Upper Tribunal
(Immigration And Asylum Chamber) **Appeal Number: IA/12181/2015**

THE IMMIGRATION ACTS

Heard at: Field House
On 18th May 2016

Decision and Reasons Promulgated
On 31st May 2016

Before

DEPUTY UPPER TRIBUNAL JUDGE MAILER

Between

MR GHOLAMMORTEZA AHMADYAR
(NO ANONYMITY DIRECTION MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation

For the Appellant: Ms P Heidar, AA Immigration Lawyers
For the Respondent: Mr S Whitwell, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellant is a national of Afghanistan born on 3 July 1976. He applied for a residence card as confirmation of his right to reside in the UK. His application dated 26 November 2014 was refused by the respondent on 14 March 2015 as he had not met the requirements of Regulation 10(5) of the Immigration (EEA) Regulations 2006 ("the 2006 Regulations").

2. He appeals with permission granted on 16 October 2015 by First-tier Tribunal Judge Martins, against the decision of the First-tier Tribunal Judge dismissing his appeal on 9 July 2015. His appeal was determined on the papers.

3. It was common ground that the appellant entered the UK on 16 March 2003. His claim for asylum was refused on 28 April 2003.

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4. On 22 July 2008 he married a Polish national, Ms. Tatarzyna Doeota Gawlik, who at the time was exercising Treaty rights in the UK.

5. On 18 July 2014, the appellant divorced his wife.

6. The First-tier Judge stated that the issue as set out in the refusal letter was whether the appellant had established that his ex-wife was exercising Treaty rights on 18 July 2014 - the date of the divorce. The respondent had also contended that the bank statements provided by his spouse did not establish that she was working during 2009-12.

7. The Judge found that the appellant had not established that the EEA national was exercising her Treaty rights at the date of the divorce [26]. Her July 2014 wage slip stood in isolation in establishing that she was working at the time of the divorce.

8. Ms Heidar relied on the grounds seeking permission. She submitted that although there was a 603 page bundle before the First-tier Tribunal, there was also a skeleton argument which had been submitted detailing the basis of the claim as well as the relevant authorities. The skeleton unfortunately not been placed before the Judge. This had however been sent and received by the Tribunal. She has produced the skeleton argument sent to the Tribunal. It was confirmed by the First-tier Tribunal that it had been received.

9. She submitted that the Judge erred in finding that insufficient evidence had been produced in order to demonstrate the retained right of residence. Furthermore, it was evident in the bundles produced to the First-tier Tribunal there had been more than one payslip produced to confirm that his ex-wife had been exercising Treaty rights at the time of divorce.

10. In that respect, Ms Heidar referred to a sequence of such payslips produced at pages 14-21 of the appellant's bundle. Some of these payslips had also been disclosed in the respondent's bundle at F1-6. There were thus payslips disclosed for each of the months from December 2013 up to and including July 2014.

11. At the adjourned hearing before Upper Tribunal on 16 March 2016 the originals of these payslips were handed to the Senior Presenting Officer, Mr Duffy, who represented the respondent. On that occasion the respondent was requested by the Tribunal to use her best endeavours to procure from HMRC the sponsor's tax records and details.

12. Mr Duffy subsequently sent several emails confirming that such requests had been made and had sent 'chasing' emails inquiring whether there had been any outcome to the HMRC checks in this case. Those emails are contained in the Tribunal's file.

13. Ms Heidar accordingly submitted that there had been more than one wage slip before the First-tier Tribunal Judge which demonstrated that the ex-wife had been working for at least eight months prior to the date of their divorce.

14. Ms Heidar referred to the decision of the Upper Tribunal in Samsam (EEA: Revocation and Retained Rights) Syria [2011] UKUT 00165 (IAC) at [44]. The Tribunal concluded that their analysis of Regulation 10(5) indicates that the focus is whether the wife retained the status of worker at the time of the divorce and not whether she had that status throughout the three years preceding the divorce. There is no such requirement in Regulation 10(5). Where the regulations impose a requirement of qualification throughout a relevant period they say so (contrast Regulation 15(1)(a)).

15. In Samsam, the Tribunal noted that the wife was a worker under Community law at the time of divorce. She had worked for the appellant's business during her marriage. This was demonstrated by isolated wage slips (as referred to at [57a]).

16. Ms Heidar also referred to the decision of the Court of Appeal in NA (Pakistan) v SSHD [2014] EWCA Civ 995. In that case the issue to be decided was whether a third country national ex-spouse of an Union citizen must be able to show that their former spouse was exercising Treaty rights in the host Member State at the time of their divorce in order to retain a right of residence under Article 13(2) of the Directive 2004/38/EC.

17. The Court of Appeal noted that the Upper Tribunal concluded that it was bound by the decision of Amos v SSHD [2011] EWCA CIV 552. There the Court of Appeal stated that Regulation 10(5) required the divorced third country national to satisfy the condition that their former EEA national spouse was residing in the UK in accordance with the Regulations at the date of the divorce [30].

18. The Court of Appeal in NA made a reference to the Court of Justice of the European Union by requesting a preliminary ruling from that Court on the proper interpretation of Article 13(2). One of the reasons was that there was no express requirement in Article 13(2) that in order to retain a right of residence a third country national ex-spouse of a Union citizen must be able to show that their former spouse was exercising Treaty rights in the host member state at the time of their divorce.

19. Neither party in NA contended that the issue raised in the appeal was "acte clair". Accordingly, the Court of Appeal posed the following question for the Court:

"Must a third country national spouse of a Union citizen must be able to show that their former spouse was exercising Treaty rights in a host member state at the time of their divorce in order to retain a right of residence under Article 13(2) of Directive 2004/38/EC?"

20. Ms Heidar further submitted that in the respondent's own application form, which was completed by the appellant, there was a list confirming that the appellant could provide wage slips. Moreover, the respondent's IDIs did not specify the documents.

21. On behalf of the respondent, Mr Whitwell submitted that the payslips submitted by the employer to Ms Gawlik were cash payments. Accordingly, these should be

treated with “scepticism”. There is no witness statement from the appellant's ex-wife, albeit that there had been oral evidence from the appellant.

22. He submitted that such earnings could be verified by HMRC which he acknowledged was a 'double edged' submission. He referred to the attempts made by the senior presenting officers in the appeal, including himself, to obtain a response from HMRC to requests for such information. Attempts had been made in this respect on several occasions since January 2016 up to and including 17 May 2016, the day before the hearing.

23. I reserved my decision in this appeal.

24. Mr Whitwell informed me shortly thereafter that he had just received an email from the senior case worker, European Case Work, in which information regarding Tatarzyna Doeota Gawlik, the appellant's ex-wife, was attached. Ms Heidar had by then already departed the building.

25. I requested that Ms Heidar be contacted to ascertain whether she would wish to have the opportunity of making further submissions later that day. She stated when contacted that this would not be possible. I did not consider it to be necessary to postpone the hearing in the light of the contents of the HMRC report to which I refer below.

26. It was noted in the written response to Mr Whitwell that there had been a request for HMRC information under s.40 of the UK Borders Act 2007.

27. The documents produced stated that the subject of the inquiry is the appellant's ex-wife. There are various personal details given including her address. The address in HMRC records corresponds with her address set out on the payslips to which I have referred. Her national insurance number with HMRC also corresponds with the national insurance number identified and set out in her payslips.

28. The information requested related to the tax years commencing in 2008 until 2015. The income details are set out in respect of those tax years. Her employer for the 2014/15 tax year, with the start date on 8 December 2013, was stated to be Hounslow Quality Fish Ltd, which corresponded to the name of the employer on each of her payslips submitted. For the tax year 2014/15 her “pay” was £11,662.98, from which £330.60 tax was deducted. Further, she was employed by the same employer during the tax year 2015-16.

Assessment

29. I am grateful for the efforts made by both Mr. Duffy and Mr. Whitwell to obtain information held on record relating to the appellant's ex-wife's employment history. That evidence had not been available to the First-tier Tribunal Judge.

30. It is unfortunate that the Judge did not have the benefit of the skeleton argument which directed the Tribunal to the relevant pages in a bundle over 600 pages long.

The Judge at [24] stated that the July 2014 wage slip stood in isolation in establishing that the spouse was working at the time of the divorce. That however was incorrect as there were payslips produced in the bundle for the period December 2013 until July 2014; there were also several such payslips in the respondent's bundle.

31. Mr Whitwell's submission that they should be treated "with scepticism" as she was paid in cash, was made shortly before HRMC provided evidence confirming the appellant's ex-wife's earnings and tax paid at the date of divorce. It turns out that she had been working at the relevant time. There was thus nothing to suggest that the wage slips were in any way suspicious.

32. I accordingly find that the Judge materially erred in concluding that the appellant's appeal could not succeed on the basis that it had not been established that the EEA national was exercising Treaty rights at the time of the divorce [26].

33. I accordingly set aside the decision and re-make it.

34. Having regard to the production of the HMRC printout and authorities to which I have been referred, I am satisfied that the appellant has produced satisfactory evidence demonstrating that his ex-wife exercised Treaty rights at the date of the divorce. 0

Notice of Decision

The decision of the First-tier Tribunal involved the making of an error on a point of law and is set aside.

I re-make the decision by substituting for it a decision allowing the appellant's appeal.

No anonymity direction is made.

Signed Date 27 May 2016

Deputy Upper Tribunal Judge Mailer