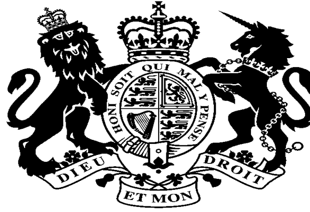


Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: EA/04466/2018

THE IMMIGRATION ACTS

Heard at Royal Courts of Justice
On 15 July 2019

Decision Promulgated
On 16 September 2019

Before

UPPER TRIBUNAL JUDGE CANAVAN
DEPUTY UPPER TRIBUNAL JUDGE ROBERTS

Between

MUHAMMAD NAEEM KHAN

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the appellant: Mr S. Bisson, instructed by PN Legal Services
For the respondent: Mr S. Kotas, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellant entered the UK on 30 September 2011 with leave to enter as a Tier 4 (General) Student Migrant, which was valid until 26 January 2014. On 20 May 2013 the appellant applied for a residence card to recognise a right of residence as the family member of an EEA national, which was refused on 13 September 2013. The First-tier Tribunal dismissed a subsequent appeal because neither the appellant nor his claimed EEA national wife attended the hearing. There was insufficient evidence

© CROWN COPYRIGHT 2019

to show that the appellant was the family member of an EEA national who was exercising EU treaty rights in the UK.

2. The appellant appealed the respondent's subsequent decision dated 14 June 2018 to refuse to issue a residence card recognising a retained right of residence as the former family member of an EEA national. Despite the earlier First-tier Tribunal decision, the only reason given by the respondent for refusing this application was that the appellant failed to produce sufficient evidence to show that he met the requirements of regulation 10(6)(a) of The Immigration (European Economic Area) Regulations 2016 ("the EEA Regulations 2016"). No issue was taken with the credibility of the appellant's original claim to be the family member of an EEA national for the purpose of regulation 10(5).

3. First-tier Tribunal Judge M. Robertson ("the judge") dismissed the appeal in a decision promulgated on 18/04/19. The judge noted that the only issue was "whether or not the appellant had been exercising Treaty rights since the date of the divorce, this being 18 October [2017]. If he was, and he was still exercising Treaty rights at the date of the hearing, he would be entitled to succeed in his appeal." [13]

4. The judge noted the submissions made by the appellant's representative that at the date of the application in February 2018 the appellant had only been able to provide a copy of his tax return for the year 2016-2017 because the return for the year 2017-2018 was not yet due. Since then the appellant had provided a copy of the tax return for 2017-2018 [14]. The judge considered the appellant's oral evidence as to his income in both tax years. She was satisfied that the appellant's oral evidence of his income in the 2016—2017 was consistent with the tax return. She was satisfied that he was self-employed as claimed in the 2017-2018 tax year and that he was self-employed at the date the divorce was finalised [14].

5. The judge turned to consider whether there was evidence to show that the appellant continued to earn a living as a self-employed person at the date of the hearing in January 2019. Again, the appellant was unable to produce a tax return for the year 2018-2019 because the return was not yet due. The appellant confirmed that he was still self-employed and estimated his income to be around £5,000 at that stage of the tax year [16]. The judge concluded:

> "19. I have considered the evidence and the submissions carefully. Mr Swaby is right to say that the only evidence we have is the Appellant's oral evidence, the invoices he has provided at pp 360-455 and the letter from G&S Accountants. The Appellant's evidence is not independent objective evidence; he has a vested interest in the outcome of the appeal; and where evidence is available, it should be provided (TK (Burundi)). G&S Accountants have recently been appointed but they had not in fact seen any evidence that the Appellant has earned anything from April 2018 to date. I have the invoices, but these do not state the addresses of the persons named on the invoices, and there would be no way of verifying that the work was in fact carried out. There are no witnesses to confirm that he has provided any services to them on a regular basis. There are no bank statements to show that the funds earned were put into a bank account.

> Finally, the Appellant's estimate of how much he thought he had earned this year tax year was wholly inadequate; the invoices add up to almost £13,000 by 8 November 2018, which is well over the earnings in previous years. As the Appellant is the person who has done the work and received the income, I find it is implausible that he would not have realised that he had in fact earned more than in his previous years of self-employment. Although it is established as fact that the Appellant has been self-employed in previous years, I find that on the totality of the evidence, there is insufficient evidence before me to confirm that the Appellant is self-employed as at the date of the hearing. He is not entitled to a residence card because he has not provided sufficient evidence to establish that he is self-employed as claimed as at the date of the hearing. The appropriate course of action for the Appellant, bearing in mind that it is found that he was self-employed as claimed at the date of the divorce, is to submit a fresh application with the appropriate evidence."

6. The appellant appeals the First-tier Tribunal decision on the following grounds:

    (i) The judge erred as to the date when the appellant was required to show that he was self-employed for the purpose of regulation 10(6)(a) of the EEA Regulations 2016.

    (ii) The judge failed to take into account the nature of self-employment or the possibility of gaps in self-employment in assessing whether the appellant met the relevant requirements.

Legal Framework

7. Article 13 of the Citizens Directive (2004/38/EC) sets out the circumstances in which family members may retain a right of residence.

    > 1. Without prejudice to the second subparagraph, divorce, annulment of the Union citizen's marriage or termination of his/her registered partnership, as referred to in point 2(b) of Article 2 shall not affect the right of residence of his/her family members who are nationals of a Member State.
    >
    > Before acquiring the right of permanent residence, the persons concerned must meet the conditions laid down in points (a), (b), (c) or (d) of Article 7(1).
    >
    > 2. Without prejudice to the second subparagraph, divorce, annulment of marriage or termination of the registered partnership referred to in point 2(b) of Article 2 shall not entail loss of the right of residence of a Union citizen's family members who are not nationals of a Member State where:
    >
    > (a) Prior to initiation of the divorce or annulment proceedings or termination of the registered partnership referred to in point 2(b) of Article 2, the marriage or registered partnership has lasted at least three years, including one year in the host Member State; …
    >
    > Before acquiring the right of permanent residence, the right of residence of the persons concerned shall remain subject to the requirement that they

are able to show that they are workers or self-employed persons or that they have sufficient resources for themselves and their family members not to become a burden on the social assistance system of the host Member State during their period of residence and have comprehensive sickness insurance cover in the host Member State, or that they are members of the family, already constituted in the host Member State, of a person satisfying these requirements. "Sufficient resources" shall be as defined in Article 8(4).

Such family members shall retain their right of residence exclusively on personal basis.

8. Regulation 10 of the EEA Regulations 2016 is said to transpose the Citizens Directive. The relevant section is regulation 10(5)-(6).

‘(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 initiation of proceedings for 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 initiation of proceedings for 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;

…

(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).’

9. In *Baigazieva v SSHD* [2018] EWCA Civ 1088 the Court of Appeal concluded that a person needed to show that they met the relevant conditions of regulation 10(5)(a) at

the date of the initiation of the divorce proceedings and not the date the proceedings were made final (decree absolute). This is consistent with the wording of Article 13 of the Citizens Directive and regulation 10(5)(a).

10. In *Gauswami (retained right of residence: jobseekers) India* [2018] UKUT 00275 the Upper Tribunal considered what the correct date was for the overall assessment of whether a person retains a right of residence. Although the Tribunal acknowledged that what was said in *Baigazieva* regarding regulation 10(5)(a) was correct, it concluded that the overall date when a person ceased to become a family member and thereby retained a right of residence is the date the divorce is finalised. It is only at that point that a person ceases to be the family member of an EEA national. The Upper Tribunal observed that regulation 10(5)(a) and (b) use the past tense, but regulation 10(5)(c) and 10(6) are framed in the present tense. The Tribunal went on to find:

> "33. In order to understand the significance of this, one needs to refer to the text of Article [13]. Article [13(2)] (a), (b), (c) and (d) set out requirements to be met in order to retain the right of residence. These requirements are essentially backward-looking in nature. So too, as we now know, is the requirement regarding the status of the qualified person.
>
> 34. By contrast, the paragraph that follows sub-paragraph (d) ("Before acquiring the right of permanent residence …") is of a present or ongoing nature. This is because a person who retains the right of residence has to be a worker/self-employed/self-sufficient and insured person (or a family member of such a person) at all times up to the point that he or she acquires the right of permanent residence; that is to say, acquires a right that is no longer retained from a previous relationship with a relevant EU citizen. In short, the meaning of the words "Before acquiring …" would perhaps be better conveyed in English by saying "Until the right of permanent residence has been acquired …".
>
> 35. Regulation 10(6) is how the United Kingdom has decided to give domestic legislative effect to that paragraph in Article [13]. As will be seen, we conclude that regulation 10(6) does not give proper or at least sufficiently clear effect to that Article, so far as concerns what is meant by being a "worker". But, so far as its temporal aspect is concerned, regulation 10(6) is entirely right. So far as the appellant is concerned, the requirements of that provision must be satisfied both on and after the date of the decree absolute." [typographical errors in legal references corrected]

Decision and reasons

11. The evidence before the judge showed that the appellant entered the UK on 30 September 2011 with leave to enter as a Tier 4 (General) Student Migrant, which was valid until 26 January 2014.

12. The evidence included a copy of a marriage certificate, which indicated that Muhammad Naeem Khan married Agnes Kocsandi, a Hungarian national, on 06 November 2012. There were four unclear photocopied photographs of the couple on what appeared to be their wedding day and another five grainy photographs of them together or with friends.

13. The bundle before the First-tier Tribunal also included some evidence to suggest that they might have been living at the same address together after the marriage. Confirmation of Ms Kocsandi's registration on the electoral register was sent to an address in Kitchener Road in High Wycombe on 19 April 2013. A Thames Water bill dated 24 December 2013 covering a period from 08 September 2013 was addressed to the appellant at the same address. A copy of the appellant's Santander bank statement from 01 March 2013 to 01 April 2013 was addressed to him at Kitchener Road.

14. The evidence also included a copy of a 12-month tenancy agreement signed by Mr Khan and Ms Kocsandi on 30 November 2013 for a property in Desborough Avenue in High Wycombe. A letter from Jobcentreplus was sent to the appellant at the address on 06 January 2014. A copy of Ms Kocsandi's counterpart driving licence recorded the same address although the document is undated. The appellant and Ms Kocsandi were named on Thames Water bills for the property at Desborough Avenue, which covered a period from January 2014 to July 2015. Copies of the appellant's Santander bank statements were sent to the same address and covered the period from December 2013 to September 2016.

15. On 20 May 2013 the appellant applied for a residence card to recognise a right of residence as the family member of an EEA national. The application was refused on 13 September 2013. No copy of the Secretary of State's decision appeared to be in the bundle before the First-tier Tribunal. However, the reasons for refusal were summarised by First-tier Tribunal Judge Thorne who heard an appeal on 23 April 2014. The Secretary of State refused the application because the passport in Ms Kocsandi's name was reported lost or stolen. The Secretary of State was not satisfied that he was married to an EEA national.

16. Neither the appellant nor Ms Kocsandi attended the hearing before Judge Thorne. The judge noted that their statements were undated and had similar wording. The appellant claimed that Ms Kocsandi reported the loss of her passport and applied for a new passport. By the time he applied for a residence card she had found the old passport at home. The old passport was mistakenly sent with the application instead of her new passport. The judge was satisfied that the appellant had been notified of the hearing and that he could proceed to determine the appeal in his absence. He concluded that the witness statements were of little evidential value. The appellant signed a statement that was undated and purported to confirm, incorrectly, that he was a national of India when he is a Pakistani national. In any event, the judge found that the explanation provided by the appellant for submitting an EEA passport that had been reported lost or stolen "makes no sense and is lacking in credibility." In addition, the judge found that the appellant failed to produce sufficient evidence to show that Ms Kocsandi was exercising EU treaty rights. Limited evidence was produced relating to her employment in the UK. The appeal was dismissed in a decision promulgated on 07 May 2014.

17. The appellant's evidence in his witness statement was that divorce proceedings were initiated on 24 February 2016. A copy of the decree absolute showed that the divorce was finalised by the Family Court in Bury St Edmunds on 18 October 2017.

18. At the point when the appellant submitted the most recent application for a residence card he had never been issued with a residence card recognising a right of residence as the family member of an EEA national. A decision of the First-tier Tribunal cast doubt on the credibility of the appellant's claim to rights of residence as a family member.

19. Having outlined the background to the most recent application, we note that, despite the credibility issues previously raised, the Secretary of State did not refuse the application made on 23 February 2018 on the ground that the appellant failed to meet the requirements of regulation 10(5) because the marriage was one of convenience. The bundle before the First-tier Tribunal contained a certified copy of Ms Kocsandi's Hungarian passport issued on 21 March 2013, which was valid for 10 years. A statement purporting to be from Ms Kocsandi was signed and dated on 07 November 2017. In that statement she said that she was willing to provide the original passport if necessary. The only reason given for refusing the application was that the appellant failed to produce sufficient evidence to show that he met the requirements of regulation 10(6)(a) to show that, even though he is not an EEA national, if he were, he was a worker, self-employed person or a self-sufficient person.

20. We turn to consider the grounds of appeal. The first point relates to the temporal assessment made by the judge. Regulation 10(5)(a) is to be assessed at the date of the initiation of divorce proceedings. The Secretary of State did not dispute this element of the regulation despite the earlier credibility findings made by the First-tier Tribunal.

21. We learn from *Gauswami* that the assessment of regulation 10(6) should be at the date when the divorce is finalised up until the date when the person acquires a right of permanent residence. It was correct for the First-tier Tribunal to consider whether there was evidence to show that the appellant was likely to be a worker at the date the divorce was finalised. If the evidence is taken at its highest, at that point he ceased to be the family member of an EEA national. However, it did not necessarily follow that the judge had to consider whether he was still a worker at the date of the hearing. Article 13 of the Citizens Directive and regulation 10(6)(a) only required the appellant to show that he continued to work until he acquired permanent residence. Once a person acquires permanent residence it is not necessary to show that they continue to be a worker. Nothing in the First-tier Tribunal's findings indicate that the judge appreciated that this assessment needed to be carried out.

22. In order to acquire a permanent right of residence the appellant would need to show that he had resided in the UK in accordance with EU law for a continuous period of five years. In the period before the divorce was finalised he would need to show that he was the family member of an EEA national who was exercising rights of free

movement in the UK. After the divorce he would need to show that he continued to work.

23. The bundle before the First-tier Tribunal included quite a lot of evidence relating to Ms Kocsandi's employment in the UK, but most of it related to work carried out from 2015 onwards. The evidence relating to her employment before then was limited. It included the letter dated 14 May 2013 from Ms Kocsandi's purported employer, which was given little weight by Judge Thorne in 2014.

24. However, an SA302 dated 13 November 2017 outlined the HMRC records for Ms Kocsandi's income from the tax years 2013-2014 to 2016-2017. It was accompanied by HMRC tax calculations for the same tax years. In 2012-2013 the HMRC had no record of income from employment or self-employment. In the year 2013-2014 HMRC records showed that Ms Kocsandi declared £7,680 profit from self-employment. For the 2014-2015 tax year she declared self-employed income of £7,890. Her income from all employments was only £2,632 in 2015-2016. She declared a total income of £8,946 from employment and self-employment for the year 2016-2017.

25. In the absence of any allegation that the marriage was one of convenience, there was evidence before the First-tier Tribunal indicating that the appellant had been the family member of an EEA national since the marriage on 06 November 2012. However, there was no evidence to show that Ms Kocsandi was exercising her rights of free movement as a worker until the tax year 2013-2014. There was some evidence to suggest that she continued to work until the end of the 2016-2017 tax year. Copies of her bank statements indicated that she continued to receive payments for employed work until the end of 2017, which covered the period when the divorce was finalised.

26. The letter from HRMC dated 13 November 2017 indicated that Ms Kocsandi began work for Extract Cleaning Services on 06 April 2013 and ended work for them on 31 May 2014. There was evidence to show that she continued to work on an employed or self-employed basis until the end of 2017. By the date the divorce was finalised in October 2017 the evidence indicated that the appellant had been living in the UK in accordance with EU law for a period of four and a half years. He only needed to show that he continued to work for another six months after the date of the divorce to acquire a right of permanent residence.

27. The judge was satisfied that the appellant produced sufficient evidence to show that he was self-employed during the 2017-2018 tax year. In the absence of any allegation that the appellant was not, in fact, a family member prior to the divorce, on the evidence before the First-tier Tribunal, it was at least more likely than not that the appellant had acquired a right of permanent residence by April 2018.

28. Once the appellant had acquired a right of permanent residence, it was not necessary for him to show that he continued to work at the date of the First-tier Tribunal hearing in January 2019 because, based on the judge's findings regarding his self-

employment during the 2017-2018 tax year, he had already acquired permanent residence.

29. Although the judge was correct to consider the position at the date of the divorce, it follows from our analysis that she erred in focusing her subsequent assessment on whether there was evidence to show that the appellant was a worker at the date of the hearing rather than considering whether the evidence indicated that he had already acquired a right of permanent residence.

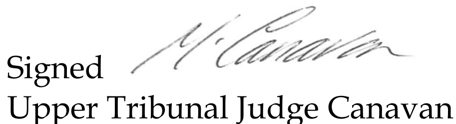
30. For these reasons, we conclude that the First-tier Tribunal decision involved the making of an error on a point of law. The decision is set aside. The analysis of the evidence we have undertaken in order to determine whether there was an error of law determines the appeal. If the appellant acquired a right of residence by April 2018 the appeal must be allowed.

31. The decision breaches the appellant's rights under the EU treaties in respect of entry to or residence in the UK.

DECISION

The First-tier Tribunal decision involved the making of an error of law

The decision is remade and the appeal is ALLOWED on EU law grounds

Signed  Date 12 September 2019
Upper Tribunal Judge Canavan