Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: EA/06189/2018

THE IMMIGRATION ACTS

Heard at Manchester Civil Justice Centre	**Decision & Reasons Promulgated**
On 26 APRIL 2019	On 28 June 2019

Before

UPPER TRIBUNAL JUDGE LANE

Between

DAVID OLAUNJI AYODEJI
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr Holmes, instructed by Adam, Solicitors
For the Respondent: Mr Bates, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellant was born on 17 July 1975 and is a male citizen of Nigeria. He applied for permanent residence under regulation 15 of the Immigration (European Economic Area) Regulations 2016 for a residence card as confirmation of a right to reside in the United Kingdom. The Secretary of State, by a decision taken on 4 September 2018, refused the appellant's application. The appellant appealed to the First-tier Tribunal which, in a decision promulgated on 21 November 2018, dismissed the appeal. The appellant now appeals, with permission, to the Upper Tribunal.

2. The appellant claimed that he had retained rights of residence as the family member (former spouse) of an EEA national (hereafter referred to, as in the First-tier Tribunal decision, as LT). Divorce proceedings had been commenced on 14 April 2014 and the decree absolute in the divorce granted on 12 September 2014. Both parties now agree that the First-tier Tribunal erred at [21] by finding that the relevant date was that of the decree absolute and not the commencement of the proceedings for divorce by petition. The Secretary of State maintains that, notwithstanding the error, the outcome of the appeal would have remained the same.

3. The appellant had failed in a previous appeal to the First-tier Tribunal in December 2016. The judge in the instant appeal discusses that previous dismissal at [14-17] and sought to determine what new evidence had been produced since that date. The previous tribunal had concluded that the appellant had not proved that his former wife had been exercising Treaty Rights at the relevant date. In the latest appeal, the appellant has provided evidence from the DWP (Department of Work and Pensions) concerning guidance on the payment of Job Seekers Allowance (JSA).

4. It is agreed that LT found work in March 2015. Both parties also acknowledge that, at some time in 2014, LT was in receipt of JSA. The previous tribunal found that LT had been working up to April 2012 but there was no evidence that she had worked in the period 2012 - 2015. That tribunal had, however, not accepted that LT had been either a worker or a jobseeker after April 2012. Although LT had found work in March 2015, that work and ceased in June 2015 and LT had been unemployed for much of 2016. The 2016 Regulations provide that the permitted time for a person to exercise Treaty Rights as a jobseeker is 91 days. There is an exception to that provision which requires providing ‘compelling evidence’ of continuing to seek employment and having a genuine chance of being engaged.

5. Mr Bates, who appeared for the Secretary of State, submitted that, because it was impossible to determine exactly when LT had begun to claim JSA, the application was bound to fail. The previous tribunal and indicated that JSA may have commenced January 2014 but that had not been a firm finding of fact based on compelling evidence but only an inference drawn from a single bank statement. Mr Bates submitted that, because JSA is paid in arrears, then the benefit may have been paid in December 2013 but, on the evidence obtained by the appellant, it was impossible to prove that the claim had begun at the end of 2013 or beginning of 2014 or, indeed, on any other date; it remained possible that LT had been unemployed for a much longer period. Without knowing the date of commencement of payment of JSA, Mr Bates submitted that the appellant was in no position to prove that his former wife had been continuing to seek employment and had enjoyed a genuine chance of being engaged.

6. I agree with Mr Bates. In cases such as this, it is often very difficult, if not impossible, for appellants to gather sufficient evidence to discharge the

burden of proof. I agree with Mr Bates that the previous tribunal's guess that JSA had commenced in January 2014 is no more than that; it is not a firm finding and there was no evidence in the instant appeal which improves upon that before the previous tribunal. I agree also that, whilst the possibility remains that LT may have been out of work for several years, it is difficult, if not impossible, for the appellant to prove to the required standard that she had been seeking employment and had a genuine chance of being engaged. At [24], the judge found that the fact that LT may have cooperated with the DWP did not necessarily mean that she was genuinely seeking employment. That finding appears a little tenuous but, in the light of what I say above, the outcome of the appeal was not in doubt. I am aware that there is a tax return for LT but this does not show where or for how long during the relevant period she had been employed. Moreover, the fact that LT did obtain work in March 2015 does not assist the appellant. I reject the submission that the judge should have found that LT was genuinely seeking work simply because, possibly some considerable period after she had first claimed JSA, she found a job. Finally, it is also the case that the judge's error as regards the material date (see [2] above) did not, in the light of the analysis above, affect the outcome of the appeal.

7. In the circumstances, the appeal is dismissed.

Notice of Decision

This appeal is dismissed.

Signed Date 2 JUNE 2019

Upper Tribunal Judge Lane