Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: EA/05694/2016

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 15 October 2021	**On 17 November 2021**

Before

UPPER TRIBUNAL JUDGE SHERIDAN

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MR GAFRI QUDARI BALOGUN
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:

For the Appellant: Mr S Whitwell, Senior Home Office Presenting Officer
For the Respondent: Mr E Thompson, Counsel, direct access

DECISION AND REASONS

This is an appeal by the Secretary of State. However, for convenience I will refer to the parties as they were designated in the First-tier Tribunal.

Background and Factual Matrix

The appellant is a citizen of Nigeria who married an EEA national in 2009. In the same year, he was convicted of making false representations and given a community order.

In 2011 he was issued with an EEA residence card, valid until June 2016, on the basis of being married to an EEA national. In the same year, he was convicted of making false representations and sentenced to six months' imprisonment suspended for 24 months.

On 20 January 2014 divorce proceedings were initiated. At this time the appellant was working.

In April 2014 the appellant was sentenced to imprisonment for 27 months, following a conviction for conspiracy to defraud.

In November 2014 a deportation was made against the appellant under the Immigration (European Economic Area) Regulations 2006 ("the 2006 Regulations").

The appellant's wife left the UK at some point between the divorce being initiated and the divorce being finalised.

On 6 March 2015 the divorce was finalised.

On 13 June 2015 the appellant was released from prison. He was released on immigration bail which included a condition prohibiting him from working. He remains subject to this condition, and has not worked since leaving prison.

On 19 April 2016 the respondent made a decision to revoke the appellant's residence card. The decision stated that the appellant did not have a retained right of residence under Regulation 10(5) of the 2006 Regulations because (a) he had not provided evidence to show his former wife was a qualified person under the 2006 Regulations when they divorced, as required by Regulation 10(5)(ii); and (b) he had not provided evidence showing that since the divorce he has been a worker, or otherwise met the conditions of Regulation 10(6) of the 2006 Regulations. The decision also stated that because of his serious criminal conduct his right to reside in the UK was being cancelled on public policy and security grounds under Regulations 20A(2), 20(1) and 21B(2) of the 2006 Regulations.

On 20 April 2016 the respondent withdrew the deportation decision made under the 2006 Regulations in November 2014 on the basis that the appellant did not qualify to be considered under the 2006 Regulations.

On 27 April 2017 the appellant was served with a deportation order under Section 32(5) of the UK Borders Act. On 12 June 2017 the appellant's human rights claim was refused.

The appellant appealed against both the EEA decision of 19 April 2016 and against the respondent's refusal of his human rights claim on 12 June 2017. The appeals were linked and came before Judge of the First-tier Tribunal Andrews ("the judge").

As recorded in paragraph 6 of the judge's decision, she decided to consider only the appeal against the EEA decision of 19 April 2016. She adjourned the human rights claim, stating that it would be decided at a later date.

The Decision of the First-tier Tribunal

The judge firstly considered whether the appellant was a family member who has retained a right of residence under Regulation 10(5).

It was common ground before the First-tier Tribunal that the appellant satisfied subparagraphs (a), (b) and (d) of Regulation 10(5) and that the only issue in dispute was whether he met Regulation 10(c), which stipulates that a person must satisfy 10(6). This is made clear in paragraph 24 of the decision where the judge stated that the respondent's representative confirmed that only Regulation 10(6) was in dispute.

Regulation 10(6) provides:

> (6) The condition in this paragraph is that the person—
>
> (a) is not an EEA national but would, if he 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).

The judge found that Regulation 10(6) was satisfied because the appellant was a worker prior to entering prison and retained the status as a worker whilst in prison. The judge also found that the appellant has continued to retain his status as a worker whilst on immigration bail.

The judge also rejected the respondent's decision in respect of public policy and security under Regulations 20(1), 20A(2) and 21B(2).

Grounds of Appeal

The first ground of appeal submits that until the divorce on 6 March 2015 the appellant was a family member under Regulation 7 who happened to be working, not a worker under Regulation 6; and therefore he was not, at the time he went into prison in April 2014, a worker, even though he was working. It is argued that because the appellant did not have legal status as a worker when he went into prison the judge erred in finding that he carried a right as a worker into and through his imprisonment.

The second ground of appeal submits that the judge erred by finding that the appellant was a worker when he was in prison.

The third ground of appeal submits that the judge fell into error by making findings on public policy and abuse of rights when these considerations could only arise if the appellant had a right of residence following his divorce, which he did not.

Both Mr Whitwell and Mr Thompson made helpful submissions at the hearing, which I have considered carefully. Mr Thompson also relied upon detailed written submissions. I have not set out their respective arguments in the decision, but have reflected upon them in, and incorporated them into, my analysis.

Analysis

In *Orfanopoulos and Oliveri* [2004] ECR I-5257, the ECJ considered the effect of imprisonment on the status of two EEA nationals who had lived in Germany for very significant periods of time. In paragraphs 49 – 51, it was stated:

> "49. So far as concerns migrant workers who are nationals of a Member State, their right of residence is subject to the condition that the person remains a worker or, where relevant, a person seeking employment (see to that effect, KC-292/89 *Antonissen* [1991] ECR I-745, paragraph 22), unless they derive that right from other provisions of Community law…
>
> 50. Moreover, in respect more particularly of prisoners who were employed before their imprisonment, the fact that the person concerned was not available on the employment market during such imprisonment does not mean, as a general rule, that he did not continue to be duly registered as belonging to the labour force of the host Member State during that period, provided that he actually finds another job within a reasonable time after his release (see, to that effect, KC-340/97 *Nazli* [2000] ECR I-957, paragraph 40).
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> 51. It is clear that Mr Orfanopoulos has made use of the right to freedom of movement for workers and has pursued several activities as an employed person in Germany. In those circumstances, it must be held that Article 39 EC and Directive 64/221 apply in circumstances such as those of the main proceedings in KC-482/01..."

In *Dogan* [2005] ECR I-6237 the ECJ considered the implication of a period of imprisonment for a Turkish national under the EEC Turkey Association Agreement, and found:

> "22. As is clear from joined cases C-482/01 and C-493/01 Orfanopoulos and Oliveri [2004] ECR I-5257, paragraph 50, the reasoning in Nazli cannot therefore be understood as being limited to the particular circumstances of that case, depending on the fact that the worker in question had been detained pending trial for more than a year and then given a suspended sentence. On the contrary, the same reasoning is applicable in its entirety, for the same reasons, to a temporary absence from the labour force due to

> the completion of a prison sentence. More particularly, the fact that the imprisonment prevents the person concerned from working, even for a long period, is irrelevant if it does not preclude his subsequent return to working life...."

Orfanopoulos and *Dogan* establish that an EEA national "worker" will not lose the status of being a worker upon being imprisoned, even for a lengthy period of time, so long as two conditions are met. The conditions are:

(a) Condition A: the EEA national must have been a worker prior to his imprisonment; and

(b) Condition B: the EEA national must resume working within a reasonable time after his release from prison.

The judge dealt with what I have categorised as Condition B in paragraph 23 of the decision, where he stated that because the appellant is prevented by the terms of his immigration bail from working it cannot be said that he has failed to resume working within a reasonable time. This finding was not challenged in the grounds and is plainly correct: the "reasonable time" period cannot elapse prior to the appellant being in a position to lawfully resume working, as if it did he would not have been given a reasonable period of time.

The judge did not explicitly address what I have categorised as Condition A, but it is apparent from the decision that the judge found that the appellant was a worker prior to his imprisonment because he was working. In other words, the judge assumed that because he worked the appellant was a worker. It is not, however, as straightforward as this. In order to determine whether the appellant was a worker prior to his imprisonment, it is necessary to consider his status under the 2006 Regulations.

The appellant was not a "worker" under the 2006 Regulations because only an EEA national can have that status. However, he only needs to show that prior to his imprisonment he was the equivalent of a worker, as regulation 10(6) is satisfied if a non-EEA national would be a worker if he were an EEA national. I will refer to this status as being a "reg. 10(6) worker". The question to be addressed, therefore, is whether the appellant was a reg. 10(6) worker prior to his imprisonment.

At the time the appellant went to prison the divorce proceedings had commenced but the divorce had not been finalised. At that time the appellant was, and the legal basis for his entitlement to work derived from being, a "family member" under regulation 7. He was not, and could not be, a reg. 10(6) worker because that status did not commence until the decree absolute in March 2015. See paragraphs 29 – 35 of *Gauswami (retained right of residence: jobseekers) India* [2018] UKUT 00275 (IAC).

Mr Thompson argued, relying on *Singh and others* [2015] EUECJ C-218/14, that the relevant date to assess whether regulation 10(6) was satisfied was the date of the initiation of proceedings for termination of the marriage (at which point the appellant was working), not the date of the decree absolute (at which point

the appellant was in prison). This argument, however, fails to recognise the distinction, as explained in *Baigazieva v SSHD* [2018] EWCA Civ 1088, between, on the one hand, the point at which family member status ceases and the right to reside under Regulation 10 commences (which is the decree absolute) and, on the other hand, the criteria that must be met for the right of residence to be retained, which can be satisfied by conduct and occurrences prior to the decree absolute.

Before his imprisonment the appellant was a family member of an EEA national under regulation 7 of the 2006 Regulations and his entitlement to work in the UK derived from this. He was not a reg.10(6) worker. The earliest date he could become a reg.10(6) worker was the date of the divorce but by that time he was in prison, and not working. As the appellant was not a reg.10(6) worker prior to his imprisonment that status could not carry into and through his imprisonment. The appellant therefore did not – and could not – satisfy the requirements of regulation 10(6).

In the light of the foregoing, I set aside the decision of the First-tier Tribunal because the judge erred in finding that regulation 10(6) was satisfied. For the same reason (that regulation 10(6) is not met) I re-make the decision by dismissing the appellant's appeal under the 2006 Regulations.

Notice of Decision

The decision of the First-tier Tribunal involved the making of an error of law and is set aside.

I re-make the decision and dismiss the appeal under the 2006 Regulations.

The appeal is remitted to the First-tier Tribunal in order for the First-tier Tribunal to decide the issue that the judge adjourned: the appellant's appeal against the Secretary of State's refusal of his human rights claim.

Signed

D. Sheridan
Upper Tribunal Judge Sheridan

Dated: 1 November 2021