



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: EA/06514/2016

THE IMMIGRATION ACTS

Heard at Field House

Decision & Reasons Promulgated

On 16 August 2018

On 18 September 2018

Before

DEPUTY UPPER TRIBUNAL JUDGE I A M MURRAY

Between

MR BONIFACE IKECHUKWU ANUNIKE
(ANONYMITY HAS NOT BEEN DIRECTED)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr Nwaekwu, Moorehouse Solicitors, London
For the Respondent: Mr Kandola, Home Office Presenting Officer

DECISION AND REASONS

1. The appellant is a citizen of Nigeria born on 10 August 1973. He appealed the respondent's decision of 23 May 2016 refusing him a document certifying his permanent residence as confirmation of a right to reside in the United Kingdom. His application was based on his marriage to an EEA national being [MM] who is national of Portugal and from whom he is now divorced. His appeal was heard by Judge of the First-Tier Tribunal Devittie on 22 February 2018 and dismissed under the Immigration Rules in a decision promulgated on 15 March 2018.
2. An application for permission to appeal was lodged and permission was granted by Judge of the First-Tier Tribunal Juliet Grant-Hutchison on 28 June 2018. The application had been refused because it was stated that there was insufficient evidence

to show that the EEA spouse was a qualified person as at the date of the decree of divorce. The permission states that it is potentially arguable that in light of the case of *Baigazieva* [2018] EWCA Civ 1088 which has been handed down since the date of promulgation of this decision the evidence that the appellant had provided may have been sufficient to show that the EEA national was exercising Treaty Rights when divorce proceedings were commenced.

3. There was no Rule 24 response.

The Hearing

4. The respondent's decision states that the appellant's EEA national former spouse must have continuously exercised free movement rights up to the point of divorce and the appellant must have been employed, self-employed or self-sufficient since the divorce and this evidence must cover a continuous five-year period to meet the requirement of Regulation 15(1)(f). The marriage took place on 23 June 2010 and the divorce was made absolute on 8 September 2015, but it was not accepted that the sponsor had been exercising her Treaty Rights in the UK continuously from the period of the wedding until the divorce or that they had both lived in the UK for a year.
5. The appellant's representative made his submissions submitting that the sponsor had exercised her Treaty Rights for five years up to the date of the divorce. He referred me to paragraph 8 of the decision. In this paragraph the Judge refers to the sponsor's payslips for March 2014, April 2015, May 2015 up to October 2015. Reference is also made in this paragraph to the Halifax Bank statements. The Judge states none of the sponsor's Halifax Bank statements show any payments corresponding to the salary payments reflected in the payslips. The representative submitted that the five-year period is running from April 2010 until April 2015 and he submitted that the appellant and his partner did not get divorced until the marriage had lasted for five years.
6. I pointed out that in this paragraph the Judge has made it clear that he is not satisfied with the payslips produced. The representative submitted that the respondent has not challenged the payslips in the refusal letter and no allegation has been made of forgery or the like.
7. I asked if the appellant and his ex-wife lived together for a year and the representative submitted that as long as they were both living in the United Kingdom for a year they do not require to have been living together. I was asked to consider the employment evidence from 2010 until 2015. I was referred to paragraph 5 of the First-Tier Judge's decision which refers to letters from debt collection agents in the name of the appellant's former spouse and again refers to her payslips, bank statements and HMRC documents. There are P60s in the appellant's bundle.
8. The representative referred me to paragraph 8 of the decision in which the Judge states that the appellant has to show on the balance of probabilities that he satisfies the requirements of the Immigration Rules. The representative submitted that this is an error as the EEA Regulations should have been referred to not the Immigration Rules.

9. The representative submitted that the Judge had sufficient evidence to show that the appellant's ex-wife met the requirements of the EEA Regulations and the Immigration Rules are not relevant.
10. The representative submitted that the Judge had sufficient evidence to show that the appellant's ex-wife was exercising Treaty Rights continuously for five years and there is therefore an error of law in the decision and it should be set aside.
11. The Presenting Officer made his submissions submitting that there is no material error of law in the First-Tier Judge's decision.
12. I was referred to the Home Office refusal letter and he submitted that for the period between September 2010 to April 2011 photocopied documents are referred to which could not be verified. A suggestion is made that although there is documentation addressed to the sponsor, supposedly to support the claim that he and his ex-wife had been living together, the documents produced raised questions as to whether the sponsor was registered at the address but not physically present. The refusal letter refers to debt letters and arrears letters and the Presenting Officer submitted that it appears that accounts have been set up and neglected, indicating a non-active presence. The Presenting Officer submitted that this was raised in the refusal letter and the Judge has upheld this. With regard to 2011 to 2012 the refusal letter refers to the income for the year being £7,965 but there being unsatisfactory official documentation to verify this, such as company bank statements or invoices, and there being nothing to confirm that the sponsor was actively engaged in trading as a self-employed person for the entire tax year. There is documentation about non-payment of direct debits but no banking documents or self-employment receipts to verify an active transaction history of the account and the refusal letter states that the accounts may be been set up to demonstrate registration at a property but with inactivity there.
13. The Presenting Officer submitted that the Judge has considered this and at paragraph 4 of the decision summarises the features common to the observations in the year April 2011 to April 2012 but also in the following three years. The Judge states that there is no evidence to demonstrate that the sponsor was actively engaged in trading as a self-employed person and that the self-assessment forms are not supported by any other documentation, e.g. payslips and bank statements or self-employment receipts. The Judge also notes that the bank statements do not verify the income received from self-employment and trading. Based on the evidence before him the Judge found that it did not demonstrate that the sponsor had been exercising Treaty Rights in the United Kingdom for a continuous period from September 2010 until April 2015, and he notes there was no evidence that the sponsor had been cohabiting in the United Kingdom for at least a year with the appellant during the subsistence of the marriage. The representative correctly pointed out that the sponsor and the appellant do not have to have been living together in the United Kingdom although the sponsor does have to have been residing in the United Kingdom for at least one year during the marriage.

14. The Presenting Officer referred me to the case of *Baigazieva* referred to in the permission. He submitted that what has to be shown is that Treaty Rights were exercised up to the start of the divorce not the decree absolute. The Presenting Officer submitted that there is no evidence of the date when the divorce proceedings started and that although this is an error on the Judge's part it is not a material error. The Judge was not satisfied that the sponsor lived in the United Kingdom for one year during the five-year period and accepts the points raised in the refusal letter finding that the evidence produced shows that accounts have been set up and neglected indicating a non-active presence.
15. The Presenting Officer referred me to paragraph 9 of the decision in which the Judge states that the appellant has failed to show to the required standard that the sponsor was in employment or self-employment for a continuous period of five years and has failed to show that as at the date of the decree of divorce (now the date when the divorce proceedings started) the sponsor was in employment or self-employment.
16. The Presenting Officer submitted that the Judge was entitled to reach the conclusion he did and I was asked to uphold his decision.
17. The appellant's representative submitted that there is nothing to suggest that the respondent conducted a verification procedure relating to any of the documents. He submitted that they were all verifiable documents and the respondent could have obtained direct evidence from HMRC as to whether they were genuine or not.
18. He submitted that the sponsor had earned over the required threshold each year and was in full employment throughout the said five-year period. I was asked to consider the P60s produced and the self-employment verified by HMRC. I was also asked to consider the bank statements and find that these corroborate the sponsor's employment. He submitted that the Judge does not engage with any of this and based on what was before the Judge it is clear that the sponsor was exercising Treaty Rights for five years continuously.
19. He submitted that the sponsor had difficulty paying her bills and the fact that she managed to get into debt indicates that she must have had employment as she was able to generate the debt. He submitted that the appellant attended the First-Tier Hearing and presented the evidence and the evidence was not challenged by the respondent. He submitted that the HMRC documentation must be accepted and this documentation is evidence of the sponsor exercising Treaty Rights.
20. The representative submitted that there was a list of evidence provided for the First-Tier hearing which showed the sponsor's employment and self-employment and this included HMRC documents, and he submitted that a P60 should be sufficient and there are a number of P60s in the appellant's bundle.
21. He submitted that based on the evidence it cannot be correct that the sponsor was not physically present in the United Kingdom. She must have been earning to be in a

position to enter into debt and based on the evidence she clearly was in the United Kingdom for more than a year but neglected to pay her accounts.

22. I was referred to paragraph 8 of the decision and the representative submitted that the bank statements produced satisfy the requirements of the Regulations and he submitted that the Judge did not take proper notice of the HMRC documents.

Decision and Reasons

23. With regard to the reference to the Immigration Rules at paragraph 8 of the First-Tier Judge's decision I accept that this is an error but it is not a material error as it is clear from the decision that the Judge is dealing with the claim under the EEA Regulations. Also with regard to the sponsor and the appellant cohabiting in the UK for a year this is again an error. What is required is that the sponsor was residing in the United Kingdom for a year during the five-year period. She does not require to have been residing with the appellant. Again this is not a material error. Neither of these matters influenced the Judge's decision. The Judge found that the evidence before him did not show that the sponsor resided in the UK either with or without the appellant.
24. The application was considered under the provisions of the EEA Regulations. It is no longer the date of the decree absolute which is the relevant date but the date on which the divorce process was started. It is not clear what that date was but this does not mean that the claim cannot properly be considered.
25. The appellant and the sponsor married on 23 June 2010 and the decree absolute was dated 8 September 2015. They were therefore married for over five years. The five-year period is the period from April 2010 until April 2015. The Judge had to decide whether the appellant was entitled to a retained right of residence following his divorce from an EEA national in accordance with Regulation 10(5) of the Regulations. One matter which is doubted by the Judge is whether the sponsor lived in the United Kingdom for at least one year during the marriage. The Judge is not satisfied with the evidence about this. The evidence produced to show that she resided in the United Kingdom consists of debt letters in the sponsor's name at a UK address. These are not sufficient proof of residence. The Judge accepts the respondent's finding that the debt letters indicate that debt was entered into in the name of the sponsor at that address, but this could be a means of providing evidence supposedly showing that the sponsor was living in the United Kingdom. According to the evidence provided by the sponsor she was earning a reasonable amount and there seems to be no reason, if that evidence is to be believed that she would allow these debts to accumulate. She would have been able to pay them from her income if her stated income was genuine. The Judge therefore had reason to doubt that the sponsor lived in the United Kingdom for a year during the period of the marriage. Based on what was before him he was entitled to this finding. The documents provided were unsatisfactory. If he had been satisfied with the sponsor's evidence of her working for a continuous five-year period this might have been sufficient to make him find that the appellant had stayed in the United Kingdom for at least one year during the marriage. However, the Judge was

not satisfied with the evidence provided relating to her employment and self-employment in the United Kingdom for a continuous five-year period.

26. The burden of proof is on the appellant and the standard of proof is the balance of probabilities. The appellant has to show that the requirements of the Regulations have been satisfied for a retained right of residence and permanent residence to be granted.
27. At paragraph 8 of the decision the Judge refers to correspondence between HMRC and the sponsor regarding self-assessment issues but notes that there is no evidence to show that the sponsor was in self-employment. He refers to the sponsor's payslips for periods between 2014 to 2015 and notes that none of the sponsor's bank statements show any payments corresponding to the salary payments reflected in the payslips. The Judge also is dissatisfied with the form of the payslips and gives proper reasons for finding this.
28. I have gone through all the evidence that was before the Judge including the HMRC evidence.
29. The appellant's representative submitted that the Home Office could have checked the HMRC documents but what the respondent originally had were photocopies. It is noted in the refusal letter that these cannot be checked. Much of the HMRC documentation is based on self-assessment forms submitted supposedly by the sponsor. It is true that there is correspondence between the sponsor and HMRC but that correspondence is not sufficient to show the sponsor's continuous employment or self-employment for a five-year period. Sums due to HMRC were not paid on time by the sponsor if they were paid at all. Some small sums were paid. No company bank statements or invoices were produced by the sponsor. The P60s are by the employers not HMRC and are not satisfactory evidence. Registration with HMRC has been instigated but not maintained. The Judge did not accept the evidence about the sponsor's self-employed trading. The Judge found the evidence to be questionable and found that the burden of proof had not been discharged. Where the salary payments and the bank statements are consistent is for the period where the payslips are found to be questionable by the Judge.

Notice of Decision

I find that the First-Tier Tribunal Judge made no material error of law in his decision and that his decision must stand. The appellant's appeal is therefore dismissed as per the promulgated decision of 15 March 2018.

Anonymity has not been directed.



Signed
Deputy Upper Tribunal Judge I A M Murray

Date 17 September 2018