UPPER TRIBUNAL
(IMMIGRATION AND ASYLUM CHAMBER) **APPEAL NUMBER: IA/42600/2013**

THE IMMIGRATION ACTS

Heard at: Field House	**Determination Promulgated**
On: 7 August 2014	**On 1 September 2014**
Prepared: 28 August 2014	

Before

DEPUTY UPPER TRIBUNAL JUDGE MAILER

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MR JEVGENI IVANISKIN
NO ANONYMITY ORDER MADE

Respondent

Representation

For the Appellant: Mr P Duffy, Senior Home Office Presenting Officer
For the Respondent: Mr A Burrett, counsel

DETERMINATION AND REASONS

1. For the sake of convenience I shall refer to the appellant as the "secretary of state" and to the respondent as "the claimant."

2. The secretary of state appeals with permission against the determination of First-tier Tribunal Judge Powell promulgated on 3rd June 2014 allowing the claimant's appeal against the secretary of state's refusal of his application for permanent residence pursuant to Regulation 10(5) of the Immigration (European Economic Area) Regulations 2006 ("the 2006 Regulations").

3. The claimant had applied for permanent residence as confirmation of his right to reside in the UK on the basis of a retained right of residence. The parties were both represented at the hearing before the First-tier Tribunal

where Mr Burrett also represented the claimant. The issue identified at the hearing was whether the claimant met the requirements for a retained right of residence in accordance with Regulation 10(5) of the 2006 Regulations.

4. There was no dispute that the claimant had divorced his wife, Ms Sirotina, an EEA national. He married his wife on 19th September 2008 and the marriage was "finally dissolved" on 28th December 2012. The decree absolute was produced.

5. The Judge found that there was no dispute that the claimant's ex-wife was an EEA National.

6. He stated at paragraph 16 of the determination that "on closer examination of the case, it was common ground that Ms Sirotina was employed as a chambermaid."

7. Having identified the issue as to whether the claimant had a retained right of residence, the judge noted that the claimant had to show that Ms Sirotina was continuing to exercise Treaty rights as at the date of the termination of their marriage on 28th December 2012 [17].

8. The claimant and his ex-wife had separated in February 2009 but remained in contact until April 2010. The relationship broke down completely after April 2010. The claimant saw her only once, namely in December 2012. The claimant recalled in evidence before the Judge that his wife ".....said she was working. [His] recollection was vague. He was not particularly interested in his ex wife's life or well being and, since then, continued not to be interested in her....." [19].

9. At paragraph 20, the Judge noted that all the claimant could say was that "....he believes his ex wife was working at the date of the decree absolute. He has no documentary evidence to support his assertion. He relies on what she told him about working as a cleaner for three days a week in central London in December 2012."

10. The Judge found that the claimant's evidence ".....was credible. I have no reason to think that the claimant was trying to deceive the Tribunal. Had he wished, he could certainly have given stronger evidence of his ex-wife's work in December 2010 (sic) but he did not do so. He told me what he knew. I accept his evidence." [21]

11. The Judge stated that it was not 'practicable or reasonable' to expect the claimant to produce documentary evidence of his ex-wife's employment. They are not in contact. They have no relationship. They have been separated for more than three years before the decree absolute [22].

12. The Judge then 'recognised' that he could have directed the secretary of state to carry out checks with HMRC or the Benefits Agency to ascertain whether Ms Sirotina was working in December 2012. However, having regard to the overriding objective and reminding himself of the proportionality of such an inquiry, "decided not to so direct." The secretary of state did not seek such an order and could have carried out such a check in any event, either at the date of application, in response to the claimant's notice of appeal or since the Judge adjourned the proceedings part heard [23].

13. In the event, the Judge was satisfied that the claimant had shown on the balance of probabilities that he had a retained right of permanent residence [24].

14. The secretary of state applied for permission to appeal, noting that the Judge found that the claimant "….had made out his case that his ex-wife had been working in the UK at the date of termination of the marriage; with reference to paras 20 and 21". The secretary of state asserted that these paragraphs "are unlawful" because:

    (a) At paragraph 23 the Judge found that it would have been disproportionate to have directed the secretary of state to make HMRC checks and/or the secretary of state could have done that anyway;

    (b) That shifted the burden of proof to the secretary of state when, as a matter of law, that "is with the claimant".

    (c) Equally, the Judge failed to have regard to the authority of **Amos v Secretary of State [2011] EWCA Civ 552** which "…..makes plain the evidential burden on the claimant and the options open to the claimant as a matter of the procedure rules (sic)".

15. First-tier Tribunal Judge Grant-Hutchinson granted the secretary of state's application for permission to appeal on the basis that it was an arguable error of law that the Judge "….has made out his case that his ex-wife had been working in the UK at the time of the termination of their marriage by shifting the evidential burden of proof to the respondent……"

16. At the hearing on 7th August 2014, Mr Duffy sought to rely on the grounds. He also submitted that the burden had in effect been reversed.

17. Mr Duffy referred to paragraph 20, emphasising that the claimant "believed" that his wife was working. The Judge should not have accepted that and should have directed checks.

18. On behalf of the claimant, Mr Burrett submitted that the Judge was entitled to come to the conclusions based on the evidence before him, namely whether she had been exercising Treaty rights at the relevant time. Although he could have asked for checks to have been made, that was not the approach adopted at the appeal. Given the burden of proof, the Judge was entitled to accept the claimant's evidence in the circumstances. There was no reason to suppose that his wife was not working.

19. I reserved my decision.

20. I have had regard to the decision of the Court of Appeal in **Amos**, supra. The second appellant in that appeal, Ms Theophilus, stated in evidence that when she met her husband he worked as a chef. She did not know whether he had continued to work after their separation and in particular she did not know whether he was working at the date of their divorce, or even whether he was still in the UK at that date.

21. It is in that context that the Court of Appeal considered the procedural law of the Tribunal, and in particular Rule 51 of the Asylum and Immigration Tribunal (procedure) Rules 2005 which authorises the Tribunal to allow oral, documentary or other evidence to be given of any fact which appears to be relevant to an appeal, even if that evidence would be inadmissible in a court of law [40].

22. In that case, the submission made was that Mrs Theophilus could have applied under Regulation 50 for a witness summons requiring her ex-husband to attend and give evidence relating to his work. She had not done so. Nor did she seek a direction under Rule 45 requiring the secretary of state to provide the necessary information for the determination of her appeal.

23. As already noted, Ms Theophilus did not know whether her ex-husband had continued to work after their separation, and in particular did not know whether he had been working at the date of their divorce, or even whether he was in the UK at that date.

24. In the appeal before me, however, Judge Powell did make a finding in relation to whether Ms Sirotina had been working at the relevant date. He first of all stated at paragraph 16 that it was common ground that Ms Sirotina was employed as a chambermaid. Moreover, when the claimant spoke to his former wife in December 2012, she told him that she was working. Although there was no documentary evidence to support that assertion, he relied on what she told him about working for three days a week in December 2012.

25. The Judge found that evidence to be credible and stated that there was no reason to think that the claimant was trying to deceive the Tribunal. Accordingly, that evidence was accepted.

26. I have had regard to the secretary of state's reasons for appealing. It is noted at paragraph 1 that the Judge found that the claimant had made out his case that his ex-wife had been working at the time of the termination of their marriage.

27. It is not asserted that the Judge had not been entitled to come to that conclusion. The secretary of state's assertion is simply that the Judge found at paragraph 23 that it would have been disproportionate to have directed the secretary of state to make HMRC checks or that the secretary of state could have done that anyway. That however shifted the burden of proof and it remained with the claimant. It is also contended that the Judge failed to have regard to the decision in **Amos**, supra, which makes plain that the evidential burden is on the claimant.

28. The First-tier Tribunal Judge had however already made the finding that the claimant's ex-wife was working at the date of the decree absolute. He went on to note at paragraph 23 of the determination that although he could have directed the secretary of state to carry out the necessary checks, he had not done so, having regard to the overriding objective and the proportionality of such an inquiry. Nor did the secretary of state seek such an order. He noted that such a check could in any event have been carried out at any time.

29. I do not construe paragraph 23 of the determination to be transferring the burden of proof to the secretary of state. The Judge is merely referring to options which might have been available to him, but he had already found that the claimant's ex- wife was working at the relevant date.

30. The secretary of state in the grounds seeking permission did not contend that the finding that the claimant's ex-wife was working was "unlawful" on the basis, for example, that there was not a sufficiency of evidence apart from his belief.

31. Unlike the appellant in **Amos**, the claimant had in fact given evidence relating to his ex-wife's employment at the relevant date. The Judge had already noted that it was common ground that she had been employed as a chambermaid and had no reason to believe that he had sought to deceive the Tribunal regarding his ex-wife's information regarding working as a cleaner for three days a week in central London in December 2012.

32. The Judge accordingly found that that evidence was sufficient to discharge the burden of proof that rested on the claimant. The rest of his determination referred to the fact that it was not practicable or reasonable to expect him to produce documentary evidence. Although he could have directed that checks against information held by HMRC be undertaken, that was disproportionate.

33. It may be that the finding by the Judge that the claimant's ex-wife had been working at the date of the decree absolute was generous; whilst it might be that another Judge may have found the evidence not to be satisfactory or sufficient, there is no suggestion that the conclusion drawn is in any way irrational or perverse. It was a finding that was capable of being made on the basis of the evidence adduced.

Decision

The making of the decision of the First-tier Tribunal did not involve the making of an error on a point of law. The decision shall accordingly stand.

No anonymity order made.

Signed Date 28/8/2014

C R Mailer
Deputy Upper Tribunal Judge