



**Upper Tribunal
(Immigration and Asylum Chamber)**

Appeal Number: EA/01561/2016

THE IMMIGRATION ACTS

**Heard at Field House
Heard on 12th September 2017
Prepared on 15th September 2017**

**Decision & Reasons Promulgated
On 9th October 2017**

Before

DEPUTY UPPER TRIBUNAL JUDGE WOODCRAFT

Between

**MR OMODAMWEN EHIGIAMUSOE
(Anonymity order not made)**

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr M Aslam of Counsel

For the Respondent: Mr N Bramble, Home Office Presenting Officer

DECISION AND REASONS

The Appellant

1. The Appellant is a citizen of Nigeria born on 27th of October 1984. He appeals against the decision of Judge of the First-tier Tribunal Obhi sitting at Birmingham on 22nd of November 2016 who dismissed the Appellant's appeal against a decision of the Respondent dated 26th of January 2016. That decision was to refuse the Appellant's application for a residence card as confirmation of a right to reside in the United Kingdom. The

Appellant's application to the Respondent was made on the basis that he had retained a right of residence as the former spouse of an EEA national, Ms Laura Chevalier a French national. The couple married on 22nd of September 2010. The Appellant had come to the United Kingdom the year before on 10th of September 2009. He applied for and was granted a residence card pursuant to the Immigration (European Economic Area) Regulations 2006 ("the 2006 Regulations") which was valid until May 2016. The marriage broke down and decree absolute of divorce was declared on 2nd of April 2014.

2. The Appellant made a further application for a residence card on 6th of May 2014 which was refused on 14th of July 2014. The Appellant's appeal against that refusal was dismissed by Judge of the First-tier Tribunal Shanahan sitting at Birmingham on 3rd of November 2014. A further application for a residence card was made by the Appellant on 26th of August 2015. It was the refusal of the August 2015 application on 26th of January 2016 which gave rise to the present proceedings.

The Appellant's Case

3. The Appellant's case was that his former spouse had established herself as a self-employed hairdresser. There was evidence in the bundle submitted to the Tribunal at first instance that Ms Chevalier had paid national insurance contributions. There was no evidence she had paid tax but there was a penalty notice sent to her which demonstrated that she was registered to pay tax. Thus, it was argued, the Appellant could show that Ms Chevalier was a qualified person at all relevant times pursuant to Regulation 6 of the 2006 Regulations and that he had retained a right of residence under Regulation 10 (5) of the 2006 Regulations. His argument was that he had ceased to be a family member of a qualified person on the termination of the marriage but was residing in the United Kingdom in accordance with the 2006 Regulations at the date of termination. Prior to the divorce the marriage had lasted for 3 years and the parties had resided in United Kingdom for at least one year during its duration.

The Decision at First Instance

4. The Judge held at paragraph 20 of her determination that the issue before her was one of proof, whether the Appellant could prove that Ms Chevalier was exercising treaty rights at the date of the divorce. In the Judge's view the Appellant had struggled to show this. This was not the first appeal on the same point, his previous appeal (before Judge Shanahan) had been dismissed because the Appellant could not show that Ms Chevalier carried out any economic activity. Instead of appealing that decision the Appellant had made a further application on the same point. In the first appeal, Judge Shanahan had not been satisfied that the tax penalty notice demonstrated that Ms Chevalier was exercising her treaty rights on the date of the decree absolute. There was no evidence before Judge Shanahan that Ms Chevalier had ever pursued her self-

employed activity or had received any income from it or that her claimed business was active at the date of the divorce.

5. Judge Obhi found that the same arguments have been put to her as had been put to Judge Shanahan namely that the Appellant only needed to show that Ms Chevalier had established herself as a self-employed person but did not need to show any economic activity. That argument had been rejected by Judge Shanahan and was rejected by Judge Obhi who cited Regulation 4 (B) of the 2006 Regulations in support of her decision.
6. During the course of the hearing Judge Obhi became concerned whether the Appellant had continued to be in a genuine relationship with Ms Chevalier. During the period of the marriage the Appellant had had 2 children by another woman. The Appellant appeared to know little about his wife's activities and was described as evasive when asked what work Ms Chevalier had done. At paragraph 22 the Judge wrote that the Appellant:

“could not answer a simple question about how long it took [Ms Chevalier] to do the hair of an average customer. Had he been living with her and she been working from home as he now claims then he would have been acutely aware of what she did and the time she spent doing it. In order to show that his former spouse was working he has provided photographs of equipment that he says he had in the room and that they share. He has also provided letters from people who he claims used to be her customers. However, there is no evidence that they paid her for doing their hair, they have not provided evidence of payment. There is no information from HMRC about her self-assessment tax purposes which suggests that she has not paid tax and that she has not undertaken any economic activity.”

As the Judge was not satisfied that it was a genuine relationship or that Ms Chevalier was exercising treaty rights for the relevant period she dismissed the appeal.

The Onward Appeal

7. The Appellant appealed the decision on two grounds. Firstly, the Judge was wrong to say the Appellant was evasive when answering questions particularly about how long it took Ms Chevalier to do the hair of an average customer. The Appellant had said it took an average of anywhere from 30 minutes to 2 hours depending on what the customer required. In any event the Appellant would not sit and watch the customer. The 2nd ground was that there was nothing in the evidence to suggest that the sponsor was carrying out hairdressing for free and therefore it could be assumed that Ms Chevalier was exercising treaty rights.

8. Permission to appeal was initially refused by Judge of the First-tier Tribunal Gillespie on 23rd of May 2017 who found that the grounds of appeal were no more than expressions of dissent with the reasons advanced by Judge Obhi. The material finding of fact was that the Appellant had failed to prove that Ms Chevalier received income from self-employment or was a qualified person at the time of the termination of the marriage. The Appellant renewed his application for permission to the Upper Tribunal on the same grounds as before. Permission was granted by Upper Tribunal Judge Plimmer on 13th of July 2017. She found it arguable that the First-tier Tribunal had failed to take into account the evidence that the Appellant separated from his wife in 2013 but added: “this may not be material to the issue in dispute [which] was [whether] the ex-wife [was] self-employed as claimed?”
9. The 2nd paragraph of the grant of permission stated that it was arguable that the First-tier had failed to take into account evidence of national insurance contributions and correspondence from HMRC regarding the ex-wife’s income. It was arguably speculative to conclude that the Appellant would be acutely aware (as Judge Obhi had put it at paragraph 22 of her determination) how long it took Ms Chevalier to do the hair of each client when he was working at the time.
10. The Respondent replied to the grant of permission by letter dated 27th of July 2017 opposing the appeal. The Respondent argued that the Judge had been entitled to find that the evidence submitted by the Appellant did not demonstrate that Ms Chevalier was economically active. A person who had established themselves as self-employed did not necessarily demonstrate that they continue to actively work since that time. There was nothing to indicate what documentation established that Ms Chevalier was economically active.

The Hearing Before Me

11. In consequence of the grant of permission the matter came before me to determine whether in the first place there was a material error of law such that the determination fell to be set aside. If there was not, then the decision would stand.
12. For the Appellant, Counsel argued that the reasons given by the Judge at paragraphs 21 and 22 of the determination were erroneous. The Judge had digressed from the issues at hand and looked at new issues that had not been raised previously. The Respondent had not previously raised the genuineness of the marriage between the Appellant and Ms Chevalier. There was nothing unusual about the Appellant’s answer to the question of how long it took to cut a customer’s hair.
13. There was some discussion before me as to what was the basis of the grant of permission to appeal. For the Appellant, counsel argued that the parties separated in 2013 so the Appellant would not know exactly what

his ex-spouse was doing. The focus of the determination at first instance had been on the argument that the Appellant did not know how long it took his wife to cut someone's hair. The Judge had failed to take note of the evidence about national insurance contributions and HMRC documents. Ms Chevalier was economically active as shown by the evidence. There was a lack of reasoning in the determination.

14. For the Respondent reliance was placed on the Rule 24 response. The Judge was dealing with the same matter previously argued before Judge Shanahan and the Appellant should have appealed Judge Shanahan's decision if he had not liked it. The Appellant had to show more than just that his ex-wife had set up as self-employed. There were concerns raised by the Judge about the evidence. Was the marriage existing at the point in time the Appellant said it was, was it a genuine relationship? The Judge did not make a finding as such on that point but was entitled to find that the Appellant did not live with his ex-wife. It was a fair question that was put to the Appellant about the length of time it took to cut people's hair. There was no evidence from other claimed clients that they had paid Ms Chevalier to do their hair.
15. In this case the Respondent herself had gone back to HMRC to check the tax documentation see paragraph 11 of the determination of Judge Shanahan which had produced the evidence that although Ms Chevalier was registered as self-employed she could show no income from employment or self-employment for the tax year 2013/2014. It had been established that Ms Chevalier was not exercising treaty rights. Even if the Judge was arguably wrong to attach weight to the issue of the length of time it took to cut someone's hair that did not flaw the determination. There was no information to show Ms Chevalier was working.
16. In conclusion Counsel for the Appellant commented that the Judge's findings were very brief. Counsel also sought to argue that the genuineness of the relationship was not an issue raised by the Respondent. I indicated that the Judge's notes of the hearing were on the court file which showed that the Presenting Officer had argued that the Appellant was not in a genuine relationship with Ms Chevalier as he was living a double life at the time having had two children outside the marriage. The point had been raised during the hearing at first instance. Counsel continued that there had been lots of documents before Judge Obhi but she had not looked at that evidence. Ms Chevalier was registered as self-employed paying contributions. It could not be said she was not exercising treaty rights. The Judge had digressed when speculating whether the marriage was genuine. The appeal should be allowed.

Findings

17. In order to come within Regulation 10 (5) of the 2006 Regulations the crucial point the Appellant had to prove was that his ex-wife Ms Chevalier

had been working at the relevant time. Judge Shanahan found that the Appellant could not show this but instead of appealing the Appellant used what was in effect the same documentation as had been before Judge Shanahan, before Judge Obhi. It was not surprising therefore that Judge Obhi should come to the same conclusion as had Judge Shanahan. The evidence of payment of national insurance contributions did not prove economic activity particularly as that was unsupported by appropriate HMRC documentation. There was no further evidence the Appellant could have provided since a section 40 enquiry had been made by the Respondent before Judge Shanahan and that documentation had been relied on in both appeals. It was not enough for the Appellant to show that his ex-wife had been registered as self-employed. He had to show that she was economically active but this he could not do for the reasons given in the determinations of both Judge Shanahan and Judge Obhi.

18. The issue in the case was as Upper Tribunal Judge Plimmer pointed out whether Ms Chevalier was self-employed as claimed. Both Judges in their respective first instance appeals had found that she was not and I have seen nothing which indicates that either or both of those Judges were wrong. It may indeed be arguable that the Appellant would not know how long it took Ms Chevalier to cut someone's hair. The point however is that Judge Obhi in that paragraph was expressing rather more than just a comment on the length of time Ms Chevalier may have taken to cut someone's hair. I read paragraph 22 of the determination as being a general point made by the Judge that the Appellant knew nothing in reality about the claimed work of his ex-wife because she had not done any work and therefore he could not answer the questions put to him. The Judge described the Appellant as evasive.
19. The grounds of onward appeal claim that the Appellant gave a detailed answer to the question how long it took Ms Chevalier to cut someone's hair. I have to say that there is no reference to any such answer in the notes of the Judge and there is no statement from the Appellant's solicitor, Mr Khushi, who represented the Appellant at first instance that there was any such detailed answer as the grounds of onward appeal now claim. The Judge's note states that the Appellant's reply to the question was "I don't know she would tell me how long it took because I would be going to work when they were doing the hair". The Appellant added that sometimes he was at home.
20. Upper Tribunal Judge Plimmer was quite correct in her grant of permission to note that the Appellant was out at work at the relevant times but it is not correct as the grounds of onward appeal claim that the Appellant was able to give a specific answer to the question. It was a matter for the Judge what weight she placed on the evidence before her. She was entitled to form the view that the Appellant was evasive and this undermined the credibility of the application. Given that the Appellant had only produced the same documentation that had been before Judge Shanahan there was no reason why, without more, Judge Obhi should

accept the Appellant's word that the situation was different to that found by Judge Shanahan in the first appeal.

21. The Respondent raised the issue of whether the marriage was genuine. Judge Obhi clearly had grave doubts whether the marriage had been genuine. Since she found that Ms Chevalier was not economically active at the relevant time strictly speaking the Judge did not need to go on to make a finding about the genuineness of the marriage. However, the doubts expressed by the Judge about the marriage were well-founded and certainly did not assist the Appellant's case. The Judge gave sound and cogent reasons for her decision based on the evidence which was before her. The appeal is in effect no more than an attempt to reargue matters which had been dismissed twice before once by Judge Shanahan and secondly by Judge Obhi. Neither Judge made any arguable error of law. Further, it appears from paragraph 14 of Judge Shanahan's determination that a previous Judge had found no evidence that Ms Chevalier was economically active. Three Judges at three separate hearings had come to the same view. I dismiss the Appellant's appeal against the decision of Judge Obhi.

Notice of Decision

The decision of the First-tier Tribunal did not involve the making of an error of law and I uphold the decision to dismiss the Appellant's appeal

Appellant's appeal dismissed

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

Signed this 22nd day of September 2017

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Judge Woodcraft
Deputy Upper Tribunal Judge

TO THE RESPONDENT
FEE AWARD

As I have dismissed the appeal there can be no fee award.

Signed this 22nd day of September 2017

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Judge Woodcraft
Deputy Upper Tribunal Judge