Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Numbers:**
EA/07420/2017

EA/074

21/2017

EA/074

19/2017

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 15th November 2018	**On 20th December 2018**

Before

DEPUTY UPPER TRIBUNAL JUDGE JUSS

Between

(1) MR MIGUEL ANIBAL CUEVA MARIN
(2) MRS VAIDA BIELSKYTE CUEVA MARIN
(3) MR L T
(ANONYMITY DIRECTION NOT MADE)

Appellants

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellants: Mr J Rene (Counsel)
For the Respondent: Ms L Kenny (Senior HOPO)

DECISION AND REASONS

1. This is an appeal against a determination of First-tier Tribunal Judge Manyarara, promulgated on 17th July 2018, following a hearing at Hatton Cross on 18th June 2018. In the determination, the judge dismissed the appeals of the Appellants, whereupon the Appellants subsequently applied for, and were granted, permission to appeal to the Upper Tribunal, and thus the matter comes before me.

The Appellants

2. The first Appellant is an Ecuadorian national. He was born on 29th May 1982. He is a male. He appealed against the decision of the Respondent dated 14th August 2017 to refuse his application for a retained right of residence as the former spouse of the second Appellant. She is a Lithuanian national. She was born on 21st February 1983. She is the first Appellant's former spouse. She appeals against the decision to refuse her application for permanent residence. The third Appellant is the second Appellant's son, born on 29th July 2007. The first and second Appellants' marriage took place on 8th February 2006 and the decree absolute was pronounced on 28th July 2014.

The Appellants' Claim

3. The essence of the Appellants' claim is that the first and second Appellants met on 4th April 2004, and began their relationship by the end of August 2004, when they started living together. They married in 2006. The marriage was registered in Lithuania on 8th February 2006. The first Appellant was then granted a residence card as a spouse from 27th October 2009 until 27th October 2014. The second Appellant herself worked for PBP in the United Kingdom from 2004 until 2009. She was on maternity leave for one year. She studied between 2010 and 2013. She received a jobseeker's allowance ("JSA"). This was between April 2010 and October 2010. She then worked on a self-employed basis as a cleaner. As for the first Appellant, he has worked continuously since being granted a residence card. He has worked for his current employer since 2007.

4. The Respondent has accepted the second Appellant's employment from 6th April 2006 until 18th August 2009. However, insofar as the question of being self-sufficient was concerned from 18th August 2009 until 31st July 2014, the Appellants failed to provide evidence to show that the second Appellant held a European Health Insurance Card during her period of self-sufficiency. There was no evidence that there was comprehensive sickness insurance in place in relation to the period during which the second Appellant was a student, between 12th August 2011 and 26th June 2014. Moreover, there was no evidence that she had been making regular national insurance contributions or that her tax affairs were up-to-date by the submission of a tax return, for the period of self-employment from 18th April 2014 to the date of the application. It was accepted that the Appellant was exercising treaty rights since the date of divorce but it was not accepted that the second Appellant had provided evidence to show she was exercising treaty rights until the date of the divorce.

The Judge's Findings

5. When the appeal came up before Judge Manyarara, a particular feature of the appeal was that there had been a previous decision by Judge Robinson on 3rd April 2017. Judge Robinson made the following material finding:

   (1) "She [the Sponsor] was supported by the Appellant [the first Appellant] from November 2009 until 26th January 2014 and was claiming JSA".

   (2) "On 18th July 2014 she started a small cleaning business. Since 1st August 2014 she has worked for a specialised opticians" (see paragraph 10 of Judge Robinson's decision).

6. At the hearing before Judge Manyarara, it was accepted by the Appellant that there was no comprehensive sickness insurance in place for the second Appellant. Judge Manyarara considered this to be potentially fatal. It was held that the requirement that the second Appellant has comprehensive sickness insurance is one that cannot be circumvented or overcome (paragraph 21). Judge Manyarara also noted that it had been accepted that the second Appellant studied between the years 2010 and 2013 and was in receipt of JSA between April 2010 and October 2010, which was a period of more than 91 days. Judge Robinson had also accepted that the Appellant had worked for opticians. There was a letter dated 5th June from Special Eyes Opticians and "this shows that the second Appellant was engaged in employment as an optical assistant and supervisor from 6th May 2014 until 21st July 2014" (paragraph 22). However, having considered all the evidence cumulatively, the judge's view was that "the second Appellant was not a worker for the period 2009 to 2014 and she did not have comprehensive sickness insurance during that period. She was on maternity leave for a year and she was also studying during that period". The judge also found that "the second Appellant was claiming JSA between January 2014 and July 2014, as shown by the documentation before me" (paragraph 24).

7. In concluding, the judge held that,

   > "On the basis of the evidence before me, I find that the Appellants have failed to show that they can bring themselves within the EEA Regulations in relation to permanent residence (or a retained right of residence in respect of the first Appellant). I have considered all of the evidence that is before me and bear in mind the burden and standard of proof" (paragraph 42).

8. The appeals were dismissed.

Grounds of Application

9. The grounds of application state that at the date of the initiation of the divorce the judge had made a clear finding that the second Appellant was receiving jobseeker's allowance, because this was a period from 26th January 2014 until 18th July 2014, when she had started a small cleaning

business. From 1st August 2014, she was employed for a specialised opticians (and this is clear at paragraph 20 of the determination). Therefore, the second Appellant was a qualified person within the meaning of Regulation 6, because that Regulation describes a "qualified person" both as a person who is a "jobseeker", as well as a "worker". The second Appellant did not have to have acquired a right of permanent residence, because this is only one of the limbs whereby the first Appellant can then go on to succeed under Regulation 10(5) in getting a retained right of residence. The judge did not direct her mind to the material date at which the second Appellant was exercising treaty rights. At paragraph 33, there is a reference to "at the time of the divorce" and at paragraph 21, there is a reference to the pronouncement of the divorce being on 28th July 2014. There is no finding by the judge whether she adopted the date of initiation of the divorce or the date of the decree absolute, as being the material date at which treaty rights should have been exercised. However, it was now well established since the decision in **Baigazeiva [2018] EWCA Civ 1088** that it is the date of initiation of the divorce that is the material date, and on this basis the Appellant would have succeeded.

10. On 9th October 2018 permission to appeal was granted.

11. On 30th October 2018 a Rule 24 response was entered by the Respondent to the effect that this was a case where all three Appellants were applying for a permanent right of residence, and therefore it was incumbent upon them to show that the second Appellant was exercising treaty rights for a period of five continuous years, and this she was unable to do because she did not have comprehensive sickness insurance for the relevant dates, when she claimed to be studying and there was insufficient evidence to show that she was a worker or a jobseeker for a continuous five year period.

Submissions

12. At the hearing before me on 15th November 2018, Mr Rene submitted that the divorce was initiated on 27th December 2012. This is clear from the document from the Croydon County Court (which he handed up) and not in 2014. At the date of the initiation of the divorce petition being filed the second Appellant was exercising treaty rights. The actual divorce then took place on 28th July 2014. The judge was not clear in specifying the material date for the purposes of EEA law. The Appellant was relying on a retained rights of residence. This was not an application for permanent residence. However, the judge erred (at paragraph 21) in appearing to focus on the relevant date being that "the decree absolute was pronounced on 28th July 2014" (paragraph 21). The focus of the judge, now that the decision in **Baigazeiva [2018] EWCA Civ 1088** has been handed down, should have been the actual initiation of the divorce by way of petition being filed on 27th December 2012. The date of the grant of decree absolute was irrelevant for these purposes.

13. Second, the judge in applying the Rule in **Devaseelan [2003] Imm AR 1** (at paragraph 19) had adopted Judge Robinson's decision to the effect that the second Appellant (the Sponsor) was claiming JSA from November 2009 until 26th January 2014, and this being so, under Regulation 6, she would have been a "qualified person". Although the judge accepts this particular aspect of the finding by Judge Robinson in relation to the second Appellant, she fails to consider the position in relation to retained rights of residence for the first Appellant.

14. For her part, Ms Kenny submitted that the second Appellant (the first Appellant's sponsoring wife) was working up to 2009, and this would have to be accepted, but she did not have comprehensive healthcare insurance.

15. In reply, Mr Rene submitted that there was a confusion here between an application for "permanent rights of residence" and for "retained rights of residence". In this case the Appellants were not applying for "permanent" rights of residence. Yet, the judge had confused the two, as is clear from the final paragraph in the determination (paragraph 42) where she states that, "I find that the Appellants have failed to show that they can bring themselves within the EEA Regulations in relation to permanent residence (or a retained right of residence in respect of the first Appellant)".

Error of Law

16. I am satisfied that the making of the decision by the judge involved the making of an error of a point of law (see Section 12(1) of TCEA 2007) such that I should set aside the decision and re-make the decision. My reasons are as follows.

17. First, this is a case where the judge does not identify the relevant period during which the second Appellant had to be exercising treaty rights. That period was when the divorce petition was filed and the divorce was initiated, this being on 27th December 2012, and not on 28th July 2014, when the decree absolute was actually announced. The judge fails to make this clear (at paragraphs 21 to 24). The reference by the judge is to the date when "decree absolute was pronounced on 28th July 2014" (paragraph 21).

18. Second, the Appellants are applying for a "retained right of residence" and not for permanent rights of residence. The issue is whether the second Appellant was a "qualified person" under Regulation 6, and it had already been determined by Judge Robinson on 3rd April 2017 that the second Appellant was supporting the first Appellant "from November 2009 until 26th January 2014 and was claiming JSA" (paragraph 20) and this was accepted by Judge Manyarara. The findings made by Judge Robinson on 3rd April 2017, which are set out in the current determination at paragraph 20, cannot be now undermined and must be the starting point. On that basis, the Appellants succeed because the second Appellant was a "qualified person" because she was both a jobseeker and a worker, as the

rest of the chronology that the judge sets out makes clear (from paragraphs 22 to 24). The Appellants succeed in their application for retained rights of residence.

Re-making the Decision

19. I have re-made the decision on the basis of the findings of the Immigration Judge, the evidence before her, and the submissions that I have heard today. I am allowing this appeal for the reasons that I have given.

Notice of Decision

20. The decision of the First-tier Tribunal involved the making of an error of law such that it falls to be set aside. I set aside the decision of the original judge. I re-make the decision as follows. This appeal is allowed.

21. No anonymity direction is made.

22. This appeal is allowed.

Signed Date

Deputy Upper Tribunal Judge Juss 17th December 2018

TO THE RESPONDENT
FEE AWARD

As I have allowed the appeal and because a fee has been paid or is payable, I have decided to make a fee award of any fee which has been paid or may be payable.

Signed Date

Deputy Upper Tribunal Judge Juss 17th December 2018