Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: EA/07143/2017

THE IMMIGRATION ACTS

Heard at Manchester Civil Justice Centre	**Decisions & Reasons Promulgated**
On 12th December 2018	**On 9th January 2019**

Before

Upper Tribunal Judge Chalkley

Between

MUHAMMAD NADEEM
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: *Mr D Balroup of Counsel, instructed by Whitefield Solicitors Ltd*
For the Respondent: *Mr C Bates, a Home Office Presenting Officer*

DETERMINATION AND REASONS

1. The appellant is a citizen of Pakistan who on 25th January, 2017 applied for a permanent residence card on the basis of retained right of residence because he was the ex-spouse of an EEA national, Virginia Mendes ("the spouse") in accordance with the Immigration (European Economic Area) Regulations 2016 ("the Regulations)". The appellant married the spouse on 1st June, 2012 and their decree absolute was on 10th February, 2016.

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2. The Secretary of State refused the application on 1st August, 2017 for several reasons. The first was that the appellant had never declared to the Rochdale Register Office that he had previously married and divorced and therefore the marriage was "invalid". Secondly, the marriage was one of convenience because his answers at interview conducted on 21st June, 2017 were, it was claimed, inconsistent with answers given by the sponsor. Thirdly, they claimed that the sponsor had been working for a firm called ABC Plastic Recycling Limited and submitted payslips on 31st January, 2016 to 29th February, 2016. However, interdepartmental checks indicated that the sponsor had never actually been employed by that company. Fourthly, the appellant claimed that the sponsor worked for the appellant's own company from April, 2013 until February, 2015 but interdepartmental checks indicated that the sponsor had worked for the appellant's own company until 5th April, 2017, and lastly, the appellant failed to prove he had been working in the United Kingdom since he was divorced on 10th February, 2016.

3. The judge was satisfied that the appellant and sponsor were legally married and that they were divorced on 10th February, 2016. He was not satisfied that the marriage was one of convenience but he did not accept that the appellant had proved to the requisite standard that the sponsor was an EEA national exercising treaty rights at the time of divorce and "had done so for the preceding five years". To the extent that he required the sponsor to have been exercising treaty rights for a period of five years he erred in law. He found that the documents produced by the sponsor did not establish that she was exercising treaty rights for five years and he believed therefore that the application failed. As I have indicated, that was an error of law.

4. The judge went on to find that the appellant had not worked since January, 2017. The appellant had adduced a letter written from the Home Office to his solicitors dated 10th February, 2017 which said: "*At this stage we are unable to confirm your right to work in the UK. This will depend on the outcome of the application. This is because you have not provided original documentation ...".* Throughout the proceedings the appellant claimed that this sentence had been understood to mean that he was not entitled to work and therefore, he had stopped working immediately following receipt of this letter. The judge did not accept that the appellant had misunderstood the terms of the letter because he had throughout the proceedings been advised by solicitors. The judge concluded that the appellant had not worked since the date of his divorce as required by the EEA Regulations and therefore the appeal failed under the Regulations.

5. The determination was challenged and in granting leave Judge Pitt said that it was arguable that the case of *Baigazieva v Secretary of State for the Home Department* [2018] EWCA Civ 1088 showed that the wrong date for assessing the employment of the appellant's ex-wife had been used and that the grounds concerning the ex-spouse having to exercise treaty

rights for five years and the appellant being precluded from working by the respondent were also arguable.

6. Mr Balroup told me that the time of the initiation of the divorce proceedings was relevant. The decree absolute was granted on 16th February, 2016 but page 22 of the appellant's bundle showed that proceedings had been started earlier. Unfortunately, there is no date on page 22 in the bundle and the date is actually on the original of the document at page 22, but has not been reproduced in the bundle. The date is 16th November, 2015, but this evidence was not before the judge. Mr Balroup submitted that the judge had erred at paragraph 24 of his determination by suggesting that the appellant was required to show that the sponsor had been exercising treaty rights in the United Kingdom at the time of the divorce and had done so for the preceding five years. That was wrong. I agree. It was only necessary to show that

> "… 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"

7. Mr Balroup suggested that the appellant had stopped working following receipt by his solicitors of the letter from the Home Office of 10th February, 2017, but that he had been working at the time of the start of the divorce proceedings and indeed was still working at the time of the decree absolute.

8. Mr Bates accepted that there were errors made in the determination by Judge Thorne. He thought he was deciding a case involving a permanent right. It was in fact a residence certificate application. The appellant needed to establish that he had a retained right of residence. That would require the appellant to establish when the divorce proceedings were initiated and whether the sponsor was exercising treaty rights, but the difficulty with this is that the evidence as to when the divorce proceedings were initiated was not before the judge. At the time of divorce, the appellant needed to show that he had a retained right and that he had been working but, given that it was an application for a residence card, the judge needed to be satisfied that the appellant was still exercising treaty rights in the place of the sponsor, so there was no material error because the appellant was still exercising treaty rights at the date of hearing.

9. So, there was no materiality in the errors committed by the judge, because the appellant was not still exercising treaty rights at the date of the hearing. He relied on the decision in *Tommy Bustamante Delos Reyes v The Secretary of State for the Home Department* [2013] UKUT 00314 (IAC), where the Tribunal decided that whether a person qualifies as a dependant under the Regulations is to be determined at the date of decision on the basis of evidence produced to the respondent or, on

appeal, the date of the hearing on the basis of evidence produced to the Tribunal.

10. Responding briefly, Counsel accepted that there were clear errors. The appellant made application under Regulation 10(5). He retained his right because he was working until 10th February, 2016. Mr Bates told me that he accepted that the appellant needs to show that he was working at the time of the decision or in the case of an appeal at the date of the hearing and because the appellant had failed to establish that he was still working as at the date of the hearing before the judge (and in fact had given evidence to the effect that he had ceased working in January 2017) he was not entitled to retained rights.

11. I granted Mr Balroup a brief adjournment in order that he could take further instructions. I proceeded to hear other cases on my list and, having concluded one of them, invited Mr Balroup to address me further. He told me that in 2015 the appellant had been detained at Manchester Airport when returning from holiday and at that time was served with Home Office form IS.96 and was told that he was required to report once a week. Form IS.96 also advised him that he was not allowed to work. However, the appellant continued working. Mr Balroup suggested that the decision of the Tribunal in *Reyes* was not applicable in relation to retained rights.

12. Responding briefly, Mr Bates suggested that the appellant needed to continue to demonstrate that he qualified in place of the sponsor as at the date of the hearing before the judge and clearly in this appeal did not.

13. I reserved my decision.

14. I have already pointed out that the determination contains errors of law. The question for me to decide is whether or not they were material errors of law and I have been guided by the decision of the Upper Tribunal in *Reyes*. There, at paragraphs 32 to 35 the Tribunal said this:

> "32. We are unable to accept that a person is entitled to succeed under Regulation 7 if able to show dependency at the date of application but not at the date of decision.
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> 33. As already noted, the test of dependency as found in Regulation 7 (and also in Regulation 8) is expressed in **the present tense**: see [19] above. As a result the appellant would only have been entitled to succeed in his application to the respondent if he had been able to show on the basis of the evidence produced to the respondent that he was dependent as at the date of decision.
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> 34. How is the position affected once a person has been refused by the respondent and lodges an appeal? In our view, the relevant date for deciding whether he met the requirements must then become the date of hearing. As a result of our finding that the First-tier Tribunal judge's decision was set aside and our giving directions making clear that the appellant was required to produce further evidence of his situation once he had got a job in Kent, the relevant date for deciding whether the requirements of Regulation 7 are met becomes the date of the hearing before us. The 2006 Regulations expressly apply to EEA appeals the provisions of Section

85(4) of the Nationality, Immigration and Asylum Act 2002: see paragraph 1 of Schedule 1.

35. Hence, even accepting that the appellant was a dependant at the date of application, the evidence, as at the date of hearing before us, was insufficient to satisfy us that the appellant had remained a dependant after he got a job in Kent circa December, 2013." [My emphasis]

15. At paragraph 19 of *Reyes* the Tribunal decided, having reviewed authorities on the point, that the test of dependency was a purely factual test.

16. Regulation 10 of the Regulations is as follows:

"**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).

(2) The condition in this paragraph is that the person—

(a) was a family member of a qualified person or of an EEA national with a right of permanent residence when the qualified person or the EEA national with the right of permanent residence died;

(b) resided in the United Kingdom in accordance with these Regulations for at least the year immediately before the death of the qualified person or the EEA national with a right of permanent residence; and

(c) satisfies the condition in paragraph (6).

(3) The condition in this paragraph is that the person—

(a) is the direct descendant of—

(i) a qualified person or an EEA national with a right of permanent residence who has died;

(ii) a person who ceased to be a qualified person on ceasing to reside in the United Kingdom;

(iii) the spouse or civil partner of the qualified person or EEA national described in sub-paragraph (i) immediately preceding that qualified person or EEA national's death; or

(iv) the spouse or civil partner of the person described in sub-paragraph (ii); and

(b) was attending an educational course in the United Kingdom immediately before the qualified person or the EEA national with a right of permanent residence died, or ceased to be a qualified person, and continues to attend such a course.

(4) The condition in this paragraph is that the person is the parent with actual custody of a child who satisfies the condition in paragraph (3).

(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).

(7) In this regulation, “educational course” means a course within the scope of Article 10 of Council Regulation (EU) No. 492/2011.

(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.”

17. Subparagraph 6 has to be satisfied and this is that the appellant 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). So, just as in paragraph 19 of *Reyes*, the requirement of the Regulation is one of the **present,** not the past. The Regulations are speaking about ***the present tense*** and I believe therefore that the judge was correct to dismiss the appellant's appeal on the basis that he had not worked since January, 2017 and was not therefore working as at the date of the commencement of his matrimonial proceedings.

18. It follows that I find that the judge did, for the reasons I have given, err in law, but that his errors were not material and his finding shall stand.

Notice of Decision

The appeal is dismissed.

No anonymity direction is made.

Richard Chalkley
A judge of the Upper Tribunal.

No fee is paid or payable and therefore there can be no fee award.

Richard Chalkley
A judge of the Upper Tribunal. Date: 19 December 2018