



**Upper Tribunal
(Immigration and Asylum Chamber)**

Appeal Number: EA/07835/2017

THE IMMIGRATION ACTS

**Heard at the Royal Courts of
Justice
On 4 March 2019**

**Decision & Reasons Promulgated
On 5 April 2019**

Before

UPPER TRIBUNAL JUDGE PERKINS

Between

EKENE ANTHONY IYIEGBU
(anonymity direction not made)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr J Rene, Counsel instructed by Direct Public Access
For the Respondent: Mr S Whitwell, Senior Home Office Presenting Officer

DECISION AND REASONS

1. This is an appeal by a citizen of Nigeria against the decision of the First-tier Tribunal dismissing his appeal against a decision of the Secretary of State on 5 November 2017 to refuse his application for a residence card as a former family member of an EEA national.
2. The decision is unsatisfactory in many ways. The appellant may well not be entitled to a residence card. It is not clear if he is in fact the former family member of the EEA national who has retained rights of residence

and, even if he has, he has created a difficulty for himself by reason of his being convicted of the offence of supplying controlled drugs of class A and sentenced to sixteen months' imprisonment.

3. There was a dispute about whether the appellant was in fact married to an EEA national. This has been resolved in his favour apparently because the marriage was accepted for the purposes of divorce proceedings. The judge says at paragraph 18:

“However, as the marriage certificate was accepted by the UK courts for the purposes of the divorce proceedings, I am prepared to accept on the balance of probabilities that this was a genuine marriage and therefore he can meet the requirements of Regulation 7 of the EEA Regulations.”

4. I do not understand that point. The fact that the marriage was recognised for the purpose of divorce proceedings where presumably, neither party to the marriage wanted to deny it, does not establish that the parties to the marriage were “spouses” for the purposes of the Regulations where parties to a marriage of convenience are excluded.
5. The First-tier Tribunal Judge was not satisfied that the appellant had been exercising treaty rights. He said at paragraph 19:

“The issue in this case is firstly as to whether he has retained a right of residence under Regulation 10 of the EEA Regulations. There is an issue as to whether his ex-wife was exercising Treaty Rights at the time of the divorce proceedings. The appellant has had difficulties in obtaining all the relevant documents regarding his ex-wife's employment record, and has an outstanding query as to her HMRC records. There are pay slips of May and June 2016, which appear to follow those last issued in 2014, which would suggest on the balance of probabilities that she was still exercising Treaty Rights. Bearing in mind that the respondent had concluded that the previous employment records had not been genuine when they refused the previous application in October 2013 as set out in paragraph 22 of the refusal letter), I am not persuaded that she was exercising Treaty Rights on the balance of probabilities.”

6. This is a startling finding. It is not clear precisely what was established on the previous occasion. The Reasons for Refusal Letter relating to that application has not been produced. Further it is not clear what judicial consideration was given to that finding. In any event it does not follow that because a person has lied once he has lied again. The only reason given by the judge in paragraph 19 for disbelieving evidence that he otherwise seemed to find credible was that “the respondent has concluded that the previous employment records had not been genuine”. It is not even a case where the judge has concluded the previous records were not genuine. That is an entirely unsatisfactory reason and should not be relied upon.
7. Further the First-tier Tribunal made no reasoned decision on the requirements of Regulation 27(5)(c) of the Immigration (European

Economic Area) Regulations 2016 that “the personal conduct of a person must represent a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society, ...”. This is a prerequisite of any lawful decision to remove a person who can rely on EEA rights and no explanation has been given for the judge’s apparent finding that the threat exists here. Given that the conviction was now some time ago and is as far as I know an isolated example of bad character and the sentencing judge and indeed a close relative of the appellant found the conduct surprising it is by no means a foregone conclusion that the appellant is a present threat.

8. It follows therefore that on the assumption that the appellant is entitled to EEA residence rights but for his behaviour the determination is flawed because the reasons are unlawful.
9. I have reflected carefully on the complaint that the Tribunal erred by not agreeing to adjourn for an **Amos** direction. This is a very fine point. The matter has been allowed to fester for some time but it is undesirable that cases are not decided on the best available evidence and on balance I am persuaded that the judge should have adjourned and made an **Amos** direction if appropriate. If there is a further application for an **Amos** direction this is something to bear in mind but the fact that there is still further time lapsed means that thought must be given to the appropriate decision.
10. Mr Whitwell accepted there were faults in the decision. He did his best to say that they were immaterial and I have considered what he had to say but I am not persuaded. There is little about this decision that shows the right approach and I set it aside in its entirety. The decision will be made again in the First-tier Tribunal and no findings of fact are preserved.

Decision

11. The First-tier Tribunal erred in law. I set aside its decision and I direct that the appeal be determined again in the First-tier Tribunal.


Signed
Jonathan Perkins

Judge of the Upper Tribunal

Dated 3 April 2019