Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: EA/05297/2017

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 17 June 2019	**On 24 June 2019**

Before

UPPER TRIBUNAL JUDGE COKER
UPPER TRIBUNAL JUDGE NORTON-TAYLOR

Between

CHAIWAT BUPPASIRIKUL
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr M Allison, Counsel, instructed by Wick and Co Solicitors
For the Respondent: Ms J Isherwood, Senior Home Office Presenting Officer

DECISION AND REASONS

Introduction

1. This is a challenge by the Appellant against the decision of First-tier Tribunal Judge Siddall ("the judge"), promulgated on 12 February 2019, in which she dismissed the Appellant's appeal against the Respondent's decision of 23 May 2017, refusing to issue him with a permanent residence card under the Immigration (European Economic Area) Regulations 2016 ("the Regulations").

2. The Appellant had entered the United Kingdom in September 2010. On 8 December 2011 he married [KK] ("KK"), a Hungarian national. The couple separated in 2015 and a divorce petition was lodged in May of that year. The marriage was terminated on 7 September 2016. The Appellant applied for a permanent residence card on 6 December 2016.

The judge's decision

3. The judge correctly directed herself to the applicable provisions of the Regulations, those being 6(2), 6(6), 10(5), 10(6), 15(1)(f), and 18(2). In respect of Regulation 10 (5)(a), the judge made express reference to the Court of Appeal's judgment in Baigazieva [2018] EWCA Civ 1088, in which the Respondent had conceded that the relevant date for an applicant to show that the former EEA spouse had been exercising Treaty rights was that at which divorce proceedings were initiated.

4. On the evidence before her, at paras. 16-17 the judge found that the Appellant satisfied the requirements of Regulations 10(5)(d)(i) and 10(6). The core issue in the appeal was whether the Appellant could show that KK had been exercising Treaty rights as at the initiation of the divorce proceedings in May 2015.

5. Following a previous direction issued by the First-tier Tribunal, the Respondent had obtained evidence from HMRC relating to KK's income details for the years 2011-2017. Having recognised the difficulties faced by the former spouses of EEA nationals in cases such as the present, the judge concluded that the evidence as a whole, in particular that emanating from HMRC, was not sufficient to show that KK had in fact been exercising Treaty rights in any capacity as at the relevant point in time. She found that the evidence of any work undertaken by KK had been "absolutely minimal" and that it was unlikely that she had been a jobseeker.

The grounds of appeal and grant of permission

6. There are two sets of grounds before us. The first were prepared by the Appellant's solicitors for the application for permission to appeal made to the First-tier Tribunal. In essence they assert that the judge failed to look at the evidence of KK's work holistically and failed to explain why even minimal work was not sufficient for her to have been a qualified person.

7. The second set of grounds were drafted by Counsel (not Mr Allison) and was submitted with the renewed application made to the Upper Tribunal. For the purposes of the appeal before us, the two relevant additional grounds are 1 and 4. The first asserts that the judge failed to address the evidence of self-employment correctly and erroneously imposed a need to show profit in respect of such work in considering Regulation 6 of the Regulations. The second ground states that the judge

erred in not requiring the Respondent to obtain further evidence in relation to KK's circumstances before determining the appellant's appeal.

8. Permission to appeal was granted by Deputy Upper Tribunal Judge Black on 23 May 2019.

The hearing before us

9. At the outset of the hearing, Mr Allison confirmed that he was only seeking to rely on the first of the original grounds of appeal, together with the first and fourth of the additional grounds. He submitted that the period of self-employment ran from April 2015 until November of that year, not through to April 2016. At para. 25, the judge had been wrong to have considered a two-year period from April 2014 to April 2016 in respect of any efforts made by KK to find work. In fact, the period was shorter: April 2014 to May 2015, when the divorce proceedings were initiated.

10. As to the information from HMRC obtained by way of a so-called "Amos direction" (see Amos [2011] Immigration AR 600), Mr Allison quite candidly acknowledged that the Appellant's representatives had not asked the First-tier Tribunal for a further direction in relation to any evidence obtainable from the Department of Work and Pensions ("DWP"), nor had there been any application to adjourn the appeal before the judge on this basis.

11. Ms Isherwood emphasised the fact that the burden of proof lay with the Appellant. It had been open to the judge to find that she did in light of the evidence before her.

12. In reply, Mr Allison submitted that the judge had not expressly found that KK's work had not been genuine and effective: £240 PAYE earnings in the tax year 2014/2015 were not, he submitted, simply marginal and ancillary.

Decision on error of law

13. As we announced the parties at the hearing, we conclude that there are no material errors of law in the judge's decision. Our reasons for this are as follows.

14. The judge clearly directed herself properly as to the law in general and in respect of the core issue of Regulation 10(5)(a) in particular. Importantly, she quite rightly recognised that the burden of proof rested throughout with the Appellant, notwithstanding the acknowledged difficulties that can arise in cases such as the present.

15. It is appropriate to deal with the last of Mr Allison's grounds of challenge first. It is clear to us that the judge was not in any way obliged to have issued a further direction to the Respondent relating to information held by the DWP and/or to have adjourned the appeal of his own volition. The HMRC evidence had been in the

possession of the Appellant's representatives since August 2018 and it is clear from the face of that evidence that details of any benefits claimed by KK might have been obtained from the DWP. As Mr Allison acknowledged, no application was made to the First-tier Tribunal for a further direction between August 2018 and the hearing before the judge in late January 2019. No such application was made on the day of the hearing, nor was an adjournment sought. There had been ample opportunity for the Appellant's representatives to have sought further evidence. No criticism can be laid at the door of the judge.

16. We add for the sake of completeness that the Respondent was not under an ongoing obligation to obtain, in the absence of any request by the Appellant or a direction from the First-tier Tribunal, yet further evidence on KK's circumstances from a different source.

17. In light of the above, the judge was fully entitled to proceed to decide the appeal in light of the evidence before her.

18. We turn now to the other grounds of challenge. It is clear from para. 23 that the judge had the provisions of Regulation 6 well in mind. It is also clear from para. 24 that the judge had considered the whole period covered by the HMRC evidence when assessing KK's circumstances, contrary to what is said in para. 7.2 of the original grounds. Having said that, the judge was clearly entitled to direct her main focus on the point in time at which the divorce proceedings were initiated. In so doing, she was entitled to conclude that the evidence of work done by KK in the period surrounding the relevant date was "absolutely minimal" (showing earnings of £240 for employment in the tax year 2014/2015 and £40 for self-employment the following year, which included the month in which the divorce proceedings were initiated). The fact that the accounting period for self-employment ended on 21 November 2015 makes no difference to this whatsoever. That end date in no way "proved self-employment", as alleged in the first of the original grounds of appeal.

19. Whilst Mr Allison submitted that the judge did not expressly find that KK's work had not been genuine or effective, the earnings were so extremely low that when placed in the context of the judge's assessment as a whole, the only rational inference to be drawn is that she was indeed concluding that the work was neither genuine nor effective, and was quite obviously only marginal in its nature. Our view on this is reinforced by the fact that the Appellant's counsel deemed it necessary to rely on the argument that KK had been a jobseeker at the relevant time: there was clearly a recognition that reliance on the negligible earnings was not going to be sufficient to show that KK was a qualified person.

20. In respect of the period during which the judge found that KK would have had to be searching for work, it is right that in para. 25 of her decision, the judge refers to April 2014 to April 2016, whilst the divorce proceedings were initiated in May 2015. There is no error here, or at least not one that can properly be described as material. The evidence before the judge for the period between May 2015 and April 2016 showed no earnings at all from employment after April 2015 and, as set out above, a

negligible income from self-employment between April 2015 and November of that year. There were no earnings at all from either employment or self-employment for any subsequent period. In light of this, the judge was fully entitled to conclude that on the evidence as a whole, the Appellant was unable to show that KK had been either a worker who had retained that status or a jobseeker under Regulation 6 of the Regulations.

21. Mr Allison, quite rightly in our view, did not pursue ground 3 of the additional grounds. In any event, on the evidence before the judge, such as it was, she was clearly entitled to conclude that the Appellant had failed to show that KK had been in receipt of Jobseeker's Allowance at the material time.

22. Whilst we have a degree of sympathy for his situation, in the absence of any material errors, the Appellant's appeal must fail.

23. We record here that at the conclusion of the hearing, Ms Isherwood provided Mr Allison with information she had obtained from the DWP regarding KK's previous benefits claims. We of course were not privy to the contents of this information.

Anonymity

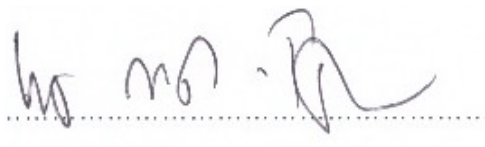
24. We do not make an anonymity order in this case.

Notice of Decision

The making of the decision of the First-tier Tribunal did not involve the making of an error on a point of law.

The decision of the First-tier Tribunal stands.

The Appellant's appeal to the Upper Tribunal is dismissed.

Signed  Date: 18 June 2019

Upper Tribunal Judge Norton-Taylor