Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: EA/05074/2016

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On Monday 3 December 2018	**On Tuesday11 December 2018**

Before

UPPER TRIBUNAL JUDGE SMITH

Between

MISS ESTHER OLUWATOSIN OLUREMI

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellants: Mr S Khan, Counsel instructed by M A Consultants (London)
For the Respondent: Mr T Lindsay, Senior Home Office Presenting Officer

DECISION AND REASONS

Background

1. The Appellant appeals against the decision of First-tier Tribunal Judge B A Morris promulgated on 29 March 2018 ("the Decision"). By the Decision the Judge dismissed the Appellant's appeal against the Respondent's decision dated 19 April 2016 refusing her a permanent right of residence as the former family member of Mr M Grossmann who is a national of the Czech Republic.

2. The Appellant is a national of Nigeria. She married Mr Grossmann on 8 May 2010. Her divorce from him was pronounced absolute on 11 September 2015. The decree nisi was made on 8 May 2015 and according to evidence recounted at [9] of the Decision, the couple separated in January 2015 and the Appellant began divorce proceedings in that month.

3. The Judge did not accept that Mr Grossmann was exercising Treaty rights at the date of the decree absolute or that the Appellant had lived in the UK in accordance with the Immigration (European Economic Area) Regulations 2016 ("the EEA Regulations") for a continuous period of five years as the EEA Regulations require.

4. The Appellant raises two grounds. First, it is said that the Judge erred by imposing a threshold figure when considering the evidence whether Mr Grossmann had been exercising Treaty rights and over what period. The Appellant says that the issue is only whether the earnings show that the EEA national was involved in genuine and effective economic activity over the period. In addition, the Judge applied the wrong date to the issue whether Mr Grossmann was exercising Treaty rights in the UK; according to the judgment in Baigazieva v Secretary of State for the Home Department [2018] EWCA Civ 1088, the relevant date is the institution of divorce proceedings and not the date when the divorce is concluded.

5. Second, and following on from ground one, the Appellant says that the Judge should have accepted that there is evidence that Mr Grossmann exercised Treaty rights for the period from 2011 to 2016 and therefore that the Appellant is entitled to a permanent right of residence. In the alternative, she says that the Judge should have considered whether regulation 10 of the EEA Regulations entitles her to a retained right of residence.

6. Permission to appeal was refused by First-tier Tribunal Judge Grimmett on 19 July 2018 but, following renewal of the application to this Tribunal, permission was granted by Upper Tribunal Judge Lindsley on 6 November in the following terms (so far as relevant):

> "… [3] The grounds of appeal contend, in summary, that the First-tier Tribunal erred in the consideration of the evidence of the sponsor's self-employment by failing to apply the correct test of whether the work done was genuine and effective economic activity and by failing to consider whether the EEA national was a qualified person at the date of initiation of the divorce proceedings, and thus failed to accept that the sponsor had exercised Treaty rights from 2011 to 2016, a five year period.
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> [4] The grounds are all arguable."

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.

Submissions

8. Mr Khan pointed to [16] of the Decision. He said that the Judge's conclusion that Mr Grossmann was not exercising Treaty rights was based on an analysis comparing his income to the minimum level of earnings to qualify as an EEA national exercising Treaty rights according to DWP's website. Mr Khan said that the test is not linked to any specific level of income but rather whether the EEA national is economically active. Mr Lindsay pointed out that the Judge adopted this approach because this is the way in which both parties submitted she should proceed. In response, Mr Khan pointed out that the Judge was not bound to accept concessions made by the parties if those were wrong in law. He said that, based on the evidence of Mr Grossmann's earnings in 2014-15, the Appellant would be able to succeed.

9. Mr Khan relied in particular on what is said by the Tribunal in Begum (EEA – worker – jobseeker) Pakistan [2011] UKUT 00275 (IAC) the headnote to which reads as follows:

> "(1) When deciding whether an EEA national is a worker for the purposes of the EEA Regulations, regard must be had to the fact that the term has a meaning in EU law, that it must be interpreted broadly and that it is not conditioned by the type of employment or the amount of income derived. But a person who does not pursue effective and genuine activities, or pursues activities on such a small scale as to be regarded as purely marginal and ancillary or which have no economic value to an employer, is not a worker. In this context, regard must be given to the nature of the employment relationship and the rights and duties of the person concerned to decide if work activities are effective and genuine."

10. Mr Khan accepted that the Appellant's ground two can only succeed if ground one is made out.

11. Mr Lindsay accepted (following the Court of Appeal's judgment in Baigazieva) that the Judge erred in taking as the relevant date for establishing whether Mr Grossmann was exercising Treaty rights the date of the decree absolute. He did at one point suggest that this could not be material because there was no evidence as to when the divorce proceedings were instituted but accepted, as I have noted above, that the Appellant said that she started the proceedings in January 2015 ([9] of the Decision). He also accepted that the issue in relation to whether a person is exercising Treaty rights is whether the economic activity is genuine and effective. I have already recorded his submission that the Judge was led to follow a mathematical approach by the parties. In any event, he said, although there is evidence of some income in the relevant five years' period, that does not show a continuous period of exercising Treaty rights and accordingly the Appellant could not succeed. A preferable course for her would be a fuller application, if necessary relying only on a retained right of residence.

Discussion and Conclusions

12. I begin with the Judge's conclusions leading to the dismissal of the appeal as follows:

> "[15] The Appellant must show, on a balance of probabilities, that her husband was exercising Treaty Rights at the date of Decree Absolute and resided in the United Kingdom in accordance with the Regulations for a continuous period of five years as required by Regulations 15(1)(b) and 15 (1)(f). The Appellant has been well aware of this requirement and, indeed, the hearing listed in August 2017 was adjourned to enable her to make the relevant enquiries. She did not do so, but, as I have set out above, those enquiries were made of HMRC by Ms Cunha on 12 March 2018. The results of those enquires are contained above and they have not been disputed on behalf of the Appellant. Further, although the Appellant stated in evidence that she had met with family members of the EEA national in the United Kingdom, there is no evidence before me that she has sought their assistance in obtaining necessary information from the EEA national concerning his exercising Treaty Rights in the United Kingdom.
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> [16] The information provided by HMRC discloses that for the tax year 2014-15 the EEA national received £2,624.96 and JSA. The period and length for which he received such allowance is not known, but the fact that he was in receipt of such benefit shows that he was a jobseeker at some point during that financial year. The guidance provided by Mr Afzal shows that for jobseekers there is a "relevant period". An EEA national may not be a jobseeker for longer than the relevant period unless they can provide compelling evidence that they are continuing to seek employment and have a genuine chance of being engaged. If the EEA national cannot satisfy this requirement, then they cease to have a right of residence as a jobseeker. The figures for the financial year 2015-16 show that the EEA national received £4,645.45 from self-employment, but the self-assessment tax return was returned to sender. There is no information as to when the EEA national earned that money during that twelve month period, but it is clearly lower than the threshold figure of £8,060 (£155 x 52). Mr Afzal asked me to find that the figure of £4,645.45 was earned by the EEA national in the first six months of that twelve month period and that, therefore, the EEA national was exercising Treaty Rights at the date of the Decree Absolute. I find that there is no evidence upon which such a finding could be based and, indeed, there is no evidence before me to show that the EEA national was in the United Kingdom at the date of Decree Absolute, let alone that he was in the United Kingdom exercising Treaty Rights.
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> [17] For all the matters set out above and taking the evidence as a whole, which I do, I find that the Appellant has not shown, on the balance of probabilities, that the EEA national as residing in the United Kingdom in accordance with the Regulations for a continuous period of five years or that the EEA national was exercising Treaty Rights in the United Kingdom at the date of the divorce."

13. The main evidence before Judge Morris as to Mr Grossmann's earnings in the relevant period is set out at [7] of the Decision and emanates from enquires made by the Respondent by telephone to HMRC. That shows that Mr Grossmann earned the following amounts:

    2011/12: £3,050.56 from self-employment.

    2012/13: £1,113 from self-employment. He was also in receipt of JSA.

    2013/14: £10,300 from self-employment.

    2014/15: £2,624.96 from self-employment. He was also in receipt of JSA.

    2015/16: £4,645.45 from self-employment.

    2016/17: £11,980.88 from PAYE income.

14. There are certainly some deficiencies in that evidence, particularly when coupled with the Appellant's evidence recited at [9] of the Decision that Mr Grossmann would leave the United Kingdom for periods of two to three months which makes it very difficult to ascertain for what period of which year he was present and working or claiming JSA. For that reason, I do not accept Mr Khan's submission that the evidence shows that Mr Grossmann has been exercising Treaty Rights for a continuous period of five years on the face of that evidence. Further analysis is likely to be required.

15. However, even if the Appellant cannot succeed in showing that she is entitled to permanent residence, the issue for the Judge is whether the Respondent's decision breaches the Appellant's rights under EU law which may also include in this case a right to retained residence. That was not considered. The fact that the Judge considered at [16] of the Decision whether there was evidence that Mr Grossmann was exercising Treaty rights at the date of divorce may be an indication that she had this in mind. However, that paragraph and her conclusion about that is founded on an error as to the relevant date. It would therefore have been necessary for her to consider the evidence concerning 2014/15 and not 2015/16. That may make little difference since, if anything, Mr Grossmann earned less in the former year. However, he was also in receipt of JSA for part of that year.

16. Further, and in any event, there is nothing on the face of the Decision to suggest that the Judge has addressed her mind to the central issue whether the evidence shows that Mr Grossmann's economic activity during the period in question (or at the date when divorce proceedings were instituted) was genuine and effective. Even if Mr Grossmann was out of the UK for periods of a few months at a time, that does not necessarily preclude a finding that he was exercising Treaty rights during the period in question (although the dates of his absence may be relevant to retained rights).

17. For those reasons, I am satisfied that the Decision contains a material error of law. I therefore set aside the Decision. Mr Khan submitted that, if I found a material error of law, I should remit the appeal. Mr Lindsay was content to leave that issue to me.

18. I have had regard to the Joint Practice Statement of the First-tier Tribunal and Upper Tribunal concerning the disposal of appeals in this Tribunal. That reads as follows:

> "[7.2] The Upper Tribunal is likely on each such occasion to proceed to re-make the decision, instead of remitting the case to the First-tier Tribunal, unless the Upper Tribunal is satisfied that:-
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> (a) the effect of the error has been to deprive a party before the First-tier Tribunal of a fair hearing or other opportunity for that party's case to be put to and considered by the First-tier Tribunal; or
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> (b) the nature or extent of any judicial fact finding which is necessary in order for the decision in the appeal to be re-made is such that, having regard to the overriding objective in rule 2, it is appropriate to remit the case to the First-tier Tribunal."

19. Although the Judge has done her best with the evidence before her, there are no findings about what I have concluded is the central issue in this case. I am therefore satisfied that it is appropriate to remit the appeal to the First-tier Tribunal for a fresh hearing before a Judge other than B A Morris. The First-tier Tribunal may consider it appropriate in light of what I say above to direct the Respondent to make further enquiries of HMRC and DWP in order to obtain written information about Mr Grossmann's self-employment and employment record and the periods during which he was in receipt of JSA.

DECISION

I am satisfied that the Decision involves the making of a material error on a point of law. The Decision of First-tier Tribunal Judge B A Morris promulgated on 29 March 2018 is set aside. The appeal is remitted to the First-tier Tribunal for re-hearing before a different Judge.

Signed Dated: 6 December 2018
Upper Tribunal Judge Smith