



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: EA/14017/2016

THE IMMIGRATION ACTS

Heard at Field House
On 12th September 2018

Decision & Reasons Promulgated
On 17th September 2018

Before

DEPUTY UPPER TRIBUNAL JUDGE SAINI

Between

SATYAJIT ROY
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr A Maqsood, Counsel, instructed by David Wyld & Co
Solicitors

For the Respondent: Mr L Tarlow, Senior Presenting Officer

DECISION AND REASONS

1. The Appellant appeals against the decision of First-tier Tribunal Judge Hendry dismissing his appeal on the basis of whether the Appellant qualified for a retained right of residence under the Immigration (EEA) Regulations and the EU Treaties. The Appellant appealed against that decision and was granted permission to appeal by Upper Tribunal Judge Pitt in the following terms:

“It is arguable that the FtTJ took an incorrect approach in requiring the Appellant and his ex-spouse to have had an active or ‘subsisting’ marriage for three years where it was accepted that the couple had lived together for a year and the marriage had existed for at least three years.”

2. I was not provided with a Rule 24 response by the Respondent but was given an indication that the appeal was resisted, although not with any vigour.

Error of Law

3. In my view, there is a material error of law in the decision such that certain discrete and specific paragraphs should be set aside in relation to the judge’s analysis and findings upon Regulation 10(5)(d)(i) and the findings as to whether he has achieved a right to a retained right of residence under the EEA Regulations.
4. In terms of the judge’s analysis of Regulation 10(5)(d)(i) the judge sets out the regulation at paragraph 14 of his decision and notes that the regulation states *inter alia* as follows:

“A person satisfies the conditions in this paragraph if -

...

(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.

...”

(underlining emphasis provided)

5. The judge, however, at paragraph 90 of the decision states as follows:

“As the Appellant and his former wife had married in February 2012, to comply with Regulation 10(5), the marriage had to have subsisted for three years, i.e. until at least February 2015”.

(underlining emphasis provided)

6. By direct comparison, it is plain that the First-tier Tribunal has committed an unforced and innocent error in conflating the terminology of Regulation 10(5) and has replaced “lasted” with “subsisted”. A previous issue that the First-tier Tribunal was dealt with correctly was whether the marriage was a ‘marriage of convenience’ and whether it was thus “subsisting”. However, that issue is distinct and apart from whether the marriage has also *lasted* for three years since it was entered into and whether one of

those years included residence in the United Kingdom. Thus, I accept the Grounds of Appeal at paragraphs 9, 10, 11 and 14 in their analysis of the law concerning this area and I note that the judge found at paragraph 89 that, as a matter of fact, there was insufficient evidence to determine that the marriage was one of convenience. Therefore, in terms of paragraphs 90 and 102 to 104, all that remained for the judge was to merely determine whether the marriage had “lasted” for at least three years with one year of marriage involving residence in the UK - albeit not even shared residence. In that light, I note the authority of *HS (EEA: revocation and retained rights) Syria* [2011] UKUT 165 (IAC), which confirmed at [34] that “the reference to marriage does not mean matrimonial cohabitation” and that this finding emanated from the decision of the European Court of Justice in *Diatta v Land Berlin* [1985] ECR 567.

7. Consequently, given that the marriage subsisted and that it was not one of convenience, it did not matter whether the couple were living together or not or cohabited or whether they were separated or were considering formal termination of their marriage (for example). All that mattered was whether the marriage was still in existence.
8. I further note the authority of *Chang (EEA Nationals, Spouses) Malaysia* [2001] UKIAT 00012 wherein the Vice President of the Upper Tribunal stated at [31] that:

“It also seems to me that what the ECJ was saying was that once the Community right is established then it will only be lost when the status of the person seeking the residence permit as a ‘spouse’ ceases. This can only occur when under the relevant national law the marriage is dissolved.”
9. Therein, Vice President Ockelton was referring to the retention of residence rights by a former spouse in the context of the *Diatta* judgment from the European Court. I pause to note that I am told by Mr Maqsood that this discrete element of *Chang* has not been subject to any distinguishing remarks in any further judgments of an equivalent or higher court and, to my mind, the logic underlying the Vice President’s reasoning that a Community right would only be lost when the status of the family member changes is consistent with the terms of the European Directive governing free movement equally.
10. As such, I do find that, given that the relationship has been accepted as commencing on 21st February 2012 when the parties married and lasted until the divorce on 4th March 2016, the marriage did last for the minimum three years and one of those years whilst it lasted involved residence in the United Kingdom. Therefore, on that basis, I do find that the First-tier Tribunal Judge has materially erred in her analysis of Regulation 10(5)(d)(i).
11. In light of the above findings I set aside paragraphs 90 and 102 to 104 of the First-tier Tribunal Judge’s decision alone, those paragraphs being the only ones that are infected by this discrete legal error.

Remaking the Decision

12. In light of my findings I briefly remake the decision in the following terms.
13. I find as a matter of fact that the marriage has satisfied the terms of Regulation 10(5)(d)(i) in that the marriage in question had “lasted for three years” and, given that it was not one of convenience. Notwithstanding the judge’s findings that the marriage had broken down in June 2014 approximately, and her observations that divorce proceedings started in September 2015, I find that the marriage did last for the requisite period as it lasted until the divorce (in terms of the wording of Regulation 10(5)(d)(i)) and also lasted a sufficient time taking into account the initiation of divorce proceedings in September 2015 (in terms of the wording of the European Directive).
14. Consequently, the Appellant has demonstrated that he is entitled to a retained right of residence, subject to the discretion of the Secretary of State inherent to the European Directive and the EEA Regulations in granting such permits and recognising that right.

Decision

15. The appeal is allowed on the basis of the Appellant having established that he qualifies for a retained right of residence under the Immigration (EEA) Regulations (as amended).

Signed

Date 17th September 2018

Deputy Upper Tribunal Judge Saini

TO THE RESPONDENT **FEE AWARD**

As I have allowed the appeal and because a fee has been paid or is payable, I have considered making a fee award and have decided to make no fee award as testimony was necessary to establish the marriage was not one of convenience.