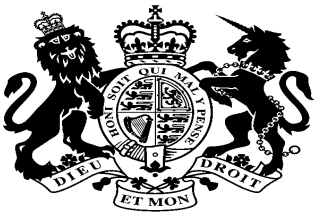


Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: EA/01560/2016

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 19 February 2019	**On 6 March 2019**

Before

DEPUTY UPPER TRIBUNAL JUDGE SYMES

Between

EVANGLE [F]
(ANONYMITY ORDER NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr A Adolphy (for Rana and Co Solicitors)
For the Respondent: Ms S Jones (Senior Home Office Presenting Officer)

DECISION AND REASONS

1. This is the appeal of Evangle [F], a citizen of Cameroon born 28 December 1985, against the decision of the First-tier Tribunal of 9 October 2018 to dismiss his appeal, itself brought against the Respondent's decision of 27 January 2016 to refuse his application for an EEA residence card.

Introduction

2. The Appellant's immigration history is that he applied for asylum, which was refused and the ensuing appeal dismissed on 15 August 2003; further representations were refused on 21 December 2007.

3. On 24 May 2008 the Appellant married Ms C, a French national, in London; the marriage certificate specified her occupation as that of *au pair*. On 21 July 2008 she gave birth to their daughter, R. On 7 April 2010 he sought a residence card confirming his right to reside as Ms C's spouse; one was issued, on 28 September 2010, valid until the same date five years later. Ms C subsequently had a second daughter, of whom the Appellant is not the father.

4. The application was refused because the documentation said to establish Ms C's exercise of Treaty rights, an HMRC document of 28 July 2015 showing her employment history from April 2010 to April 2015, did not in fact demonstrate that she had consistently worked, given that there appeared to be an employment gap from 20 August 2010 until 1 February 2013. Furthermore there was no evidence that she was exercising free movement rights when the decree absolute was issued: the document supposedly showing she worked for Comptoir Gourmand Ltd at the point of divorce was a copy rather than an original, and it was thus not capable of verification.

5. The appeal has previously been heard by the First-tier Tribunal, and remitted for hearing afresh. Nothing arises from that save for the useful indication by Upper Tribunal Judge Storey in his remittal decision of 31 January 2018 that that relevant considerations at the re-hearing were likely to include

   (a) Whether Ms C had been exercising Treaty rights for 5 continuous years during their marriage, in which case the Appellant would have established a permanent residence right;

   (b) Whether she was working at the date of divorce, in which case he would be entitled to a retained right of residence: "it should be within the power of the claimant to produce the original of this letter and if he does that, that might then bring him within the material scope of Regulation 10".

The First-tier Tribunal decision against which this appeal now lies

6. The First-tier Tribunal heard oral evidence, which it summarised. The Appellant had been in continuous employment at Maloko Restaurant from 2010 to 2015, and with Katakata Ltd from 2015 until now. He had paid all his taxes. The HMRC had sent him a copy of their July 2015 letter in the course of 2015, after his former wife had declined to cooperate in obtaining evidence for his appeal by providing her own pay slips. Their relationship haf been on and off from 2011, finally breaking down in 2012; nevertheless, he continued to see Ms C in the course of dropping off

their daughter R. He had called HMRC and they had sent him the July 2015 letter, a copy of which he had used in his application to the Home Office, having given the original letter to his former representatives.

7. The First-tier Tribunal concluded that the Appellant had not demonstrated his former spouse had been exercising Treaty Rights. This was because the original HMRC document had not been produced, and the explanation for how the copy had entered his possession was not credible. He had stated in oral evidence that he had obtained the letter from HMRC, that the original had been handed over to his previous representatives: but this was "not credible as a matter of law", given that it was addressed not to him but to Ms C. HMRC could not have sent this to him without her consent, absent a Court Order, because it would have breached data protection legislation and the law of confidence. Accordingly the only credible explanation for him having access to the document was that Ms C had given it to him – but that in turn undermined his account of her having refused to cooperating in evidencing his case.

8. That left the question as to whether Ms C had been working at the date that divorce proceedings were initiated (the Appellant having stated the divorce petition was filed in June 2012). The evidence indicated that she had been out of work for a significant period. Even treating her as having been on maternity leave for a year from her second child's birth in November 2010, up to November 2011, this still left a significant period during which she was not shown to have worked. The only source of income was Job Seekers Allowance for the tax year ending April 2012, and for that ending April 2013, her employment with Comptoir Gourmand Ltd which began on 1 February 2013.

9. Nor had Ms C been a qualified person when the marriage was terminated: in the year ending 5 April 2015, she was shown as having received zero pay from her employment with Comptoir Gourmand Ltd. The Judge noted that the Respondent had indicated willingness to concede the fact that she had been working for Comptoir Gourmand Ltd at the time of the divorce, presuming the original HMRC document was available. However, the FTT took the view that the Respondent was not bound by that concession, contingent as it was on that document materialising. The information in the HMRC letter was consistent with her having worked instead for Quaar Group Ltd at the marriage's termination; but no payslips had been produced to confirm this, again leaving the copy status of the letter as unsatisfactory.

10. Accordingly the question of whether the Appellant had established that he himself had been in continuous employment since the date of the decree absolute did not arise.

Onwards appeal to the Upper Tribunal

11. Grounds of appeal contended the First-tier Tribunal had erred in law by

(a) Rejecting the Appellant's evidence of Ms C having been in work at the date of divorce, notwithstanding that the Respondent had made a concession to such effect, which should have been treated as leaving the Tribunal as *functus officio*;

(b) Acting unfairly by going behind that concession;

(c) Failing to appreciate that the receipt of Jobseekers Allowance had in fact constituted Ms C as a qualified person at the date the petition was filed (3 July 2012);

(d) Failing to have regard to Ms C having attained permanent residence as at November 2012, their relationship having begun in November 2007, before their marriage on 1 June 2008;

(e) Failing to have regard to Regulation 10(5)(d)(i) addressing whether the Appellant had established permanent residence via having a right of access to the child of a qualified person.

12. Judge Parkes granted permission to appeal for the First-tier Tribunal on 3 January 2019.

13. I raised the issue of the concession to which the First-tier Tribunal had alluded at the start of the hearing. It did not appear clearly in any written document, nor in the Home Office's submissions.

14. Mr Adophy explained the source of the concession: Mr Eaton, counsel for the Secretary of State below, had noted in submissions that the original document had been forwarded to the Secretary of State, and that therefore the copy letter provided to the Tribunal could be accepted as genuine. In Mr Adophy's submission, an advocate is freely entitled to make concessions which are then binding in the subsequent disposal of the appeal. In any event, he contended that the Secretary of State was duty bound to make enquiries into the authenticity of this document if its bona fides was to be disputed.

15. For the Secretary of State, Ms Jones submitted that the precise scope of the concession was not evidenced, and that Mr Adophy's description of it was inconsistent with the fact that the Tribunal had recorded in its decision that Mr Eaton had maintained the Home Office's position as being to dispute the HMRC letter's authenticity. There was no material unfairness here, and the concession had not been pleaded with sufficient clarity; it was not appropriate for the advocate who had appeared below to seek to give oral evidence as to its contents without notice. Besides, no material unfairness arose given that the Appellant had long been on notice that a copy document alone would not satisfy the Respondent of Ms C's exercise of Treaty rights.

Decision and reasons

16. The Immigration (European Economic Area) Regulations 2006 in so far as relevant provide:

"**Family member who has retained the right of residence"**

10.— (1) In these Regulations, "family member who has retained the right of residence" means, subject to paragraphs (8) and (9), a person who satisfies a condition in paragraph (2), (3), (4) or (5).

…

(5) The condition in this paragraph is that the person ("A")—

(a) ceased to be a family member of a qualified person or an EEA national with a right of permanent residence on the termination of the marriage or civil partnership of A;

(b) was residing in the United Kingdom in accordance with these Regulations at the date of the termination;

(c) satisfies the condition in paragraph (6); and

(d) either—

(i) prior to the initiation of the proceedings for the termination of the marriage or the civil partnership, the marriage or civil partnership had lasted for at least three years and the parties to the marriage or civil partnership had resided in the United Kingdom for at least one year during its duration;

(ii) the former spouse or civil partner of the qualified person or the EEA national with a right of permanent residence has custody of a child of that qualified person or EEA national;

(iii) the former spouse or civil partner of the qualified person or the EEA national with a right of permanent residence has the right of access to a child of that qualified person or EEA national, where the child is under the age of 18 and where a court has ordered that such access must take place in the United Kingdom; or

(iv) the continued right of residence in the United Kingdom of A is warranted by particularly difficult circumstances, such as where A or another family member has been a victim of domestic violence whilst the marriage or civil partnership was subsisting.

(6) The condition in this paragraph is that the person—

(a) is not an EEA national but would, if the person were an EEA national, be a worker, a self-employed person or a self-sufficient person under regulation 6; or

(b) is the family member of a person who falls within paragraph (a).

Right of permanent residence

15.— (1) The following persons acquire the right to reside in the United Kingdom permanently—

(a) an EEA national who has resided in the United Kingdom in accordance with these Regulations for a continuous period of five years;

(b) a family member of an EEA national who is not an EEA national but who has resided in the United Kingdom with the EEA national in accordance with these Regulations for a continuous period of five years;

…

(f) a person who—

(i) has resided in the United Kingdom in accordance with these Regulations for a continuous period of five years; and

(ii) was, at the end of the period, a family member who has retained the right of residence."

17. Hamblen LJ in *IM (Pakistan)* [2018] EWCA Civ 626 §23 helpfully reviewed various authorities relating to concessions made in the course of immigration proceedings:

"14 ... *Carcabuk and Bla -v- Secretary of State for the Home Department* [2000] Appeal No. 00TH01426 IAT at [11]-[12.5] and *R(Ganidagli) -v- Immigration Appeal Tribunal* [2001] INLR 479 Admin) at [20]. In *Carcabuk* Collins J stated:

"11. It is in our judgment important to identify the precise nature of any so-called concession. If it is of fact (for example that ... an event described by the appellant or a witness did occur), the adjudicator should not go behind it. Accordingly, if facts are agreed, the adjudicator should accept whatever is agreed. Equally, if a concession is clearly made by a HOPO that an Appellant is telling the truth either generally or on specific matters, the adjudicator may raise with the HOPO his doubts whether the concession is appropriate but, if it is maintained, he should accept it ..."

15. It is to be noted that this authority recognises that, at least in some circumstances, a tribunal may raise doubts about a concession made and states that it is only if the concession is still maintained that the tribunal should accept it. The right of a tribunal to question concessions made is borne out by other authorities, as referred to below.

23 … neither the FTT nor the UT were bound to accept the concession made by the respondent in the RL. As stated in the case of *Kalidas (agreed facts – best practice)* [2012] UKUT 00327 (IAC):

'35. Judges, unless in exceptional circumstances, do not look behind factual concessions. Such exceptional circumstances may arise where the concession is partial or unclear, and evidence develops in such a way that a judge considers that the extent and correctness of the concession must be revisited. If so, she must draw that immediately to attention of representatives so that they have an opportunity to ask such further

> questions, lead such further evidence and make such further submissions as required. An adjournment may become necessary.'"

18. As made clear by *IM (Pakistan)*, concessions are not necessarily binding on parties, and a Judge must always be astute to determine the precise scope of any concession said to have made. In this case, any "concession" appears to have been misunderstood by the Appellant's representative. The refusal letter stated

> "While the HMRC employment history document would suggest that the EEA national was working for Comptoir Gourmand Ltd at the time of divorce, upon close inspection it is clear that the document is a photocopy and as such cannot be solely relied upon as evidence in support of your application."

19. Mr Eaton appearing for the Secretary of State below had clearly defended that refusal reason: as the First-tier Tribunal summarised his submissions §23, "the point made in the refusal letter held good. The appellant had not provided the original of the letter from HMRC." It is impossible to reconcile this submission with acceptance that the HMRC document was sufficient for the Appellant to make good his case. There has been no attempt made to precisely delineate the Appellant's understanding of the terms of the concession in writing, on notice to the Upper Tribunal and the Respondent.

20. So I do not accept that there was here any "concession" in the terms asserted by the Appellant. It may well be the case that the Respondent's stance below was that, *if* the HMRC document was established as genuine, *then* it would establish that the Appellant's ex-spouse had been exercising Treaty Rights as claimed. But there was no concession that the HMRC document was to be treated as if it was genuine. Indeed, the Respondent's case was to the contrary.

21. The absence of an original document is not necessarily fatal to an appeal. If the explanation as to a document's provenance is accepted, then doubtless a fact-finder might accept it as genuine. But there is no rule of law that compels acceptance of a document from an ostensibly official source notwithstanding that it is a copy rather than an original. Here, the explanation for how the Appellant came into possession of the HMRC letter was found wanting by the First-tier Tribunal.

22. The Judge's thinking is readily comprehensible: it is inherently unlikely, given the modern response of officialdom to obligations arising from data protection laws, that HMRC would release a document addressed to Ms C, addressing Ms C's working history, to the Appellant. No error of law was asserted in the reasoning underlying that conclusion, save for the "concession" argument, which I have rejected.

23. As to Mr Adophy's further submission that the Secretary of State was bound to investigate the validity of the HMRC letter himself, Stanley Burnton LJ in *Amos* [2011] EWCA Civ 552 at §34ff explains that there is no rule of European Union law

that necessarily requires the Secretary of State to assist an Appellant to discharge the burden of proof on them, and no domestic principle to that effect either. He also noted that the Appellant had not suggested

> "40 … that the procedural law of the Tribunal hindered her ability to prove her case. Rule 51 of the Asylum and Immigration Tribunal (Procedure) Rules 2005 authorises the Tribunal to "allow oral, documentary or other evidence to be given of any fact which appears to be relevant to an appeal" … even if that evidence would be inadmissible in a court of law. Furthermore, as Mr Eicke pointed out, Ms Theophilus could have applied under regulation 50 for a witness summons requiring her ex-husband to attend and give evidence as to whether or not he was and had been working. She did not do so. Nor did she seek a direction under rule 45 requiring the Secretary of State to provide any information necessary for the determination of her appeal. Indeed, she made no relevant application to the Tribunal. As Maurice Kay LJ pointed out in the course of argument, in these circumstances it is impossible to identify any error of law on the part of the Tribunal in this respect.
>
> …
>
> 42. *Kerr* [*v Department for Social Development* [2004] UKHL 23] is not authority for the proposition that the Department for Social Development of Northern Ireland, the appellant in the appeal, was under any duty to obtain information available to other government departments or authorities. Even if transposed to the present context, it is not authority for the proposition that the Home Secretary is bound to make enquiries of other government departments for evidence they may or may not have concerning issues before the Tribunal."

24. As can be seen from *Amos* §40, the appropriate course of action in such a case is to seek a direction from the First-tier Tribunal to order HMRC to assist with the Appellant's enquiries (or to order that the Secretary of State for the Home Department to use his best endeavours to secure such information). However there is no indication here that that course of action was taken. A party who declines to follow the appropriate procedural approach for securing relevant information runs the risk that judges will be sceptical as to their reasons for failing so to do.

25. The Appellant's case as to Ms C's exercise of Treaty rights depends on the reliability of the HMRC letter both for the purposes of establishing a claim based on 5 years' residence compatibly with the EEA Regulations, and for making good his claimed retained right of residence based on her being a qualified person at the moment divorce proceedings were initiated. Accordingly his claim in that regard is doomed to fail.

26. The other grounds of appeal are misconceived. As to the ground I have identified as (d) at paragraph 11 above, pre-marriage cohabitation in a durable relationship cannot be counted towards satisfaction of the five-year residence period absent the issue of a residence card as an extended family member for the relevant period: see *Macastena* [2018] EWCA Civ 1558. There is no evidence here that such an application was made and granted.

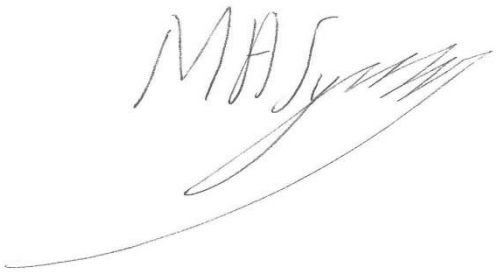
27. As to ground (e), any entitlement based on access to a child (Regulation 10(5)(d)(iii)) simply gives rise to another route by which a retained right of residence may be asserted: however, that route requires that the former spouse be a qualified person or individual with permanent residence, a status which once again necessitates establishing the exercise of Treaty rights for the relevant period and/or at the relevant time. The inadequacies of the HMRC letter, the sole independent evidence put forward to establish that proposition, bars the Appellant's ability to satisfy that route as much as it does the primary case put under Regulation 10(5)(d)(i).

28. I accordingly conclude that there is no material error of law in the decision of the First-tier Tribunal and the appeal is dismissed. In the event that the Appellant obtains an original HMRC document in the future that establishes that Ms C's working history is as he asserts it is, he is doubtless free to make a further application.

Decision:

The decision of the First-tier Tribunal contains no material error of law.
The appeal is dismissed.

Signed: Date: 25 February 2019



Deputy Upper Tribunal Judge Symes