



IAC-FH-NL-V1

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

Appeal Number: IA/41124/2014

THE IMMIGRATION ACTS

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

**Decision & Reasons Promulgated
On 1 March 2016**

Before

DEPUTY UPPER TRIBUNAL JUDGE CHAMBERLAIN

Between

**FAOUZI BEN MOHAMED AMDOUN
(ANONYMITY DIRECTION NOT MADE)**

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr. M. Rashid of Counsel, Carlton Law Chambers

For the Respondent: Mr. C. Avery, Home Office Presenting Officer

DECISION AND REASONS

1. This is an appeal by the Appellant against the decision of First-tier Tribunal Judge Kainth promulgated on 18 August 2015 in which he refused the Appellant's appeal against the Respondent's decision to refuse to issue an EEA residence card as confirmation of his right to reside in the UK under the Immigration (European Economic Area) Regulations 2006 (the "Regulations").
2. Permission to appeal was granted as follows:

“This was a brief decision which turned on the appellant’s inability to show that his ex-wife was a “qualified person” at the date of decree absolute. Although no jurisprudence is referred to, that approach is consistent with Sansam [2011] UKUT 165 and other decisions. The grounds, as drafted, raise the short point of whether that approach was correct, given the Court of Appeal’s decision in NA [2014] EWCA Civ 995 to refer precisely that issue. In the circumstances it is arguable that the Judge’s approach was flawed.”

3. At the hearing I heard submissions from both representatives. I reserved my decision which I now set out with reasons.

Submissions

4. At the outset of his submissions, Mr. Rashid provided a copy of a grant of leave from the Appellant’s passport which showed that he had been granted five years residence from 6 November 2001 to 17 October 2006 on the basis of his marriage to his ex-wife. This had not been before the First-tier Tribunal. He accepted that the judge had not found that the Appellant had been living in the UK for a continuous five year period, but submitted that this was evidence of such residence. He submitted that the Appellant was able to satisfy the requirements of regulation 15(1)(b), but said that nobody had picked up on this at the hearing.
5. In relation to regulation 15(1)(f), it was submitted that there were three issues, and the judge had found for the Appellant on two of those. He submitted that the judge had not accepted the photocopies but that he could not find any rule which prevented photocopies from being accepted in an EEA context.
6. The second error made by the judge was in looking at 2011 rather than 2009 as the relevant date on which evidence was needed. I was referred to paragraphs [16] and [17]. He submitted that the material time was 2009.
7. The third error related to NA. There was no requirement under the Directive for the EEA ex-partner to be exercising Treaty rights on the date of the divorce. I was referred to paragraph [21]. The Directive did not impose the requirement, which was only imposed by the Regulations. The Directive had direct effect. The reference made to the ECJ was in July 2014, prior to the hearing. The judge should either have adjourned awaiting the ECJ, or should have applied the Directive directly, and allowed the appeal.
8. However for the purposes of regulation 15(1)(f)(i), he accepted that there had been no finding of five years’ continuous residence.
9. Mr. Avery submitted that, in relation to regulation 15(1)(b), the judge could not be criticised for taking into account an issue on which he had no evidence. The judge was not impressed by the evidence regarding the

EEA national at the time of the divorce. Irrespective of the date, the evidence of the EEA national exercising Treaty rights was simply not there. He did not accept that the judge had the wrong date in mind.

10. In relation to the referral to the ECJ, this did not change the law. It was not appropriate to change the way in which matters were dealt with now on the basis of this referral.

Error of law

11. Regulation 15(1)(f) provides that a person shall acquire the right to reside in the United Kingdom permanently if he:
 - (i) has resided in the United Kingdom in accordance with these Regulations for a continuous period of five years; and
 - (ii) was, at the end of that period, a family member who has retained the right of residence.
12. The judge set out the evidence before him, consisting of a bundle of 48 pages from the Appellant and payslips from 2001 and 2002 [7]. In paragraph [13] he sets out the evidence on which the Appellant sought to rely, the wage slips for his ex-spouse from 2001 and 2002.
13. In paragraph [14] he states:

“The evidence does not suggest that the appellant’s former spouse was a qualified person under the 2006 EEA Regulations. Other than the wage slips for 2001 and 2002, no further evidence has been submitted.”
14. The judge is clear in his decision that was very little documentary evidence before him. In order to meet the requirements of regulations 15(1)(f), the first thing that the Appellant needs to do is show that he has resided in the United Kingdom in accordance with the Regulations for a continuous period of five years. In the reasons for refusal letter the Respondent stated that the Appellant failed to provide evidence that he had done so. It is only once the judge was satisfied that regulation 15(1)(f)(i) had been met that he needed to consider whether the Appellant met the requirements of 15(1)(f)(ii), i.e. that he was at the end of that period a family member who had retained the right of residence.
15. The judge does not set out the regulations in any detail. In paragraph [3] he refers to the fact that the Respondent refused the Appellant’s application “with reference to the requirements of Regulation 15(1)(f)”, but he does not set out what these requirements are. He does not address whether or not the Appellant meets the requirements of regulation 15(1)(f)(i). As accepted by Mr. Rashid, he made no finding as to whether the Appellant met the requirements of regulation 15(1)(f)(i).
16. Therefore, irrespective of any error in relation to consideration of regulation 10(5) and 10(6), which are required to be met by reference to regulation 15(1)(f)(ii), I find that the decision involves the making of an

error of law insofar as the judge has failed to consider and make findings as to whether the Appellant met the requirements of the first limb of regulation 15(1)(f).

17. In order to ascertain whether or not this error is material, I have considered the evidence which was before the judge. The reasons for refusal letter refers to the documents submitted with the application as being the wage slips for the Sponsor from 2001 to 2002, the Appellant's P60s, a letter from the Appellant's employer, and the marriage and divorce certificates. The schedule of documents of evidence which was before the First-tier Tribunal includes "Lanc Office Cleaning six weeks payslips for Mr Amdoun", "Rentokil Initial ten weeks payslips for Mr Amdoun", "Confirmation of employment letter from Initial Cleaning", "P60 2004-2005 for Mr Amdoun", "P60 end of year certificates to 2002, 2003, 2004 and 2005". I have copies of P60s for the Appellant ending 2002 to 2008, 2010 and 2011.
18. At the hearing before me, the Appellant provided a copy of his grant of leave dependent on the marriage to his EEA Sponsor from 2001 to 2006. This was not before the judge, but even had it been, although it is evidence that the Appellant was permitted to reside in the United Kingdom for a period of five years, it is not in and of itself evidence that he "has resided in the United Kingdom in accordance with these Regulations for a continuous period of five years".
19. In his statement the Appellant said that he came to the United Kingdom in 2000 and has not left since that time. He stated that he has been working since that time. He provided evidence in the form of letters from friends to corroborate his claim that had not left the United Kingdom. However, evidence that he himself has been working and has been resident is not enough to show that he has been residing in accordance with the Regulations. Evidence is needed to show that his EEA Sponsor was exercising Treaty rights.
20. As set out by the judge in paragraph [14], there was very little evidence before the judge relating to the Sponsor's exercise of Treaty rights. There was no evidence before him that the EEA Sponsor had been exercising Treaty rights for a five-year period. The Appellant provided payslips for the EEA Sponsor for 2001 and 2002, but this does not cover a five-year period.
21. I therefore find that there was no evidence before the judge to show that the Appellant had been residing in the United Kingdom for a continuous period of five years in accordance with the Regulations, and therefore no evidence that he met regulation 15(1)(f)(i). Consequently I find that this error of law was not material, and the Appellant's appeal fell to be dismissed as he failed to show that he met the requirements of regulation 15(1)(f)(i).

22. Given that the Appellant failed to show that he met the first limb of regulation 15(1)(f), it was unnecessary for the judge to proceed to consider the second limb of the regulation. Therefore, without making any specific finding on that issue, I find that any error of law in the judge's consideration of regulation 15(1)(f)(ii) cannot be material.
23. I accept that the decision states that the appeal is dismissed under the Immigration Rules, but it is clear from the body of the decision that the judge was considering the appeal under the Regulations.
24. It was submitted that the Appellant had now located his ex-wife and could provide evidence that she had been working, in which case it is open to him to make a fresh application.

Notice of decision

The decision does not involve the making of a material error of law. I do not set it aside.

The decision of the First-tier Tribunal to dismiss the Appellant's appeal stands.

Signed

Date 25 February 2016

Deputy Upper Tribunal Judge Chamberlain