IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2022-001536

First-tier Tribunal No: EA/51914/2021
IA/08810/2021

THE IMMIGRATION ACTS

Decision & Reasons Promulgated
On 12 March 2023

Before

UPPER TRIBUNAL JUDGE GRUBB
DEPUTY UPPER TRIBUNAL JUDGE DAVIDGE

Between

KHAISAR SYED

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr N Aghayere, Lawland Solicitors
For the Respondent: Ms S Rushforth, Senior Home Office Presenting Officer

Heard at Cardiff Civil Justice Centre on 15 December 2022 and 16 February 2023

DECISION AND REASONS

Introduction

1. The appellant is a citizen of India who was born on 15 July 1986. He entered the UK as a Tier 4 student on 16 January 2010 with leave valid until 30 April 2012.

2. On 9 October 2011, the appellant married a French citizen, Manuella Isabelle Kitou ("MK") in Accra, Ghana by proxy.

3. Divorce proceedings between the appellant and MK were commenced on 10 August 2017 and the marriage was dissolved by degree absolute on 22 November 2019.

4. The appellant made a number of unsuccessful applications for a residence card as a spouse of an EEA national. His applications were rejected on 14 May 2012 and 13 October 2012. On 12 November 2013, the appellant was granted a residence card as the spouse of an EEA national valid until 12 November 2018. An application for permanent residence card was refused on 20 December 2018.

5. On 11 January 2020, the appellant again applied for a permanent residence card based upon 5 years' residence in the UK in accordance with EU law. The appellant relied upon his residence in the UK as the spouse of an EEA national who had been exercising Treaty rights as a worker since October 2013 and that he had, on divorce, retained a right of residence under reg 10(5) of the Immigration (EEA) Regulations 2016 (SI 2016/1052) (the "EEA Regulations 2016"). He claimed that he had been self-employed as a taxi driver since July 2016.

6. On 14 September 2020, the Secretary of State refused the appellant's application for a permanent residence card. The Secretary of State was not satisfied that the appellant had established the required 5 years' residence under EU law. First, the evidence in relation to MK's exercise of Treaty rights only showed that she was working from 30 November 2016 until 30 November 2019. Second, the only evidence to support the appellant's exercise of Treaty rights was on 25 November 2019. As a consequence, the appellant had not shown a combination of 5 years' residence under EU law as the spouse of a qualified person prior to divorce taken together with any lawful residence on the basis of a retained right of residence after the divorce.

The Appeal to the First-tier Tribunal

7. The appellant appealed to the First-tier Tribunal under reg 36 of the EEA Regulations 2016.

8. Judge French, inaccurately, stated that the appellant claimed to have a 'retained right to permanent residence' (see [17]). That is inaccurate because if the appellant could establish a permanent right of residence prior to his divorce, based upon being the spouse of an EEA national exercising Treaty rights for a period of 5 years, the issue of whether he had a 'retained right of residence' under reg 10(5) of the EEA Regulations 2016 would not arise. His personal right of permanent residence would survive his divorce. He would only lose that right if it were lawfully revoked under the EEA Regulations 2016 or if the appellant were absent from the UK for more than 2 years (see regs 15(4) and 15(3) respectively).

9. If, however, the appellant could not establish the required 5 years' lawful residence prior to divorce, then he would have to rely upon a period post-divorce when he had a retained right of residence as a divorced spouse of an EEA national under reg 10(5). The combination of such periods, if amounting to 5 years, will suffice to establish a permanent right of residence (see reg 15(1)(f)).

10. In the result, Judge French was not satisfied that the appellant had established the required 5 years' lawful residence. The Judge said this at [18]-[20]:

> "18. In order for this appeal to succeed I would need to have been persuaded that the Appellant is a former member of an EEA national who has been exercising Treaty rights in the UK for a continuous period of at least 5 years.
>
> 19. It had been claimed in the skeleton argument and the oral submissions of the Appellant's advocate that I had various documents, which I had not been supplied with, such as the Sponsor's bank statements. In addition it had been claimed that the tenancy agreements were in joint names, but they were not.
>
> 20. I have considered most carefully the actual evidence that I have been provided with, alongside the Appellant's oral evidence. It would have of course been helpful to have oral evidence from the "Sponsor" or at least a witness statement, but I was told by the Appellant that he was not on good terms with his ex-wife, so she would not co-operate. However it was apparent that the ex-wife had at least partially cooperated, by giving the Appellant copies of 3 of her P60's for example. It did not seem to be logical that she would "partially``' co-operate. It seemed more likely that she would either give him no documentation or everything. In any event I had to proceed on the basis of the evidence I did have. On that basis I can say immediately that the Appellant has failed to show the former family member EEA national exercised Treaty rights for a continuous period of 5 years. All that he had done was to show that in 2012 and 2017/2018, Ms Kitou was living in the UK and was exercising treaty rights by working. I am not persuaded that Ms.Kitou exercised treaty rights for a continuous period of 5 years. I am not convinced that Ms. Kitou was even in the UK for a continuous period of 5 years, let alone working and exercising treaty rights. In the circumstances the Appellant had failed to show that he had a right to permanent residence in the UK."

11. It would appear, therefore, that the judge determined the appeal on the basis that the appellant could only succeed if he established (which he had not) that his former wife had been exercising Treaty rights for 5 years.

The Appeal to the Upper Tribunal

12. The appellant appealed to the Upper Tribunal ("UT") on a number of grounds. Permission to appeal was initially refused by the First-tier tribunal (Judge Monaghan) on 12 April 2022. On renewal the UT (Judge O'Callaghan) granted the appellant permission to appeal on 9 August 2022 limited to one ground, namely the judge's failure to consider the claim on the basis of a combination of a pre-divorce period of residence (as a 'spouse' of an EEA national exercising Treaty rights) and a post-divorce period of residence (on the basis of a 'retained right' of residence):

> "7. Ground 4 (paras. 6 to 8): It is arguable that the Judge's requirement at [5] and [20] of the decision that the appellant establish that his wife have resided in this country and exercised EEA Treaty rights for a period of 5 years prior to the initiation of proceedings for the termination of the marriage is inconsistent with regulation 10(5) of the Immigration (European Economic Area) Regulations 2016. It will be for the appellant to establish that the error is material in light of the Judge's overall findings."

13. The appeal was initially listed for hearing on 15 December 2022 but that hearing was adjourned part-heard in order for the representatives to make additional submissions on the post-Brexit implications, in particular for any right of retained residence the appellant might have after 31 December 2020. At both hearings the appellant was represented by Mr Aghayere and the respondent by Ms Rushforth. We heard oral submissions from both and they each filed written submissions on the post-Brexit law. We are grateful to them both.

The Issues

14. The first issue is whether the judge erred in law in failing to consider the appellant's claim to have a right of permanent residence without reference to any period post-divorce when he might have retained a right of residence under reg 10(5).

15. The second issue, if there is an error of law, in re-making the decision is whether the appellant has established on the basis of the evidence the required 5 years' continuous lawful residence under the EEA Regulations 2016.

16. In regard to the latter, without any objection, we admitted new evidence under rule 15(2A) of the Tribunal Procedure (Upper Tribunal) Rules 2008 (SI 2008/2698).

Discussion

17. We have already set out above the potential basis upon which the appellant's claim to have a permanent right of residence could be established. It will be helpful to begin with the relevant provisions in the EEA Regulations 2016 and then to consider what impact Brexit has had on their application.

18. As the spouse of an EEA national, the appellant would have a right of residence under reg 14(2) as a "family member" provided both parties are in the UK (though not necessarily living together) and the spouse is exercising Treaty rights, i.e. in this appeal as a worker. Regulation 14(2) provides:

> "(2) A person ("P") who is a family member of a qualified person residing in the United Kingdom under paragraph (1) or of an EEA national with a right of permanent residence under regulation 15 is entitled to remain in the United Kingdom for so long as P remains the family member of that person or EEA national.

19. Of course, on divorce, an individual will cease to be a family member of an EEA national and so that right of residence will cease to apply. However, on divorce an individual may be a family member who has "retained a right of residence" in certain circumstances set out in regs 10(5) and (6) (read with reg 10(1)). That provides, so far as relevant, as follows:

> "10(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 … on the initiation of proceedings for the termination of the marriage … 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 initiation of proceedings for the termination of the marriage …, the marriage … had lasted for at least three years and the parties to the marriage … 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
>
> ….".

20. By virtue of reg 14(2) a person who has a retained right of residence under reg 10 is

> "entitled to reside in the United Kingdom so long as that person remains a family member who has retained the right of residence".

21. In summary, the key elements are that:

(a) The marriage ended in divorce and "A" ceased then to be a family member of a qualified person;

(b) The EEA national was a "qualified person" at the time the divorce proceedings were initiated;

(c) "A" was residing in the UK lawfully under the EEA Regulations 2016 when divorce proceedings were initiated;

(d) Prior to the initiation of divorce proceedings the marriage had (i) lasted for 3 years and (ii) the parties had resided in the UK for at least a year;

(e) At the initiation of the divorce proceedings, "A" would have been a "qualified person" if an EEA national, i.e. was exercising Treaty rights for example as a worker or self-employed person; and

(f) The retained right of residence continues only so long as "A" continues to exercise Treaty rights.

22. The requirements for a 'permanent right of residence' are set out in reg 15. The relevant provisions are in regs 15(1)(b) (as a 'family member' of an EEA national) and 15(1)(f) (on a combination of residence as a family member and post-divorce with a retained right of residence:

> "15 (1) The following persons acquire the right to reside in the United Kingdom permanently—
>
> …;
>
> (b) a family member of an EEA national who is not 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 the period, a family member who has retained the right of residence."

23. As will be clear, in this appeal the appellant, at least in principle, could seek to rely upon periods of residence before his divorce on 22 November 2019 and periods of residence after that time on the basis of a retained right of residence. The Judge only considered the former and it was this failure to look at periods of residence after the divorce which led Judge O'Callaghan to grant permission although, in doing so, he commented on whether any error was material. We will return to these issues shortly.

24. The issue then arises for how long after the divorce did any retained right continue if he met the condition in reg 10(6) of being 'self-employed'? If it were not for Brexit, the answer would have been up to the conclusion of the appeal proceedings. The answer, in the light of Brexit, is unfortunately not so clear. It was the complexity of this issue which led to the earlier adjournment in order for the parties to prepare submissions. In the result, following detailed oral submissions, the position became palpably clearer at the hearing.

25. It is not in dispute that following the UK exit from the EU on 31 January 2020, the EEA Regulations 2016 remained in force, in all relevant respects, until the end of the 'transition period' which was at 11pm on 31 December 2020. On that date, the EEA Regulations 2016 were revoked (see Immigration and Social Security Co-Ordination (EU Withdrawal) Act 2020, Sched 1(1), para 2(2)).

26. However, thereafter, some of the provisions of the EEA Regulations 2016 (perhaps with modification) were retained and remained in effect. The representatives drew our attention to two relevant sets of Regulations:

    (a) Immigration and Social Security Co-Ordination (EU Withdrawal) Act 2020 (Consequential, Saving, Transitional and Transitory Provisions) (EU Exit) Regulations 2020 (SI 2020/1309) – hereafter the "ISSC Regulations 2020"; and

    (b) Citizens' Rights (Application Deadline and Temporary Protections) (EU Exit) Regulations 2020 (SI 2020/1209) – hereafter the "CR(ADTP) Regulations 2020".

27. Ms Rushforth focussed her submissions on the ISSC Regulations 2020. She placed reliance on provisions in Schedule 3 which came into effect on 31 December 2020 at the end of the 'transition period' (referred to as "commencement day" in the Regulations) and when, otherwise, the EEA Regulations 2016 would be revoked. Ms Rushforth submitted that the ISSC Regulations 2020 applied to applications under the EEA Regulations 2016 where the decision was taken before "commencement day" or any appeal remained "pending" and not finally determined (see Sched 3, para 5(1)(b) and (c)). She submitted the appellant fell within that scheme as his appeal against the respondent decision on 14 September 2020 was pending on 31 December 2020.

Ms Rushforth submitted that, by virtue of Sched 3, para 5 the provisions in the EEA Regulations 2016 (subject to any modifications) as set out in Sched 3, para 6 continued to apply. By virtue of para 6, reg 10(5) with modification applied (para 6(1)(j)); the right of appeal in reg 36 continued (para 6(1)(u)) with consequential modification to the ground of appeal to reflect EU exit (para 6(1)). But, importantly, Ms Rushforth submitted, reg 15 and the right to permanent residence which the appellant claimed based upon a retained right after 31 December 2020 was not retained by Sched 3, para 6. She submitted, therefore, that the appellant could only succeed if he was lawfully resident by combining periods of residence as a spouse and a retained right of residence post-divorce for a 5-year period ending no later than 31 December 2020 (i.e. since 31 December 2015). She submitted he could not establish that on the evidence, not least in relation to any pre-divorce period his spouse would have to be shown to be exercising Treaty rights, i.e. as a worker. That evidence, she submitted, did not date back earlier than 1 November 2016.

28. Mr Aghayere placed reliance on the CR(ADTP) Regulations 2020 which, he submitted, created a 'grace period' from 31 December 2020 (when the 'transition period' came to an end and the EEA Regulations 2016 were revoked) until 30 June 2021 (see reg 3). He submitted that during the 'grace period' these Regulations retained provisions in the EEA Regulations 2016 (with any modifications) as set out in regs 5 to 10 (reg 3(3)). Mr Aghayere submitted that both reg 10(5) and reg 15 of the EEA Regulations 2016 were retained by virtue of reg5(j) and reg 6(e), together with reg 36 with an appropriately modified ground of appeal under the EEA Regulations 2016 (see reg 9(b) and (i)). Mr Aghayere submitted that the 5-year period to establish a permanent right of residence was, therefore, 30 June 2016 to 30 June 2021. On the evidence, Mr Aghayere maintained that the appellant had established his spouses employment from 30 June 2016 until their divorce – and he relied principally upon P60s for the tax years 2016/2017 and 2017/2018. He relied upon the appellant's Lloyd Bank statements showing income from his self-employed taxi business since the initiation of his divorce and up to 30 June 2021.

29. We have not found the inter-relationship between the ISSC Regulations 2020 and the CR(ADTP) Regulations 2020 easy to discern. To the extent each representative relied on the respective Regulations, their submissions would appear to be sound on their application. The appellant could not succeed under the CR(ADTP) Regulations 2020 because, unless reg 15 of the EEA Regulations 2016 continues to have effect after 31 December 2020, it is not suggested that the appellant can establish 5-years lawful residence as required to establish his claimed permanent right of residence. By contrast, if the CR(ADTP) Regulations 2020 apply, at least up until 30 June 2021, the appellant can rely upon a retained right of residence (if it is established he is self-employed) and reg 15 to establish a permanent right of residence but, he must do so, on the evidence, it was accepted for the period 30 June 2015 to 30 June 2021.

30. In the result, having heard Mr Aghayere's submissions, Ms Rushforth was content to accept it was the CR(ADTP) Regulations 2020 which applied to the appellant's situation. But, of course, she did not accept the evidence was sufficient for him to succeed.

31. It is, as a consequence, unnecessary for us to set out in detail the two sets of Regulations. We do, however, consider that the representatives are right that it is the CR(ADTP) Regulations 2020 that apply. The reason we say this is because of

Sched 3, para 5 of the ISSC Regulations 2020. This is the important provision which, on one view, would continue in force for the purposes of this appeal certain parts of the EEA Regulations 2016 after 31 December 2020. We set it out in full as follows:

> **5.**—(1) Subject to sub-paragraph (4), the provisions of the EEA Regulations 2016 specified in paragraph 6 continue to apply—
>
> (a) to any appeal which has been brought under the Immigration (European Economic Area) Regulations 2006 and has not been finally determined before commencement day,
>
> (b) to any appeal which has been brought under the EEA Regulations 2016 and has not been finally determined before commencement day,
>
> (c) in respect of an EEA decision, within the meaning of the EEA Regulations 2016, taken before commencement day, or
>
> (d) in respect of an EEA decision, within the meaning of the EEA Regulations 2016 as they continue in effect by virtue of these Regulations or the Citizens' Rights (Application Deadline and Temporary Protection) (EU Exit) Regulations 2020, which is taken on or after commencement day.
>
> (2) For the purposes of paragraph (1)—
>
> (a) an appeal is not to be treated as finally determined while a further appeal may be brought and, if such a further appeal is brought, the original appeal is not to be treated as finally determined until the further appeal is determined, withdrawn or abandoned; and
>
> (b) an appeal is not to be treated as abandoned solely because the appellant leaves the United Kingdom.
>
> (3) The revocation of the EEA Regulations 2016 does not affect the application of the Immigration (European Economic Area) Regulations 2006 to an appeal that falls within paragraph 3(1) of Schedule 4 to the EEA Regulations 2016.
>
> (4) *The provisions specified in paragraph 6 do not apply to the extent that the provisions of the EEA Regulations 2016 specified in paragraph 6 continue to apply to an appeal or EEA decision by virtue of the Citizens' Rights (Application Deadline and Temporary Protection) (EU Exit) Regulations 2020*." (our emphasis)

32. As we set out above, it is para 5(1)(b) and (2) which, on their face, apply to the appellant. He had a pending appeal prior to "commencement day" (i.e. 31 December 2020). As a result, again on its face, para 5 applies the provisions of the EEA Regulations 2016 set out in Sched 3, para 6 including regs 10(5) and 36 but not reg 15 of the EEA Regulations 2016. But para 5(4) is important as it disapplies the provisions in para 6 to the extent that the decision or appeal is governed by the CR(ADTP) Regulations 2020. Those Regulations *do* apply to this appeal, and apply the relevant parts of the EEA Regulations 2016, to this appeal by virtue of reg 3(2) of the CR(ADTP) Regulations 2020 which states:

> "3(3). The provisions specified in regulation 11 apply in relation to a relevant person during the grace period as if any reference to the EEA Regulations

> 2016 or any provision of those Regulations are to the Regulations or provision of the Regulations as continued in effect and modified by regulations 5 to 10."

33. The appellant is a "relevant person" by virtue of reg 3(j):

> ""relevant person" means a person who does not have (and who has not, during the grace period, had) leave to enter or remain in the United Kingdom by virtue of residence scheme immigration rules and who—
>
> (j) immediately before IP completion day –
>
> (i) was lawfully resident in the United Kingdom by virtue of the EEA Regulations 2016, or…."

34. The appellant has not had leave under the EUSS and, subject to proof, is arguing he was lawfully resident, based upon a retained right of residence, prior to "IP completion day", i.e. 31 December 2020.

35. We proceed, therefore, on the basis accepted by both representatives.

36. It is clear to us, as we indicated at the hearing, that the judge failed to consider the relevant period during which the appellant could, potentially, establish a permanent right of residence; that is 30 June 2016 to 30 June 2021. He confined himself to considering the period prior to the (initiation of) divorce and whether it was established the appellant's former wife had exercised Treaty rights for a continuous period of 5 years prior to that (see [20] set out above). That was an error of law and we set aside the decision and move to re-make it on the proper basis.

37. We heard detailed submissions on the evidence in the appeal.

38. The judge was satisfied that the appellant's spouse had worked in 2012 and then again in 2017/2018 – the latter based upon a P60 disclosing an income of £9,000 (£750 per month). We also had a P60 for 2016/2017 showing an income of £3,750. We further had payslips beginning from 1 November 2016 which we are satisfied establish his spouse's employment from 1 November 2016 (£750 per month). We accept that, despite the relatively low pay, the appellant's spouse was engaged in "effective and genuine" economical activity (see Levin v Secretary of State for Justice (Case 53/81) [1982] ECR 1035 (ECJ)). She was during this period exercising Treaty rights as a worker.

39. Mr Aghayere accepted he was in some difficulty on the evidence in demonstrating that the appellant's spouse was working in the period before 1 November 2016 but, he submitted, if she was not, then she was a 'jobseeker' and exercising Treaty rights on that basis. There is not, however, any evidence to support this. It would only apply for a 6 month period after she ceased to work sometime before 1 November 2016. The judge did not accept she was working after 2012/2013 and we were taken to no evidence which would establish that the 6 month period would be such that it could be added to the spouse's employment before 1 November 2016. It follows that the evidence only shows that the appellant's spouse was exercising Treaty rights, prior to the initiation of (or actual) divorce in August 2017 (or November 2019) from 1 November 2016. That in itself prevents the appellant establishing the 5 year period which, as was accepted before us, had to be taken as 30 June 2016 to 30 June 2021. There is a 4 month deficit in the period that is required prior to the divorce.

40. We have considered the HMRC documentation and multiple bank statements of the appellant which (with only immaterial gaps) show income from his self-employed taxi business from the divorce in November 2019 until 30 June 2021 (see statements covering the period 4 November 2019 to 2 August 2021). We are satisfied on a balance of probabilities that during this period he was, as a result, a person who (if an EEA national) would be exercising Treaty rights and so satisfied the condition in reg 10(6) of the EEA Regulations 2016 and so retained his right of residence following divorce at least until 30 June 2021. However, the cumulative period of lawful residence running back from 30 June 2021 does not amount to 5 years but only 4 years and 8 months which is insufficient to establish his claimed permanent right of residence under reg 15 of the EEA Regulations 2016.

41. The appellant's application was for a permanent residence card under reg 19 (read with reg 15). The relevant application forms are specified (see reg 20). He did not make an application for a residence card on any other basis. The appellant has not established an entitlement to a permanent residence card. The appeal, therefore, does not succeed.

Decision

42. For the above reasons, the decision of the First-tier Tribunal to dismiss the appellant's appeal involved the making of an error of law. That decision cannot stand and we set is aside.

43. We re-make the decision dismissing the appeal under the EEA Regulations 2016.

Andrew Grubb

Judge of the Upper Tribunal
Immigration and Asylum Chamber

6 March 2023