



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

Appeal Number: IA/17487/2014

THE IMMIGRATION ACTS

**Heard at Field House
On 20th March 2015**

**Decision & Reasons Promulgated
On 28th May 2015**

Before

DEPUTY UPPER TRIBUNAL JUDGE D N HARRIS

Between

**MR LYES BABA-AISSA
(ANONYMITY ORDER NOT MADE)**

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr Lam, Counsel

For the Respondent: Mr I Jarvis, Home Office Presenting Officer

DECISION AND REASONS

1. The Appellant is a citizen of Algeria born on 2nd August 1974. On 26th January 2014 the Appellant's instructing solicitors applied on his behalf for a permanent residence card as a confirmation of a right to reside in the United Kingdom. The Appellant had been issued on 22nd April 2002 with a residence card on the basis that he was the family member of an EEA national, an Irish national named Alison Margaret Sewell who was exercising treaty rights in the United Kingdom as a worker. Making the further application on 26th January 2014 in support of the application the

Appellant submitted a decree absolute dated 25th May 2011 confirming his divorce from Alison Margaret Sewell on 26th January 2011.

2. The Appellant's application was refused by the Secretary of State by Notice of Refusal dated 7th April 2014. The Secretary of State noted that in order to qualify for retained right of residence following divorce from an EEA national the Appellant needed to meet the requirements of Regulation 10(5) of the Immigration (EEA) Regulations 2006. The Appellant needed to provide:-
 - Evidence that the Appellant's EEA former spouse was exercising free movement rights in the United Kingdom at the time of divorce.
 - Evidence that the Appellant's marriage had lasted for at least three years and that he and his former spouse resided in the United Kingdom for at least one year during their marriage.
 - Evidence that the Appellant was currently in employment, self-employment or economically self-sufficient as if he were an EEA national himself.
3. In addition as the Appellant's application was for permanent residence it was necessary for him to demonstrate that he had resided in accordance with the Regulations for a continuous five year period, which would mean that his EEA national former spouse continuously exercised free movement rights up to the point of divorce and that he had been employed, self-employed or self-sufficient since his divorce. In order to meet the requirement of Regulation 15(1)(f) collectively that evidence must cover a continuous five year period.
4. Refusing the application the Secretary of State noted in the Notice of Refusal that the Appellant had failed to provide the evidence required to meet Regulation 10(5) and/or 10(6) and therefore had not retained the right of residence following divorce or he had resided under the Regulations for five continuous years to qualify for permanent residence.
5. The Appellant appealed and the appeal came before Judge of the First-tier Tribunal Miller sitting at Taylor House on 13th November 2014. In a determination promulgated on 1st December 2014 the Appellant's appeal was allowed.
6. On 4th December 2014 the Secretary of State submitted Grounds of Appeal to the Upper Tribunal, those grounds noted that at the time of the Appellant's application he was serving a prison sentence and as such could not be classed as exercising treaty rights. The Secretary of State relied on the authority of *Onuekwere v The Secretary of State for the Home Department (C-378/12)*; [2014] WLR (D) 7 being authority that periods of imprisonment cannot be taken into account for the purpose of calculating residence and that imprisonment in addition to being considered non-legal residence would also break continuity of residence. The Secretary of State consequently submitted that a person cannot use residence before and during imprisonment to count towards qualifying

periods of residence and any qualifying period would effectively restart at the point they were released from prison and become a qualified person again.

7. On 22nd January 2015 First-tier Tribunal Judge Heynes granted permission to appeal. On 19th March 2015 submissions in response to the grounds for permission to appeal pursuant to Rule 24 were served by the solicitors on behalf of the Appellant. Those submissions which run to fourteen paragraphs are drafted by Counsel. It is on that basis that the appeal comes before me to determine whether or not there is a material error of law in the decision of the First-tier Tribunal Judge. This is an appeal by the Secretary of State. However, for the purpose of continuity throughout the legal process Mr Baba-Aissa is referred to herein as the Appellant and the Secretary of State as the Respondent. The Appellant appears by his instructed Counsel Mr Lam. Mr Lam is familiar with this matter. He appeared before the First-tier Tribunal and is the author of the Rule 24 reply. The Secretary of State appears by her Home Office Presenting Officer Mr Jarvis.

Submission/Discussion

8. Mr Lam starts by relying on his Rule 24 response pointing out that the ground for permission to appeal by the Secretary of State seeks to address the narrow ground of namely whether the period the Appellant was in prison can or cannot be taken into account for the purpose of calculating residence. He further points out (and this is clear from the determination) that the issue that is now raised before the Tribunal was not raised at all at the hearing and it is the submission of Mr Lam that the grounds for permission to appeal seek to solely rely on the refusal letter in that the Appellant was in prison at the time of application and as a result it is contended by the Secretary of State that the Appellant was not able to exercise any freedom movement right under Regulation 10(6). He submits that that argument is misconceived.
9. At paragraph 6 to 9 he sets out both the marital history and the issue of a residence card to the Appellant. Mr Lam points out that a First-tier Tribunal had found that the Appellant had a retained right under Regulation 10(5) and hence he met the requirement for a permanent right of residence under Regulation 15(1)(f) namely as a person who had resided in the UK in accordance with the Regulations for a continuous period of five years and was, at the end of that period, a family member who had retained the right of residence. He points out that the Appellant had been married to his EEA wife for almost ten years and that he was not sentenced until 14th June 2013 when he received a six month prison sentence and that this was therefore more than two and a half years since he was a qualified person under Regulation 10(5).
10. He notes that the main argument of the ground for permission to appeal to the Upper Tribunal was that the Appellant was not economically active as he was sentenced to six months in prison in June 2013 as required by

Regulation 10(6). He submits that following *HS (EEA: revocation and retained rights) Syria [2011] UKUT 00165 (IAC)* it is clear that on divorce a person ceases to be a family member by reason of marriage but that does not cause the right of residence to cease as Regulation 10(5)(a) explains. He further contends as Section 15(2) of the Immigration (European Economic Area) Regulations 2006 makes clear the right of permanent residence under this Regulation shall be lost only through absence from the UK for a period exceeding two consecutive years and that this is not applicable to the Appellant, therefore the First-tier Tribunal has not made an error of law.

11. Mr Jarvis acknowledges that in *Amos [2011] EWCA Civ 552* different procedures were followed and he further acknowledges that no questions were asked in this case and that the judge had therefore assumed that nothing in the witness statement was in dispute. All he can submit is that Regulation 10(5) does differ from Regulation 15(1). The judge under Regulation 15 has to look at the period in question but what the judge has not said is what that period was and he speculates that as we do not know it is possible that that period could include the period of imprisonment which would of course stop the clock running. Mr Jarvis considers *HS* is supportive to the Secretary of State's claim bearing in mind that the references therein are to paragraph 10(5) rather than to Regulation 15. He submits that paragraph 10(5) only relates to retained rights of residence not permanent ones and that for permanent rights it is necessary to show residency lawfully within the scheme of the Regulations. He submits that all the judge has done is look at the date the marriage ended but that it is necessary for the judge to have gone on to explain which five year period he is looking at and he has not done so and that consequently there is a material error of law.

The Law

12. Areas of legislative interpretation, failure to follow binding authority or to distinguish it with adequate reasons, ignoring material considerations by taking into account immaterial considerations, reaching irrational conclusions on fact or evaluation or to give legally inadequate reasons for the decision and procedural unfairness, constitute errors of law.
13. It is not an arguable error of law for an Immigration Judge to give too little weight or too much weight to a factor, unless irrationality is alleged. Nor is it an error of law for an Immigration Judge to fail to deal with every factual issue of argument. Disagreement with an Immigration Judge's factual conclusion, his appraisal of the evidence or assessment of credibility, or his evaluation of risk does not give rise to an error of law. Unless an Immigration Judge's assessment of proportionality is arguable as being completely wrong, there is no error of law, nor is it an error of law for an Immigration Judge not to have regard to evidence of events arising after his decision or for him to have taken no account of evidence which was not before him. Rationality is a very high threshold and a conclusion is not irrational just because some alternative explanation has been

rejected or can be said to be possible. Nor is it necessary to consider every possible alternative inference consistent with truthfulness because an Immigration Judge concludes that the story is untrue. If a point of evidence of significance has been ignored or misunderstood, that is a failure to take into account a material consideration.

Findings on Material Error of Law

14. It is clear that the Secretary of State's basis of appeal stems from the reference that as the Appellant could not meet the requirement of Regulation 10(6) at the time of application due to his prison sentence he cannot succeed. This issue does not get aired at all before the judge on appeal. The Appellant gave evidence and gave due and full consideration to the authority in *HS* (sometimes referred to as *Samsam*) (*EEA: revocation and retained rights*) *Syria* [2011] UKUT 00165 (IAC). The representative of the Home Office relied on the contents of the refusal letter and accepted that the Appellant and his EEA national wife were divorced. There was no evidence as to whether the Appellant was exercising treaty rights before the court.
15. The judge noted the evidence and on due consideration of that evidence accepted that his ex-wife was employed by Virgin and accepted evidence that the Appellant remained in employment in the UK. The judge found the Appellant's evidence to be credible and that given that the Appellant's ex-wife was accepted by the Respondent as working in September 2002 there was no reason to suppose she was not working at the date of divorce. Consequently following that analysis the First-tier Tribunal Judge was satisfied the Appellant met the requirement of Regulation 10(5) and that he met the requirement for a permanent right of residence under Regulation 15(1)(f).
16. It is fair to say that in a throwaway line often used on appeal the Home Office Presenting Officer indicated that she relied on the Notice of Refusal. It is therefore incumbent upon the First-tier Tribunal to address all issues albeit that it is clear that the issue of the Appellant's imprisonment was not a matter that was specifically raised on appeal. It is on that basis alone that the Secretary of State seeks to find a material error of law.
17. The failure of the judge to have addressed the issue is an error. The question arises as to whether it is material. It is clear that the Appellant's application form stated that he was in prison from 14th June 2013 for six months.
18. Regulation 10(5) and (6) of the EEA Regulations require an applicant who has divorced to satisfy 10(5)(a)-(d). Regulation 10(5)(c) requires an applicant to satisfy Regulation 10(6). Regulation 10(6) imposes two

conditions either one of which should be met: the 10(6)(a) requirement is the non-EEA national would be a worker, self-employed or a self-sufficient person if we were an EEA national. That is not challenged. The alternative requirement is 10(6)(b) that the person is the family member of a person within paragraph (a).

19. I can do no better than quote directly from paragraph 40 of *HS*:-

“If construed literally regulation 10(6) may give rise to problems. On divorce, a person ceases to be a family member by reason of marriage. That does not cause the right of residence to cease however as regulation 10(5) (a) makes plain. Family members with a retained right of residence in regulation 10 and regulation 14(3) must be a term of art and mean a person who comes within regulation 10(2) to (5). Further a non EEA family member does not have to be economically active during the marriage and nor is there any indication in Article 13 of the Directive that they have to be economically active on their own account on termination of the marriage”.

20. When applying this alongside the factual matrix of this case I am of the view that the Appellant would have considerable difficulty in meeting the requirement of the Regulations had imprisonment taken place during the period of continuity. The fact remains however that the period of imprisonment took place some considerable time thereafter namely two and a half years and that the facts are not in dispute that he had five years continuous residence prior to 2011. Consequently I am satisfied that the finding made by the judge was the one that was open to him as a matter of fact and that there is nothing to stop the clock from running. I am satisfied looking at the factual matrix of the case that the decision in *Onuekwere* is completely different. In those circumstances the conclusion has to be whilst the judge erred in law in not giving due consideration in his determination to the position relating to the fact that at time of application the Appellant was in prison that error is not material as the outcome of the appeal would be the same. For all the above reasons therefore the determination discloses no material error of law and the appeal of the Secretary of State is dismissed and the decision of the First-tier Tribunal is maintained.

Notice of Decision

The decision of the First-tier Tribunal does not disclose a material error of law and the appeal of the Secretary of State is dismissed and the decision of the First-tier Tribunal is maintained.

No anonymity order is made.

Signed

Date

Deputy Upper Tribunal Judge D N Harris

TO THE RESPONDENT
FEE AWARD

No fee award is made.

Signed

Date

Deputy Upper Tribunal Judge D N Harris