



**IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM
CHAMBER**

Case Nos.: UI-2023-005198

First-tier Tribunal Nos:
EA/05492/2022

THE IMMIGRATION ACTS

Decision & Reasons Issued:

On 12th of March 2024

Before

**UPPER TRIBUNAL JUDGE SMITH
UPPER TRIBUNAL JUDGE STEPHEN SMITH**

Between

**M N
[ANONYMITY DIRECTION MADE]**

Appellant

And

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: The Appellant appeared in person

For the Respondent: Mr P Deller, Senior Home Office Presenting Officer

Heard at Field House on Monday 4 March 2024

Order Regarding Anonymity

The Appellant was granted anonymity by the First-tier Tribunal due to his vulnerability. Pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008, that order is continued. No-one shall publish or reveal any information, including the name or address of the Appellant, likely to lead members of the public to identify the Appellant. Failure to comply with this order could amount to a contempt of court.

DECISION AND REASONS

1. The Appellant appeals against the decision of First-tier Tribunal Judge Behan promulgated on 17 May 2023 (“the Decision”) dismissing his appeal against the Respondent’s decision dated 24 August 2021 refusing him status under the EU Settlement Scheme (“EUSS”) as the spouse of an EEA national.
2. The Respondent refused the Appellant’s application on the basis that he was no longer married to his wife, having been divorced from her on 8 May 2017. The Appellant denies that this is so. He says he has no knowledge of any divorce. The Respondent did not accept that the Appellant had been married to his EEA national wife for at least three years and therefore could not benefit from any retained EU law rights.
3. Judge Behan correctly identified the sole issue for her consideration as being whether the Appellant was still married to his EEA national wife or had been married to her prior to divorce for at least three years. At [31] of the Decision, the Judge concluded that the Appellant had now shown that he was still married to or had been married to the EEA national for at least three years. For that reason, she dismissed the appeal.
4. The Appellant’s grounds of appeal can be understood as being a complaint that he does not know where the divorce took place if indeed it ever did. He points out that the Respondent produced no documentary evidence to support the assertion that he is divorced and had relied solely on what the Respondent was told by his wife. He also says, in effect, that the divorce might not be valid since he had no notice of it.
5. Permission to appeal was granted by First-tier Tribunal Judge I Burnett on 26 October 2023 in the following terms:
 - “1. The application is out of time. The appellant applied on 7 August 2023 for permission to appeal, the decision date is 17 May 2023. The appellant explains that he tried to appeal on 16 June 2023 to the Upper Tribunal. There is no evidence of that before me. However the judge hearing the appeal treated him as a vulnerable witness and due to his difficulties, I extend time for appealing.
 2. The grounds are rambling and do not explain or engage with the decision of the judge. However the issue before the judge was whether the appellant was still married to the union citizen or not. The judge does not refer to any documentary evidence to substantiate that the appellant is in fact divorced. It is an assertion set out in the RFRL. The appellant asserts he has no knowledge of this divorce. I consider that it is arguable that it has not been demonstrated by evidence that the appellant is in fact divorced. I grant permission to appeal.”
6. The matter comes before us to determine whether the Decision discloses an error of law. If it does, we then have to decide whether to set aside the

Decision in consequence. If we do so, we either have to remit the appeal to the First-tier Tribunal or re-make the decision ourselves.

7. We had before us a consolidated bundle of documents relevant to the error of law, together with the documents produced before the First-tier Tribunal. In light of the way in which the hearing proceeded we do not need to refer to any of the documents.
8. At the outset of the hearing, Mr Deller accepted that the Decision contained an error of law. He conceded that the burden of proving that the Appellant was divorced from his EEA national wife lay with the Respondent since the Respondent relied on that assertion. He accepted that there had been no evidence before Judge Behan save for an assertion in the decision under appeal and, accordingly, it was not open to the Judge to determine that issue in the Respondent's favour.
9. We accepted that concession which accorded with our own view. The error of law was therefore established.
10. We invited Mr Deller to address us on next steps. As he correctly pointed out, in normal circumstances, the Respondent would propose a remittal of the appeal so that it could be determined on the correct legal footing taking account of the evidence. However, he indicated that, despite his best endeavours, he had been unable to locate the evidence of the divorce on which reliance was placed. There were notes indicating that the Respondent had been told of the divorce by the Appellant's wife and had, according to the notes, been shown a copy of the divorce certificate. However, no copy could be located on file.
11. Mr Deller therefore very fairly conceded that the Respondent would be unable to make out his case as to the divorce on any re-making. There would therefore be little point in remitting the appeal and he accepted that it would be appropriate for this Tribunal to go directly on to re-make the decision in the Appellant's favour.
12. It appears from the documents before us that the Appellant was married to his EEA national wife on 12 January 2015 and on the face of the documents, he would appear to qualify for settled status under the EUSS. He appears to meet EU11 of Appendix EU, condition 1(a)(iii) on account of satisfying the definition in Appendix EU as "a family member who has retained the right of residence" under (d)(i), (ii) and (iii) (aa). His application made to the Respondent was for settled status. As we explained to the Appellant, however, the implementation of our decision allowing the appeal is a matter for the Respondent. Mr Deller agreed that he would ensure that our decision when promulgated reaches the correct department as soon as possible following promulgation.
13. The Appellant made various representations to us as to what he sees as an injustice in the handling of his case. In particular, he could not understand why the Respondent would not have taken steps to revoke his residence permit in 2017 if the Respondent was told at that time that he

was no longer married to his EEA national spouse. However, as we explained to him, that is not a matter for us. The only issue before us is whether his appeal against the decision refusing him status under the EUSS should be allowed on the basis that it is either contrary to the rules relating to EUSS (Appendix EU) or the Withdrawal Agreement.

14. Having determined that the Respondent is unable to prove that the Appellant is no longer married to his EEA national spouse or was not married to her for at least three years, the Appellant has made out his case. We accordingly allow his appeal.

NOTICE OF DECISION

The Decision of Judge Behan promulgated on 17 May 2023 involved the making of an error of law. We therefore set aside that Decision. We re-make the decision by allowing the Appellant's appeal.

L K Smith
Judge of the Upper Tribunal
Immigration and Asylum Chamber
5 March 2024