Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: EA/03135/2018

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 20 February 2019	**On 01 March 2019**

Before

UPPER TRIBUNAL JUDGE KAMARA

Between

DANIEL POSTIGO GONZALES
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr K Jegede, counsel instructed by Law Lane Solicitors
For the Respondent: Mr N Bramble, Senior Home Office Presenting Officer

DECISION AND REASONS

Introduction

1. This is an appeal against the decision of First-tier Tribunal Judge S Taylor, promulgated on 19 November 2018. Permission to appeal was granted by First-tier Tribunal Judge PJM Hollingworth on 17 January 2019.

Anonymity

2. No anonymity direction was made previously and there is no reason to make one now.

Background

3. On 24 January 2018, the appellant sought a permanent residence card as a family member who had retained a right of residence following the end of his marriage to a Spanish national. That application was refused by the Secretary of State on 10 April 2018 because the appellant had not provided an original valid identity document for his former spouse and he had not provided adequate evidence that his former spouse was a qualified person or had a right of permanent residence on the "date of the divorce."

The hearing before the First-tier Tribunal

4. A request was made for an adjournment in order to obtain a direction that the respondent should make further enquiries of HMRC into the sponsor's employment record. The judge refused to adjourn or make the requested direction on the basis that the appellant was in contact with his former spouse. The appeal was dismissed owing to inadequate evidence of the sponsor's employment and owing to the appellant's failure to provide a valid passport or identity card for the sponsor.

The grounds of appeal

5. In the grounds of appeal, it was argued that the judge was mistaken regarding the document enclosed at page 9 of the appellant's bundle which he took to indicate that the only records of employment related to the period ended April 2014. It was further argued that the judge was wrong in concluding that the appellant was in contact with his further spouse, it being argued that if he was, he would have requested evidence covering the entire relevant period. Issue was taken with the judge's refusal to make the direction sought. Lastly, it was said that the judge's findings regarding the sponsor's documentation were contradictory.

6. Permission to appeal was granted on the basis sought.

The hearing

7. Mr Jegede relied on the grant of permission. He took me to the HMRC document in the appellant's bundle which was before the First-tier Tribunal. He emphasised that the document referred only to the financial year 2013-2014. That had been the only evidence the appellant could acquire from the sponsor. He argued that if the direction had been given, the outcome would have illustrated that the sponsor was a qualified person up until the divorce proceedings were initiated. The appellant was of the view was that his former spouse had been working but had no other evidence.

8. On behalf of the respondent, Mr Bramble noted that Mr Jegede had made no reference to the other ground of appeal, that being whether the appellant had submitted a valid passport or identity card for the sponsor. He argued that there was no confusion regarding the judge's findings. At [11] the judge set out what the respondent accepted and rejected. Mr Bramble concluded by stating that if the appellant had not provided the required documents, the first ground was academic. On the first ground, he submitted that the judge applied Amos. It was for the appellant to show that he has exhausted attempts to obtain information and the document from HMRC confirming the sponsor's employment details indicated that he had been in contact with her. The judge was entitled to be dissatisfied that the appellant had made all attempts to obtain all the information [8].

9. In response, Mr Jegede submitted only that it was difficult for the appellant to acquire evidence from the sponsor and it was only in an ideal world that he could be expected to obtain such documents from a previous partner. In response to my query, he confirmed that the appellant had not previously made an application for a residence card following his 2013 marriage to the sponsor.

10. At the end of the hearing, I reserved my decision.

Decision on error of law

11. The sole evidence relating to the sponsor exercising Treaty rights at any stage up to the time of the initiation of divorce proceedings was at page 9 of the appellant's bundle. That document was dated 3 October 2017 and was addressed to the sponsor. It referred to a telephone call from the sponsor on 2 October 2017 in which she asked her employment history. The information provided was headed, "Sources of income for the tax year ended 5 April 2014." The judge's assessment of this evidence was that it indicated that "*the only record available related to the tax year ended April 2014*." This is not what the letter states and the judge erred in so finding. While the enquiry made was for the entire employment history, this document addresses only one tax year. It is unclear whether this document is complete. Nonetheless, this is the only evidence the appellant was able to obtain for his hearing relating to the sponsor's employment.

12. That the appellant obtained the HMRC document supports his claim that he has made efforts to substantiate his case. In his witness statement the appellant indicates that he no longer has a current telephone number for the sponsor. It is notable that the document at page 9 dates from a full year prior to the hearing of the appeal and also predates the application for permanent residence by some months. The evidence which the appellant obtained was insufficient as the divorce proceedings were initiated in either 2016 or 2017, it is unclear when. This is the type of case which would have benefitted from a direction to the respondent to obtain the sponsor's full records from HMRC, Amos v Anor [2]110 EWCA Civ 552 considered. The judge's erroneous understanding of the document at page 9 led to the situation where it appeared to him that evidence of the

sponsor's employment history was complete and that no direction was required.

13. Mr Bramble argued that any error in relation to the direction was immaterial given that the appellant had failed to provide the sponsor's original passport or identity card. I find that the error was material for the following reasons.

14. The judge simply repeated the observations of the respondent that the appellant failed to provide evidence of "*circumstances beyond his control*" which prevented him from providing the identity documents. The respondent's guidance to caseworkers does not impose such a high test. What is said at page 21 of the Guidance is as follows:

> *"… if you are satisfied the applicant cannot get the evidence themselves, make enquiries on their behalf where possible, getting agreement from your senior caseworker before doing so."*

15. The brief reasons provided by the judge did not adequately engage with the appellant's account of having lost telephone contact with the sponsor and how realistic it would be for him to obtain her original documents following divorce to either send to the Home Office or bring to his hearing. Indeed, the appellant advised the respondent in his application that he was unable to provide a passport-sized photograph for the sponsor along with evidence of her identity and nationality because, "*she will not provide her Spanish ID or national passport for this application*." The appellant did what was requested at 2.13 of the application, in that he enclosed alternative evidence in the form of a photocopy of the sponsor's passport. Nor is there any evidential basis for the judge concluding that the appellant was in contact with the sponsor over a year after the divorce was finalised and a year after he obtained the HMRC document from her. This issue could also be addressed by way of a direction to the respondent to act in accordance with the Guidance and make enquiries on the appellant's behalf. I conclude that the judge's treatment of the Regulation 21(5) issue was also inadequate.

16. For the foregoing reasons, the decision of the judge is set aside in its entirety.

Decision

The making of the decision of the First-tier Tribunal did involve the making of an error on a point of law.

The decision of the First-tier Tribunal is set aside.

The appeal is remitted, de novo, to the First-tier Tribunal to be reheard at Taylor House, with a time estimate of one day by any judge except First-tier Tribunal Judge S Taylor.

This appeal is to be case managed with reference to any application to be made on the appellant's behalf for a direction under section 40 of the UK Borders Act 2007.

Signed Date 09 April 2019

Upper Tribunal Judge Kamara