Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/24895/2012

THE IMMIGRATION ACTS

Heard at Field House	**Determination Sent**
On 6th June 2013	**On 10th June 2013**

Before

UPPER TRIBUNAL JUDGE REEDS

Between

CEM MANSUROGLU

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: The Appellant in person
For the Respondent: Ms J Ishewood, Home Office Presenting Officer

DETERMINATION AND REASONS

1. This is an appeal brought by the Appellant from a decision of the First-tier Tribunal (Judge Callow) who dismissed his appeal against the decision of the Respondent to refuse him a permanent residence card in accordance with the Immigration (European Economic Area) Regulations 2006 ("the 2006 Regulations").

Background

2. The Appellant is a national of Turkey who was born on 28th July 1975. The Appellant first arrived in the United Kingdom on 9th November 2006 as a student having been granted entry clearance from 20th October to 31st May 2007.

3. On 26th January 2008 he married Asli Ulusoy (a French national exercising treaty rights in the United Kingdom) and they lived together as husband and wife until their marriage broke down. On 21st August 2008 the Appellant was issued with a residence card valid until 21st August 2013 as a family member of an EEA national. Having resided in the UK as an EEA national for over five years, the Appellant's wife was naturalised as a British citizen on 16th September 2009. On 25th May 2012, a decree of divorce was made absolute by the Edmonton County Court. It is said that since June 2012 the Appellant's former wife had been living and working in France, but frequently visiting the United Kingdom and since the divorce the Appellant's former wife had not been absent from the UK for two years or more. On 14th June 2012 the Appellant made an application for permanent residence. Since his divorce, the Appellant has been in full-time employment.

4. In a notice of immigration decision dated 29th May 2012 the Respondent refused the application under Regulation 15(1)(f) of the 2006 Regulations. The basis for the refusal was that the Appellant had not completed five years' residency in the United Kingdom in accordance with the Regulations and thus it was stated that he had no basis of stay.

5. The accompanying reasons for refusal letter gave the following reasons by reference to Regulation 10(5) of the 2006 Regulations. It was noted that in accordance with those Regulations, the Appellant was required to produce evidence of the EEA former spouse as exercising treaty rights in the United Kingdom at the time of the divorce and evidence that the marriage lasted for at least three years and that they had lived together in the UK for at least one year during the marriage. Furthermore evidence was required to show that he was currently in employment, self-employment or economically self-sufficient as if he were an EEA national. In addition, he would have to demonstrate that he had resided in accordance with the Regulations for a continuous five year period which would mean that the EEA national former spouse continuously exercised treaty rights up to the point of divorce and that he had been employed, self-employed or self sufficient since the divorce. Collectively the evidence must cover a continuous five year period to meet the requirements of Regulation 15(1)(f).

6. The refusal letter looked at the factual chronology set out earlier in the determination noting that any evidence of the former EEA family exercising treaty rights could only be taken from the date of marriage, that is 20th January 2008. The letter also looked at the evidence that had been produced concerning the EEA family member exercising treaty rights

and noted that evidence had been submitted until April 2010 but there was nothing from April 2010 to the date of divorce which is 25th May 2012. Therefore the Appellant had failed to show that his EEA national former spouse continuously exercised treaty rights up to the point of divorce.

7. The Appellant exercised his right to appeal that decision and the appeal came before the First-tier Tribunal (Judge Callow) on 14th March 2013. It is clear from the Record of Proceedings and the Appellant's bundle that was produced for that hearing that the Appellant was present at the hearing as was his former wife who had produced evidence concerning her self-employed status and evidence to demonstrate that she was in self-employment from April 2010 to the date of the divorce of 25th May 2012 and before that date. There was also documentary evidence within the Appellant's bundle relating to his own self-employment for the requisite period.

8. In a determination promulgated on 2nd April 2013, the judge in his findings of fact accepted the history that was given earlier in this determination. The judge at paragraph 5 found that the Appellant had been in full-time employment. In respect of the issue identified in the refusal letter concerning evidence of the former EEA Sponsor's employment from April 2010 to the date of divorce on 25th May 2012, the judge found it a fact at paragraph 13 of the determination that at all times whilst residing in the UK until their divorce the spouse was self-employed. The judge described this in the following way "It is common cause in this appeal that at all times whilst residing in the UK until their divorce the spouse was self-employed." In the Grounds of Appeal subsequently provided on behalf of the Appellant, it was made clear that at the hearing the Presenting Officer, having had time to consider all the documentary evidence made a concession that the evidence did demonstrate that the former spouse had been self-employed throughout that period of time hence the judge's comment that it was "common cause in the appeal". The Judge went on to state that the parties were resident in the UK as spouses married to one another for a period of four years and four months. In making this finding he took the period of time from 26th January 2008 (date of the marriage) until 25th May 2012 (date of divorce). The judge stated that:

> "This period is obviously not a continuous period of five years' residence and therefore the Appellant fails to satisfy the requirements of Regulation 15(1)(f) of the Regulations. He was not a family member who has retained a right of residence at the date of his divorce."

Thus he dismissed the appeal.

The Appellant sought permission to appeal that decision on the basis that the judge had made a material misdirection in law in applying the 2006 Regulations. The Appellant relied upon the law as it was stated originally in the Respondent's refusal letter noting that for the Appellant to qualify for a permanent residence he would have to establish that he met the requirements and the conditions in Regulation 10(5) and (6) and that

having retained his right of residence he would have to demonstrate that he had resided in accordance with the Regulations for a continuous five year period, which would mean that the EEA national former spouse continuously exercised treaty rights up to the point of divorce and that the Appellant had been employed, self-employed or self-sufficient since the divorce. Collectively this evidence must cover a continuous five year period to meet the requirements of Regulation 15(1)(f).

Thus it was submitted that the issue that had been raised in the refusal letter upon which the permanent residence card had been refused, namely, that one of the conditions in Regulation 10 was not satisfied was that the Appellant had not demonstrated that the former spouse was exercising treaty rights up until the time of divorce, had in fact been resolved in favour of the Appellant. Furthermore it had further been resolved in favour of the Appellant that he had been in employment since the divorce. On the basis of the findings of fact made by the judge, and taking into account that he had been able to satisfy Regulation 10(5) and (6) it demonstrated that he was able to show a five year continuous period made up firstly, of the EEA national former spouse continuously exercising treaty rights up to the point of divorce and that since that time the Appellant had been employed and that the period of time was for a period of five years. Where the judge fell into error was to find that the couple had not been married and resided together as a couple for five years. The date that was important was the five year period which had elapsed from the date of their marriage namely 26th January 2008 until 26th January 2013 which was the five year point and which was prior to the hearing but post the decision in the appeal. In those circumstances, it was submitted that there was an error of law.

9. Thus the appeal came before the Upper Tribunal. The Appellant was assisted by a McKenzie friend Mr Cecil Decker who had also accompanied and assisted the Appellant before the First-tier Tribunal. Upon enquiry, he was recognised as a McKenzie friend as he was before the First-tier Tribunal and he confirmed that he understood his role as he had done before the First-tier Tribunal.

10. The Appellant confirmed that the grounds as drafted were full and complete grounds and further confirmed what had been written in those grounds concerning the concession made on behalf of the Secretary of State which had been referred to by the judge at paragraph 13 of the determination relating to the Appellant's former spouse demonstrating from evidence that had been produced that she was self-employed until their divorce. Furthermore that he had also produced documentary evidence to demonstrate his full-time employment which had been found as a fact at paragraph 5 of the determination.

11. I heard Ms Ishewoood on behalf of the Secretary of State. She stated that it had not been clear from the use of the terminology by the judge that the Secretary of State had made a concession concerning the real issue that had been set out in the refusal letter. She confirmed that the findings of

fact made by the judge had not been challenged but had not read paragraph 13 to mean that was a concession. However, the documentation had been served on behalf of the Appellant in respect of his former wife's self-employment in the form of documents from HM Revenue and Customs and including information from her accountants. There was no reason to believe that what the Appellant had said was in any way inconsistent with what the judge had set out at paragraph 13. In those circumstances, she accepted that on the facts found by the judge she would be in difficulty in the case to uphold the determination.

Conclusion

12. I am satisfied that the First-tier Tribunal made a material error of law in this appeal. It is clear from the refusal letter and the notice of immigration decision that the relevant Regulations were Regulation 10(5) and (6) read with Regulation 15(1)(f). The issue identified in the refusal letter was that in order to qualify for a retained right of residence following the divorce from an EEA national, in accordance with Regulation 10(5) of the 2006 Regulations, the Appellant would have to demonstrate that the EEA former spouse was exercising treaty rights in the United Kingdom at the time of the divorce. It is clear from the findings of fact made by the judge that he was so satisfied. I should observe at this stage that whilst Ms Ishewoood had not appreciated that a concession had been made by the Presenting Officer concerning that issue (which was the main issue set out in the refusal letter) it is clear from paragraph 13 of the determination and the documentation that was produced that it was agreed between the parties that at all times whilst residing in the UK until their divorce the Appellant's former spouse was self-employed. The use of the words "common cause in this appeal" was another way of saying that it was common ground between the parties, and that refers back to the concession that was made. It would have been preferable to use the terminology of a concession but I am satisfied having considered the documentation, the Grounds of Appeal and its contents and the determination at paragraph 13 that that was in fact a finding made by the judge. Thus the main issue in the appeal was satisfied.

13. The Appellant would also have to show that the marriage lasted for at least three years and that they had resided in the United Kingdom for at least one year during the marriage. There was no issue concerning that as it was set out in the refusal letter that it was recognised that they had lived together for at least one year and had been married for at least three years. The third element that was required to be satisfied was that the Appellant was in employment as if he were an EEA national. The finding of fact made by the judge at paragraph 5 was that he had been in full-time employment.

14. As this was an application for permanent residence, the Appellant would have to demonstrate that he had resided in accordance with the Regulations for a continuous five year period which would mean that his EEA national former spouse continuously exercised treaty rights up to the

point of divorce and that the Appellant would have to have been employed (or self-employed or self-sufficient) since their divorce. Collectively, the evidence must cover a continuous five year period to meet the requirements of Regulation 15(1)(f).

15. It is clear from the determination the judge found in favour of the Appellant and it was common ground that the EEA national former spouse was exercising treaty rights up until the point of divorce. It is also clear that he had been employed since the divorce. The issue was whether or not collectively that evidence covered a continuous five year period. It was here that the judge made the error of law. He considered the five year period to stretch from 26th January 2008 which was the date of the marriage until 25th May 2012 which was the date of divorce. He found that not to be a continuous period of five years' residence. However it is clear from the timeline that the five year period that the judge was required to consider started from the marriage date on 26th January 2008 and the five year period which ended on 26th January 2013. It seems to me that the difficulty in calculating the five year period arose because at the date of the decision in this case that was before the five year period had elapsed and thus in effect the Appellant had applied before the five year period and could not show at that point a continuous five year period. However at the date of the hearing which was 14th March 2013 that postdated the five year point of 26th January 2013 by which stage he could show under the Regulations that collectively the evidence covered a continuous five year period being made up from the period of time where the former spouse was exercising treaty rights and then the Appellant himself exercising treaty rights being employed or self-employed or self-sufficient since the divorce. It is clear that the Regulations require that collectively the evidence must cover a continuous five year period and this would include evidence up to the date of the hearing.

16. In those circumstances, as acknowledged by Ms Ishewoood the judge fell into error and on the facts of this case and on the findings of fact that he made which was supported by the evidence, the Appellant did indeed satisfy the 2006 Regulations. For those reasons, the First-tier Tribunal made an error of law, I consequently set aside the decision and re-make the decision allowing the appeal.

Decision

The First-tier Tribunal made a material error of law.

The decision is set aside and remade as follows:- the appeal is allowed.

Signed Date 7th June 2013

Upper Tribunal Judge Reeds