



IAC-HW-AM-V1

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

Appeal Number: IA/39859/2014

THE IMMIGRATION ACTS

**Heard at Field House
On 7th January 2016**

**Decision & Reasons Promulgated
On 1st February 2016**

Before

DEPUTY UPPER TRIBUNAL JUDGE WOODCRAFT

Between

**MR INNOCENT CHUKWUDI ANISIOBI
(~~ANONYMITY ORDER MADE~~)**

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr S. Nwaekwu, Solicitor

For the Respondent: Mr P. Duffy, Home Office Presenting Officer

DECISION AND REASONS

The Appellant

1. The Appellant is a citizen of Nigeria born on 16th June 1980. He appeals against the decision of Judge of the First-tier Tribunal Baldwin sitting at Hatton Cross on 17th July 2015 who dismissed the Appellant's appeal against a decision of the Respondent dated 21st October 2014. That decision was to refuse the Appellant's application for permanent residence made on the basis that the Appellant had a retained right of residence

following the termination of his marriage to a European Economic Area national exercising treaty rights at the time of the divorce.

2. On 9th August 2008 the Appellant married Silvia Patricio Tavares a Portuguese citizen born on 16th June 1987 ("the Sponsor"). On 8th October 2008 the Appellant applied for a residence card as the spouse of an EEA national which was granted valid until 21st August 2014. On 12th August 2014 the Appellant applied for a permanent residence card on the basis that he had retained a right of residence in the United Kingdom notwithstanding the breakdown of his marriage to the Sponsor. It was the refusal of this application on 21st October 2014 which has given rise to the present proceedings.

The Application for Permanent Residence

3. When making the application on form EEA 4 the Appellant referred at paragraph 3.15 to the Sponsor as his ex-wife. Under Section 4 of the form "Retained right of residence in the United Kingdom" he stated that his reason for claiming entitlement under this section was because of a divorce. A covering letter written by his solicitors (who continue to act for him) dated 11th August 2014 stated that the Appellant was applying for a permanent residence card because he satisfied the conditions in Regulation 10(5) of the Immigration (European Economic Area) Regulations 2006 ("the 2006 Regulations"). The Appellant it was argued ceased to be a family member of a qualified person on the termination of the marriage to the qualified person. The Appellant was residing in the United Kingdom in accordance with the 2006 Regulations at the date of the termination. Prior to the initiation of the proceedings for divorce the marriage had lasted for at least three years and the parties to the marriage had resided in the United Kingdom for at least one year during the duration of the marriage.
4. A number of documents were submitted with the EEA 4 application form including a letter from the Edmonton County Court dated 10th March 2014 stating that an acknowledgement of service of the petition had been received from the Sponsor and was enclosed. The acknowledgement of service form itself was not submitted with the EEA 4 form and there was no other documentation such as decree nisi or decree absolute submitted. There were a number of financial documents, payslips and bank statements for the Appellant and Sky statements for the Sponsor.

Explanation for Refusal

5. The Respondent refused the application stating that the Appellant had to show that he had resided in accordance with the 2006 Regulations for a continuous five year period which would mean that the Sponsor had continuously exercised free movement rights up to the point of divorce and that the Appellant had been in work since the divorce. Collectively this evidence must cover a continuous five year period to meet the requirement of Regulation 15(1)(f). The Respondent noted the

documentation provided by the Appellant which was said to include several P60s for both the Appellant and the Sponsor. The Appellant had failed to provide a divorce certificate and therefore there was no evidence that the marriage had been terminated which meant that the Appellant could not retain any right of residence until such time as a decree absolute was obtained. As the Appellant could not show he was divorced he could not provide evidence that the Sponsor was exercising free movement rights when any decree was issued. The Appellant could not meet Regulation 10(5) and the application was refused under Regulation 15(1) (f). The Appellant appealed against that decision arguing that the Respondent failed to have proper regard to the evidence submitted and that the decision breached Article 8. Little detail of any substance was enclosed with the Grounds of Appeal.

The Decision at First Instance

6. The Judge heard oral evidence from the Appellant and two other witnesses. He considered the documentation at paragraph 9 and concluded:

“The very large number of address documents provided with the application put the Appellant at [-] Ordinance Road or [-] Langhedge Lane, whilst those in respect of his wife put her at [-] Dover Road or [-] Langhedge Lane. None of them put him at [-] Dover Road or her at [-] Ordinance Road. Documents relating to Dover Road put [the Sponsor] there between December 2013 and July 2014, whilst documents place her at Langhedge Lane between March 2011 and October 2013.

7. The Appellant told the Judge that he was ‘not fully divorced’ but had been trying off and on for the last fourteen months to reconcile with the Sponsor. She had been ready to attend court when the appeal was first listed a month earlier but could not afford to take time off another day to attend the hearing before Judge Baldwin although there was no letter from the Sponsor confirming that.
8. The Judge’s findings were set out at paragraphs 16 and 17 of the determination. The Appellant had not told the Respondent that he was attempting reconciliation despite being advised in the penultimate paragraph at page 3 of the refusal letter that if there was an alternative basis under European law (i.e. other than as a divorced spouse) he could submit a further application on that basis. All that would appear clear according to the Judge was that the Appellant and Sponsor were not living together and were not divorced. From 7th June 2010 the Sponsor chose to take out health insurance in her name alone and for her sole benefit. Where a marriage had broken down and the decree absolute could be provided the position in relation to the duration of the marriage was clear. The Judge noted that that was not the case in this appeal where a legal and factual matrix was being put forward to him which was quite different to that put to the Respondent at the time of the application. There was no letter from the wife in support of the Appellant’s appeal. If she were prepared to attend the Tribunal as was claimed by the Appellant it was

reasonable to have expected her to have at least provided a statement but none had been provided. Given the new situation the Presenting Officer had commented during the course of the hearing that the correct course of action would be for the Appellant to simply reapply on the basis that he was still married to the Sponsor. However the Appellant had not made out his case based on the situation put forward in his application. As there were no removal directions set the Judge did not go on to address Article 8.

The Onward Appeal

9. The Appellant appealed against this decision arguing that it was his case that he had obtained the right of permanent residence in the United Kingdom on the basis of his relationship with an EEA national who had herself obtained entitlement to permanent residence after five years as a worker in accordance with the Regulations. The Judge had failed to consider Regulation 15(1)(b) of the 2006 Regulations. Somewhat unhelpfully the grounds did not set out the wording of Regulation 15(1)(b) which states that a person shall acquire the right to reside in the United Kingdom permanently if they are a family member of an EEA national and has resided in the United Kingdom with the EEA national in accordance with the 2006 Regulations for a continuous period of five years.
10. As the right of residence in the EEA for a spouse of an EEA national lasted until the marriage was formally dissolved the requirement could be satisfied without necessarily depending upon residence together in the same domicile. The fact that the Appellant's Sponsor moved out of the marital home in April 2013 was thus irrelevant. The Appellant continued to benefit from the fact that the parties were still married. If the Sponsor had herself obtained entitlement to permanent residence in the United Kingdom after five years as a qualifying person (at the latest by May 2014 or the date of the hearing in 2015) then the Appellant would have obtained it as well after five years of marriage. This was so given that the marriage had lasted from 2008 until 2015. The absence of the wife from the hearing would have no effect on this entitlement because the parties were still married.
11. Where a spouse has obtained permanent residence under Regulation 15 prior to the divorce, when the divorce takes place it does not affect that acquired right see **Amos [2011] EWCA Civ 552**. At paragraph 20 of **Amos** it was said that a divorced spouse must establish that he has the right of residence in question before the issue arises of whether notwithstanding the divorce the right of residence has been retained by virtue of the 2006 Regulations. The Judge should have made a finding on whether the Sponsor was exercising treaty rights in the United Kingdom for a period of five years as it was the Appellant's case that the Sponsor was. Further there was an error in that the Judge had not dealt with Article 8.

12. The application for permission to appeal came on the papers before First-tier Tribunal Judge Grimmett on 4th November 2015. In granting permission to appeal she found it was arguable that the Appellant having failed to show that he was divorced the Judge should have considered the application under Regulation 15(1)(b) as it did not appear to have been in issue that the marriage between the Appellant and the Sponsor was a valid one.
13. The Respondent replied to the grant of permission by letter dated 11th November 2015 indicating that she opposed the appeal. The Appellant had applied on the basis that he was a divorced spouse of an EEA national. He was not able to establish this material fact to the balance of probabilities. It did not follow inextricably that he was still married. There was clearly some tension in the evidence of the Appellant and his witnesses. It was entirely open to the Judge to conclude that the Appellant did not establish his case and therefore the appeal failed. No further speculative consideration was required or necessary.

The Hearing before Me

14. At the hearing before me the Appellant's solicitor argued that there had clearly been an error of law. Since the Appellant was not divorced at the date of the hearing, the Judge ought to have considered the case under Regulation 15(1)(b). The Appellant had married in 2008 and resided with the Sponsor until 2015. Authority from the Court of Justice of the European Union such as **Diatta** made clear that whilst a marriage was still in existence it was subsisting even if the parties were not residing together. The Appellant sought to rely on an unreported decision of the Upper Tribunal before Upper Tribunal Judge Taylor sitting at Bradford on 25th October 2013 who had found an error in a decision of the First-tier. It was incumbent upon a Judge to make findings on whether an EEA national spouse was exercising treaty rights in the United Kingdom for a period of five years. The Judge had not done that in that particular case. The EEA national in question had acquired a permanent right of residence in the United Kingdom by the date of her departure from the United Kingdom because she had been exercising treaty rights in the United Kingdom for a continuous period of five years under Regulation 15(1)(a). As the EEA national spouse had obtained entitlement to permanent residence so too did the Appellant in that case her husband after five years of marriage to her.
15. In reply the Presenting Officer indicated that the position was more prosaic than that was being put forward by the Appellant's solicitor. The Appellant had applied for a permanent residence card stating he was divorced from his Sponsor. The Judge's point was that the Appellant had not proved his case. There appeared not to be any decided authorities on the meaning of Regulation 15 that had been reported. What was important was that the Appellant's case had changed between the application and the appeal but the Judge had not been satisfied on the basis of the application put to him.

16. In conclusion it was argued that the Appellant had said to the Judge at the hearing that he was still married to the Sponsor, see paragraph 10 of the determination. The divorce had gone through now, a decree absolute had been issued on 11th December 2015, the decree nisi having been granted earlier on 21st September 2015. However whether a divorce occurred subsequent to the hearing was immaterial, the Sponsor was entitled to permanent residence and therefore the Appellant was as well. The application had been made on the basis of a pending divorce. As no certificate of divorce had been provided the Respondent should have considered the case that the Appellant was still married. Assuming an error of law was found the matter could be re-decided straightaway as there had been no finding by the Judge on whether the Sponsor was exercising treaty rights for five years.

Findings

17. The Appellant in this case has sought to make an application for a permanent residence card on two separate bases. The first basis was that he was divorced from an EEA national who had been exercising treaty rights and he therefore retained a right of residence from that marriage. The difficulty with that argument was that when the Appellant made his application to the Respondent and indeed when his appeal was heard by the First-tier Tribunal, the Appellant was still married to the EEA national. He could not therefore succeed under Regulation 10 of the 2006 Regulations as a family member who had retained the right of residence.
18. For the Appellant to show an error of law in the First-tier Tribunal's decision to dismiss his appeal, the Appellant must show that his second argument based on the fact that he was still married to the Sponsor was a valid one but not considered adequately by the First-tier. Although it is correct that the Appellant accepted at first instance that he was not divorced from the Sponsor it is not at all clear from the determination that the second argument which would be under Regulation 15 of the 2006 Regulations was made with any force to the First-tier Tribunal.
19. Regulation 15 sets out the categories of persons who are entitled to acquire the right to reside in the United Kingdom permanently. There are two relevant categories for the purposes of this appeal and in particular deciding whether the First-tier Tribunal has made an error of law. Those two categories are 15(1)(a) an EEA national who has exercised treaty rights for five years and (b) the family member of an EEA national who has resided in the United Kingdom with the EEA national in accordance with the Regulations for a continuous period of five years.
20. The Appellant argues that the Sponsor acquired the right to reside in the United Kingdom permanently having resided in accordance with the 2006

Regulations. The evidence before the Judge of that consisted of the Appellant's assertions (to a certain extent supported by his witnesses) and the documentary evidence analysed by the Judge at paragraph 9 of the determination (see paragraph 6 above). The Appellant's case was not helped at first instance by the untidy bundle presented to the Judge which amongst other matters was intended to show that the Sponsor had been exercising treaty rights for a continuous period of five years. There were wage slips for the period 2013 to 2015 and self-employment tax returns for the period 2009 to 2013. The Judge did not make a specific finding that these documents could not be relied upon. On that basis when considering whether an error of law has arisen I proceed on the assumption that the Sponsor could show she was exercising treaty rights for a continuous period of five years or more.

21. That means that one moves on to Regulation 15(1)(b) where the Appellant must show that he has resided in the United Kingdom with the Sponsor in accordance with the Regulations for a continuous period of five years. The argument put to me in submissions was that "resided with" did not mean cohabitation between the Appellant and the Sponsor it merely meant that their marriage was still in existence. By the time the marriage was in fact put to an end it had lasted for more than five years and therefore the Appellant could satisfy the criteria of 15(1)(b).
22. In my view the 2006 Regulations have to be given their plain and ordinary meaning. The words "resides with" must mean that it is a condition that an Appellant can show he has resided with his or her EEA Sponsor before being able to satisfy the requirements and entitlement to a permanent right of residence. The question of whether a marriage is still in existence until it is terminated by divorce is irrelevant for the purposes of 15(1)(b). It may be highly relevant for the alternative case which the Appellant initially made in his application under Regulation 10 but that is not relevant where the marriage was not ended by divorce at the time of the application and/or hearing at first instance. If Regulation 15(1)(b) had meant to say that a family member of an EEA national was entitled to acquire the right to reside in the United Kingdom as long as they had been married for at least five years to an EEA national who had themselves acquired permanent of residence then no doubt the Regulations would have said that. They do not say that.
23. What the Appellant had to show was that he had been residing with the Sponsor for a period of five years. It is at this point that the findings of the First-tier Tribunal are especially relevant. The Judge did not find that the Appellant could show that he had been residing with the Sponsor for five years continuous or otherwise. Had the Sponsor attended to give oral evidence, indeed had she been prepared to make a statement for these proceedings, the decision may have been different but that is to engage in speculation which understandably the Judge did not engage in. What the Judge had to deal with was the position before him. He had no evidence beyond the assertion of the Appellant which he was not prepared to accept for the reasons he gave that showed that the Appellant and

Sponsor had resided together in accordance with the Regulations. The Appellant could have produced such evidence if for example the Sponsor had been prepared to make a statement or attend court but she was not it seems prepared to do either. The Sponsor did not attend the error of law hearing before me notwithstanding that the Tribunal had made a direction in standard terms that if an error of law was found any further evidence that the Upper Tribunal might need to consider (if it decided to remake the decision) should be available to be considered at that hearing.

24. I do not accept the argument that the Judge failed to deal with a material matter namely whether the Appellant could show he had resided with the Sponsor for a continuous period of five years in accordance with the 2006 Regulations. The Judge made it clear that the Appellant could not show that for the reasons given. There was no error of law for the Judge to dismiss the appeal under Regulation 10 (because at the time of the hearing the parties were not divorced) and under Regulation 15.
25. A further ground of appeal was made against the Judge's decision that he had not considered Article 8. Permission to appeal was not granted on that basis and there were no arguments made to me in relation to Article 8. That must be correct since the Court of Appeal have made clear in the case of **TY Sri Lanka [2015] EWCA Civ 1233** that where no removal directions are made Article 8 cannot be argued in relation to an EEA decision such as the present one which was to refuse to issue a permanent residence card. As it is not necessary to have leave to remain when making an application under the 2006 Regulations, there is as the First-tier Tribunal pointed out no reason why the Appellant cannot make another application under Regulation 10 now that he is in fact divorced from the Sponsor. An application may or may not succeed, that is a matter for an assessment by the Respondent of the evidence. What I am concerned with is whether there was an error of law by the Judge based on the situation as it was before him at the time and I find there was no such error. The Appellant's appeal is dismissed.

Notice of Decision

The decision of the First-tier Tribunal did not involve the making of an error of law and I dismiss the Appellant's appeal against the decision of the First-tier Tribunal.

Appellant's appeal dismissed.

I make no anonymity order as there is no public policy reason for so doing.

Signed this 28th day of January 2016

.....
Deputy Upper Tribunal Judge Woodcraft

TO THE RESPONDENT
FEE AWARD

As the appeal has been dismissed there can be no fee award.

Signed this 28th day of January 2016

.....
Deputy Upper Tribunal Judge Woodcraft