Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: EA/04402/2017**

THE IMMIGRATION ACTS

Heard at Field House, London	**Determination Promulgated**
On 24th September 2018	**On 8th October 2018**

Before

UPPER TRIBUNAL JUDGE SMITH

Between

MR NIKOLOZ BEBOSHVILI

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Not in attendance nor represented
For the Respondent: Mr S Whitwell, Senior Home Office Presenting Officer

DECISION AND REASONS

Background

1. The Appellant appeals against the decision of First-tier Tribunal Judge Cary promulgated on 7 June 2018 (“the Decision”). Following a consideration of the appeal on the papers (at the request of the Appellant), by the Decision, the Judge dismissed the Appellant’s appeal against the Respondent’s decision dated 14 April 2017 refusing his application for a residence card confirming his retained right of residence following dissolution of his marriage to his former Lithuanian spouse, Ms Latakaite.

2. The Appellant is a national of Georgia. He married Ms Latakaite on 22 November 2011 and they were divorced by proceedings begun on 8 February 2016, culminating in a decree absolute on 18 July 2016.

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3. Ms Latakaite was in the UK as a student at the relevant date. The Respondent refused the Appellant's application on the basis that there was no evidence that Ms Latakaite was working and, in relation to her status here as a student, the Appellant had failed to provide evidence that she had sufficient funds to support herself and that she had comprehensive medical insurance for herself and the Appellant for the duration of her studies (see Regulation 4(1)(d) read with 4 (3)). The Respondent therefore did not accept that Ms Latakaite was a "qualified person" for the purposes of the relevant regulations (which are in this case The Immigration (European Economic Area) Regulations 2016).

4. The Judge considered the evidence before him at [9] of the Decision before concluding at [13] of the Decision that the Appellant had failed to show that Ms Latakaite was, at the date of the divorce proceedings, a "qualified person". He also rejected a claim that she was permanently resident at that time for reasons given at [16] of the Decision.

5. The Appellant challenges the Decision on the basis that the Judge failed to take into account evidence which should have been before him, namely a bundle which is stamped as received on 8 May 2018. The Judge considered the appeal on the papers on 11 May 2018 and, according to a note on the file, returned his decision for promulgation on 15 May 2018. He did not have sight of the bundle at the time of making the Decision.

6. Permission to appeal was nonetheless granted by First-tier Tribunal Judge Lambert on 9 August 2018 in the following terms so far as relevant:

> "….
> 2. The Appellant representative had asked for consideration of the appeal on the papers.
> 3. The judge found the evidence not to establish that the Appellant's former wife was exercising treaty rights at the date of divorce and that she had not at that date acquired permanent residence. The decision is adequately reasoned with regard to the evidence referred to in the decision.
> 4. The application is based on failure to have regard to the Appellant's evidence. It is accompanied by a bundle of documents that appear to have been intended for the appeal hearing. There is a letter from Royal Mail confirming delivery of a mail item to the Tribunal at Taylor House on 8 May. There is no record on the file or bundle of the date of original receipt at Taylor House. However they were stamped received (apparently back from the Judge) on 17 May, after the determination ready for promulgation had been sent to Taylor House. A note on the bundle appears to indicate that it was placed before the judge *after* the date of consideration of the appeal on 11 May. It is difficult to understand how this can have happened, however there does in the processing of the Appellant documents appear to have been a procedural error by the Tribunal amounting to an error of law.
> 5. There is therefore an arguable error of law."

7. The matter comes before me to assess whether the Decision does disclose an error of law and to re-make the Decision or remit to the First-tier Tribunal for re-hearing.

Discussion and conclusions

8. The Appellant did not attend the hearing before me. At the time of the hearing, I had no explanation for non-attendance by him or his representatives which caused the Tribunal clerk to make telephone enquiries of the Appellant's representative for an explanation of their and the Appellant's absence. Those enquiries failed to elicit a response. However, since the appeal hearing, I have now received a letter dated 17 September 2018 but only received by e mail on 24 September 2018 (at 1742 hours) asking that the appeal be considered on the papers. Since I did not have that letter at the time of the hearing, I received short oral submissions from Mr Whitwell for the Respondent but, otherwise, this appeal has been determined on the papers as requested.

9. With that brief introduction, I now turn to the merits of the appeal beginning with whether there is a material error of law in the Decision.

10. Notice of the appeal hearing before Judge Cary (subsequently converted to a determination on the papers) was given as early as 19 September 2017. The notice sent to the parties made clear that all evidence should be submitted as soon as possible and served on the other party. There is no explanation from the Appellant for filing the evidence as late as he did. Even if he had difficulties in making contact with Ms Latakaite, her statement in the bundle is dated 27 April 2018 and no explanation is provided for a delay in sending that evidence for a further week. The Respondent also takes issue with the reliance placed on these documents on the basis that there is no record of service on the Respondent.

11. Be that as it may, the bundle was date-stamped as received by the Tribunal on 8 May 2018 and there is nothing to show why that bundle was not put before the Judge who was considering the appeal some three working days later. I am therefore prepared to accept that there is a procedural error made by the Tribunal albeit not by the Judge himself.

12. As the Respondent points out though, a finding that there is an error of law does not necessarily lead to the setting aside of the Decision under challenge if the result of the further material does not materially alter the conclusions reached by the Judge. I therefore go on to consider whether the error is material.

13. In relation to the determinative issue, namely whether Ms Latakaite was a "qualified person" at the date of divorce, the Appellant relies on the statement from Ms Latakaite dated 27 April 2018 which reads as follows:

> "I, Karina Latakaite write this witness statement in support of my former spouse Nikoloz Beboshvili's Immigration Appeal.
>
> I have read my ex-husband's refusal letter dated 15 April 2017, the refusal is mainly based on myself and my studies at the time we

divorced. I have European Health Insurance (EHIC) which was confirmed to me by the Home Office on the phone that I don't need any private medical insurance if I have this card.

Me and Nikoloz were very happy together and were married for almost 5 years. As the relationship between us became difficult we decided to sadly divorce and it has been amicable between us and I hope this can continue to be the case. Our divorce came through on 18th July 2016.

I enrolled on a Full Time English Course in the UK at the beginning of January 2016. I was a full time student at the time of the divorce and I was financially dependent on Mr Nikoloz Beboshvili, who has been financially supporting throughout my studies until January 2017. He has been working at TSS since 2013 and still works there, I'm proud of him and how he has stuck to this job and progressed through the company.

I have provided my European Health Insurance Card as proof of my medical cover in the UK which I obtained in April 2015. Since I came to the UK many years ago up until now I have exercised my treaty rights here, however I do not intend to live in the UK permanently. I always had adequate funds and medical cover while I studied.

I was studying at the time of our divorce and I gave all my papers for my ex-spouse application, I feel chastised for being a student but this shouldn't be the case as I was not in breach of any rules.

Please let me know if you require any more information."

14. Based on the evidence which the Judge had before him at the date of the Decision, he found as follows:

"[13] The Appellant was divorced from his wife on July 18 2016. At that date she was a full-time student. There is no evidence that she had the necessary comprehensive sickness insurance in place at the date of the divorce. It must therefore follow the Respondent was right to conclude that the Appellant could not establish that his wife was a "qualified person" as a student at the time they were divorced. The Appellant also failed to produce any evidence that Ms Latakaite had sufficient resources to maintain herself during her studies. Although he suggested that she had "savings from employment" in his application he has produced no evidence to support that assertion. I have seen no bank statements or evidence of savings. The Respondent was therefore also entitled to refuse the application on that ground.

[14] The Appellant failed to produce any evidence to show that at the time they were divorced Ms Latakaite was exercising treaty rights in some other capacity as a worker. Accordingly the only way the Appellant can possibly succeed with his appeal is by showing that at the date of the divorce Ms Latakaite had acquired permanent residence. I should add that no such assertion was made by the Appellant in the letter from Visa Direct dated October 26 2016 or his appeal.

[15] Under Article 16 of EU Directive 2004/38 ('the Directive'), EEA nationals automatically acquire a right of permanent residence in the UK if they have legally resided here for a continuous period of five years. For these purposes, 'legal' residence includes periods spent as a worker (including part-time work if it is 'genuine and effective'), a self-employed person, a student with adequate financial resources and comprehensive sickness insurance or a jobseeker. An individual in one of these categories is described as a 'qualified person' in the UK legislation and is also known as someone who is 'exercising Treaty rights'. 'Continuous' residence is not affected by periods of absence for mandatory military service or by absence from the UK for a total of no more than six months

in any one calendar year. One absence from the UK of up to 12 months is permitted if it is a result of an important reason such as pregnancy and childbirth, serious illness, study or vocational training or a posting abroad. An EEA national who has resided in the United Kingdom in accordance with the 2006/2016 Regulations for a continuous period of five years will acquire permanent residence – see regulation 15(1)(a) of the 2016 Regulations.

[16] Unless Ms Latakaite was registered under Worker Registration Scheme any periods of residence prior to 30 April 2011 will not count in calculating her entitlement to permanent residence. There is no evidence that Ms Latakaite was ever registered under that Scheme. According to Eynsford College her studies started on January 20 2016 less than 5 years after the registration requirement under the Workers Registration Scheme came to an end for the purpose of the acquisition of permanent residence. Accordingly the Appellant cannot establish that Ms Latakaite had acquired permanent residence at the time of the divorce even if she had been in continuous employment from April 30 2011 to January 19 2016 as this is a period of less than 5 years. In any event it is unclear from the evidence whether Ms Latakaite's employment up until the time she began studying was "continuous" for the purposes of the 2006/2016 Regulations. The letter from HM Customs and Excise does not give any start dates or termination dates for the various periods of employment referred to in the letter. I also note that in 2014/15 she appears to have been working for at least part of the time on a self-employed basis in that there is reference to the payment of class 2 self-employed national insurance contributions. The pay slips the Appellant has produced for Ms Latakaite for 2015 do not help. They are not in her name. I have not seen the originals. The Appellant did not take the opportunity of continuing with his request for an oral hearing when he could have given evidence in support of his application. When I look at all the evidence before me I am not satisfied that the Appellant has established that at the date of his divorce he was entitled to a retained right of residence."

15. The Appellant's grounds to appeal the Decision do not engage with the question of what material difference the further evidence makes. The only evidence which could be relevant to the Judge's findings is Ms Latakaite's statement which I have set out at [13] above and her European Health Insurance Card ("EHIC") which is valid for five years and expires on 27 April 2020. Ms Latakaite says that she was told by the Home Office that she did not need private medical insurance if she had this card. However, that does not assist the Appellant. Not only is it the case that Ms Latakaite has produced no confirmation from the Home Office in this regard but, also, in April 2015 when the card was apparently issued, she is said to have been working in the UK and not studying.

16. Further and in any event the Judge has with some foresight dealt with this point at [12] of the Decision where he says this:

"[12] An EEA national purporting to exercising [sic] their free movement rights in the UK as a student must show that they have enough money to meet their living expenses and so will not become a burden on the social assistance system of the UK during their residence and comprehensive sickness insurance (CSI) cover in the UK for themselves to be recognised as a "qualified person" for the purposes of the 2016 Regulations – see

regulation 4(d)(ii) and (iii). The requirement of comprehensive sickness insurance cover is not merely a formality but is an integral part of self-sufficiency under the regulations – see **FK (Kenya) v SSHD (2010) EWCA Civ 1302**. That condition is not satisfied by an EEA's citizen's entitlement to free healthcare under the NHS – see **Ahmad v Secretary of State for the Home Department [2017] EWCA Civ 988."**

17. In the case of Ahmad, the Court of Appeal summarised its conclusions on the issue whether the availability of free NHS treatment in the UK is sufficient to fulfil the requirement for comprehensive sickness insurance in the following way:

> "[70]…If an EEA national enters the UK and is not involved in an economically active activity, for example because she is a student, her residence and that of her family members will not be lawful unless she has CSIC while she is a student in the five years following her arrival. Accordingly her family members will not be able to qualify for permanent residency in the UK.
>
> [71] So Mrs Ahmad had to have CSIC while she was a student. This condition must be strictly complied with. The fact that she would be entitled to treatment under the NHS, and was thus at all times in substantially the same position as she would have been if she had CSIC, is nothing to the point. Her failure to take out CSIC put the host state at risk of having to pay for healthcare at a time when the Ahmads had not then achieved the status of permanent resident and she was not economically active."

18. The position of Ms Latakaite and the Appellant is analogous. There is nothing in Ms Latakaite's statement which in any way undermines the Judge's finding that she did not already have permanent residence when she commenced her studies in January 2016. Although her statement says that she came to the UK "many years ago", she does not provide a date nor say on what basis she came here first or on what basis she has remained since. She has a EHIC which confirms her entitlement to receive free NHS treatment but, as the Court of Appeal held in Ahmad, that is not enough to fulfil the condition requiring comprehensive sickness insurance.

19. The Appellant has to show that Ms Latakaite was a "qualified person" at the relevant date (which I accept following the Court of Appeal's decision in Baigazieva v Secretary of State for the Home Department [2018] EWCA Civ 1088 is the date when divorce proceedings were issued). In this case that date was 8 February 2016 (see [9] of the Decision). Ms Latakaite's statement records that she began a full-time English course at the beginning of January 2016. There is no suggestion that she was also working. As I have already explained, there is no evidence to undermine the Judge's findings that she was not at that time a permanent resident.

20. Since Ms Latakaite did not have comprehensive sickness insurance cover as at 8 February 2016 (she relies only on the EHIC as meeting that requirement), it follows that the Appellant cannot show that she was a "qualified person" at the relevant date. I add for completeness on this

issue that the requirement for comprehensive sickness insurance cover relates not only to treatment for the EEA national but also for his/her family members (see Regulation 4(3)(b)). Even if, contrary to the Court of Appeal's judgment in Ahmad, a EHIC was sufficient to fulfil the requirement, it would not show that Ms Latakaite had comprehensive sickness cover also in relation to the Appellant.

21. I should also add that, in addition to needing to show that she had comprehensive sickness insurance at the relevant time, in order to show that she was a "qualified person", Ms Latakaite also needed to show that she had "sufficient resources not to become a burden on the social assistance system of the United Kingdom" (Regulation 4(3)(a)). The evidence of Ms Latakaite and the Appellant in the further evidence bundle that the Appellant was maintaining Ms Latakaite until she finished her studies in January 2017 is contrary to the Appellant's evidence recorded at [9] of the Decision that Ms Latakaite was maintaining herself from "savings from employment". I do not have evidence in support of either assertion. That is an additional reason why the Appellant's appeal fails.

22. However, the primary reason why the Appellant's appeal cannot succeed based on the further evidence is that set out at [20] above. Although the Judge did not have the further evidence before him when he made the Decision, he has referred at [12] of the Decision to the reason why the appeal would fail for the same reason. Accordingly, the failure to refer to the further evidence, even if a procedural error of law in circumstances where the evidence was with the Tribunal but not before the Judge, is not material as the appeal fails for essentially the same reasons as those given by the Judge.

23. For the foregoing reasons, the Appellant has not shown that there is any material error of law in the Decision. I therefore uphold the Decision.

DECISION

I am satisfied that the Decision does not involve the making of a material error on a point of law. I uphold the Decision of First-tier Tribunal Judge Cary promulgated on 7 June 2018 with the consequence that the Appellant's appeal remains dismissed.

Signed Dated: 1 October 2018

Upper Tribunal Judge Smith