



IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2022-002280
First-tier Tribunal No:
EA/50029/2021
IA/03555/2021

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On the 17 May 20223

Before

UPPER TRIBUNAL JUDGE CANAVAN
DEPUTY UPPER TRIBUNAL JUDGE JOLLIFFE

Between

KEN IBE ISIMA
(NO ANONYMITY ORDER MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr Chowdhury Sultan, instructed by Ratna & Co Solicitors
For the Respondent: Mr C Avery, Senior Home Office Presenting Officer

Heard at Field House on 9 February 2023

DECISION AND REASONS

Introduction

1. The Appellant is a Nigerian national who was born on 27 September 1981. He appeals against a decision of FtTJ Hanbury (“the Judge”) dated 28 March 2022 in which the Judge refused his appeal against a decision of the Respondent dated 7 October 2020. By that decision, the Respondent refused his application for a permanent residence card as a former family member of an EEA national with a retained right of residence.

The application and the Respondent’s refusal decision

2. The Appellant through his solicitors, Ratna & Co, made an application dated 15 June 2020. The basis of the application was set out in a covering letter dated 5 June 2020. It was explained that the Appellant had been lawfully resident until 18 June 2020 on the basis of his marriage to an EU

national - Sara Cardoso Martins, a national of Portugal. The marriage had come to an end and his sponsor had returned to Portugal. It was said that the Appellant's application satisfied the requirements of regulation 10(5) of the Immigration (EEA) Regulations 2016.

3. The 7 October 2020 decision to refuse stated that the Appellant had failed to provide a passport or ID card to confirm the identity of the sponsor, and he had not provided any evidence that the sponsor had left the United Kingdom or attempted to obtain the documents from her. It went on to note that the application would also have been refused because he had not provided a decree absolute to prove that the marriage had been dissolved.

The Judge's judgment

4. The Judge recorded that there was an application by the Appellant's counsel for an adjournment on the bases that the decree absolute was not available, and for further inquiries to be made to HMRC about the sponsor's earnings.
5. The Judge directed himself to the overriding objective before rejecting that application. His reasons were that it was the second time that such an adjournment had been sought (see also letter dated 9 September 2021 from Ratna & Co seeking an adjournment to obtain the decree absolute), and there was nothing to say that the documents would be provided within a reasonable time frame. The Appellant's original application for leave had been made nearly two years before and the Judge considered that it would be unreasonable to delay still further the determination of the appeal indefinitely.
6. The Judge framed the issues for determination as being whether the Appellant had ceased to be a family member of an EEA national so as to come within paragraph 10(5) of the 2016 Regulations; whether it was significant that the Appellant was in 2021 no longer living with the sponsor, following her return to Portugal; and whether there was any other matter which would mean the appeal should be allowed.
7. The Judge cited *Baigazieva v SSHD* [2018] EWCA Civ 108 as authority for the proposition that a person needs to show that their former EEA spouse exercised treaty rights as a qualified person until divorce proceedings were commenced, not until the divorce itself.
8. The Judge made factual findings that on 8 January 2021, i.e. the date on which divorce proceedings were commenced, there was no evidence that the sponsor was exercising Treaty rights. The Judge also found that the Appellant has not obtained a decree nisi from the court and therefore he was not a family member of a qualified person "on termination of the marriage" because the marriage is subsisting.

The grant of permission

9. The Appellant sought permission to appeal, which was granted by FtT Judge Grey on 17 May 2022 in the following terms:

3. *In respect of Ground a., although it is accepted that the Appellant is now in possession of a decree absolute which was uploaded to My HMCTS on 13 January 2022 prior to the hearing (albeit to the wrong section), this does not materially affect the Judge's findings that the appellant was unable to establish that his former spouse was exercising Treaty rights as a qualified person when divorce proceedings were commenced on 8 January 2021. Although the Judge was not aware of the decree absolute, as will be apparent from [21.(ii)] of the Decision and Reasons, this was not material to the Judge's determination of whether the Appellant could satisfy the terms of regulation 10(5) of The Immigration (European Economic Area) Regulations 2016.*

4. *Ground b. asserts that a submission was made at the hearing on which the Judge has failed to make findings. In this submission it was asserted that the appellant would have had a permanent right of residence by 2018, having married his EEA ex-spouse on 26 October 2013 and resided for a continuous period of 5 years in the United Kingdom. This submission is referred to at [13] of the Decision and Reasons. It is arguable that the Judge failed to make findings on this material issue.*

The Respondent's Review

10. In the Respondent's rule 24 response dated 10 June 2022, it was stated that the only question to be decided by the FtT was the application for an EEA residence card on the basis of a retained right. The Respondent submitted that paragraph 13 showed that the Judge had found the appellant could not meet the requirements of regulation 15(1)(b) because he had not lived continuously for 5 years with the sponsor, and so any failure to make a specific finding could not be material on the facts.

Legal framework

11. The relevant provisions of the Immigration (European Economic Area) Regulations 2016/1052 are as follows:

"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.

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;*

12. The Court of Appeal in *UT (Sri Lanka) v SSHD* [2019] EWCA Civ 1095 restated that the Upper Tribunal should only interfere with a judgment of the First Tier Tribunal where there has been an error of law; the fact that the Upper Tribunal disagrees with the First Tier Tribunal's decision or might have expressed it differently is not a reason to set aside its judgment – see at paragraph 19.
13. The leading authority on the law concerning reasons in public decision making is *South Buckinghamshire DC v Porter [No.2]* [2004] UKHL 33. See the speech of Lord Brown at 36:

36... The reasons for a decision must be intelligible and they must be adequate. They must enable the reader to understand why the matter was decided as it was and what conclusions were reached on the "principal important controversial issues", disclosing how any issue of law or fact was resolved. Reasons can be briefly stated, the degree of particularity required depending entirely on the nature of the issues falling for decision.

The reasoning must not give rise to a substantial doubt as to whether the decision-maker erred in law, for example by misunderstanding some relevant policy or some other important matter or by failing to reach a rational decision on relevant grounds. But such adverse inference will not readily be drawn. The reasons need refer only to the main issues in the dispute, not to every material consideration. They should enable disappointed developers to assess their prospects of obtaining some alternative development permission, or, as the case may be, their unsuccessful opponents to understand how the policy or approach underlying the grant of permission may impact upon future such applications. Decision letters must be read in a straightforward manner, recognising that they are addressed to parties well aware of the issues involved and the arguments advanced. A reasons challenge will only succeed if the party aggrieved can satisfy the court that he has genuinely been substantially prejudiced by the failure to provide an adequately reasoned decision.

The parties' submissions

14. Counsel for the Appellant argued that the Judge had made a factual mistake which was an error of law because the decree absolute had been uploaded but was not brought to the Judge's attention, although he acknowledged that there was an issue about whether this was actually material to the appeal. He also argued that there should have been an adjournment to obtain documents about the sponsor's earnings from HMRC in accordance with the Court of Appeal's judgment in *Amos v SSHD* [2011] EWCA Civ 552 – see at paragraph 34-42 in particular.
15. The Presenting Officer submitted that the Appellant could not prove that at the time when the divorce proceedings were initiated, his sponsor was in the UK and exercising treaty rights. Although the evidence was imperfect and could have been more extensive, it was nonetheless clear that she had left the UK. An adjournment on the basis of an *Amos* direction would have been a “*fishing expedition*”, i.e. speculative – it was clear on the Appellant's own evidence that she had left the United Kingdom sometime on 2017, and so in any event the Appellant could not qualify for five years continuous residence in 2018.

Analysis

16. The appellant's rights of residence as a family member of an EEA national began when he married on 26 October 2013. He was issued with a five-year residence card recognising this right of residence on 18 June 2015. His witness statement at paragraphs 2 and 6(d) made it clear that his marriage with the sponsor broke down in the summer of 2017. She returned to Portugal at about that time and did not then return to the United Kingdom.
17. This is consistent with the sponsor's pay slips provided in the bundle, the latest of which is dated 30 September 2016.
18. Accordingly, she ceased to exercise treaty right over a year before he completed the requisite 5 year period.

19. The First-tier Tribunal's records show that the Decree Absolute was uploaded before the hearing. For this reason it is unlikely that the appellant's representative would have made an application for an adjournment on this basis. To this extent we find that the judge's reference to an application made on this basis is likely to amount to an error of fact. However, we find that nothing turned on this error if the appellant did not meet the requirements for a retained right of residence even if the evidence was taken at its highest.
20. The Appellant's contention that the Judge erred in law in not granting an adjournment for further inquiries to be made with HMRC does not disclose an error of law. Firstly, the Judge directed himself quite correctly to the Procedure Rules and the overriding objective. He took account of considerations which were clearly proper and material, i.e. that there had been a previous adjournment and further delay would be undesirable, that there was no timeline for when material would be become available, and that an adjournment would prejudice the interests of other appellants. In any event, even if there were an error of law in not adjourning, it would not have been material.
21. The burden was on the Appellant to prove his case to the necessary standard. It was open to the judge to refuse the adjournment application on the grounds of delay given that the appellant had had more than sufficient time to apply for an *Amos* direction if one was thought necessary. There is force in the Presenting Officer's submission that such a direction would have been speculative, in light of the Appellant's witness evidence.
22. Mr Chowdhury did not address the Upper Tribunal on the point identified by FtT Judge Grey in granting permission that the Judge failed to make findings about whether the Appellant had acquired a permanent right of residence in October 2018, 5 years after his marriage in October 2013. For completeness, we will deal with that point as well.
23. It is apparent from paragraph 13 of the Judge's judgment that he was aware of the point. It is well-established from *Porter No.2* and other appellate authorities that a decision maker or judge does not have to address every point raised and piece of evidence submitted. The decision maker is entitled to take account of the fact that the decision is addressed to parties who are well aware of the issues. The Judge was entitled not to deal further with this point and make findings about it because even on the Appellant's case taken at its highest, it would not have made any material difference to the outcome of the appeal because the sponsor had ceased to exercise Treaty rights in the United Kingdom and returned to Portugal in the latter part of 2017.
24. For the reasons given above, we conclude that the First-tier Tribunal decision did not involve the making of an error on a point of law.

Notice of Decision

The appeal is refused, and the decision of the First Tier Tribunal Judge is confirmed.

Signed J Jolliffe Date: 23 April 2023

Deputy Upper Tribunal Judge Jolliffe