



**Upper Tribunal
(Immigration and Asylum Chamber)**

Appeal Number: IA/22083/2014

THE IMMIGRATION ACTS

**Heard at Field House
On 16 September 2015**

**Decision & Reasons Promulgated
On 16 September 2015**

Before

DEPUTY UPPER TRIBUNAL JUDGE GRIMES

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

RASHID BASHIR

Respondent

Representation:

For the Appellant: Mr D Clarke, Home Office Presenting Officer

For the Respondent: no appearance

DETERMINATION AND REASONS

1. Although this is an appeal by the Secretary of State I will refer to the parties as they were in the First-tier Tribunal.
2. The appellant, a citizen of Pakistan, appealed to the First-tier Tribunal against a decision of the Secretary of State dated 7 May 2014 to refuse his application for permanent residence as confirmation of his right to reside in the UK with a retained right of residence under regulations 15 (1) (f) and 10 (5) of the Immigration (EEA) Regulations 2006 (the Regulations). First-tier Tribunal Judge Jessica Pacey allowed the appeal. The Secretary of State appeals with permission to this Tribunal.

3. Following a hearing on 10 June 2015 I decided, in a decision promulgated on 7 July 2015, that the decision of the First-tier Tribunal contained an error of law for the reasons set out in that decision and I set aside the First-tier Tribunal Judge's decision. In summary I decided that the Judge had no evidential basis for her finding that the appellant satisfied Regulations 10 (5) (a) and (b) of the Regulations and she erred in failing to make findings as to whether the EEA national former civil partner of the appellant, rather than the appellant, was residing in the UK in accordance with the Regulations at the date of termination of the civil partnership.
4. I listed the appeal for a resumed hearing in order to remake the decision. In light of the failure of the Presenting Officer to comply with her undertaking to provide clarification as to whether the Secretary of State could obtain HMRC records about the appellant's former partner, I issued a direction to the Secretary of State to establish whether she can obtain evidence in relation to the activities of the appellant's former partner between 16 November 2010 and the date of the termination of the civil partnership on 17 September 2012 and to obtain any such evidence in advance of the hearing.
5. There was no appearance by or on behalf of the appellant at the resumed hearing. Since the promulgation of my decision on 7 July 2015 the appellant has sought to challenge my decision by way of Judicial Review and to the Supreme Court. However, in the absence of any order from a Higher Court, I am of the view that I am still seised of this appeal and I am satisfied that it is appropriate for me to proceed to remake the decision in this appeal.
6. It is clear from the correspondence from the appellant that he was aware of the resumed hearing. It appears from the correspondence that it was not likely that he would attend the resumed hearing. I was satisfied that the appellant had been notified of the hearing and I considered that it was in the interests of justice to proceed with the hearing despite the absence of the appellant and I did so in accordance with Rule 38 of the Tribunal Procedure (Upper Tribunal) Rules 2008.
7. I heard submissions from Mr Clarke. He accepted that section 40 of the UK Borders Act 2007 gives the Secretary of State the power to obtain evidence from HMRC however he submitted that there is no duty to do so. He relied on the cases of Amos v SSHD [2011] EWCA Civ 552, SSHD v Rodriguez [2914] EWCA Civ 2 and AG and Others v SSHD [2007] UKAIT 00082. He also submitted a copy of an extract from the respondent's policy guidance in relation to family members who have retained the right of residence. This guidance outlines the circumstances in which a Home Office case worker may make inquiries as to whether the EEA national sponsor has been exercising free movement rights. Although this policy guidance us from April 2015 Mr Clarke did not argue that it, or a predecessor policy, does not apply in this case. He submitted that the guidance could have been considered and the discretion exercised despite not being referred to in the reasons for refusal letter. He submitted that in

this case there is a gap in the evidence covering a two year period and because this is a long period it may not have been appropriate to exercise the discretion in this case. He submitted, in line with AG, that if I found that the discretion has not been exercised the decision of the Secretary of State is potentially unlawful and, if so, any remedy would be to return the case to the Secretary of State for exercise of the discretion.

Remaking the decision

8. The decision of the Secretary of State dated 7 May 2014 makes no reference to the policy guidance submitted by Mr Clarke or to its predecessor. I do not accept that it can be assumed that consideration was given to the exercise of this discretion in circumstances where it was not mentioned in the reasons for refusal letter. The appellant had indicated to the respondent in his covering letter dated 1 November 2013 that he could not obtain the necessary evidence in light of the circumstances of the relationship breakdown. It is clear from his application that the appellant was unable to provide the evidence required to show that he met the requirements of regulation 10 (5). No consideration was given to the reasons why the appellant could not obtain the evidence required to show that his former partner was exercising treaty rights at the date of termination of the civil partnership.
9. In these circumstances I am satisfied that the Secretary of State has not exercised her discretion to consider making enquiries on the appellant's behalf to establish whether the appellant's former civil partner was exercising Treaty rights at the date of the termination of the civil partnership. Accordingly I am satisfied that the decision of the Secretary of State is unlawful in that she failed to exercise discretion.
10. I allow the appeal to the extent that the decision remains outstanding before the Secretary of State for the exercise of her discretion as set out in the policy guidance.

Conclusion:

The making of the decision of the First-tier Tribunal did involve the making of an error on point of law.

I set the decision aside and remake it by allowing the appeal to the extent that the decision remains outstanding before the Secretary of State.

Signed

Date: 16 September 2015

A Grimes
Deputy Judge of the Upper Tribunal