Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/08588/2013

THE IMMIGRATION ACTS

Heard at Bradford	**Determination Promulgated**
On 25th October 2013 and 3rd January 2014	**On 15th January 2014**

Before

UPPER TRIBUNAL JUDGE D E TAYLOR

Between

BUJAR MULGECI

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr J Ficklin, instructed by Howells Solicitors
For the Respondent: Mr M Diwnycz, on 25th October and Mrs R Pettersen on 3rd January, Home Office Presenting Officers.

DECISION AND REASONS

1. This is the Appellant's appeal against the decision of Judge Scobbie made following a hearing at North Shields on 24th May 2013.

2. The Appellant is a national of Albania born on 25th February 1986.

3. His immigration history is as follows. He applied for asylum in the UK on 7th September 2001 and was granted exceptional leave to remain until 24th February 2004. On 20th February 2004 he applied for further leave to remain which was refused on 25th November 2004. On 3rd February 2005 he married his former EEA national spouse and applied for an FMRS which was issued until 19th September 2005. On 16th April 2005 and on 21st August 207 he applied for a residence card.

4. On 29th November 2010 he was divorced from his former EEA national spouse. On 1st November 2012 he and his Albanian partner were encountered by Humberside police and he was issued with an IS151A. On 5th March 2013 a decision was made to refuse to grant him permanent residence (retained right of residence).

5. The notice of refusal to issue a permanent residence card states that the Appellant had applied for permanent residence on the basis that he had resided in the UK in accordance with the 2006 Regulations for a continuous period of five years, but he had not completed five years residency in the UK in accordance with the Regulations and his application was refused under Regulation 15(1)(f).

6. The reasons for refusal letter, also dated the 5th March 2013, states that in order to qualify for a retention of a right of residence under Regulation 10(5) the Appellant has to have met the following requirements:

   (i) The marriage has to have lasted for three years immediately before the initiation of divorce proceedings, the parties to the marriage have to have resided in the UK for at least one year during the duration of the marriage, the EEA national has to have been a qualified person exercising treaty rights at the time of the divorce and the Appellant must either be a worker, self-employed person or self-sufficient person in the UK.

7. The documentation which the Appellant had produced failed to demonstrate that the former EEA national spouse had been exercising treaty rights in the UK and was a qualified person at the time of the divorce.

8. The Appellant appealed and in the grounds of appeal asserted that he satisfied the requirements for a retained right of residence under Regulation 10(5).

The judge's determination

9. The judge recorded that the Appellant accepted at the hearing that he did not acquire a retained right of residence upon divorce became the EEA national former spouse was not exercising treaty rights in the UK at the date of the termination of the marriage.

10. However, he stated that the Appellant argued that:

"If the ex-wife had established five years as a qualifying person before March 2009 his ex-wife is entitled to permanent residence. If she has established this five years after the date of marriage the Appellant automatically gets a right of permanent residence. The argument is that the date by which the Appellant will have achieved the five years is February 2010. This is prior to the date of divorce which took place in December 2010."

11. The judge said that he had some difficulty with some of the evidence produced indicating that the ex-wife had been a worker for a period of five years but this did not matter because he had only lived with her between December 2004 and April 2008. He therefore did not reside with her for five years. He dismissed the appeal with respect to the Regulations.

12. With respect to Article 8 he said that the Appellant had been here for twelve years and had been of good character and made a successful business for himself with four employees but there was nothing particularly unusual about the circumstances and the Immigration Rules "have to be given a fair degree of prominence". He concluded that removal would be proportionate.

The Grounds of Application

13. The grounds of application state as follows:

"19. The Appellant's case was that he had obtained permanent residence in the UK on the basis of his relationship with an EEA national who had herself obtained entitlement to permanent residence after five years as a worker in accordance with the Regulations. As set out in Amos v Secretary of State for the Home Department [2011] EWCA Civ 552, where the spouse of the EEA national such as the Appellant has obtained permanent residence under Regulation 15 of the Immigration (European Economic Area) Regulations 2006 (as opposed to a retained right of residence under Regulation 10) prior to divorce the divorce does not affect that right. Amos states:

"20. ... A divorced spouse must establish that he or she has the right of residence in question before the question whether, notwithstanding the divorce, it has been retained by virtue of first Article 13 can be determined. His or her right of permanent residence is the subject of Article 16.2 or Article 18."

14. It was argued that paragraph 18 (quoted above) of the determination is in error. It is settled law and was submitted at the hearing on behalf of the Appellant that the benefit of rights of residence in the EEA for a spouse of an EEA national lasts until the marriage is formally lawfully dissolved and is not dependent upon residence together in the same domicile. Ahmed (Amos; Zambrano; Regulation 15(a)(iii)(c) [2006] EEA Regs) 2013 UKUT 00089 makes this clear:

> "59. ... Our start point must be the ruling of the Court of Justice in Diatta v Land Berlin case 6-267/83 (1985) (EUECJR) in which the court has continued to endorse in subsequent case law. This case establishes that a spouse continues to enjoy an EU right of residence as the family member of a Union citizen notwithstanding the fact that the couple may be leaving apart or their relationship be problematic."

15. The fact that the Appellant's wife moved out of the marital home in April 2008 is irrelevant to the application of EEA law. In EEA law the Appellant continued to benefit from the legal relationship. If his wife had obtained entitlement to permanent residence in the UK after five years as a qualifying person at the latest by May 2009, then the Appellant would have obtained it as well as after five years of marriage to her in February 2010. His wife's absence from the UK at that point (November 2009 to February 2010) would have no effect on his entitlement, because they were still married and permanent residence, once acquired, requires a two year absence to break.

16. By failing to make findings on whether the Appellant's wife had been a worker for five years and what date that had been achieved the judge erred in law, because from those findings, would flow the Appellant's entitlement to permanent residence.

17. It was also argued that the judge's consideration of Article 8 was inadequate. Submissions had been made that removal was not in the interest of an effective immigration policy because it would result in harm to the UK in the form of the loss of a professional business and the associated jobs. It was also submitted that as the Appellant had come here as a 15 year old in 2001 and most of his time here had been lawful as per Maslov serious reasons were required to expel him but there was no consideration of any of this in the determination.

18. Permission to appeal was granted by Designated Judge Garratt on 21st August 2013 for the reasons stated in the grounds.

Submissions

19. Mr Ficklin relied on his grounds and in particular paragraph 59 of the decision in Ahmed as cited there. He repeated that by February 2010 the evidence showed that the EEA wife had obtained permanent residence in the UK as a qualified person and since the couple were not divorced until December 2010 the Appellant would have also obtained entitlement to permanent residence in the UK by that date. The marital relationship had legal effect until the date of the divorce.

20. He accepted that the Appellant could not meet Regulation 10(5) because the decision in Ahmed required the EEA national spouse to be exercising treaty rights at the date of the termination of the marriage which she was not. However Ahmed was solely concerned with retained rights of residence whereas it was the Appellant's argument that he had already obtained permanent residence by the date of the divorce.

21. The Czech Republic joined the EU on 1st April 2004 and if it was accepted that the former EEA spouse was employed in any capacity from that date she was exercising treaty rights.

22. Mr Diwncyz did not oppose the submission.

Decision and Directions

23. The decision of the judge is set aside for the following reasons.

24. It was incumbent upon him to make findings on whether the EEA national spouse was exercising treaty rights in the UK for a period of five years. Her case is that she was exercising treaty rights from 1st April 2004 until 9th November 2009 when she left for three months.

25. Second, the judge erred by failing to properly engage with the argument that the fact that the couple did not live together for five years was irrelevant since by the date of the divorce the Appellant was already entitled to permanent residence.

26. Third, the consideration of Article 8 did not engage with the submissions before him that little weight should be placed on the identified legitimate aim because it would be to the UK's economic detriment were the Appellant to be removed and fourthly, that serious reasons were needed to justify his removal in the light of the time he has spent here as a child.

27. No skeleton argument had been produced for this hearing and Mr Diwncyz was not in a position to deal with the points being made. Furthermore there was no schedule of the EEA national's work in the UK from her arrival until November 2009.

Directions

(1) This matter is to be listed for a CMR hearing before Mrs D Taylor at Bradford in eight weeks. The Appellant and his representatives do not need to be present.

(2) Within 21 days of this hearing the Appellant must file and serve a skeleton argument setting out all of the points which he raises in support of the submission that he meets the requirements of Regulation 15(1)(b).

(3) The Appellant must file and serve copies of all the authorities upon which he wishes to rely.

(4) The Respondent, within 14 days thereafter, is to serve a skeleton argument and specifically to state whether it is accepted that, if it is established, that the Appellant is entitled to succeed on the basis that, if his former wife had obtained entitlement to permanent residence in the UK after five years as a qualified person by May 2009, then the Appellant would have obtained it as well after five years of marriage to her in February 2010.

(5) The Appellant must file and serve a detailed schedule of the EEA national's work in the UK from her arrival here until November 2009 or any later period if the Appellant wishes to rely on it, within 21 days of this hearing, together with two bundles of all of the evidence of the EEA national's exercise of treaty rights in the UK.

(6) The Respondent is to be in a position to state at the CMR hearing whether any periods of work set out in the Appellant's schedule are disputed i.e. whether it is accepted that the EEA spouse was exercising treaty rights as claimed for the period stated.

(7) Depending on the Respondent's views this matter may be concluded at the CMR hearing without a further hearing. If not, it will be set down for a further hearing possibly before a panel of two Upper-tier Judges.

THE RESUMED HEARING

28. Following the directions which were sent out following the hearing on 25th October 2013, the Appellant supplied a skeleton argument setting out his submission that the Appellant meets the requirements of Regulation 15(1)(b) and a schedule of the Appellant's former spouse's work and exercise of treaty rights in the UK.

29. She is a citizen of the Czech Republic which acceded to the EU in May 2004. The Appellant argues that both any period of time that she was working in the UK prior to the accession of the Czech Republic would count towards her period of continuous residence for the purpose of permanent residence but in any event, since she was working for a continuous period of five years between May 2004 and May 2009 she did not need to rely upon her earlier period of economic activity.

30. As stated above, the Appellant argues that he became a family member of an EEA national upon marriage in February 2005 and remained a family member until his divorce in December 2010. By February 2010, notwithstanding the fact that the former spouse had moved out of the family home in April 2008, and indeed had departed from the UK in November 2009, the Appellant could be said to have "resided in the UK with the EEA national in accordance with the Regulations for a continuous period of five years".

31. The EEA national had acquired a permanent right of residence in the UK by the date of her departure in November 2009 because she had been exercising treaty rights in the UK for a continuous period of five years under Regulation 15(1)(a). She was only absent from the UK for the last three months of a period in which the appellant lived in the UK as her family member, in accordance with the Regulations, which would not disrupt her continuity of residence for the purpose of qualifying for a right of permanent residence.

32. Mrs Petterson said that, having had an opportunity to review the skeleton argument and to consider the documentary evidence, she accepted that it was correct. The EEA national spouse had obtained entitlement to permanent residence in the UK after five years by May 2009 and that the appellant therefore also obtained permanent residence after five years of marriage to her in February 2010. Her absence from the UK for three months had no effect on his entitlement. Neither did the fact that no application for permanent residence had been made as at that point.

33. She was also satisfied that the documentary evidence showed that the EEA spouse was working as claimed between February 2004 and May 2009 and accordingly the appellant has acquired a right of permanent residence. She agreed with Mr Ficklin that the appeal should be allowed.

Decision

34. The original judge erred in law and his decision has been set aside. It is remade as follows. The Appellant's appeal is allowed.

Signed Date

Upper Tribunal Judge Taylor

Approval for Promulgation

Name of Upper Tribunal Judge issuing approval:	Mrs D E Taylor
Appellant's Name:	Bujar Mulgeci
Case Number:	IA/08588/2013

Oral determination (please indicate) ☐

I approve the attached Determination for promulgation

Name:

Date:

Amendments that require further action by Promulgation section:

Change of address:

Rep: ☐ Appellant: ☐

Other Information:
