



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: EA/05701/2016

THE IMMIGRATION ACTS

Heard at Field House
On 2 July 2018

Decision & Reasons Promulgated
On 12 July 2018

Before

DR H H STOREY
JUDGE OF THE UPPER TRIBUNAL

Between

MR KAZZIM EDIRIESI AWOBAJO
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr E Waheed, Counsel, instructed by BWF Solicitors
For the Respondent: Mr E Tufan, Home Office Presenting Officer

DECISION AND REASONS

1. On 4 May 2016 the respondent decided to refuse the application of the appellant, a citizen of Nigeria, for a permanent residence card as the family member of an EEA national. The appellant's appeal was dismissed by Designated Judge Woodcraft of the First-tier Tribunal (FtT) on 26 October 2017. The judge accepted that the couple's marriage was genuine (paragraph 16) and that "the Sponsor was exercising treaty rights for a continuous period of more than 5 years" whilst the couple were still married but dismissed it because the evidence did not show the appellant had resided with the sponsor except for a short period after they were married (paragraph 16).

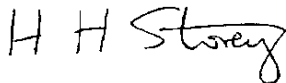
2. In her Rule 24 response the respondent accepts that the judge erred in law in his treatment of the “residing with” provision of the Regulations. It is well-established that as a matter of EU free movement law it is not necessary in order to meet this condition that the couple have been living together following a genuine marriage.
3. The respondent contends, however, that the decision on the appeal should be re-made with a fresh oral (continuance) hearing to resolve whether the appellant meets the requirements of the EEA Regulations because, it is submitted, the FtT Judge failed to provide adequate reasoning and arguably reversed the burden of proof for concluding that the sponsor had been exercising treaty rights for five consecutive years. In this connection it was submitted that the burden of proof remained on the appellant to demonstrate that the non-original P60s adduced were reliable, particularly as the appellant had provided no reasonable explanation for why the original P60s were not available. It was argued that the respondent was under no obligation to authenticate the non-original P60s that were only served at the hearing.
4. I am grateful to both representatives for their succinct submissions.
5. I do not find the respondent’s grounds made out. Mr Tufan, amplifying the Rule 24 response, submitted that the respondent had been “ambushed” at the hearing by the late submission of the P60s relating to the sponsor’s employment which were copies, not originals. However, the judge specifically asked the respondent “whether he wished to have the matter adjourned in order that the validity of the new documents submitted (which had not been seen by the respondent before the day of the hearing) could be examined” (paragraph 8) and that “[t]he Presenting Officer indicated that he was not requesting an adjournment and that the case could proceed” (same paragraph).
6. As regards the issue raised about reversal of the burden of proof, I see absolutely nothing in the argument. Not only did the judge remind himself at paragraph 3 that the burden of proof rested on the appellant, but his findings from paragraph 12 onwards specifically note that it was for the appellant to demonstrate that he met all of the requirements of regulation 15.
7. The Rule 24 response and Mr Tufan are right to observe that, notwithstanding declining to seek an adjournment, the Presenting Officer raised the issue of the P60s being in non-original form. At paragraph 11 the judge stated:
 - “11. For the Respondent reliance was placed on the refusal letter. At the date of application inadequate documentation had been supplied. The difficulty with the P60 forms in the Appellant’s bundle were that they were not originals. On the one hand, the Appellant had complained in his witness statement (and his grounds of appeal against the Respondent’s decision) that he was unable to provide further documents yet somehow after making the statement and before the hearing he had managed to obtain P60 forms. In reply counsel argued that it was open to the Respondent to liaise with HMRC to validate the documents now supplied but they had not done so.”

8. However, the Presenting Officer did not seek to cross-examine the appellant to require an explanation for why he had been able, after all, to obtain the documents and accordingly I see no arguable error in the judge failing to seek one. The judge's readiness to accept an adjournment application was not confined to the context of the respondent liaising with HMRC (see paragraph 8), but in any event it was certainly open to the respondent to request the judge to make a direction that the respondent obtain confirmation of the P60 copies from the respondent. No such request was made. Mr Tufan may be right that the respondent's EU permanent residence application procedures require applicants to produce original P60s, but there are no specified documents prescribed by the EEA Regulations and it was open to the judge considering the evidence as a whole to conclude that the appellant had established that the sponsor had exercised treaty rights for a continuous period of five years (the P60 copies covered 2010/11 - 2015/16) The judge noted that the sponsor had been issued with a residence card in 2011 (I note also that the respondent has not taken any steps to revoke the sponsor's registration document). The P60 copies were also supplemented with payslips covering the sponsor's employment in 2015). Given that the Presenting Officer elected not to conduct any cross-examination (see paragraph 9), it was lawful, rational and reasonable for the judge to conclude that the sponsor was exercising treaty rights for a continuous period of five years.
9. In light of the above I conclude:
10. The judge's decision is to be set aside for material error of law.
11. The decision I re-make is that as the respondent has not made out her Rule 24 challenge to the judge's finding that the appellant's sponsor had exercised treaty rights for a continuous period of five years, the appellant is entitled to succeed in his appeal on the basis that he was at the relevant time a family member of such a person and was someone who had therefore acquired permanent residence.

No anonymity direction is made.

Signed

Date: 10 July 2018



Dr H H Storey
Judge of the Upper Tribunal