' point by virtue of Schedule 2 of the Regs:

"1. The following provisions of, or made under, the 2002 Act have effect in relation to an appeal under these Regulations to the First-tier Tribunal as if

it were an appeal against a decision of the Secretary of State under section 82(1) of the 2002 Act (right of appeal to the Tribunal) –

section 84 (grounds of appeal), as though the sole permitted grounds of appeal were that the decision breaches the appellant's rights under the EU Treaties in respect of entry to or residence in the United Kingdom ("an EU ground of appeal");

section 85 (matters to be considered), as though –

(a) the references to a statement under section 120 of the 2002 Act include, but are not limited to, a statement under that section as applied by paragraph 2; and

(b) a "matter" in subsection (2) and a "new matter" in subsection (6) include a ground of appeal of a kind listed in section 84 of the 2002 Act and an EU ground of appeal;..."

10. As Upper Tribunal Judge Plimmer explains in Oksuzoglu (EEA appeal - "new matter") [2018] UKUT 00385 (IAC):

"It is abundantly clear from this provision that a "new matter" in section 85(6) of the 2002 Act includes not only a ground of appeal of a kind listed in section 84 but also an EU ground of appeal"

11. For his part the Appellant accepted this authority but submitted that factually it was not a new matter, since it was predicated on the same set of circumstances, namely the Appellant's marriage to an EEA national and their joint residence in the UK over a five year period. By an application dated the 17th September 2020 he sought a direction pursuant to Amos and Another -v- SSHD [2011] EWCA Civ 552 that the Respondent use the authority vested in her to check the HMRC records of the Appellant's ex-wife covering the period 8th November 2010 to the 8th November 2015. If she was exercising treaty rights during this period, this would support his claim to a right of permanent residence under Reg 15.
12. Judge Aziz at this stage made no finding on whether the permanent residence argument constituted a 'new matter'. He instead gave directions that the Appellant set out his case in writing, specifying what provisions and authority he relied upon, and in addition what matters if any he would like made subject of an *Amos* direction. Judge Aziz directed that the Appellant set out what efforts he had made to obtain the relevant evidence from his wife himself.
13. By an email dated the 19th October 2020 the Appellant responded, in part, to Judge Aziz's directions by providing a short statement explaining the difficulties he had faced trying to locate his ex-wife.
14. On the 2nd November 2020 the file was passed to Tribunal Caseworker Lashford, who noted the Appellant's efforts, and having done so, issued an *Amos* direction in the following terms:

“the Respondent is to obtain from HMRC the employment or self-employment, tax and NI history records of Salima Dounia Deredaidji.... from 1st April 2015 up to 31st March 2020”.

It is unclear where Caseworker Lashford got those dates from: as can be seen from my §11 above, these were not the dates identified as the relevant period, and requested by the Appellant.

15. The hearing was set down for the 14th December 2020 but this date was subsequently vacated at the request of the Respondent who needed more time to comply with Caseworker Lashford’s *Amos* direction.
16. The matter then came back before Judge Aziz, on the 1st February 2021. The Respondent had by that date provided, in accordance with Caseworker Lashford’s *Amos* direction, the HMCR records relating to Ms Deradji (as HMRC have her) between the 6th April 2015 and the 6th November 2019.
17. At last we come to the decision itself. Judge Aziz promulgated his decision on the 10th February 2021. The Judge made findings first on retained rights of residence, then on permanent residence: his conclusion on each is challenged in his grounds of appeal to the Upper Tribunal.

Proceedings thus far in the Upper Tribunal

18. The matter came before me on the 28th June 2021. For the reasons I set out below, at that stage I only considered it necessary to deal with one of the grounds before me, that relating to whether the Article 15 claim amounted to a ‘new matter’.
19. The First-tier Tribunal had begun its deliberations on Reg 15 by properly directing itself to consider whether the question of permanent residence was a ‘new matter’. Counsel for the Appellant made no submissions either way, but he had in written argument already submitted that there was no distinct factual matrix (see above). As the decision makes clear, one of the matters taken into account in determining whether or not this did in fact constitute a ‘new matter’ was the conduct of Counsel for the Appellant, Mr Ahmed, and the way that the case had been put:

“61. In light of the above I asked Mr Ahmed if he was still intent on pursuing this ground (leaving aside for the moment the issue of whether reliance on this ground amounted to a ‘new matter’). Mr Ahmed indicated that he was. He stated that the respondent had incorrectly identified the five year period that the appellant was seeking to rely upon. He was relying on the 2010 to 2015 period and not the 2014 to 2019 period that the respondent had concentrated on. This is somewhat unfair on the respondent. Up until Mr Ahmed first mentioned this period in his closing submissions nowhere in any of the documents submitted by the appellant is it stated that this is the five year period which the appellant is seeking to

rely upon. The respondent may have been helped if the appellants representative had made clear in their communications to the tribunal that this was the five year period they were relying on in their request that the tribunal issued the respondent with an Amos direction.

62. I therefore consider the issue of whether Regulation 15(1)(b) is a 'new matter' with reference to Mr Ahmed's clarification that in the appellant's application for permanent residence, he was relying on the period 2010-2015. I conclude that the factual matrix of considering whether the Appellant's former spouse was exercising treaty rights from the 2010 to 2015 period alongside the fact that he is also relying upon a completely different part of the 2016 EEA Regulations to constitute a very different factual matrix. Apart from the fact that the requirements of Regulation 10(5) and Regulation 15(1)(b) are different, the appellant is also asking the tribunal to look at different time periods. I find that the additional ground raised is a new matter the respondent does not consent to this ground being raised in this appeal.

20. I am satisfied that this reasoning reveals an error of law. Key to the Tribunal's reasoning was its assumption that it was somehow Mr Ahmed's fault that the *Amos* direction given, and complied with, related to an entirely irrelevant time period. As I observe above, the direction sought by the Appellant's solicitors in fact related to 2010-2015, as one would expect. It is unclear why Caseworker Lashford made her direction in the terms that she did. I might add it is somewhat surprising that the HOPO, upon receipt of the information from HMRC, did not think to wonder why anyone would be interested in what Ms Deredaidji had been up to in the years since she and her husband were divorced. As Judge Zucker notes in granting permission the correct time period was also identified in the Appellant's skeleton argument, filed some six months before the appeal hearing. Judge Aziz was obliged to consider the facts in order to determine whether this was a 'new matter'¹: it was therefore important that he got those facts right.

21. I therefore set the decision on whether the Appellant's reliance upon Article 15 was a 'new matter' aside.

22. At that hearing on the 28th June 2021 the Secretary of State was represented by Senior Presenting Officer Mr Diwnycz. The factual errors of the First-tier Tribunal having been identified, Mr Diwnycz realistically accepted that that was the end of that. That is because at the date of the hearing the relevant Tribunal authority to be followed in this matter was Birch (Precariousness and mistake; new matters) [2020] UKUT 00086 (IAC). Applying Birch I said this, in my written decision of the same date:

"In remaking in the Upper Tribunal I am not required to obtain the Secretary of State's consent to considering any of the grounds raised before me. That is because under s81 Nationality, Immigration and Asylum Act 2002 the phrase "the Tribunal" is defined for the purpose of the ensuing

¹ Mahmud (S. 85 NIAA 2002 - 'new matters') [2017] UKUT 00488 (IAC)

part (including s 85) as meaning the First-tier Tribunal. The phrase specifically does not apply to the Upper Tribunal. The provisions of s 84(4) are not needed to enable the Upper Tribunal, a superior court of record, to take relevant matters into account....”

23. Finding accordingly that I did not need the Secretary of State’s consent to consider any matter, I proposed to remake the decision on permanent residence. Regulation 15(1)(b) provides that a family member of an EEA national who is not an EEA national but who has resided in the United Kingdom with the EEA national in accordance with these Regulations for a continuous period of five years will acquire the right to reside here permanently. It is not in dispute that the Appellant and his wife lived together in the UK between the 8th November 2010 and the 8th November 2015. Throughout that period he was still her family member. All he needed to establish was whether his wife was, for the duration of that five year period, living in accordance with the Regulations, ie as a qualified person.

24. I therefore made a direction pursuant to Amos and Another -v- SSHD [2011] EWCA Civ 552 as follows:

“The Respondent is, no later than the 9th August 2021, to obtain from HMRC the employment or self-employment, tax and NI history records of Salima Dounia Deredaidji (alternative spellings Deraidji, Deradji) from the 8th November 2010 to the 8th November 2015.

If the records demonstrate that Ms Deredaidji was indeed living in accordance with the Regulations then it is now common ground that the Appellant has already acquired permanent residence”.

25. I directed that in the event that Ms Deredaidji’s tax records did not assist the Appellant then I would reconvene the hearing to enable the parties to make their submissions on whether the First-tier Tribunal erred in its approach to retained rights of residence under Regulation 10(5)(b).

Permanent Residence: Discussion and Findings

26. It took some time for the Home Office to comply with my *Amos* direction. In the hiatus between the last hearing and this the Upper Tribunal handed down the decision in Hydar (s 120 response; s 85 “new matter”: Birch) [2021] UKUT 00176 (IAC) which entirely reversed the decision in Birch, the Vice President properly acknowledging that it was *per incurium*, since a Court of Appeal authority on the point had not been brought to his attention. The upshot of that is that my decision to remake the Appellant’s case, insofar as it related to permanent residence, is on very shaky ground.

27. Happily that matters not for two reasons. First, because Mr McVeety was prepared to waive any objection to the ‘new matter’ being considered. Secondly because the HMRC documents relating to Ms Deredaidji’s income

between the 8th November 2010 and the 8th November 2015, produced pursuant to my *Amos* direction, did not in fact assist the Appellant in the way that he had hoped. These show that there is no PAYE record relating to the relevant period. Although Ms Deredaidji was registered as self-employed the entire time, she only declared an income of £590 in 2010-11, and in 2013-14 no income at all. It is apparent from this that she was not in fact exercising treaty rights for a continual period of 5 years during the currency of the marriage, and that the Appellant's claim under Reg 15 is bound to fail for that reason. I should say that in reaching that finding I reject the contention of Mr Ahmed that the HMRC records are in any way ambiguous. They plainly state that there is no record to show for 2013-14; which I can only read as indicating that no income was declared. She may have filed a tax return, but it appears that the income declared was 'nil'. I therefore remake the decision, insofar as it relates to Reg 15, by dismissing it.

Retained Rights: Discussion and Findings

28. That brings me back to Reg 10. The Appellant's objection to the approach taken by the First-tier Tribunal to this aspect of his case was in essence a fairness point. Much had been made, prior to the hearing, of whether he had comprehensive sickness insurance while he was a student; in fact, as Mr McVeety agrees, all of that was a red herring since he fell to be treated as a 'qualified person' because he was, at the same time as he was studying, funding himself through self-employment. The unfairness arose because no one asked him about whether he was working at the operative time. Had they done so he would have confirmed that he was, and produced the evidence to prove it, as he now has. The absence of evidence referred to in the First-tier Tribunal decision has therefore been remedied. I would also note that the focus for the First-tier Tribunal's enquiry, pursuant to the decision in Gauswami (retained right of residence: jobseekers) India [2018] UKUT 275, was the date of dissolution of marriage. This was subsequently found by the Court of Appeal to be the wrong test. In Secretary of State v Baigazieva [2018] EWCA Civ 1088 the Court of Appeal held that the evidence of qualification was to be produced in respect of the date of initiation of divorce proceedings. Since Mr McVeety accepts that on *that* date the Appellant was a qualified person by virtue of his self-employment, and that his then wife was further exercising her treaty rights on that date, it follows that the appeal must be allowed on the basis that the Appellant is entitled to a retained right of residence under Reg 10.

Decision and Directions

29. The decision of the First-tier Tribunal is set aside.

30. The appeal is allowed with reference to Regulation 10 of the Immigration (European Economic Area) Regulations 2016
31. There is no order for anonymity.

Upper Tribunal Judge Bruce
1st October 2021