Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: EA/05843/2016

THE IMMIGRATION ACTS

Heard at: UT(IAC) Liverpool	**Decision and Reasons Promulgated**
On: 3 October 2018	**On: 10 October 2018**

Before

UPPER TRIBUNAL JUDGE KEBEDE

Between

KINGSLEY NNAEMEKA EMENAHA
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr A Bello, instructed by Apex Solicitors
For the Respondent: Mr McVeety, Senior Home Office Presenting Officer

DECISION AND REASONS

1. This case involves a cross-appeal, with both parties appealing the First-tier Tribunal's decision of 1 September 2017. Following a grant of permission to appeal against the decision, it was found, at an error of law hearing on 15 February 2018, that the First-tier Tribunal had made errors of law in its decision. The decision was accordingly set aside.

2. The appellant is a citizen of Nigeria born on 14 July 1986. On 25 February 2014 he married a Dutch national, [AH] and on 28 April 2015 he was issued

with a residence card under the under the Immigration (European Economic Area) Regulations 2006 as the family member of an EEA national. Following subsequent checks with HMRC, the respondent discovered that the EEA national sponsor had not been exercising treaty rights in the UK since 2015 and concluded that the appellant had provided insufficient evidence to demonstrate that his EEA family member was a qualified person in the UK as a worker. The respondent therefore revoked the appellant's residence card on 29 April 2016, pursuant to regulation 20(2) of the EEA Regulations.

3. The appellant appealed against that decision, asserting in his grounds of appeal that his spouse had been exercising treaty rights at all relevant times and the only times when she was not working was when she was on maternity leave. The appellant also asserted in his grounds that he had a right of residence by virtue of his relationship with his EEA national child who had since been born in the UK. Following his divorce from his wife, which became final on 27 July 2016, the appellant sought leave to amend his grounds to add the further ground that he had retained a right of residence on divorce under regulation 10 on the basis of having divorced his wife, having access to their daughter and being the victim of domestic violence.

4. The appellant's appeal was heard by First-tier Tribunal Judge Goodman on 19 September 2017. The judge had before her a statement from an officer at HMRC together with payslips for the appellant's ex-spouse and her hospital records showing the birth of their child on [~] 2016, a police record of a report of a domestic incident and the appellant's medical records referring to domestic violence. The judge was also provided with a Child Arrangements Order from the Family Court in relation to the appellant's daughter. The appellant appeared and gave oral evidence before the Tribunal. The appellant's ex-spouse did not appear. The appellant relied upon the decision of Saint Prix (Judgment of the Court) [2014] EUECJ C-507/12 in relation to the retention of status as a worker of an EEA national temporarily unable to work due to pregnancy and childbirth.

5. Judge Goodman had regard to the payslips in the appellant's bundle showing that his ex-wife was working and paying deductions of tax in May 2015, July 2015 and September 2015 and a P45 showing a leaving date from her employment of 21 October 2015. The judge considered that the beginning of the statutory maternity period would be around 19 December 2015 and that that left two months for which there was no evidence of whether or how the appellant's ex-wife was exercising her treaty rights. The judge had regard to the police report of 23 September 2015 which recorded that the couple had recently split up as the appellant's ex-wife believed he had been cheating on her and that they had had a verbal altercation and she had made threats to him whilst holding a knife. In a counselling report of 22 January 2016 the appellant had said that he had not been in touch with his ex-wife since September 2015. The judge noted that the couple started divorce proceedings in June 2016 and the decree nisi was dated 27 July 2016.

6. The judge considered that the appellant's ex-wife had been working until at least 21 October 2015 and that, since she was entitled to take 6 to 12 months off work as maternity leave, she was exercising treaty rights at the date of the divorce, subject to the two missing months of October to December 2015. The judge considered various scenarios for the missing two months and concluded, taking the evidence in the round, that it was likely that the appellant's ex-wife was exercising treaty rights as of 5 April 2016 and as of the date of the termination of the marriage in July 2016. Accordingly the judge allowed the appeal against revocation of the residence card. However the judge did not accept that the appellant had retained a right of residence upon divorce. She did not accept that the incidents described by the appellant amounted to domestic violence. She accordingly dismissed the appeal on that basis.

7. Both parties sought permission to appeal against the respective decisions of the judge. The respondent asserted that the judge had speculated about the appellant's ex-wife's status during the missing two months of October 2015 and December 2015, that there was no information about her work or benefits from 1 October 2015 until the birth certificate dated 22 March 2016 and that there was no evidence that she was on maternity leave from work. The respondent relied upon Weldemichael and another (St Prix C-507/12; effect) [2015] UKUT 540 in asserting that the sponsor could not be treated as a worker as her unemployment was for more than 11 weeks before her due date of 11 March 2016. The appellant, for his part, asserted that the judge did not properly consider his retained rights on the basis of having access to his child, pursuant to regulation 10(5)(d)(iii), or as a result of domestic violence pursuant to regulation 10(5)(d)(iv).

8. Permission was granted to both parties. In a decision of 23 February 2018, following a hearing on 15 February 2018, Upper Tribunal Judge Hanson found there to have been material errors of law in the judge's decision in relation to the challenges made by both parties. He found that in allowing the appeal against the revocation of the residence card the judge had erred by embarking upon speculation which was not supported by the evidence and in dismissing the appeal in relation to retained rights the judge had failed to undertake a proper assessment.

9. UTJ Hanson set aside the decision of the First-tier Tribunal and made directions for further evidence to be provided within relevant time limits.

10. Prior to the appeal being relisted for hearing the appellant's representatives made an application to the Upper Tribunal for a summons to be issued, pursuant to the provisions of Part 1 clause 2 and Part 2 clause 16(1)(a) and (b) of The Tribunal Procedure (Upper Tribunal) Rules 2008, to compel the appellant's ex-wife to attend the hearing in order to answer questions as to her activities at the relevant time, namely between October 2015 and the end of July 2016 when the decree absolute of divorce was issued, and to produce documentation confirming that she was registered unemployed and/or claiming benefits or working in the relevant period. The request was made further to

the appellant's ex-wife's solicitors advising the appellant's solicitors that his ex-wife was not confident providing her confidential and personal documents to the appellant but would abide by any requirements if a summons were issued by the Tribunal.

11. A witness summons was issued to the appellant's ex-wife on 6 September 2018, ordering her to attend at a hearing on 3 October 2018 and:

> "To produce the following documents: evidence of the exercise of EU treaty rights in the United Kingdom as a worker such as contract(s) of employment, payslips, tax documents, etc, or otherwise, with specific reference to the time you were married to Mr Emenaha, up to and including the date of the decree absolute of divorce."

Appeal hearing and submissions

12. [AH] attended the hearing in response to the witness summons. She requested that the summons be set aside on the basis that she had no further documents other than those already produced and she had already given everything she had to the appellant. I considered there to be no reason to set aside the summons and [AH] indicated that she was willing to answer questions put to her.

13. When asked by Mr McVeety whether she had given up work to have her baby and then returned to work, [AH] said that she had not and that she had given up work without going on maternity leave. In response to Mr Bello's questions, [AH] said that she had worked on and off, with periods of six to seven months in between. The employment that she left on 21 October 2015, as shown in the P45 at page 9a of Annex A of the appeal bundle, was a temporary job. She was covering for someone who had moved from Liverpool to London but then when that person returned and resumed work, she ([AH]) had left the job. She was about four or five months pregnant at the time. She did nothing after that and lived on her credit cards. She did not register as unemployed or claim benefits as she was not entitled to do so. The benefits referred to in the HMRC documents were child benefit, child tax credit and carers allowance and disability allowance for her son. When asked why she did not provide documents to the appellant when he asked for them, she said that he had been harassing her and had not explained why he needed the documents but just said that his lawyer needed them. She received a letter from his solicitors requesting documents but she did not understand why she had to be a part of that as they were divorced. After giving birth she started claiming benefits in around July 2016. She believed that she received income support but had not been entitled to that between October and December 2015. She returned to work in about September 2017.

14. The appellant then gave his evidence. He adopted his witness statement of 27 March 2018. He said that his ex-wife was claiming benefits between 21 October 2015 and December 2015. He knew that as she had told him that she was claiming benefits to support herself and her children. The appellant said

that his ex-wife stopped working in October 2015 because of her pregnancy. She was registered as unemployed between October and December 2015. He had made a lot of efforts to obtain evidence from her but she refused to give him anything and said that she wanted him to have to return to Nigeria. When cross-examined by Mr McVeety and asked how he was able to produce his ex-wife's payslips if she refused to give him anything, the appellant said that that was before his solicitor wrote to her. He knew that she was working and claiming benefits as he dropped her to work. When asked how he would be dropping her to work if they were separated, he said that he spoke to her on the telephone and she said that she was going to work. When asked why his wife would have given up work because of her pregnancy when she was only four or five months pregnant, the appellant said that she had pregnancy issues and had pains in her stomach so she had to give up work. With regard to the issue of domestic violence the appellant said that he told the police everything, including how his wife had thrown his belongings out of the house and insulted him in front of the children. When re-examined, the appellant said that he obtained the payslips from his wife in 2015, before he lodged his appeal, but she refused to give him anything else. He had reported the domestic violence to the police and went to see his GP because he was having nightmares after she tried to kill him with a knife. The GP referred him to a therapist and he went there twice a week.

15. In response to my enquiry, the appellant said that his ex-wife gave him her payslips in 2015 when he asked for them. He told her that he needed them for his application to the Home Office. When further examined by the parties the appellant said that his relationship with his ex-wife was good at the time she gave him the payslips and she promised to give him further documents if he needed them. However after the relationship broke down she refused to give him any further documents and said that she would never support him. She did not give him any documents after 2015. Mr McVeety asked the appellant how come, if his ex-wife had only given him documents when their relationship was good, she had given him documents dated late September and October 2015 after the incident with the knife. The appellant said that his parents approached her for the documents and, as she told them that she was very sorry for her actions in relation to the domestic violence incident, she agreed to provide them. He believed that she had more documents. Mr McVeety referred the appellant to the maternal transfer document at page 11 of section A of the appeal bundle, which referred to the birth of their child in [~] 2016, and the appellant agreed that his ex-wife had given the document to him, but said that they were on good terms then. They were off and on.

16. The parties then made submissions.

17. Mr McVeety asked me to find that there was no credible evidence that the appellant's ex-wife was exercising treaty rights between October and December 2015. Her employment was temporary and there was no evidence to suggest that she had given up work due to her pregnancy. The appellant had not provided a credible account and had given inconsistent evidence about her working. His ex-wife was not a hostile witness but had tried to assist and had

provided all the documents she had. There was nothing else for her to produce and she was exasperated because she was continually asked for documents she did not have. As for the question of retained rights, there was no evidence of domestic violence. The Child Arrangements Order showed that there were no such concerns. The police report showed a one- off incident of a fight which had escalated. The police report recorded the appellant as having said that there was no history of domestic violence. The police clearly had no concerns. As for retained rights on the basis of access to a child, the Child Arrangements Order simply confirmed that the child was in the custody of her mother. The appellant did not meet the requirements of the EEA Regulations. Article 8 was not a matter before the Tribunal.

18. Mr Bello submitted that there had been a trend of non- cooperation by the appellant's ex-spouse, despite the appellant's best efforts to obtain evidence from her. She had not been truthful to the Tribunal. The appellant's evidence was that she gave up work due to problems with her pregnancy and accordingly she should be treated as a qualified person during the period October to December 2015. As for the question of retained rights, there was copious evidence which showed that the appellant had been a victim of domestic violence. The Home Office guidance recognised the fact that it was difficult to obtain evidence of domestic violence. The appellant's ex-wife was a qualified person after giving birth and up until the divorce and the appellant therefore met the requirements of the EEA Regulations on the basis of retained rights, on the basis of domestic violence and on the basis of having continued access to his child.

Consideration and findings

19. The question of [AH]'s activities and status under the EEA regulations in the period October 2015 to December 2015 and after giving birth is the starting point and the pivotal issue in re-making the decision in this appeal. The appellant and his ex-spouse gave different accounts of her status, the appellant's account being favourable to his own status and his ex-wife's being detrimental. It must be recognised, in such circumstances, given the state of their relationship, that there could be ulterior motives for both parties, in particular [AH], to have given the evidence they did. I therefore take that into account.

20. However, having heard from both witnesses I prefer the version given by [AH]. Her evidence was straightforward and clear and was consistent with the documentary evidence. She said that her last employment was temporary and that she had left that employment at the stage that she did, not because of her pregnancy, but because she was temporarily replacing an employee who then returned to her job. She said that she had given the appellant all the documentary evidence that she had and therefore any failure on her part to provide further evidence for his solicitors or for the Tribunal was due only to the fact that she had nothing else to produce. She said that she had not registered as unemployed and had only received benefits for her children. That account is entirely consistent with the HMRC records relating to her

employment record and her tax credits. I agree with Mr McVeety that she was not a hostile witness and was not being uncooperative, but was simply frustrated at being continually asked for documentary evidence that she did not have.

21. The appellant's account, however, was inconsistent, contradictory and vague and he appeared to adjust his evidence to suit the questions put to him by Mr McVeety. He claimed that his wife provided him with documentary evidence when they were on good terms and when he needed it for his application to the Home Office, but otherwise refused to give him anything despite his repeated requests and those of his solicitors. However his residence card was issued on 28 April 2015 and his application would have been made before that date, yet the evidence from [AH] included payslips for June 2015, August 2015, September 2015 and October 2015, a P45 issued on 27 October 2015 and a maternal transfer issued after 2 March 2016, all of which post-dated his application and some of which post-dated the time of their separation and the incident with the knife. When that was put to him he provided an explanation not previously given, that his parents had intervened and that his ex-wife, feeling guilty for her actions in threatening him with a knife, handed over documents. The appellant also gave an inconsistent account of his wife's employment status, claiming that she was working and claiming benefits in the period between October and December 2015 and that he knew about that because he would drive her to work. When asked by Mr McVeety why he would be driving her to work if they were separated, he then said that he had spoken to her on the telephone and she had said that she was on her way to work. The appellant's evidence was that his wife had ceased working due to her pregnancy but when it was pointed out to him that she was only four to five months pregnant at the time, he said that she had problems in her pregnancy as her stomach was hurting, yet he had never suggested that in any of his evidence previously. Overall his evidence was lacking in credibility and was clearly adapted to suit his claim and I find that I am unable to give weight to his account of his wife's status at the relevant time.

22. On the basis that there is no credible evidence that the appellant's ex-spouse was working or otherwise exercising treaty rights between October and December 2015 or after the birth of her child up until the respondent's decision on 29 April 2016 or the time of the divorce, and that the evidence in fact points to the contrary, I do not accept that the appellant can succeed in showing that the respondent wrongly revoked his residence card under the EEA Regulations.

23. The above conclusion also disposes of the matter of retained rights of residence. However, even if the appellant was able to satisfy regulation 10(5)(b), I do not accept that he could meet the criteria in regulation 10(5)(d). He clearly could not meet the requirements of 10(5)(d)(i) as the marriage had not lasted three years. That is not a matter under challenge. Neither is the appellant's inability to meet the requirements of 10(5)(d)(ii), as he does not have custody of his daughter. With regard to 10(5)(d)(iii) it is argued by the appellant that he meets the relevant requirements on the basis of the Family Court Order which appears at the beginning of section A of his appeal bundle.

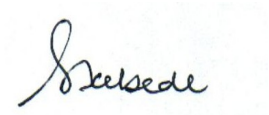
However that document is a Child Arrangements Order granting his ex-wife's application for an order enabling her to apply for a passport for their daughter. There is no order for the appellant to have access to his daughter and for that access to take place in the UK. The criteria in 10(5)(d)(iii) are therefore not met.

24. As for the question of domestic violence for the purposes of 10(5)(d)(iv), I am in agreement with Mr McVeety that the evidence shows no more than that there were disagreements between the parties in the marriage prior to separation and that there was a one-off incident which started as a verbal altercation but then escalated to a fight between the parties. I have carefully read through all the evidence relied upon by the appellant in this regard. At page 16 of section A of the appeal bundle the police report records, as Mr McVeety submitted, that the appellant told the police that there was no history of domestic violence. At page 18 the report confirms that both parties were uncooperative and at page 18a that it was unknown whether the appellant's account of his wife threatening him with a knife was true and states that this was a verbal altercation over infidelity. Whilst the evidence at pages 19 to 24 from SelfHelp confirms the appellant's account of being referred for counselling by his GP, page 20 makes it clear that they were unable to assist him and that he did not receive any counselling there. There is reference to the appellant being referred on to Community Counselling, but no evidence to confirm that the referral was pursued. The letter at page 31 from the African and Caribbean Mental Health Services simply refers to an appointment with no details of whether there was any attendance or follow-up and in fact the GP's medical notes at page 28 confirm that he was discharged from their services the day after the appointment. There is clearly no evidence to support the appellant's claim to have been receiving therapy twice a week. Furthermore the evidence in regard to counselling and therapy includes no suggestion of a history of domestic violence or that the appellant's claim to suffer from depression was related to domestic violence. The medical notes at pages 26 to 30 and the summary of call to national domestic violence helpline at page 32 take matters no further than the police report. The evidence therefore falls well short of demonstrating that the appellant was a victim of domestic violence during the marriage and the appellant plainly cannot meet the criteria in regulation 10(5)(d)(iv).

25. Accordingly there is no basis for the appellant's claim to be entitled to a retained right of residence upon divorce or otherwise and the appellant's appeal cannot succeed under the EEA Regulations in that or any other respect.

DECISION

26. The making of the decision by the First-tier Tribunal involved the making of an error on a point of law. The decision has been set aside. I re-make the decision by dismissing the appellant's appeal under the EEA Regulations.

Signed  Dated: 4 October 2018
Upper Tribunal Judge Kebede