



IAC-AH-DP-V1

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

Appeal Number: IA/22765/2014

THE IMMIGRATION ACTS

**Heard at Field House
On 9 February 2016**

**Decision & Reasons Promulgated
On 3 March 2016**

Before

DEPUTY UPPER TRIBUNAL JUDGE G A BLACK

Between

**MR ANDREW ODIAKA
(ANONYMITY DIRECTION NOT MADE)**

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr L Youssefian (Counsel instructed by D J Webb & Co Solicitors)
For the Respondent: Mr N Bramble, Home Office Presenting Officer

DECISION AND REASONS

1. This matter comes before me as an error of law hearing. The appellant appeals a decision made by the First-tier Tribunal (Judge Telford) ("FtT") promulgated on 29 July 2015 in which the FtT dismissed the appeal on immigration grounds under the Immigration EEA Regulations 2006 ("EEA Regs") and on human rights grounds.

Background

2. The appellant is a citizen of Nigeria. He made an application on 14 March 2014 for a residence card as confirmation of his right to reside in the UK as a family member under Regulation 15(b) of the EEA Regs. He was married to an EEA National on 24.11.2004.
3. The FtT heard the appeal and found that there was no reliable evidence to show that the appellant's wife was living and working in the UK for the requisite five year period; the documentary evidence as regards employment between 2005 and 2007 was not satisfactory. The FtT was not satisfied that she was a qualified person under Regulation 6(b). The FtT found that the EEA national lived in Germany for a period of time which broke the continuity of residence (Reg 15(2) EEA Regs).
4. In its decision and reasons the FtT [13] recorded an alternative submission by the appellant's representative that he was entitled to a residence card. The FtT considered family life at [14 - 16].

Appellant's application for Permission to Appeal

Ground 1

5. The FtT failed to properly apply Regulation 15 of the Immigration (EEA) Regulations 2006, a right to permanent residence. The FtT made a material error of law by miscalculating the five year period of residence as from 2005 until March 2011. The correct period of time was from the date of marriage on 24 November 2004 to March 2011. There was no break in the continuity (Regulation 15(2)).

Ground 2

6. The FtT failed to properly consider evidence to show that the EEA national was a qualified person. The FtT erred in finding that a letter from HMRC which confirmed national insurance payments for the tax years 2004-2005 and 2005-2006 was not evidence of actual work completed on the part of the EEA national. It further erred in finding that an unpaid tax demand for £411 was also not evidence of actual work done by the EEA national.
7. The weight of the appellant's evidence (including the oral evidence from the appellant and his wife) together with 140 pages of documentary evidence ought to have been assessed in the appellant's favour. Specifically the FtT failed to take into account the unchallenged oral evidence that their original documentation for the period 2004 to 2008 remained with the Home Office. The evidence was sent pursuant to applications made by the appellant for three residence cards which were granted.

Ground 3

8. The FtT failed to properly consider Regulation 14 and 17 EEA Regs in the alternative. The appellant was entitled to the grant of a five year residence card on the basis that

he was a family member of an EEA national in the UK exercising treaty rights as a self-sufficient person. The findings made by the FtT at paragraph 13 were unclear and unsupported by adequate reasoning.

Permission to appeal

9. Permission was granted by Designated Judge of the FtT Appleyard on all grounds.

Rule 24 Response

10. In a letter dated 14 December 2015 the Secretary of State opposed the appeal. The FtT was entirely correct that the five year period of continuous residence had not been established [10-12], and gave reasons why the appellant had not discharged the burden of proof.
11. The criticism of the FtT was totally without merit as Class 3 National Insurance Contributions were voluntary and could be paid by those who are unemployed and not claiming benefits.
12. Ground 3 was without merit as the FtT [13] took into account at the appellant had only recently "taken out health insurance and that the sponsor had left the UK in 2011".

Error of Law Hearing

13. At the hearing Mr Youssefian and Mr Bramble made further submissions. Mr Bramble conceded that contrary to the position taken in the Rules 24 response, it was now accepted that the FtT had erred in miscalculating the five year period of continuous residence.
14. Mr Youssefian expanded on ground 2 and 3 arguing that this was a material error such that the determination should be set aside. He submitted that whilst the National Insurance Contributions under Class 3 were in effect a voluntary contribution, the evidence ought properly to have been considered with all the evidence establishing that the EEA national was economically active. He submitted that the NI document (page 28 A/B) showed two different figures for contributions made, which was an indicator that there must have been one contribution paid as a result of employment. The FtT failed to consider the Class 1 Contributions and had not taken into account the evidence given by the parties on this issue. Further the FtT failed to take into account that the appellant had been issued with residence cards in 2005 and 2006; the issuance of which required the respondent to be satisfied that the EEA national produced evidence of being a qualified person. There was unchallenged evidence that the documentary evidence submitted in support of the applications for the two residence cards had not been returned by the Secretary of State.
15. As to ground 3 Mr Youssefian submitted that the FtT failed to consider the alternative submission under Regulation 15 for the grant of a residence card. This

failure amounted to a material error of law as the appellant was able to show that he met the necessary Regulations at the date of hearing.

16. Mr Bramble submitted that notwithstanding his acceptance of the error in miscalculation, it was only material if the other grounds were made out.
17. Mr Bramble submitted that there was insufficient evidence before the FtT to establish that the EEA national was in work and or details thereof. The unpaid tax demand was not an indication of work done or hours or period covered. The FtT was permitted to consider aspects of the evidence of economic activity between 2005 and 2007 and to conclude that there was a paucity of evidence.
18. Mr Bramble submitted that as at the date of hearing the appellant failed to establish evidence that the sponsor/EEA national was a qualified person as a self-sufficient person.
19. Mr Youssefian responded.

Discussion and Decision

20. I decided that there was a material error of law in the decision and reasons. It was conceded by Mr Bramble that Ground 1 was made out. The FtT miscalculated the period of five years' continuous residence and failed to specify a start date and thereafter further erred by finding that that continuous period was broken. I am satisfied that this amounts to a material error because the FtT's further consideration of evidence was infected by the miscalculation of the relevant period of time. I am further satisfied that ground 2 is made out. The EEA Regs require evidence to show that the EEA national is a qualified person in specified categories, in this instance as a worker for the duration of the five year period. The FtT failed to take into account all of the relevant and material evidence, including the written evidence, in reaching its conclusions that the EEA national was not a qualified person for the relevant period. In particular the FtT failed to place weight on the very significant evidence that the appellant had been granted residence cards in 2005 and 2007, and the unchallenged evidence that the Secretary of State had retained the documentary evidence in support of applications in 2004, 2005 and 2008. The FtT erred by restricting its assessment to particular aspects of the evidence in isolation. Looking at the evidence in the round I am satisfied that there was sufficient evidence to establish that the EEA national was working. The regulations do not require specific evidence of the nature and details of any work done and the FtT erred in its approach in this regard [11]. Whilst accepting that the payment of Class 3 National Insurance Contributions were voluntary contributions, there was no consideration by the FtT that the EEA national was otherwise working. I accept also that the FtT [13] did not adequately consider or reach any decision on the alternative submission made under Regs 14 and 17.

Decision

21. There is a material error of law in the decision and reasons which shall be set aside. I remake the decision by substituting a decision to allow the appeal under the Immigration Rules (EEA) Regulations and grant the appellant a permanent residence card as the family member of an EEA national under Regulation 15(1)(b) of the Immigration (EEA) Regulations 2006.

No anonymity direction is made.

Signed

Date 26.2.2016

GA Black
Deputy Upper Tribunal Judge G A Black

TO THE RESPONDENT
FEE AWARD

No fee is paid or payable and therefore there can be no fee award.

Signed

Date

Deputy Upper Tribunal Judge G A Black