



**Upper Tribunal
(Immigration and Asylum Chamber)
IA/00534/2016**

Appeal Number:

THE IMMIGRATION ACTS

Heard at Field House

On 22 January 2018

**Decision & Reasons
Promulgated**

On 14 February 2018

Before

DEPUTY UPPER TRIBUNAL JUDGE WOODCRAFT

Between

**ME BALASINGAM KUGATHAS
(ANONYMITY ORDER NOT MADE)**

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr D Balroop of Counsel

For the Respondent: Ms J Isherwood, Home Office Presenting Officer

DECISION AND REASONS FOR FINDING A MATERIAL ERROR OF LAW

The Appellant

1. The Appellant is a citizen of Sri Lanka born on 8th of August 1979. He appealed against a decision of the Respondent dated 22nd of December 2015 to refuse his application for a permanent residence card in the United Kingdom pursuant to Regulation 15 (1) of the Immigration (European Economic Area) Regulations 2006 ("the 2006 Regulations") as amended. His appeal was allowed by Judge of the First-tier Tribunal Amin sitting at Taylor House on 15th of March 2017. The Respondent appeals with leave against that decision and for the reasons which I set out below I have found a material error of law in the decision at first instance and

have set it aside. Although this appeal came before me in the first place as an appeal by the Respondent I have for the sake of convenience continued to refer to the parties as they were known at first instance.

The Appellant's Case

2. The Appellant stated that he underwent a religious marriage on 8th of April 2006 with Ms PY a German citizen ("the sponsor") and he started living with her following this marriage. The marriage was formally registered in the United Kingdom on 5th of October 2007 and a couple had a baby girl born on 13th of September 2009. The marriage ran into difficulties following the birth of their daughter and the sponsor left the Appellant in February 2011. The marriage was dissolved on 16th of August 2012, the Appellant claiming that he had suffered domestic violence at the hands of his sponsor. The Respondent had refused the application on the grounds that the Appellant had not provided evidence that either he or the sponsor had resided in the United Kingdom in accordance with the 2006 Regulations during a 5-year period.

The Decision at First Instance

3. At [17] the Judge gave her reasons why she was allowing the appeal. The marriage had lasted from 5th of October 2007 until 16th of August 2012 when the marriage was dissolved. The marriage therefore lasted at least 3 years prior to the initiation of the divorce proceedings and the Appellant had retained a right of residence since the dissolution of the marriage. She found the Appellant had met the requirements under Regulation 10(5). He only had to satisfy one of the requirements in subsection (5) (d) and this he could do because the marriage had lasted for at least 3 years and the couple had lived at least one year of that time in the United Kingdom.
4. The Judge also found that the Appellant had resided in the United Kingdom in accordance with the 2006 Regulations for a continuous period of 5 years and was at the end of that a family member who had retained the right of residence pursuant to Regulation 15(1)(f). The Appellant had sought to rely on alternative limbs of Regulation 10 but the Judge did not consider she needed to decide those as the Appellant succeeded as indicated. She allowed the appeal.

The Onward Appeal

5. The Respondent appealed against this decision arguing that the Judge had made a material misdirection in law. The Appellant had said that his sponsor left the United Kingdom in February 2011 and was not resident in the United Kingdom at the time the divorce was finalised in August 2012. The Appellant could not therefore meet the provisions of Regulation 10(5)(b) and his application was therefore correctly refused. As the Appellant could not satisfy subsection (5)(b), that he was residing in the United Kingdom in accordance with the Regulations at the date of the termination of the marriage, it mattered not that he could satisfy

subsection (5)(d), three-year duration of the marriage. The sponsor had left the United Kingdom before the divorce. The Appellant had not provided sufficient evidence to qualify under Regulation 15 and the Judge did not appear to have considered the Respondent's argument on that point.

6. The application for permission to appeal came on the papers before Judge of the First-tier Tribunal Frankish 8th of November 2017. In granting permission to appeal he commented that the Respondent may have brought this decision upon herself with slapdash photocopying. The grounds however were arguable. The Appellant did not file a rule 24 response to the grant.

The Hearing Before Me

7. At the hearing before me it was conceded by counsel for the Appellant that there had been an error in the First-tier determination. The application form submitted by the Appellant had said that the sponsor left the United Kingdom in February 2011. At section 8.25 of the application form the Appellant indicated that the sponsor had left the United Kingdom at the date of divorce and returned to Germany. This point was clarified in a covering letter from the Appellant's then legal advisers Linga and Co who wrote "in February 2011 [the sponsor] left [the Appellant] without informing him. She took [the couple's daughter] with her. She took everything that belonged to [the daughter] and all her photos so that [the Appellant] did not have anything of her." Counsel conceded that if the Judge had not realised that the sponsor was not in the United Kingdom at the relevant time then it was a material error to conclude that the Appellant could satisfy Regulation 10 in the circumstances set out in the determination.

Findings

8. The Judge had found as a fact at [13] that the sponsor had left the Appellant in February 2011. However, the Appellant had to show that he was residing in the United Kingdom in accordance with the 2006 Regulations at the date of termination. Since the sponsor was back in Germany by then the Appellant could not have retained a right of residence under Regulation 10. This was because the Appellant could not show that the sponsor was exercising treaty rights at the date of termination, he did not appear to know where she was or what she was doing.
9. The marriage had lasted for at least 3 years during which for at least one year the Appellant and sponsor had lived in the United Kingdom (in fact rather more than one year) and the Appellant himself was in employment, according to his application form but the important point was the status of the sponsor. On the basis of the Appellant's own case, as found by the Judge, he could not show that the requirements of the 2006 Regulations were met. The Judge had not directed herself on the contents of the refusal letter. The important page was page 2 which as

Judge Frankish pointed out had not been copied in the Respondent's bundle. There was however a full copy on file because it had been annexed to the notice of appeal against the Respondent's decision submitted by the previous representatives.

10. Unfortunately, the Judge, although indicating that there were other possibilities whereby the Appellant's appeal might succeed, had not in fact gone on to deal with the case on that basis in the alternative. The separation and the return of the sponsor to Germany meant that the issue of whether the Appellant could show that the sponsor had been working for a continuous 5-year period was not properly decided. At [16] the Judge noted the five-year requirement and at [19] stated she was satisfied it was met but this was inadequately reasoned. I considered whether I should proceed to rehear the appeal but as the hearing at first instance had proceeded on the basis of a mistake of fact by the Judge the appeal had not properly taken place and it would not be right therefore for me to make a final decision at this stage.
11. I bear in mind the Senior President's direction in relation to the remittal of appeals back to the First-tier. There may be further evidence which the Appellant wishes to submit to indicate that the sponsor was exercising treaty rights and/or that he can otherwise satisfy the Regulations. For example, he may wish to pursue his claim of being a sufferer of domestic violence (which was not adjudicated upon at first instance) or provide better evidence of the Sponsor's employment for a continuous five-year period. As this is an EEA appeal the Appellant can submit further evidence at the re-hearing even if that is post decision. I find the determination contained a material error of law and I remit this appeal back to the First-tier to be re-determined de novo with no findings preserved. Any further evidence to be relied upon by the Appellant must be filed and served at least 14 days before the final hearing.

Notice of Decision

The decision of the First-tier Tribunal involved the making of an error of law and I have set it aside. I remit the appeal back to the First-tier Tribunal to be reheard, with no findings of fact preserved, by any Judge save Judge Amin

Respondent's appeal allowed to the limited extent above

I make no anonymity order as there is no public policy reason for so doing.

Signed this 9th of February 2018

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Judge Woodcraft
Deputy Upper Tribunal Judge

TO THE RESPONDENT
FEE AWARD

As I have set the determination aside on the grounds of material error of law, I also set aside the decision to make a fee award in this case. The issue of the fee award will have to be considered by the First-tier Tribunal when this appeal is reheard.

Signed this 9th of February 2018

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Judge Woodcraft
Deputy Upper Tribunal Judge