Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: EA/02737/2018

THE IMMIGRATION ACTS

Decided at Field House	**Decision & Reasons Promulgated**
On 27 May 2020	**On 29 May 2020**

Before

UPPER TRIBUNAL JUDGE PERKINS

Between

IBRAHIMA ISMAEL BAH
(anonymity direction not made)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

DECISION AND REASONS

1. Pursuant to Rule 34 of the Tribunal Procedure (Upper Tribunal) Rules 2008 I make this decision without a hearing.

2. I have already presided at a hearing to determine if there was an error of law in the First-tier Tribunal's decision. When the appellant applied for permission to appeal to the Upper Tribunal he indicated in grounds settled by Counsel that in the event of an error of law being established he requested the Tribunal to "rehear the evidence and remake the decision". As far as I can see, the respondent has not asked for an oral hearing at any stage although she did attend before me when an error of law was established. After that hearing I sent out my "Reasons for Finding Error of Law and Directions" and made it plain at paragraphs 15 and 16 that I required the appellant to produce a full up-to-date bundle and the respondent to state after receipt of that bundle if she agreed the facts that the appellant sought to establish.

3. The bundle was sent and in response to an enquiry from me by letter dated 10 March 2020 the appellant's representatives confirmed that the supplementary bundle was served on the respondent on 29 January 2020 by recorded delivery. I made plain in my directions that in the event of non-compliance I would consider determining the appeal without a hearing and that is what I have decided to do.

4. This is an appeal against the decision of the Secretary of State on 21 March 2018 to refuse the appellant's application for a permanent residence card. The appellant said he was entitled to such a card because he was the former family member of an EEA national exercising treaty rights in the United Kingdom. The Secretary of State identified three problems in the application.

5. First, he had not satisfied the Secretary of State that his former partner was an EEA national. As indicated when I found an error of law, this point has already been resolved in the appellant's favour. It is dealt with at paragraph 29 of the First-tier Tribunal's Decision and Reasons. It was the judge's view that the appellant *must* have established his then wife's citizenship in an earlier application and could rely on having established it in the past for the purposes of the application leading to this appeal unless there was some intervening evidence pointing to the unlikely conclusion that she had ceased to be an EEA national and there was not.

6. Second, the appellant had to establish that this former wife was exercising treaty rights when she was present in the United Kingdom. I should have made it clear in my Reasons for Finding Error of Law that the First-tier Tribunal Judge accepted the appellant's evidence on this point.

7. Third, the Secretary of State concluded, uncontroversially, that the appellant had not produced evidence that his former partner had remained a worker at the material time. The Secretary of State, rightly, asked herself if the appellant was a worker but concluded that he was not. That is the point of contention between the parties. It is the appellant's case that although not *employed* at the material time he was a *worker* within the broader meaning of the Directive because he was available for work and anxious to work. It is his case that he was not working because the Secretary of State had decided that he was not entitled to work and had notified his former employers that that was the case.

8. It is the appellant's case, set out in his application form, that he married on 17 February 2010 and that marriage was ended by decree absolute on 5 April 2017. The appellant had an EEA family permit issued on 13 September 2010 and that expired on 13 September 2015. The Secretary of State has not chosen to expand on the Reasons for Refusal and so must rely on the relevant part of the decision letter of 21 March 2018.

9. The Secretary of State said (fourth paragraph on page 2 of 3):

> "Further, as evidence that you have been exercising Treaty rights since the date of divorce, you have submitted a letter from Verve People dated 18

> September 2017, that states you have been employed by them since 25 November 2014. However, the last payslip you have provided is dated 24 July 2016. Additionally, the letter from your representatives states that you have not worked since you were unable to extend your visa. The decision to refuse your first application for a permanent residence was made 9 February 2016. These discrepancies cast doubt on the information provided in the letter from Verve People and therefore this office is unable to confirm that you have been exercising Treaty rights since the dates of your divorce".

10. I remind myself that the date of divorce is 5 April 2017, proceedings having been initiated sometime in February 2017.

11. In his additional witness statement dated 28 January 2020 the appellant said that he had made a mistake in his previous statement. He said:

> "It was not July 2016 that I was refused an EEA residence card, it was actually 2 March 2017. After this, the Home Office called my workplace and said that I cannot work."

12. This mistake should not have happened. It is quite important and the Secretary of State is entitled to assume that people get things correct. However, this is not a matter of judicial review. For these purposes I am a primary decision maker and the appellant has given weight to his claim to have made an error by producing apparently authentic copies of payslips showing his work for Verve People. These show that he worked in January, March, April, May, June, July, August, September 2016 and February, March 2017 and again in July 2018 and for some time after that. The last payment in 2017 is dated 3 March 2017. This fits in with his claim to have been unceremoniously and summarily stopped from working following intervention by the Secretary of State on 2 March 2017.

13. The appellant said in his statement that the Verve agency contacted him to say that they were no longer allowed to employ him until he had resolved his immigration situation. He explained that he had said on a previous occasion he had tried to get confirmation from Verve but they denied having records extending to 2017. Nevertheless he said they would "keep him on the books" and indeed he did resume work with them when that was possible.

14. I remind myself I am dealing with probabilities. This case is not proved perfectly. I find it surprising that the company Verve could not produce more helpful documentation or some confirmation of the reasons for his employment being stopped but if it was following oral representations it is perhaps not entirely surprising. Documentation supports his case. He has to live somehow and he is a man who has shown a willingness to work if, and I do not say this disrespectfully, generally only able to obtain casual work but frequently. I accept his explanation that he would have worked had the Secretary of State not stopped him.

15. I make it plain I am not saying that the Secretary of State had done anything improper. It is appropriate for the Secretary of State to be zealous in policing immigration control because if it is not policed it may

as well not exist. However, the appellant's claim and dates have been put forward clearly in a signed statement and the Secretary of State has had an opportunity of responding and has not taken it. I assume that is because there is nothing to say to the contrary rather than indifference or inertia, so there is no proper basis for undermining what the appellant has said, which is, I find, inherently reasonable. I also find as a matter of law it is sufficient to show that he was a "worker". He had not left the job market. He had been stopped from working. It follows therefore on a balance of probabilities he has proved his case and I allow the appeal.

Notice of Decision

16. This appeal is allowed.

Jonathan Perkins
Signed
Jonathan Perkins
Judge of the Upper Tribunal Dated 27 May 2020