Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: EA/05408/2018**

THE IMMIGRATION ACTS

Heard at Field House **Decision & Reasons Promulgated**
On 9 September 2019 **On 17 September 2019**
On the papers

Before
UPPER TRIBUNAL JUDGE FINCH

Between
ANOUAR MEHEBHI

Appellant

-and-

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

DECISION AND REASONS

BACKGROUND TO THE APPEAL

1. The Appellant is a national of Morocco. He married a Lithuanian national on 3 October 2011. The Appellant was issued with a residence card as the family member of an EEA national on 12 March 2013. The card was valid until 12 March 2018.

2. The Appellant petitioned for divorce on 27 April 2018 and the Appellant's wife acknowledged service of the petition on 25 July 2018.

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3. Meanwhile, on 12 March 2018 the Appellant had applied for a permanent residence card as the direct family member of an EEA national. This application was refused.

4. He appealed but his appeal was dismissed by First-tier Tribunal Judge Keith in a decision promulgated on 22 February 2019. First-tier Tribunal Judge Lever refused the Appellant permission to appeal on 10 April 2019 but Upper Tribunal Judge Canavan granted him permission to appeal on 30 May 2019 on a limited basis.

5. The appeal came before me on 28 June 2019 and I found that there had been an error of law in First-tier Tribunal Judge Keith's decision. At the hearing before First-tier Tribunal Judge Keith the Appellant had not relied on any retained right of residence even though by the date of the hearing he had obtained a decree absolute. This was because the Home Office Presenting Officer had submitted that the reliance on the divorce would amount to a new matter and he was not prepared to consent to it being considered at the hearing.

6. However, the refusal letter under appeal had also stated that the Appellant's application had been considered under Regulation 15 of the Immigration (European Economic Area) Regulations 2016 ("the 2016 Regulations") which relates to his entailment to permanent residence as the spouse of an EEA national.

7. Permission to appeal had been granted on the sole issue of whether First-tier Tribunal Judge Keith had taken into account the reported decision of *Barnett and Others (EEA Regulation; rights and documentation)* [2012] UKUT 00142, where the Upper Tribunal found:

> "(3) The "proof" that the Secretary of State can lawfully require in applications under regulations 17 and 18 in order to entitle a non- EEA national to a residence card (regulation 17) or a permanent residence card (regulation 18) may, nevertheless, depending on the circumstances, entail the production of the passport or other identity document of an EEA national; but it is unlawful to refuse applications merely because such documentation is not forthcoming. The Secretary of State needs to show a valid reason why it is required.
>
> (4) This is particularly so in the case of regulation 18, given that there is likely to be relevant material relating to such documentation on file from a previous, successful, application".

8. *Barnett* was decided under the Immigration (European Economic Area) Regulations 2006 ("the 2006 Regulations") but there is no material difference between Regulation 17 of the

2006 Regulations and Regulation 21 of the Immigration (European Economic Area) Regulations 2016 ("the 2016 Regulations").

9. In the light of the case of *Barnet,* the absence of his wife's passport or identity document was not sufficient to justify refusing him permanent residence.

10. However, the Home Office Presenting Officer submitted that this error of law was not a material one as the Appellant had not provided sufficient evidence to establish that his wife had exercised a Treaty right for the required five-year period.

11. In some circumstances, that would have been the end of the matter. However, in the current case, neither the Respondent or First-tier Tribunal Judge had applied their minds to the evidence related to the exercise of the wife's Treaty rights.

12. Therefore, I found that it was in the interests of justice to retain the case in the Upper Tribunal in order for there to be a *de novo* hearing at which all outstanding issues relating to whether the Appellant has acquired a permanent or a retained right of residence could be decided. I also gave a direction, pursuant to rule 5(3)(d) of the Tribunal Procedure (Upper Tribunal) Rules 2008, as amended, that the Respondent obtain any relevant records about the Appellant's ex-wife's employment in the United Kingdom between 3 October 2011 and 18 January 2019. This was on the basis that this remained the only matter of dispute between the parties.

13. The renewed hearing was set down for 7 October 2019. However, on 2 September 2019, I received an email from Mr. Kotas at the Specialist Appeals Team, which stated:

> "I can confirm in accordance with direction (1) that the Respondent made enquiries of HMRC regarding the appellant's ex-spouse's employment history. The information received confirms that the ex-spouse/sponsor was exercising treaty rights for the relevant tax years from 2011-2018, therefore the Respondent is now satisfied that the appellant acquired a permanent right of residence pursuant to Regulation 15(1)(b) of the 2016 Regulations. The Respondent is therefore content for the Upper Tribunal to remake the decision allowing the appellant's appeal on the papers without the need for a further hearing.".

14. Therefore, I allow the Appellant's appeal on the basis that it is now accepted by the Respondent that the Appellant has acquired a permanent right of residence in the United Kingdom under Regulation 15.

Decision

(1) The Appellant's appeal is allowed.

Nadine Finch

Signed Date: 10 September 2019
Upper Tribunal Judge Finch