Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/23175/2013

THE IMMIGRATION ACTS

Heard at Newport	**Determination Promulgated**
On 20 March 2014	**On 19 May 2014**

Before

MR C M G OCKELTON, VICE PRESIDENT
UPPER TRIBUNAL JUDGE GRUBB

Between

VLADIMIR ANDREEV

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: In person
For the Respondent: Mr I Richards, Home Office Presenting Officer

DETERMINATION AND REASONS

Background

1. The appellant is a citizen of the Russian Federation who was born on 20 July 1977. On 1 March 2006, he married an Estonian national, Raili Raimet at the register office in Tallin in Estonia. He applied for and was granted a family permit to enter the UK as the spouse of an EEA national. The appellant entered the United Kingdom on 8 March 2006. On 8 September 2006, he applied for a residence card as a family member of an EEA national under the

Immigration (European Economic Area) Regulations 2006 (SI 2006/1003) (the "2006 EEA Regulations"). Thereafter, on 20 April 2007, he was issued with a residence card on that basis valid until 20 April 2012.

2. The appellant's relationship with his wife deteriorated and his wife petitioned for divorce in Estonia. On 6 July 2011, the appellant and his wife were divorced by judicial decree issued by the Harju County Court in Estonia.

3. On 20 April 2012, the appellant's legal representatives applied on his behalf for a residence card confirming that he had a permanent right of residence under reg 15 of the 2006 EEA Regulations. The basis for that application was that the appellant had resided in the UK in accordance with the EEA Regulations for a period of 5 years from 8 March 2006 when he entered the United Kingdom with a family permit as the family member of an EEA national. The application also made reference to the appellant's reliance upon his having retained a right of residence under reg 10 of the 2006 EEA Regulations following his divorce on 6 July 2011.

4. On 24 June 2013, the respondent refused the appellant's application on a number of bases. First, the respondent was not satisfied that the appellant's overseas divorce was valid by virtue of s.46(2) of the Family Law Act 1986 as it could not be shown that both parties to the marriage were not "habitually resident" in the UK throughout the period of one year immediately preceding the date of divorce. Secondly, on the basis of the documentary evidence submitted, the respondent was not satisfied that the appellant's wife had been exercising Treaty rights, namely as a self employed person up to the date of divorce on 6 July 2011.

The First-tier Tribunal's Decision

5. The appellant appealed to the First-tier Tribunal. The appeal was determined by Judge Kempton without a hearing in a determination dated 17 November 2013. Judge Kempton dismissed the appellant's appeal both under the 2006 EEA Regulations and also in reliance upon para 276ADE of the Immigration Rules (HC 395 as amended) and Article 8 of the ECHR. Having set out at some length extracts from the 2006 EEA Regulations, Judge Kempton's reasons are set out at para 9 of her determination as follows:

> "There is no evidence before me that the divorce in Estonia was a valid divorce in terms of the law applicable to marriage and divorce in that country. Accordingly, I cannot accept that the divorce was valid. The appellant's representatives said that they would provide such evidence but have failed to do so. There is no additional evidence before me to show the sponsor's financial circumstances allow her to meet the regulations, even if the divorce had been valid. The appeal fails. The appellant has not specified how he would be affected by Article 8 of ECHR, and accordingly, I am not in a position to consider any argument in relation to Article 8."

6. On 6 December 2013, the First-tier Tribunal (Judge Blandy) granted the appellant permission to appeal to the Upper Tribunal. He did so on the following grounds:

> "2. The grounds of the application argue at some considerable length that the Judge did not adequately consider the question of the validity of the Estonian divorce and wrongly found that it was not valid. It is generally argued that the Judge failed to address the law relating to an application for confirmation of permanent residence. I do find the grounds to be arguable. I consider that the reasons for the decision in paragraph 9 of the determination arguably do not adequately address the issues either in relation to the validity of the divorce or in relation to the application generally, It is arguably impossible to ascertain the reasoning behind the findings of the Judge. I find all grounds to be arguable."

7. Thus, the appeal came before us.

Error of Law

8. The appellant was not legally represented and the respondent was represented by Mr Richards.

9. Mr Richards accepted that both the Secretary of State and the Judge were wrong to conclude that the appellant's divorce was not valid and recognised in the UK. That is patently correct. The Secretary of State (and by adoption the Judge) applied the wrong provision in the Family Law Act 1986. As the respondent's refusal letter makes clear, s.46(2) of that Act, which was specifically relied upon to reject the application, only applies to overseas divorces "obtained other than by means of proceedings". The appellant's divorce was obtained by judicial proceedings in Estonia and so s.46(2) – and the requirement that neither party be habitually resident in the UK during the period of one year before the date of divorce – was simply inapplicable. Mr Richards accepted that as the appellant's divorce was obtained by judicial proceedings it is recognised in the UK. There is no doubt, therefore, the First-tier Tribunal's decision involved the making of an error of law. Nevertheless, Mr Richards submitted that the error by the Judge was not material as there was insufficient evidence before the Judge to find that the appellant's ex-wife had been self-employed during the relevant period relied upon.

10. Before we turn to deal with the evidence, it is clear to us that there was a procedural error in the First-tier Tribunal's proceedings. In reaching her adverse findings on the evidence, it is clear that Judge Kempton did not have before her a bundle of documents which were sent to the Tribunal under cover of a letter dated 8 November 2013 and which is stamped as received on 12 November 2013. It is also clear from correspondence between the appellant's then legal representatives and the First-tier Tribunal that the Tribunal was informed that these documents were to be sent to the Tribunal albeit outside the date set out in the Tribunal's notice for submission of written evidence by 16 October 2013. At the date that Judge Kempton determined this appeal on 17 November 2013, the Tribunal had in its

possession evidence relevant to the appellant's appeal which had been received 5 days earlier. It does not seem that this evidence was passed on to the Judge prior to her making the decision. That was a procedural error which, through no fault of the Judge, means that her decision cannot stand.

11. That said, we turn to the substance of the appellant's claim under the 2006 EEA Regulations.

The 2006 EEA Regulations

12. We begin with the relevant provisions of the 2006 EEA Regulations.

13. Regulation 15 sets out the circumstances under which a person acquires a right of permanent residence in the UK. Regulation 15(1)(b) and (f) deal, so far as relevant, with the position of a family member as follows:

> "15.(1) The following persons shall acquire the right to reside in the United Kingdom permanently –
>
> ….
>
> (b) a family member of an EEA national who is not himself 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;
>
> ….
>
> (f) a person who –
>
> (i) has resided in the United Kingdom in accordance with these Regulations for a continuous period of five years; and
>
> (ii) was, at the end of that period, a family member who has retained the right of residence."

14. The reference in reg 15(1)(f) to a person who has "retained the right of residence" is a reference back to reg 10 which, in relation to those who have been divorced, provides as follows:

> "10(1) In these Regulations, 'family member who has retained the right of residence' means, subject to paragraph (8), a person who satisfies the conditions in paragraph (2), (3), (4) and (5).
>
> …..
>
> (5) A person satisfies the conditions in this paragraph if –
>
> (a) he ceased to be a family member of a qualified person or of an EEA national with a permanent right of residence on the termination of the marriage or civil partnership of that person;

(b) he was residing in the United Kingdom in accordance with these Regulations at the date of the termination;

(c) he 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 he 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)."

15. In her decision, the Secretary of State focussed upon the validity of the appellant's divorce and whether, therefore, he could have retained a right of residence under reg 10. In fact, the appellant's claim did not necessarily rely at all upon reg 10. The appellant came to the UK on 8 March 2006 with a family permit as a family member of his wife. He was granted a residence card on that basis on 20 April 2007 valid until 20 April 2012. In fact, the appellant's claim was therefore that between 8 March 2006 and 7 March 2011 (a 5 year period) he was residing in the UK in accordance with the EEA Regulations as the family member of an EEA national exercising Treaty rights. (see reg 15(1)(b) set out above). In other words, prior to his divorce the appellant's claim was that he had already acquired a permanent right of residence and that right of residence was simply not lost by the fact of his divorce on 6 July 2011. As reg 15(2) makes clear:

"15 (2) The right of permanent residence under this regulation shall be lost only through absence from the United Kingdom for a period exceeding two consecutive years." (our emphasis).

16. It was only as an alternative basis that the appellant's legal representatives asserted that the appellant retained a right of residence under reg 10 at the date of his divorce if, but only if, he could not establish that prior to that date he had lived in the UK for a continuous period of five years as the family member of an EEA national exercising Treaty rights. His principal case was, of course, that since his arrival his wife had been exercising Treaty rights and therefore he had been lawfully residing in the UK initially by virtue of reg 13(2) for a period of 3 months and thereafter by virtue of reg 14(2) which states that:

"14(2) A family member of a qualified person residing in the United Kingdom under paragraph (1)…is entitled to reside in the United

> Kingdom for as long as he remains the family member of a qualified person or EEA national."

17. Both the family permit and residence card valid until 20 April 2012 evidenced that the appellant was indeed residing in accordance with the Regulations.

18. Consequently, in our judgment, the reliance upon reg 10 and any claimed retained right of residence is potentially irrelevant to this appeal. The principal issue is whether the evidence establishes that between 8 March 2006 and 7 March 2011 the appellant, was residing in the UK as the family member (spouse) of his wife who was exercising Treaty rights, namely as a self-employed person as both he, and she, claim.

Discussion

19. We turn, therefore, to that issue which involves an assessment of the evidence. In doing so, we remind ourselves that the burden of proof is upon the appellant to establish on a balance of probabilities that he meets the requirements of the EEA Regulations.

20. Has the appellant established on the documentary evidence that his (now) ex-wife was self-employed between 8 March 2006 and 7 March 2011?

21. First, there is the witness statement of the appellant's ex-wife dated 28 October 2013 (at pages 51-52 of the bundle) in which she states:

> "I have been and continue to be a self-employed person in the UK. My tax affairs are up-to-date. I pay my taxes. You can check my HMRC details. Some of the documents I already provided to my ex-husband, the appellant. I refuse to provide my other documents as I believe that this information is private. I do not wish for my ex-husband to see my bank statements. I believe that I am entitled to some privacy about our divorce. I however authorise the Court or the Home Office to do their checks as required to confirm my self-employment in the UK."

22. In addition, the appellant's statement dated 8 October 2013 (at pages 177-181 of the bundle) states as follows at paras 16-21 as follows:

> "16. With regard to my ex-wife's self employment, I wish to confirm that she has been self employment all the time. The Respondent confirms that we provided documents such as HMRC Tax Returns, Self Assessments, invoices, National Insurance Contributions bills, Working Tax Credit documents, HMRC tax calculation which confirm my ex-spouse's self employment from 2006 until 2012. She currently continues to be self employed as confirmed by up-to-date tax documents and her witness Statement together with a copy of the ID which is certified by a solicitor. Furthermore, she provides her authority to the Court or the Respondent to contact the HMRC to confirm her self employment.
>
> 17. She refused to give me her bank statements and she explained this in her witness statement.

> 18. The Respondent stated that she had gaps in her national insurance contributions bills. This is incorrect as the different is adding up to the next National Insurance contributions bill when it is not paid. The last bills for July 2011 – the period in question – as we divorced then, clearly confirms that my ex-spouse has been a self employed person. Her invoices, receipts, Tax Returns, Self Assessments, paid National Insurance contributions bills are confirmation of this.
>
> 19. The Respondent sated that HMRC recommends National Insurance contribution bills to be paid by direct debit. I believe that this is a recommendation only and the payment can be made in any way the individual want. I have provided NI contributions bill for 200, 2007, 2008, 2009 and two for 2011. The bill for 2011 includes 2010 liabilities. Therefore it is clear that all the NI bills have been paid.
>
> 20. HMRC only recommends to pay NI by direct debit and use business bank account but is individual preference as confirmed but in letter form the HMRC addressed to the accountant that was instructed by my solicitors at page 176.
>
> 21. Every invoice provided could be corroborated. The details on the invoice itself. My details also have been provided but I have not been contacted."

23. It is for the appellant to establish on the evidence that he meets the requirements of the 2006 EEA Regulations and there is no obligation upon the respondent to trawl for relevant documents in other government departments (see Amos v SSHD [2011] EWCA Civ 552).

24. Turning to those documents, they are set out in the appellant's appeal bundle. At pages 77-85 there are a number of invoices between 8 May 2006 and 5 February 2013 which it is claimed established that the appellant's ex-wife was engaged in self employment as a babysitter and housekeeper. In addition, at pages 89-92, there are a number of HMRC documents relating to, inter alia, working tax credits paid to the appellant's ex-wife between 24 April 2007 and 5 April 2008. At pages 53-60 there are a number of documents again from HMRC relating to national insurance contribution payments covering periods between July 2006 and January 2009 and then again in 2011 and 2012. There are no such documents relating to 2010. At pages 69-76 there are tax returns, although we apprehend not all the returns which were placed before the Secretary of State which are referred to in her decision letter relating to the tax years 2007, 2009, 2010, 2011 and 2012.

25. In her decision letter, the Secretary of State declined to find as reliable the evidence concerning the tax, national insurance and tax credit documents without supporting documentation such as bank statements, audited accounts etc. The Secretary of State also doubted their reliability on the basis that the sponsor's income appeared to be not above the threshold for personal allowance and her expenses for self employment were correspondingly small.

26. It has never been suggested that the appellant's ex-wife was the principal or even equal breadwinner in their family. It is clear from the documentation

submitted in relation to the appellant's employment in the form of P60 certificates from 2007 until he was made redundant on 10 May 2013 that he was employed earning an income initially just below £20,000 per annum and latterly between £22,000 and £25,000 per annum.

27. There is no requirement under EU law in order to establish that an individual's employment or self employment is an exercise of Treaty rights that their income should be substantial but merely that it is a genuine employment or business activity, so that the individual can properly be described as a 'worker'.

28. We must assess the documentary evidence but must do so in the light of a number of features in this appeal which we consider to be important. First, there is the evidence of both the appellant and his ex-wife that she was self employed at the relevant time. It has never been suggested that the appellant is other than a truthful individual. The documentation concerning his employment is supportive of his own evidence on that issue and nothing we have seen casts any doubt upon any other aspect of his evidence. Secondly, the appellant came to the UK on a family permit as a family member of an EEA national and thereafter was granted a residence card in April 2007 on the same basis. Clearly at that time, the respondent was satisfied that his ex-wife was exercising Treaty rights. Although it is no more than evidence that his residence in the UK was lawful, it remains the fact that his residence card was valid until April 2012 and at no point has the respondent sought to revoke that on the basis that he was no longer a family member of an EEA national exercising Treaty rights.

29. We accept that there are gaps in the documentation and, perhaps if it were not for the divorce, the appellant might be in a position to provide better documentation in the form of bank statements showing his ex-wife's earnings. It remains the fact, however, that his ex-wife has been declaring income to HMRC and making income tax and national insurance contributions.

30. Looking at all the evidence in this case, we simply cannot conclude that that has been done as a device to assist the appellant to establish a false claim under the 2006 EEA Regulations. We ask rhetorically, why would an individual voluntarily pay tax and national insurance contributions which there was no legal obligation (because the payer was not engaged in business activity) to pay to HMRC? Despite, therefore, some unevenness in the documentary evidence, taking into account all the factors we have set out above, we are satisfied that the appellant's ex-wife was self employed between 8 March 2006 and 7 March 2011. On that basis, the appellant was resident for a continuous period of 5 years as a family member of an EEA national exercising Treaty rights and he acquired a permanent right of residence on that latter date under reg 15(1)(b) of the 2006 EEA Regulations.

31. For completeness, we would add that we are satisfied that the appellant's ex-wife continued to be self employed at the date of their divorce on 6 July 2011

and, as we have already said, the evidence clearly demonstrates that the appellant was himself working at that date as he had been in the preceding years and continued to work subsequent to his divorce. Consequently, even if he had not acquired a permanent right of residence based upon 5 years lawful residence prior to his divorce, he retained a right of residence at the date of his divorce. We are satisfied that he continued to be employed thereafter until he was made redundant on 10 May 2013. As a result, following his divorce he acquired a permanent right of residence by virtue of reg 15(1)(f) based upon 5 years' residence in accordance with the 2006 EEA Regulations cumulatively taking account of his lawful residence as a spouse prior to his divorce and thereafter on the basis of his retained right of residence under reg 10.

32. Consequently, the appellant has satisfied us on a balance of probabilities that he has a permanent right of residence under reg 15 and is entitled to a residence card as evidence of that right.

Decision

33. The decision of the First-tier Tribunal involved the making of an error of law and we set it aside.

34. We remake the decision allowing the appeal under the 2006 EEA Regulations for the reasons we have given above.

Signed

A Grubb
Judge of the Upper Tribunal

Date:

To the Respondent
Fee Award

As we have allowed the appeal and because a fee has been paid or is payable we have considered making a fee award and have decided to make a whole fee award of £140.

Signed

A Grubb
Judge of the Upper Tribunal

Date: