Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: EA/00102/2016

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 27 March 2018	**On 19 April 2018**

Before

UPPER TRIBUNAL JUDGE GLEESON

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

SOLOMON [O]
(NO ANONYMITY ORDER MADE)

Respondent

Representation:
For the Appellant: Mr T Wilding, a Senior Home Office Presenting Officer
For the Respondent: Mr S Osifeso, instructed by Lannex Immigration and Legal Aid

DECISION AND REASONS

1. The Secretary of State appeals with permission against the decision of the First-tier Tribunal (Taylor House hearing centre) allowing the claimant's appeal against her decision that he is not entitled to indefinite leave to remain as a family member who has retained the right of residence after a divorce pursuant to the Immigration (European Economic Area) Regulations 2016 (as amended).

2. It is unclear when the claimant first entered the United Kingdom. In his oral evidence to the First-tier Tribunal and his witness statement, he said

he had done so on a visit visa. He first came to attention when he married his French wife on 12 August 2004.

3. On 9 February 2005, the claimant made an application for a residence document as an EEA spouse, which was granted on 21 May 2005. The spouse residence document was to have expired on 21 May 2010. However in 2008, unhappy difficulties between the parties, which were acrimonious but short of domestic violence, caused the marriage to fail and a petition for divorce was filed. The copy of the divorce petition on the file is undated, but bears a 2008 file number, establishing the year in which it was filed.

4. On 14 January 2009, Bromley County Court granted the claimant a decree nisi of divorce which became a decree absolute on 2 April 2009. That is the date on which the applicant claims that became a family member who has retained the right of residence. There is evidence that the wife was working on that date but no evidence that he was doing so.

5. There have been two previous applications for permanent residence. The first on 29 June 2010, for which the claimant had a full in-country right of appeal on which he was appeal rights exhausted on 7 February 2011. The second application was made almost immediately on 12 April 2011, and was refused with no right of appeal initially, but on 25 October 2011, the claimant received a revised refusal letter with an in-country right of appeal. He did not exercise that right of appeal.

6. The circumstances which ensued are summarised in the First-tier Judge's decision. She accepted at [12] that the divorce had been acrimonious and that the wife had refused to hand over her documents showing whether and when she had exercised Treaty rights in the United Kingdom. The claimant had not produced evidence establishing that his wife was exercising Treaty rights on 2 April 2009, the date of the divorce. There are a few wage slips in the bundle for each of the parties, and a contract of employment, but not enough to discharge the burden of proof on the claimant.

7. At paragraph 14 of the First-tier Tribunal decision, the Judge summarised her findings in relation to the claimant's own alleged employment in the United Kingdom:

> "14. … I find that the [claimant] has not produced a profit and loss account despite stating in his evidence that he has accountants in Woolwich. Nor has he produced any business receipts to corroborate his evidence that he was self-employed. Whilst I find that prior to the divorce in April 2009 the [claimant] had periods of employment, I find that there are significant gaps in his employment since the date of the divorce. I find that the documentary evidence shows that the [claimant] was employed as a worker for periods in 2010 to May 2011 which are referred to in the [Secretary of State's] refusal letter. However there is little credible evidence that he was self-employed from either February or June 2011 until February 2015. In cross-examination the

> [claimant] said that he could have been self-employed from June 2011 until February 2015."

8. The reason for the vagueness of the claimant's response is that he has had alcohol problems which have, as Mr Osifeso vividly described it, resulted in his life being in tatters and his living like a tramp. It is also the case that since his arrest for overstaying on 10 February 2015, the claimant had completely stopped working and has been living with a supportive aunt.

9. It follows that when the present application was made on 21 February 2015, the claimant was definitely not working and could not at that point, even allowing for any extension under Regulation 10(6), show five years in which he had continuously lived in the United Kingdom in accordance with the Regulations. The Secretary of State refused his application, and there was a subsequent judicial review which resulted in reconsideration and a decision on 7 December 2015 refusing permanent residence with an in-country right of appeal.

10. At the end of her decision the First-tier Tribunal Judge said this:

> "15. Regulation 15(f) states that the applicant must have resided in the United Kingdom in accordance with the Regulations for a continuous period of five years and must have been at the end of that period a family member who has retained the right of residence. It is common ground that the [claimant] has been in the United Kingdom for a continuous period of five years. I find that up to the date of divorce, that is 2 April 2009 he was employed. I take into account that the [claimant] moved addresses and had problems with alcohol abuse. Given his difficult personal circumstances, I accept his evidence that he has not been able to provide all the documentary evidence to demonstrate that he has been a worker for a continuous period of five years. *On a balance of probabilities I find that the [claimant] has lived continuously in the United Kingdom for five years and has worked.* Consequently he meets the requirements of Regulations 15(1)(f) and Regulation 10(6) of the 2006 Regulations." (Emphasis added)

11. For the claimant, Mr Osifeso relied on an European Operational Policy Team document, revised 4 August 2011, concerning a pragmatic approach in cases where an applicant is unable to provide required evidence (Pragmatic Approach Guidance Note). The Home Office Presenting Officer at the First-tier Tribunal hearing verified that the policy was still in effect.

12. The policy begins by stating that it is intended to clarify the process which caseworkers must follow when a family member of an EEA national applies for a residence card under the EEA Regulations, but is unable to demonstrate that they meet all of the requirements due to the exceptional circumstances of the application. That would appear to be the position here. Paragraphs 4 to 8 of the Note deal exclusively with domestic violence, which is not relevant to this appeal.

13. So far as relevant, the Pragmatic Approach Guidance Note is as follows:

> "2. Applications received on the basis that the applicant has a retained right to reside in accordance with regulation 10 of the Regulations, should be treated pragmatically where there has been a breakdown in the relationship between the applicant and their EEA national sponsor. This is because it may not be possible for the applicant to provide the required documents to support their application. Examples of this may include … where the applicant's relationship has ended acrimoniously but they have provided evidence to show that they have made every effort to provide the required documents. For example, attempts to make contact with the EEA national sponsor during divorce proceedings.
>
> 3. Caseworkers must look at each case according to its individual merits and where they are satisfied that there is a valid reason why the applicant is unable to get the required evidence, enquiries must be made on behalf of the applicant where possible. …
>
> **Applications for registration certificates or residence cards or permanent residence**
>
> 9. …the applicant will be expected to provide as much detail as they can about the sponsor …"

Paragraphs 9 to 17 then go on to provide for certain enquiries which may be made.

14. For the claimant, Mr Osifeso was unable to take me to any evidence of the applicant making "every effort to provide the required documents", for example by making contact with the EEA national sponsor during divorce proceedings or contacting her employer directly, the name being clearly displayed on her pay slips. This is not a case where the caseworker got the agreement of a senior caseworker to make further direct enquiries or indeed one where the caseworker was asked to do so by those representing the claimant.

15. On that basis the provisions of paragraph 9 to 17 of the Pragmatic Approach Guidance Note are not triggered and the Secretary of State was not required to make further enquiries. In any event, so far as the applicant is concerned, the HMRC documents which were disclosed show a pattern of failing to make returns and failing to pay monies due to HMRC by way of instalments and the claimant's own evidence is that between June 2011 and February 2015, he cannot be certain whether he was self-employed or not working. On the basis of that evidence, and of the clear findings in paragraph 14, the First-tier Tribunal Judge erred in law in concluding that the requirements of paragraph 15 were met.

16. At 15(1)(f), in order to obtain the right to reside in the United Kingdom permanently an applicant must show that they have resided in the United Kingdom in accordance with the Regulations for a continuous period of five years and were at the end of that period a family member who retained the right of residence.

17. On the date when the application was made the applicant was no longer working. He cannot show that he has resided in the United Kingdom in accordance with the Regulations for any continuous period of five years

and in those circumstances this application should not have succeeded and cannot succeed on remaking.

18. I set aside the decision of the First-tier Tribunal and substitute a decision dismissing the appeal.

Signed: Judith A J C Gleeson Date: 18 April 2018
Upper Tribunal Judge Gleeson