Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: EA/07309/2016

THE IMMIGRATION ACTS

Heard at Field House	Decision and Reasons Promulgated
On 18 April 2018	On 23 April 2018

Before:

UPPER TRIBUNAL JUDGE GILL

Between

Anselm Njemani Demuyakor Appellant
(ANONYMITY ORDER NOT MADE)

And

The Secretary of State for the Home Department Respondent

Representation:

For the Appellant: Ms S Bassiri-Dezfouli, of Counsel, instructed by Bwf Solicitors.
For the Respondent: Mr P Nath, Senior Home Office Presenting Officer

DECISION AND REASONS

Introduction and background facts:

1. The appellant, a national of Ghana born on 1 October 1975, appeals to the Upper Tribunal against a decision of Judge of the First-tier Tribunal Nixon who, following a hearing on 28 April 2017, dismissed his appeal against the respondent's decision of 9 June 2016 to refuse his application of 12 December 2015 for a residence card. The respondent considered that the appellant did not have a retained right of residence in accordance with regulation 10(5) of the Immigration (European Economic Area) Regulations 2006 (the "2006 Regulations") following his divorce from Ms Sotana Pereira Dapenticul (hereafter the "sponsor"), an EEA national said to have been exercising Treaty rights. The sponsor is a national of Portugal, born on 8 February 1985.

2. The appellant and the sponsor were married on 18 April 2008. In 2010, a residence card was issued to the appellant as the sponsor's family member under the 2006 Regulations. On 13 November 2014, the sponsor commenced maternity leave. On 25 December 2014, she gave birth to a child by another man. On 9 October 2015, the marriage was dissolved. On 12 December 2015, the appellant made the application which was the subject of the decision that was appealed in the instant appeal.

3. The respondent's reasons for her decision may be summarised as set out in para 4 (i) to (iv) below. Logically, reason (iv) should be listed at the very beginning. However, it is convenient to list the reasons in the order set out at para 4 below, because the written grounds only took issue with (i) and (ii) and I heard submissions from Ms Bassiri-Dezfouli as to whether the appellant should be permitted to argue (iii) and (iv) *de bene esse* at the end of the hearing. The respondent's reasons are therefore set out in the order in which I have decided to deal with them in this decision.

4. The following is a summary of the respondent's reasons for her decision:

   (i) (Issue 1) (Regulation 10(5)(a)) The respondent considered that the appellant had not established that the sponsor was exercising Treaty rights as at the date of the divorce. In this regard, the respondent considered that the appellant had not shown that the sponsor had returned to work or was a jobseeker within a reasonable period of the birth of her child.

   (ii) (Issue 2) (Regulation 10(5)(d)(i)) The respondent accepted that the marriage had lasted for a period of at least 3 years. She considered that the appellant had to show that he had "*resided with*" the sponsor for at least one year in the United Kingdom. She accepted that the sponsor had resided in the United Kingdom for at least one year but did not accept that the appellant had shown that he had resided with the sponsor in the United Kingdom for at least one year.

   (iii) (Regulation 10(6)) The respondent did not accept that the appellant had shown that, as at the date of the divorce, he would, if he were an EEA national, be a worker, a self-employed person or a self-sufficient person under regulation 6.

   (iv) The respondent considered that the marriage entered into between the appellant and the sponsor was a marriage of convenience. In this regard, the respondent considered that the appellant had not provided evidence to show that he and the sponsor had resided together in a genuine relationship.

5. Regulations 10(5), 10(6) and 15(1) of the 2006 Regulations provide (insofar as relevant):

> 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) …;

(iii) …; or

(iv) ….

(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).

15 *Permanent right of residence*

(1) The following persons shall acquire the right to reside in the United Kingdom permanently--

(a) an EEA national who has resided in the United Kingdom in accordance with these Regulations for a continuous period of five years;

(b) a family member of an EEA national who is not himself 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;

6. In PM (EEA – spouse - "residing with") Turkey [2011] UKUT 89 (IAC), the Upper Tribunal (the then President, Mr Justice Blake, and SIJJ Storey and Perkins) interpreted the words "*resided … with*" in regulation 15(1)(b). The Upper Tribunal concluded that this requirement relates to presence in the United Kingdom and that it does not require living in a common family home. I mention PM at this stage because (as will be seen) the grounds rely upon PM, although it should be remembered that PM concerned regulation 15(1)(1)(b).

7. In Weldemichael and another (St Prix) [2014] EUECJ C-507/12; effect) [2015] UKUT 00540 (IAC), the Upper Tribunal (UTJJ Storey, Reeds and Rintoul) considered the judgment of the Court of Justice of the European Union (CJEU) in Jessy St Prix v DWP [2014] CJEU C-507/12 (hereafter St Prix) and gave the following guidance for determining whether a EEA national woman retains continuity of residence for the purposes of the 2006 Regulations for a period in which she was absent from working or job-seeking owing to the physical restraints of the late stages of pregnancy and the aftermath of childbirth. The judicial head-note of Weldemichael reads:

> "An EEA national woman will retain continuity of residence for the purposes of the Immigration (European Economic Area) Regulations 2006 (the 2006 EEA Regulations) for a period in which she was absent from working or job-seeking owing to the physical constraints of the late stages of pregnancy and the aftermath of childbirth if, in line with the decision of the CJEU in Jessy St Prix:
>
> (a) at the beginning of the relevant period she was either a worker or seeking employment;
> (b) the relevant period commenced no more than 11 weeks before the expected date of confinement (absent cogent evidence to the contrary that the woman was physically constrained from working or seeking work);
> (c) the relevant period did not extend beyond 52 weeks; and,
> (d) she returned to work.

> So long as these requirements are met, there will be no breach of the continuity of residence for the purposes of regulation 15. Time spent in the United Kingdom during such periods counts for the purposes of acquiring permanent residence."

The judge's findings, the grounds and the submissions

Issue 1 - Regulation 10(5)(a) - Whether the sponsor was exercising Treaty rights as at the date of the divorce

8. The judge found that the appellant had not demonstrated that, as at the date of the divorce, the sponsor was exercising Treaty rights. In particular, she did not accept that the sponsor returned to work in July 2015. She rejected the evidence that the sponsor started to work with Golden Services Care Ltd in July 2015.

9. The grounds take issue with the judge's conclusion but on an interpretation point, i.e. it is contended that the judge erred in law in requiring the appellant to demonstrate that the sponsor had returned to work within a reasonable period in order to preserve her worker status. It is contended that this interpretation is contrary to St Prix and Weldemichael. It is contended that, where a marriage is terminated during the 52-week period referred to in Weldemichael, the relevant date for assessing whether the EEA national was exercising Treaty rights is the date of divorce as set out under regulation 10(5) and that, from then onwards, it is the non-EEA national's work that is relevant.

10. I pause to stress that the challenge in the written grounds to the judge's finding that the appellant had not demonstrated that the sponsor was exercising Treaty rights as at the date of the divorce was limited to the interpretation point mentioned above. The written grounds do not challenge the judge's finding that the appellant had not shown that the sponsor returned to work in July 2015.

11. Ms Bassiri-Dezfouli informed me at the commencement of the hearing that she wished to apply for permission to challenge the judge's finding that the appellant had not shown that the sponsor returned to work in July 2015. I informed her that I would hear her submissions *de bene esse.* I record that, when the time came for me to hear her submissions on her application *de bene esse,* she confirmed that she did not wish to challenge the judge's finding that the appellant had not shown that the sponsor returned to work in July 2015.

12. In her submissions on the interpretation point, Ms Bassiri-Dezfouli essentially repeated the contention in the grounds that, where the 52-week period referred to in Weldemichael is interrupted by divorce, it is only necessary to show that the sponsor-EEA national was exercising Treaty rights as at the date of divorce and that, following the date of divorce, it is only relevant to consider whether the appellant would be considered to be exercising Treaty rights if he were an EEA-national. Although Ms Bassiri-Dezfouli did not put her point in this way, the implication must be that the judge therefore erred in reaching her conclusion that the appellant did not satisfy regulation 10(5)(a) because he had not shown that the sponsor returned to work in July 2015.

13. In response, Mr Nath submitted that, if the guidance in Weldemichael was satisfied, then and only then is the sponsor to be regarded as a person who had exercised her Treaty rights for the entire duration of the period during which she was not working etc and absent on maternity leave. This means, in his submission, that the guidance

in Weldemichael must be satisfied for the appellant to show that the sponsor was exercising Treaty rights as at the date of divorce.

14. In response, Ms Bassiri-Dezfouli repeated her earlier submissions.

15. I asked Ms Bassiri-Dezfouli to explain how an applicant would show that the EEA national was exercising Treaty rights if the EEA national only returns to work or becomes a job-seeker after the date of divorce. Ms Bassiri-Dezfouli reiterated that the time for considering whether the sponsor was exercising Treaty rights stops at the date of divorce. From that point onwards, it is only necessary to show that the appellant, if he were an EEA national, would be regarded as exercising Treaty rights.

Issue 2 - Regulation 10(5)(d)(i) – whether it is necessary for the appellant to establish that he had "resided with" the sponsor for at least one year

16. It is plain that the judge considered that it was necessary for the appellant to show that he had resided with the sponsor in the United Kingdom for at least one year during the duration of their marriage. The judge found that the appellant had not shown that he had *"resided with"* the sponsor for at least one year. Her reasoning is at para 12, which (insofar as relevant) reads:

> "12. … on the appellant's own evidence, the couple never cohabited during their marriage. He stated that he lived in London whilst she remained in Milton Keynes and that they only got together when on holiday from work. He provided her address for a postal address for telephone bills, but there is no need for me to make any finding on the documents provided as he was honest enough to make it clear that they never lived together. I find therefore that he cannot meet the requirement of living with his former spouse for at least a year."

17. The grounds contend that the judge had erred in law in requiring the appellant to show cohabitation, contrary to the guidance in PM (EEA – spouse - "residing with") Turkey [2011] UKUT 89 (IAC).

18. Ms Bassiri-Dezfouli submitted that it was clear from PM that "*residing with*" means presence in the United Kingdom and that cohabitation between the sponsor and the appellant is not required.

19. In Ms Bassiri-Dezfouli's submission, this was not only an error of law but, in itself, a material error of law. I asked Ms Bassiri-Dezfouli to explain why, if I decided the interpretation point in relation to Issue 1 against her, the error in relation to Issue 2 is material. Ms Bassiri-Dezfouli submitted that it is material because the judge had not made a finding as to whether the marriage was a marriage of convenience.

20. In response, Mr Nath accepted that the judge had erred of law in requiring the appellant to show cohabitation. However, in his submission, this error was not material to the outcome because Issue 1 is determinative.

The remaining issues before the judge

21. The judge made no findings on the remaining issues before her, i.e. the following issues:

    (i) whether the marriage was a marriage of convenience; and

(ii) whether the appellant had demonstrated that, as at the date of the divorce, he would (if he were an EEA national) be a worker, a self-employed person or a self-sufficient person under regulation 6, as required by regulation 10(6).

22. As I said at para 3 above, I heard Ms Bassiri-Dezfouli's submissions, at the end of the hearing, on whether she should be permitted to challenge the judge's decision on the ground that she had erred in law in failing to make findings of fact on the two issues described at para 21 above.

23. I should record that Mr Nath objected to my hearing Ms Bassiri-Dezfouli's submissions *de bene esse*, on the basis that he had not prepared to deal with these issues and also because he would need to take instructions on the respondent's position concerning whether the marriage was a marriage of convenience.

24. Ms Bassiri-Dezfouli submitted that whether the marriage was a marriage of convenience should have been the first issue to be considered by the judge. Ms Bassiri-Dezfouli submitted that the judge's failure to consider these two issues was material because the two issues go to the heart of the case.

25. At the end of the hearing, I reserved my decision.

Assessment

Issue 1 - Regulation 10(5)(a) - Whether the sponsor was exercising Treaty rights as at the date of the divorce

26. It is not in dispute that the appellant has to establish that, at the time of his divorce, the sponsor was exercising Treaty rights. This is because regulation 10(5)(a) requires the non-EEA spouse to establish that "*he ceased to be a family member of a qualified person on the termination of the marriage …"* and regulation 6(1) defines "*qualified person*" as follows:

> "a person who is an EEA national and in the United Kingdom as-
> (a) a jobseeker;
> (b) a worker;
> (c) a self-employed person;
> (d) a self-sufficient person; or
> (e) a student.

27. Weldemichael did not concern retained rights. However, it is relevant in the instant case because the Upper Tribunal gave guidance in that case on the requirements to be satisfied for an EEA national woman to retain continuity of residence during a period in which she is absent from working or job-seeking owing to the "*physical constraints of the late stages of pregnancy and the aftermath of childbirth"* (hereafter referred to as "*maternity leave*"). These requirements are set out at my para 7 above. It will be seen that this includes a requirement that the period of the maternity leave must not extend beyond 52 weeks and the EEA national woman must return to work.

28. The issue that arises in this case is whether, in a case where a non-EEA national spouse or civil partner relies upon regulation 10(5) and the marriage or civil partnership terminates at some point before the end of the 52-week period mentioned in Weldemichael, it becomes irrelevant to consider whether the EEA national did return to work within the 52-week period and, if so, whether the non-EEA spouse is permitted to establish that the EEA-national spouse or partner was exercising Treaty rights at the date of termination of the marriage by reference to his work, self-

employment etc from the date of the divorce so that, if he were an EEA national, he would be regarded as exercising Treaty rights. In other words, should the words "*family member of a qualified person*" in regulation 10(5)(a), taken together with the definition of "*qualified person*" in regulation 6(1), be interpreted so as to refer to the work etc undertaken by the non-EEA national spouse or civil partner? I have referred to this as the *"interpretation point".*

29. I was unable to find any authority on the interpretation point. The parties did not refer me to any authorities.

30. In my view, the submissions advanced on the appellant's behalf on the interpretation point are entirely misconceived. Firstly, regulation 10(5)(a) requires the appellant to show that he was "*the family member of a qualified person on the termination of his marriage*". If he establishes this by reference to his own work, self-employment etc on or after the date of divorce, he has *not* established that he was a "*family member of a qualified person on the termination of his marriage".* Effectively, therefore, Ms Bassiri-Dezfouli's interpretation would mean that the non-EEA national is excused from satisfying this condition in regulation 10(5)(a).

31. Secondly, Ms Bassiri-Dezfouli's interpretation would render redundant the requirement in regulation 10(6) by which the appellant must establish that, if he were an EEA national, he would be a worker, a self-employed person or a self-sufficient person under regulation 6.

32. Thirdly, the interpretation advanced by Ms Bassiri-Dezfouli could lead to the appellant obtaining a greater right than that acquired by his sponsor. For example, suppose in reality, the sponsor never returned to work or she returned to work after the 52-week period had expired. If Ms Bassiri-Dezfouli's interpretation is correct, this would mean that the sponsor would have to be regarded as having ceased to exercise her Treaty rights from the beginning of her maternity leave but the appellant would be regarded as having retained his rights of residence on the basis that his EEA-national spouse is to be regarded as having exercised her Treaty rights as at the date of divorce. This simply cannot be correct.

33. I therefore reject Ms Bassiri-Dezfouli's submissions on the interpretation point. In my view, Mr Nath is correct.

34. For the above reasons, I have concluded that, where a non-EEA national spouse or civil partner relies upon the retained right in regulation 10(5) and the termination of the marriage or civil partnership occurs during a period of maternity leave, the question whether the EEA-spouse or civil partner was exercising Treaty rights at the date of the termination is to be decided by applying the guidance in the judicial head-note in Weldemichael. If (and only if) the requirements set out in the judicial head-note are satisfied, the EEA national spouse or civil partner will be regarded as retaining continuity of residence (and therefore exercising Treaty rights) during the period of maternity leave, including as at the date of the termination of the marriage or civil partnership.

35. In the instant case, Ms Bassiri-Dezfouli accepted, on the appellant's behalf, that the appellant had to show that the sponsor was exercising Treaty rights as at the date of divorce. The only way the appellant could establish that the sponsor was exercising Treaty rights as at the date of the divorce was by demonstrating that the requirements set out in the judicial head-note of Weldemichael were each satisfied.

36. As I have said, the written grounds did not challenge the judge's finding that the appellant had not demonstrated that the sponsor returned to work in July 2015, as claimed. Ms Bassiri-Dezfouli did not wish to make an application to challenge this finding (para 11 above). There was no credible evidence before the judge that the sponsor returned to work at any other time during the 52-week period.

37. It therefore follows, applying the guidance in Weldemichael, that the sponsor did not retain continuity of residence for the purposes of the 2006 Regulations from the date she ceased work on 13 November 2014 to begin her maternity leave. It follows that she was not exercising Treaty rights when the marriage was dissolved on 9 October 2015.

38. Although I appreciate that the judge considered Issue 1 by considering whether the sponsor had returned to work within a reasonable period, as opposed to applying the guidance in Weldemichael, this is immaterial. If she had applied the guidance in Weldemichael, she would still have reached the same conclusion, that regulation 10(5)(a) was not satisfied, given her unchallenged finding that the appellant had not demonstrated that the sponsor returned to work in July 2015 and given that there was no credible evidence before her that the sponsor returned to work at any other time within the 52-week period.

39. This conclusion is determinative of the appeal, irrespective of Issue 2 and the "*remaining issues before the judge*", as described above.

40. I record that I asked Ms Bassiri-Dezfouli more than once why, if I decide the interpretation point against her, any of her remaining submissions were material. I regret to have to say that I did not hear any helpful submissions on this point. Ms Bassiri-Dezfouli merely repeated her submissions on the interpretation point which were not of any assistance on the question of materiality.

Issue 2 - Regulation 10(5)(d)(i) – whether it is necessary for the appellant to establish that he had "resided with" the sponsor for at least one year

41. As I stressed above, PM concerned regulation 15(1)(b) and not regulation 10(5)(d)(i). There is no need to resort to PM in order to conclude that regulation 10(5)(d)(i) does not require the EEA national and the non-EEA national to cohabit in the United Kingdom for at least one year during the duration of their marriage. This is because there is nothing in regulation 10(5)(d)(i) that can be construed as requiring such cohabitation, the relevant words being: *"… and the parties to the marriage or civil partnership had resided in the United Kingdom for at least one year during its duration".*

42. Plainly, the judge had erred in law in requiring cohabitation between the appellant and sponsor in her consideration of regulation 10(5)(d)(i). However, for the reasons given above, Issue 1 is determinative of this appeal.

43. Accordingly, although I accept that the judge had erred in law in relation to Issue 2, I have decided not to set aside her decision to dismiss the appeal.

The remaining issues before the judge

44. Plainly, the respondent had contended in the decision letter that the marriage between the appellant and the sponsor was a marriage of convenience. The judge should have considered this issue first. It was also in issue before her whether the

appellant had demonstrated that, as at the date of the divorce, he would (if he were an EEA national) be a worker, a self-employed person or a self-sufficient person under regulation 6, as required by regulation 10(6).

45. The mere fact that the judge did not make findings of fact on these two issues is not a sufficient reason to set aside her decision to dismiss the appeal. Given that Issue 1 is determinative, it would be pointless to set aside the decision simply so that the Tribunal can make findings of fact on these remaining issues that were before the judge. Even if such findings were in the appellant's favour, his appeal would still have to be dismissed.

46. I therefore refuse to permit the appellant to bring his late challenge to the judge's failure to make findings of fact on the two issues described at paras 21 above. Even if the written grounds had advanced these challenges, I would have rejected those grounds, for the reasons given above.

47. I record that the fact that the judge did not make a finding on whether the marriage was a marriage of convenience means that there has been no judicial determination of this issue, in case it becomes relevant at some future date.

Decision

The First-tier Tribunal did not materially err in law. The decision of the First-tier Tribunal to dismiss the appellant's appeal against the respondent's decision therefore stands.

Signed Date: 20 April 2018
Upper Tribunal Judge Gill