Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/29658/2013

THE IMMIGRATION ACTS

Heard at Stoke	**Determination Promulgated**
on 31st July 2014	**On 5th September 2014**

Before

UPPER TRIBUNAL JUDGE HANSON

Between

TARKEEL AKHTAR
(Anonymity direction not made)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Miss Dhaliwal instructed by Cartwright King Solicitors
For the Respondent: Mr Harrison – Senior Home Office Presenting Officer.

DETERMINATION AND REASONS

1. This is an appeal against a determination of First-tier Tribunal Judge Thorne promulgated on 10 January 2014, following a hearing at Nottingham on 21 December 2013, in which the Judge dismissed the Appellant's appeal under the Immigration (European Economic Area) Regulations 2006 (as amended), hereinafter referred to as the EEA Regulations, and on human rights grounds.

2. The Appellant is a citizen of Pakistan born on 10 September 1976. On 27 January 2012 he applied for a Residence Card as confirmation of a right to reside

in the United Kingdom as the family member of an EEA national, Ms Begum, a Spanish national who it is claimed had exercised treaty rights in the UK for a continuous period of five years in accordance with the 2006 Regulations.

3. The Appellant advised the First-tier Tribunal that Ms Begum left the United Kingdom in April 2011 and returned to Spain. Such rights as she may have acquired can be lost as a result of two years absence from the UK. It was said she had been employed from 2006 to 2007 although no documentary evidence was provided to support such a claim and that she had been self-employed from 2010 to 2011 which was supported by a letter from AH Accountants stating Ms Begum was working self-employed as a lady's dress designer and that her income in the year April 2010 to 2011 was £6,860. She was also said to be economically self-sufficient from 2007 although no evidence had been provided that she had comprehensive medical insurance cover or that she had adequate funds to support herself for this period.

4. The application was refused on 27 June 2013 on the basis the Appellant had failed to provide adequate proof that Ms Begum had been exercising Treaty rights in the United Kingdom for a period of five years.

5. Having considered the evidence the Judge set out relevant findings from paragraph 27 of the determination. It is not disputed that the Appellant entered the United Kingdom on 8 April 2004 and that he was issued with a Residence Card on 30th January 2007. In paragraph 31 of the determination the Judge states:

> 31. In order for the appellant to succeed under Regulation 15 (1) (b) of the Regulations he must prove on the balance of probabilities that he resides in the United Kingdom with his wife in accordance with the Regulations for a continuous period of five years i.e. since 2006 (his wife having left the UK in 2011).

6. The Judge found that as the Appellant was only issued with a Residence Card in 2007 he cannot have resided in the United Kingdom in accordance with the Regulations for a continuous five year period since 2006.

7. At paragraph 33 the Judge provides an analysis in the alternative in which he concludes that the Appellant has failed to prove on the balance of probabilities that his wife was exercising Treaty rights in the UK for a continuous five-year period since 2006 [33]. The Judge found there was insufficient evidence to prove that treaty rights had been exercised for a continuous period of five years during this period.

8. In paragraph 35 the Judge notes an argument advanced that the Respondent had been unfair in not providing Ms Begum's HMRC records but concluded that the argument has no merit on the basis there was no reason to conclude that

the Secretary of State had not acted fairly and because the HMRC documents would not be likely to show that Ms Begum had comprehensive medical insurance.

9. In paragraph 37 the Judge states "in addition (and most tellingly) the appellant gave evidence that he has never in fact asked his wife to provide any documentary evidence about these matters".

10. Having dismissed the appeal under the EEA Regulations the Judge considered the Article 8 claim and found the Appellant did not qualify under Appendix FM or paragraph 276ADE and therefore could not succeed under the Rules. The Judge then went on to undertake a free standing Article 8 assessment at the end of which he concluded that any breach was not so serious so as to amount to a breach of a fundamental right under Article 8; leading to the dismissal of the appeal on this ground too.

Grounds and submissions

11. The written grounds upon which permission to appeal is sought refer to section 40 UK Borders Act 2007 and the fact the Judge was invited to make a direction under section 40 at the appeal hearing on 24th December 2013 both as a preliminary issue and during submissions. It is asserted the Judge made an error in finding that such a direction to disclose material had to be made in writing prior to the hearing and the determination is said to be silent on whether the Judge exercised his mind to the merits of ordering HMRC to disclose material relating to the Appellant's wife.

12. It is also asserted the Judge has erred in his claim that the five years continuous residence period started in 2006/7 when the Appellant was issued with a residence card, such being wrong in law. It is submitted the relevant period during which the Judge should have made this assessment was from April 2004 when the Appellant entered the United Kingdom and April 2011 when she left to return to Spain, a period of 7 years. The Appellant's assertion that he had therefore lived in the United Kingdom for more than five years, during which time he has been a family member of an EEA national, meant it was necessary to consider whether the Appellant had retained rights residence which had been overlooked completely in the determination pursuant to Regulation 10 of the 2006 Regulations.

13. The final allegation is that the Judge failed to apply the required degree of anxious scrutiny.

Error of law

14. The Upper Tribunal was advised by Miss Dhaliwal that the Judge was asked to hear as a preliminary issue an application that a direction is made pursuant to

section 40 for the Secretary of State to disclose the HMRC records of the Appellant's wife. There is evidence of correspondence between the Appellant's representatives and the Secretary of State seeking information and the eventual response, dated prior to the date of the First-tier hearing, from the Respondent making it clear that the requested information would not be made available on a voluntary basis. Notwithstanding this, it appears no formal application was made for the relevant direction until the hearing.

15. Miss Dhaliwal confirmed the Judge decided to hear the evidence before making a decision. The issue was also referred to in submissions and it appears no indication was given by the Judge at the hearing of his decision in relation to the same. Although it is not necessarily a legal error for a Judge not to deal with such an application immediately the party making the application is entitled to know what the eventual decision is. In this case there is no indication that the application was rejected at the hearing but there is reference to the issue in paragraph 35 of the determination to which I have referred above. The Judge's conclusion that the HMRC records are unlikely to show that Ms Begum had comprehensive medical insurance is a clear finding that such an application was not warranted on the facts as it would serve no real purpose.

16. The importance of this issue is illustrated by the decision of the Court of Appeal in Ahmad v Secretary of State for the Home Department [2014] EWCA Civ 988, in which it was held that where an EEA citizen resided in the UK but was not economically active, the right of the EEA citizen's spouse to permanent residence was conditional, under Article 7(1) of Directive 2004/38/EC, upon the EEA citizen holding comprehensive sickness insurance cover. That condition had to be strictly complied with, and could not be satisfied by the EEA citizen's entitlement to free healthcare under the NHS.

17. In addition to the finding in paragraph 35 it can be inferred by the lack of a grant of the application that the Judge did in fact refuse it.

18. It is also relevant to note the Appellants own evidence in that he does not claim his wife worked before 2006 and so was not exercising treaty rights prior to this time. There may, in fact, not be any error if the reference to 2006 was to the time the Appellant claimed his wife was working and exercising treaty rights rather than the only period for which such an assessment could be made by counting back from 2011 when she left the UK.

19. In **Amos v Secretary of State for the Home Department; Theophilus v Secretary of State for the Home Department [2011] EWCA Civ 552** (and see in this respect **Ziolkowski and others v Land Berlin (Cases C-424/10 and C-425/10) CJEU (Grand Chamber)**) the Court of Appeal held that a divorced spouse had to establish that he or she had the right of residence before the question whether, notwithstanding the divorce, the right had been retained by Article 13 of the Citizens Directive could be determined. The right was subject to

Articles 16(2) or 18 of the Citizens Directive. The former provision applied to family members of EEA nationals who must have resided with the EEA national in the host Member State legally for a continuous period of five years. The word "legally" had to be given a Community meaning, which essentially depended on the exercise of Treaty rights. The requirements of the Citizens Directive applicable to the Claimants were that at all times while residing in the UK until their divorce the spouse had to be a worker or self-employed (or otherwise satisfied Article 7(1) of the Citizens Directive); the marriage had to have lasted at least three years, including one year in the UK, and they had to show that they were workers, self-employed or otherwise satisfied the penultimate paragraph of Article 13(2). The 2006 Regulations were consistent with those provisions. Provided that the conditions in regulation 10(5) continued to be satisfied, after five years' continuous residence in the UK, a non-EEA national would be entitled to a permanent right of residence under regulation 15(1)(f) (paras 29 – 31). Under regulation 10 of the 2006 Regulations, the ex-spouse of an EEA national continues to enjoy a right of residence if he was residing in the UK in accordance with the Regulations when the marriage was terminated (i.e. the decree of divorce was made absolute), and the marriage had lasted for three years, at least one of which was spent by both parties in the UK. This 'retained' right of residence may lead to a permanent right of residence under regulation 15(1)(f) if he clocks up a total of five years' residence.

20. The Court of Appeal also found that the EEA national must, therefore, have been exercising Treaty rights up to the date of the divorce, but thereafter that is not required. What is required is that, after the divorce, the non-EEA national former spouse must himself exercise 'Treaty rights', in the sense of being a worker or self-employed or self-sufficient. That is set out at Article 13 of the Citizens Directive, and is reproduced at regulation 10(6) of the 2006 Regulations. If the 'third country national' continues to do that up to the five-year point, he will have "resided in the United Kingdom in accordance with these Regulations" and will have acquired a permanent right of residence under regulation 15(1)(f). That satisfies the requirement at Article 18 of the Citizens Directive to have been "residing legally for a period of five consecutive years in the host Member State", in order to transform a retained right of residence into a right of permanent residence. But it must still be shown that the EEA national was working, or otherwise exercising Treaty rights, until the termination of the marriage. If the couple separated acrimoniously and have not stayed in touch with each other, that can be difficult. Lord Justice Stanley Burnton rejected an argument that, in such a case, the Secretary of State should assist the third country national to obtain the missing information about the divorced EEA national. His Lordship stressed the "essentially adversarial" nature of immigration appeals, as opposed to the inquisitorial nature of welfare benefits adjudication. Even in a benefits case, there was no authority for the contention that the department concerned had a duty to obtain information from other government departments. Just so, in a case under the EEA Regulations, the Home Office could not be expected to ask HM Revenue & Customs or the

Department for Work and Pensions whether the EEA national was working or was self-employed. His Lordship does allude, however, to the possibility of the non-EEA national former spouse asking the Tribunal, on an appeal against the refusal of a permanent residence card, to issue a witness summons for the attendance of the EEA national under rule 50 of the Procedure Rules 2005. This is a power which is very rarely exercised, but there is no reason why it should not be in a case such as this. Tim Eicke QC also mentioned the possibility of seeking a direction under rule 45 for the Secretary of State to provide any information necessary for the determination of the appeal. But as the Home Office cannot be forced to obtain information from other government departments, such a direction would only yield the information which the Home Office happens to have itself, and there might be nothing at all on the unco-operative former spouse.

21. The above judgment highlights the comparatively disadvantageous position of the third country national who is separated, but not divorced, from a Union citizen although thanks to the decision in Diatta v Land Berlin, such an individual can acquire a permanent right of residence under regulation 15(1)(b) if his or her spouse keeps on working in the UK during the requisite period of five years, without having to reside with him – see also PM (EEA – spouse – "residing with") Turkey [2011] UKUT 89 (IAC).

22. The problem of many, including Mr Akther, is that if the EEA spouse stops working, or it cannot be proved that they have been exercising Treaty rights, the third country national's five years' residence will not lead to a permanent right of residence, even if the have been working themselves.

23. In this case the Appellant and his wife are separated but not divorced. The Appellants own material suggests his wife worked from 2006-2007 but not before but the Judge noted this claim was not supported by any evidence. Even if this was proved to be so, there is insufficient evidence to prove Ms Begum was economically self sufficient and was able to meet the requirements of the Regulations from 2007 to 2010 or that she was engaged with the labour market at that time. The period 2010- 2011, even if accepted as proved, was only a period of one year indicating two years engagement with the labour market exercising treaty rights.

24. On the available evidence the finding the Appellant had not proved he was able to meet the requirements of the Regulations is a sustainable finding and not one shown to be infected by procedural of any other form of material legal error.

25. Even if the Appellant entered the UK as a spouse of Ms Begum in 2004 there is still a need to prove she exercised treaty rights for the relevant period which has not been forthcoming. The grant of a residence card to the Appellant as recognition of his right to reside as a spouse of an EEA national in 2007 reflects the claim his wife was working at this time, but not more.

26. The assertion the Judge failed to apply the required degree of anxious scrutiny to the evidence is not made out on the facts.

27. The finding in relation to Article 8 has not been shown to be infected by arguable legal error either and is sustainable on the facts.

Decision

28. **There is no material error of law in the First-tier Tribunal Judge's decision. The determination shall stand.**

Anonymity.

29. The First-tier Tribunal did not make an order pursuant to rule 45(4)(i) of the Asylum and Immigration Tribunal (Procedure) Rules 2005. I make no such direction pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008.

Signed…….
Upper Tribunal Judge Hanson

Dated the 5th September 2014