Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: EA/06108/2017

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 25 July 2019	**On 2 August 2019**

Before

UPPER TRIBUNAL JUDGE BLUNDELL

Between

RIDA [Z]
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr Moll, instructed by Howe & Co Solicitors
For the Respondent: Mr Bramble, Senior Presenting Officer

DECISION AND REASONS

1. The appellant is a Moroccan national who was born on 9 August 1985. He appeals against a decision which was issued by Judge McIntosh on 7 March 2019, dismissing his appeal against the respondent's refusal of a Permanent Residence Card.

Background

2. The history of this appeal is highly relevant and it is necessary to set it out in a little detail. On 22 December 2016, the appellant made an

application for a Permanent Residence Card. He stated that he had married a Lithuanian national named [KS] on 6 June 2012 and had been issued with a Residence Card, in reliance on that relationship, on 25 June 2012. He stated that he and Ms [S] had divorced on 26 February 2016. He claimed to have retained a right to reside in the UK following the termination of the marriage and that he had subsequently become entitled to Permanent Residence under regulation 15(1)(f) of the Immigration (EEA) Regulations 2016.

3. The application was refused on 16 June 2017. In that decision, the respondent stated that she was not satisfied that the appellant and Ms [S] were actually divorced, since only a *decree nisi* had been sent with the application. Secondly, although it was accepted that the marriage had lasted for three years and that the couple had lived in the UK for a year, it was not accepted that Ms [S] had been exercising Treaty Rights at the point of divorce. The evidence provided showed that Ms [S] had only worked between October 2011 and 31 March 2016. Thirdly, the respondent did not accept that the appellant himself had been economically active since his divorce, as required by regulation 10(6), because the evidence of employment at the material times was inadequate.

4. The appellant's first solicitors (Messrs Shervins) lodged an appeal against the first decision on 5 July 2017. The Tribunal's records show that the appeal was struck out for non-payment of a fee on 31 July 2017, and the file made its way to the Tribunal's storage facility because no further action was to be taken.

5. In November 2017, the appellant instructed new representatives (Sterling & Law Associates LLP). They attempted to have the appeal re-instated but were initially unsuccessful, for reasons which I need not detail. In order to progress matters, therefore, Sterling & Law lodged a fresh notice of appeal against the decision of 16 June 2017. They did so on 13 April 2018. The grounds of appeal were helpfully accompanied by a document setting out the history of the matter and seeking a significant extension of time.

6. On 14 June 2018, Judge Shanahan issued a decision in which she reinstated the appellant's appeal and extended time. Appeal EA/06108/2017 therefore began to progress through the appeal process once again.

7. Meanwhile, on or about 1 June 2018, Sterling & Law Associates assisted the appellant to make another application for a Permanent Residence Card, accompanied by more evidence than had been submitted in support of the first. I need not rehearse what was provided. This second application gave rise to a second refusal from the respondent, dated 18 July 2018.

8. In the second refusal, the respondent concluded that the appellant had failed to submit a valid passport or identity card for Ms [S]; failed to submit

any evidence that the couple had lived together; and failed to establish that either the appellant or his spouse had been economically active at the material times. There was no appeal against this decision.

9. This appeal was then listed to be heard at Taylor House on 10 January 2019. In preparation for that appeal, the respondent filed a bundle which contained only the 2018 application and the second refusal letter. When the appeal came in front of Judge McIntosh, therefore, she was confronted with a refusal letter from 17 July 2018 in an appeal which had been filed in 2017. She also had a copy of the first refusal letter, against which the appeal had actually been brought.

The Decision of the FtT

10. Judge McIntosh made reference to the fact that there were two refusal letters at [20] of her decision but she treated the appeal as being against the 18 July 2018 decision. Leaving that to one side for the moment, the judge considered the evidence before her at some length before coming to the conclusion that the appellant had indeed failed to submit his wife's passport or ID card and that he had not discharged the burden of proof upon him of showing that his ex-wife was exercising Treaty Rights at the date of divorce or that he had continued to be economically active thereafter. She dismissed the appeal, therefore, because she was not satisfied "that the appellant meets the requirements of Regulation 10 with reference to 21(5) and 15 of the EEA Regulations 2016".

Permission to Appeal

11. Permission to appeal was refused by the First-tier Tribunal but granted by Upper Tribunal Judge McWilliam. Whilst the pleaded grounds spanned several pages, there was actually only a single point made, which was that Judge McIntosh had erred in law in considering the second refusal letter when the appeal was against the first. Judge McWilliam considered that (just) arguable. She also noted, with reference to Baigazieva [2018] EWCA Civ 1088, that the judge may have focussed her consideration of the sponsor's economic activity at the date of the decree absolute, rather than the date on which the divorce proceedings were commenced.

Submissions

12. Before me, Mr Bramble conceded that Judge McIntosh had fallen into error in the following ways. Firstly, whilst the respondent was at liberty (whether in a subsequent decision letter or otherwise) to amend or amplify the grounds of refusal, it was incumbent on the judge to ensure that the representatives both understood the scope of the issues which were to be considered in light of the procedural tangle which had gone before. She had failed to do so, despite noting that there was a disagreement in this respect between the representatives at [20]-[22]. What it was not open to the judge to do was simply to ignore that disagreement and treat the appeal as if it was against the second decision, which it was not.

13. Secondly, the judge had fallen into the same error as the respondent in the second decision letter, in holding against the appellant the fact that he had not submitted proof of his ex-wife's identity and nationality, in circumstances where that had been accepted by the respondent in the earlier Residence Card application: Barnett [2012] UKUT 142 (IAC) and Rehman [2019] UKUT 195 (IAC) refer.

14. Thirdly, although the judge had explored the evidence at some length, she had failed to reach clear findings or to give clear reasons for her findings that the appellant and his spouse had not been economically active at the material times.

15. Fourthly, as had concerned Judge McWillian when granting permission, Judge McIntosh had failed to apply the law as stated in Baigazieva, in that she had focused on the sponsor's economic activity at the date of divorce rather than the date on which the divorce proceedings had commenced.

16. In light of Mr Bramble's stance, with which I agreed entirely, I was able to indicate at the hearing that Judge McIntosh's decision would be set aside and that I would, if possible, remake the decision on the appeal without the need for remittal to the FtT or a further hearing in the Upper Tribunal. To that end, I asked Mr Bramble what remained in issue between the parties. Most helpfully, Mr Bramble indicated that he had undertaken a full review of the papers with a view to answering that very question.

17. Mr Bramble was able to state immediately that it was accepted by the respondent that the appellant had retained a right to reside upon divorce from his ex-wife. He was not required to produce her ID card in the circumstances of this case. The parties had been married for three years and had spent at least one of those years in the United Kingdom (it not being required that they lived 'together' during that time: PM (Turkey) [2011] Imm AR 413). The evidence clearly established that the sponsor had been economically active when the divorce proceedings commenced, and that the appellant had himself been economically active when the marriage came formally to an end.

18. What Mr Bramble was not initially minded to accept was that the appellant had subsequently obtained a right to reside permanently in the United Kingdom thereafter, under regulation 15(1)(f). Mr Bramble had been unable to locate any evidence to show that the appellant had continued to be economically active between 5 April 2017 and 6 June 2017. If the appellant was able to demonstrate economic activity between those dates, and therefore to show the continuous period of five years required by regulation 15(1)(f), the proper course would be for the appeal to be allowed.

19. Mr Moll indicated that he needed time to take instructions and I put him back in the list in order to enable him to do so. On returning to this appeal some time later, Mr Moll had not only had an opportunity to take instructions, he had been able to obtain a number of pertinent documents

from the appellant, copies of which he provided to me and to Mr Bramble (without objection).

20. The documents related to the period in question and showed that the appellant had been supporting himself during this period by working as a delivery driver for Amazon Flex and another company called Jinn. There were emails and records of the deliveries the appellant had undertaken as a driver, stretching into the financial year 2017-2018, although not up to the start of June 2017. Mr Moll explained, on instructions, that the appellant had reduced his hours of work during the summer of 2017 as he had been diagnosed with Crohns Disease and had been required to have an operation. Mr Moll had seen an email from the appellant's consultant in this regard, although he did not have a hard copy (he offered to show the email to Mr Bramble on his computer).

21. Mr Bramble was content to accept, in light of this evidence, that the appellant would have been a worker (had he been an EEA national) during the period which remained in contention. He considered, as do I, that the evidence is not of continuous work but it is sufficient to show economic activity during that period which is real and effective and more than marginal or ancillary. In the circumstances, I was invited by both representatives to allow the appeal on the basis that the appellant is entitled to a Permanent Residence Card, which I do.

Notice of Decision

Judge McIntosh's decision was vitiated by legal error and is set aside. I remake the decision on the appeal, and allow the appeal on the basis that the appellant is entitled to Permanent Residence.

No anonymity direction is made.

MARK BLUNDELL
Judge of the Upper Tribunal (IAC)

19 September 2019