Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/03194/2015

THE IMMIGRATION ACTS

Heard at Bradford	**Decision & Reasons Promulgated**
On 20 October 2015	**On 22 October 2015**

Before

DEPUTY UPPER TRIBUNAL JUDGE SAFFER

Between

RASHID ALI
(NO ANONYMITY ORDER MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr Schwenk of Counsel
For the Respondent: Mrs Petterson a Senior Home Office Presenting Officer

DECISION AND REASONS

Background

1. The respondent notified the appellant on 20 November 2014 of her decision to revoke his EEA residence card and refuse to issue an EEA residence card as confirmation of a right of residence under European Community law as the former spouse of Dagmara Balogova, a Slovakian national exercising treat rights in the United Kingdom. His appeal against that decision was dismissed by First-tier Tribunal Judge Caswell ("the Judge") following a hearing on 14 April 2015. This is an appeal against that decision.

2. First-tier Tribunal Judge Pirotta refused permission to appeal on 30 June 2015. Upper Tribunal Judge Goldstein granted permission to appeal on 22 August 2015 only on the ground that;

> "…there is arguable merit to the challenge to the Judge's approach to the Article 8 of the ECHR issue raised…"

3. The respondent contended (10 September 2015) that the Judge's approach to the appellant's Article 8 issue at [15] reflects correctly the conclusion of Amirteymour & others (EEA appeals; human rights) [2015] UKUT 00466 which states that;

> "Where no notice under section 120 of the 2002 Act has been served and where no EEA decision to remove has been made, an appellant cannot bring a Human Rights challenge to removal in an appeal under the EEA Regulations."

4. Mr Schwenk conceded that the appeal could not succeed on the ground by which permission to appeal had been granted given Amirteymour which was promulgated shortly before that grant.

5. Mr Schwenk applied for permission to amend the basis on which permission to appeal had been granted to replace that ground with one that had been rejected by Judge Pirotta and Judge Goldstein.

Discussion

6. The Judge found;

> "12. The Respondent is correct that there is no reliable evidence to show that the Appellant's ex-wife was working as a self employed person after 2011. The documents from HMRC only show economic activity up until then by her. The letter from 19 November 2014 only shows earnings from the tax year 2009-2010. After that time there is evidence of benefits being claimed. There was working tax credit and child tax credit paid in the year 2009/2010 and some child tax credit paid in the year 2010/2011, but after that there is reference to a joint claim for working tax credit and child tax credit, with the payments being made to her partner. This covers a period after the Appellant and his wife separated and presumably refers to her new partner.
>
> 13. The Appellant argues that the records do not show that she was not claiming JSA. However, the only precise reference to benefits is to working and child tax credits, and the Appellant's ex-wife could only have been exercising Treaty rights as a jobseeker if she could show she had reasonable prospects of obtaining work. Given the gap in working, this would appear hard for her to do. What is more, the burden is on the Appellant to prove the case, and on the evidence before me he cannot show his ex-wife was exercising Treaty rights as a self employed person, a self sufficient person or a jobseeker."

7. Mr Schwenk submitted that the Judge had too narrow a focus and concentrated on whether she was working rather than whether there was a permissible reason for her not to. In doing so he noted [6 of the grounds] regulation 5(7) of the Immigration (European Economic Area) Regulations 2006 which states that:

> "(a) periods of inactivity for reasons not of the person's own making;
> (b) periods of inactivity due to illness or accident; and
> (c) in the case of a worker, periods of involuntary unemployment duly recorded by the relevant employment office,
> shall be treated as periods of activity as a worker or self-employed person, as the case may be".

8. He further noted [7 of the grounds] that Samsam (EEA: revocation and retained rights) Syria [2011] UKUT 165 (IAC) states that [38];

> "Strictly, whether the wife was a worker is not the same as whether the wife was working at that time, as exemplified by Article 7 (3) of the Directive which provides that the status of a worker is retained if any temporary inability to work was through illness, accident, involuntary unemployment, or relevant vocational training…it demonstrates the dangers of drawing inferences from gaps in wage slips alone."

9. I pointed out to Mr Schwenk that on the application the Appellant signed and submitted at 4.17 he did not tick any of the boxes where he was asked;

> "are you or are you the family member of someone who is either (please tick):
> A worker?
> Economically self sufficient?
> Self-employed?
> Temporarily unable to work through illness or accident?
> Involuntarily unemployed?
> Unemployed and undertaking vocational training?"

10. Mr Schwenk submitted the Appellant was unrepresented and that was not the basis of the appeal. When I pointed out that in the refusal letter it clearly states that when he submitted his application he was represented by Reiss Solicitors, Mr Schwenk said that he was not represented at the hearing, he struggled with English, and the issue was not raised by the Judge. I note here that he had the services of an interpreter at the hearing and on 4.18 of the application form the box is empty where it states;

> "If you answered yes to 4.17 please give details below".

11. Mr Schwenk submitted [8 of the grounds] that the;

"HMRC report dated 9th November 2014 was not determinative of the issue of whether the A's wife was exercising Treaty Rights at the date of the determination. There may have been many reasons why the HMRC records did not show earnings beyond 2009-2010. She may have been incapacitated from working or left the labour market to look after children."

12. He submitted [9 of the grounds] that;

"There was evidence that the A's wife was exercising Treaty Rights post 2009-2010 as the R was content to re-issue the residence card to the A on the 18th August 2011…The A's evidence was that whilst he and his wife lived together, he worked as a self-employed taxi driver and his wife continued to work as a cleaner. It is not clear whether the Judge accepted or rejected such evidence."

13. He submitted [10 of the grounds] that;

"The Judge does not properly assess on the evidence whether the A's wife could be a worker under Regulation 5(3) or 5(4) of the 2006 Regulations and those provisions seem to have been (sic) be totally overlooked by her …. The Judge has failed to assess whether the reason why the A's ex-wife may have left the labour market was to look after children and whether in such circumstances she would have retained the status of worker under EU law. There was clear evidence of the existence of children by references to the child tax credit being paid."

14. He added nothing orally to any of the above 3 paragraphs.

15. In relation to this application, Mrs Petterson submitted that the Judge weighed the matter up correctly and made findings she was entitled to reach on the evidence. It had not been argued that the Appellant's ex-wife was on maternity leave or had child care commitments.

16. Judge Pirrota stated in relation to this ground that;

"there was no reliable evidence that the sponsor was exercising Treaty Rights at the relevant dates, the burden of proof was on the Appellant (sic) he had not submitted any evidence that she was employed or self-employed."

17. Judge Goldstein stated in relation to this ground that the Judge;

"properly addressed inter alia, the relevant statutory provisions against the backdrop of the facts as found, clearly reasoning as to why she concluded that as submitted by the respondent, there was indeed no satisfactory evidence to show that the appellant's former wife was working as a self employed person after 2011."

Determination

18. In my judgement there is no merit in the application to amend the grant of permission to appeal as the grounds and submissions seeking it disclose no arguable material error of law for the following reasons.

19. There is no merit in [6/7/8] of the grounds. The Appellant did not assert on the application that his ex-wife fell within any of the categories identified at 4.17 of the application or may have left the labour market to look after children. He was represented then. The box for additional information if any of those categories was prayed in aid was left blank. It was not just the missing of a tick on a form. The Appellant signed the form and is responsible for the information in it. There is no suggestion of any complaint having been made to the Solicitor's Regulation Authority that he had been badly advised or represented or that the form was not completed in accordance with his instructions.

20. It is not for the Judge to fish for grounds that may support an application or speculate as to what the Appellant's ex-wife's circumstances may be. She relied on the evidence submitted by him and made findings that were supported by the evidence.

21. The Appellant had the services of an interpreter at the hearing and there is no suggestion that he complained about the services provided or that he did not understand what was being asked of him.

22. There is no merit in [9] of the grounds. The fact that a residence card had been re-issued in August 2011 is irrelevant to the issue of whether she was still a qualified person after 2011 as it related to a wholly different period of time. The Judge did not need to make a finding as to the occupations they had whilst together as that was neither central nor peripheral to the decision – it was entirely irrelevant as it related to a wholly different period of time.

23. There is no merit in [10] of the grounds. The payment of child tax credit does not mean anything other than she received child tax credit. It does not mean she may have left the labour market to look after children. There was no evidence whatsoever that she may have left the labour market to look after children. This ground is entirely speculative with no evidential basis.

24. It was for the Appellant to establish on the balance of probabilities that his ex-wife was exercising Treaty rights and he failed to do so.

25. I therefore decline to allow the grounds by which permission to appeal was granted to be amended.

Decision

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

I do not set aside the decision.

Deputy Upper Tribunal Judge Saffer
21 October 2015