Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: EA/03868/2016

THE IMMIGRATION ACTS

Heard at Manchester	**Decision & Reasons Promulgated**
On 7th November 2017	**On 10th November 2017**

Before

UPPER TRIBUNAL JUDGE REEDS

Between

NOYA IKCHE
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr Manu, Solicitor for Galaxy Law
For the Respondent: Mr McVeety, Senior Presenting Officer

DECISION AND REASONS

1. The appellant is a citizen of Nigeria born on the 15th August 1977. He appeals with permission, against the decision of First-tier Tribunal Judge Hudson, who, in a determination promulgated on the 26th July 2017 dismissed his appeal against the decision of the respondent to refuse to his application for a permanent residence card.

2. No anonymity direction was made by the First Tier-Tribunal and no application has been made on behalf of the appellant or any grounds put forward to support such an application.

The background:

3. The appellant is a national of Nigeria. When resident in Manchester the appellant met and married a French national who was working in the United Kingdom. They married on 7 February 2009. It was asserted by the appellant that during the time that they were married his spouse continued to exercise a treaty rights by being in employment and self-employment as a hairdresser. It was also stated that he also was in employment.

4. The appellant started divorce proceedings which were finally concluded by way of a Decree Absolute on 10 January 2017.

5. On the 20th October 2015 he applied for a permanent residence card as a confirmation the right to reside in the United Kingdom based on his prior residence in the United Kingdom as a family member of EEA national.

6. The application was refused in a decision made on the 21st March 2016.

7. Accompanying the notice of decision was a reasons for refusal letter which expanded on the reasons given for the refusal of the application and made reference to the documentary evidence that had been produced with the application. The decision letter made reference to assessing the application under Regulation 10 (5) and Regulation 15(1) (f) of the EEA Regulations 2006. By reference to the application form, it was stated that the appellant had failed to provide evidence in the form of a Decree Absolute to show that he was divorced from his EEA sponsor and thus failed to meet the criteria of Regulation 10 (5).

8. As to the application for permanent residence, the decision letter made reference to the material provided for the purposes of the application. The decision letter noted that the EEA national sponsor was a worker between March 2013 to July 2013 and from April 2014 to June 2014 but had failed to provide any evidence during the period between August 2013 to March 2015. Thus the Secretary of State was not satisfied that the EEA national sponsor was a qualified person. The decision letter went on to consider other documents including a P 45 dated 16 October 2014 demonstrating the EEA national sponsor may not have been exercising treaty rights as a worker or self-employed person that the printed bank statements showing payments of jobseekers allowance were also noted but no evidence to show that the sponsor was seeking a job during this period.

9. As to evidence of self-employment, the decision letter made reference to the tax returns but that they had stated that they were “in progress” and not complete and had not been submitted to the HMRC. It also made reference to expected evidence such as SA302 tax return forms, audited

accounts and evidence of NI contributions. It also considered a letter from JRK Accounting Services making reference to the period of self-employment. This was not acceptable as a sufficient evidence of self-employment. In addition, it was noted from the evidence there was no address for the business. As a result, the Secretary of State was unable to establish whether the EEA sponsor had been exercising treaty rights for a continuous period of five years whilst employed self-employed.

10. It further stated that as he had not made a valid application under Article 8, consideration had not been given as to whether his removal from the UK would breach Article 8 of the ECHR. The letter went on to state that the decision not to issue a residence card did not require him to leave the United Kingdom if he could otherwise demonstrate that he had a right to reside under to reside under the Regulations.

11. The appellant appealed the decision on the 30th March 2016. The appeal came before the FTT (Judge Hudson). For the purposes of that hearing the appellant had produced a bundle of documentation that included a copy of the Divorce Absolute, a letter from the HMRC confirming the work history of the EEA national from 2011 – 2015, letter from the accountancy services plus accounts and payslips from the EEA national and additional evidence relating to the appellant's work in United Kingdom.

12. In a determination promulgated on 26 July 2017, Judge Hudson dismissed his appeal. The judge made reference to the appellant having failed to provide accurate information in the application form having not supplied details of the EEA sponsor's activity within the UK and having stated clearly that he was divorced at the date of the application whereas in fact, he and his wife divorced on 10 January 2017 (which was after the application form and been submitted).

13. The judge considered the evidence that had been provided by the appellant relating to the work history of his former spouse. At paragraphs 13 to 14 the judge considered the evidence as recorded in the refusal letter but noted that he had seen incomplete tax returns and a letter from the JRK accountancy services relating to self-employment from September 2009 to September 2015 and had also seen accounts.

14. At paragraph 13, the judge again made reference to the appellant having failed to supply evidence for the period of August 2013 to March 2014 which was a point raised in the refusal letter but the judge further noted that he had now been provided with "year overview evidence and finalised tax returns" but that there was "nothing to tell me what form of self-employment was taking, when she was continuously trading or took any time off. I do not know in what way she was exercising treaty rights during that period, if indeed she was."

15. At paragraph 14, the judge noted that at some point she claimed jobseekers allowance and that whilst she would potentially be a qualified

person during that period no information had been supplied as to when she was claiming what she had been doing. Thus he dismissed the appeal.

16. The appellant sought permission to appeal that decision on the basis that the judge had erred in law by failing to consider all of the supporting documents in the appellant's bundle which set out the EEA nationals working history throughout the marriage and period of five years. The grounds also relied upon the respondent's own policy guidance published on 1 February 2017 whereby the policy listed reasonable evidence as proof of employment and self-employment.

17. On the 2nd May 2017 First-tier Tribunal Judge Mailer granted permission for the following reasons:

> "It is arguable that the judge failed to consider relevant supporting documents from pages 3 – 34 the bundle, setting out the EEA nationals working history between 2009 and 2015. It is also arguable that the respondents policy guidelines which it is claimed produced and referred to, were not considered by the judge. The latter came should be substantiated at the hearing before the Tribunal."

18. At the hearing before the Upper Tribunal, I heard from both advocates. Mr Manu relied upon the grounds and took the Tribunal through the documentation to demonstrate the EEA nationals working history for the relevant period of time. He provided a copy of the relevant extract from the respondent's guidance which made reference to the definition of self-employment and in particular the reasonable evidence of self-employment which included proof of registration for tax and national insurance purposes with HMRC, business bank statements. Thus he submitted that in line with the policy, the appellant had produced before the Tribunal reasonable evidence to demonstrate that the appellant was self-employed during the relevant period.

19. Following those submissions, Mr McVeety on behalf of the Secretary of State did not seek to uphold the determination of the First-tier Tribunal observing that there had been sufficient evidence provided to demonstrate that the EEA national was self-employed (and employed for some of those periods) for the relevant five year period. He submitted what was required was evidence to show economic activity, whether employed or self-employed, and that on the material that was presented when seen in the light of the policy guidance, this had been sufficient.

20. In the light of those submissions, it was accepted that the decision of the First-tier Tribunal involved the making of an error on a point of law by reference to the documentation presented to the Tribunal.

21. Dealing with that material, there was a letter from the accountants (page 10) confirming her registration with the HMRC as self-employed in September 2009-2015. Complete accounts for the periods 2009 – 2015 were exhibited in the bundle between pages 11 – 34 showing evidence

from self-employment during those accountancy periods. In addition at page 3 there was a letter from the HMRC enclosing the SA302 documentation from 2011 to 2014. These were the documents referred to in the original refusal letter which had not been previously provided. Those documents set out the profit from both self-employment but also periods of employment for the years 2011-2012, 2012 – 2013, 2013-2014, 2014 – 2015. Those documents also made reference to National Insurance being paid and tax also being paid for her periods of employment and self-employment. There were also payslips within the bundle for periods in 2013 and 2013 – 2015 which supported the periods of employment referred to in the HMRC documentation.

22. As Mr Manu submitted, the documentation that had been produced to demonstrate self-employment corresponded to the reasonable evidence expected. The policy does make reference to the reasonable evidence expected to be produced in such applications. It is not exhaustive nor can it be conclusive. However by reference to the documentation taken in its totality and the submission made by Mr McVeety that there was sufficient evidence to demonstrate self-employment during the relevant period, the appellant is entitled to succeed in his application for permanent residence.

23. Therefore in the circumstances, the appellant has demonstrated that there was a material error of law in the decision made by the First-tier Tribunal. I set aside that decision and re-make it allowing the appeal.

Decision:

The decision of the First-Tier Tribunal did involve the making of an error on a point of law and the decision is set aside. The decision is re –made; the appeal is allowed.

Signed

Date: 8/11/2017

Upper Tribunal Judge Reeds