



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: IA/19471/2013

THE IMMIGRATION ACTS

Heard at Field House
On 17 March 2014

Determination Promulgated
On 26 March 2014
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Before

UPPER TRIBUNAL JUDGE PINKERTON

Between

MR BRIGHT VITALIS OKWARA
(NO ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms E Lagunju
For the Respondent: Mr I Jarvis

DETERMINATION AND REASONS

1. The appellant is a citizen of Nigeria who applied for permanent residence on the basis of being a family member of an EEA national and that he has resided in the United Kingdom with that EEA national in accordance with the Immigration (European Economic Area) Regulations for a continuous period of five years. His application was refused because it was said that he had not provided evidence that

the EEA national resided in the UK in accordance with those Regulations during that five year period.

2. The Reasons for Refusal Letter noted that the appellant provided evidence of his residence and employment in the United Kingdom and of his divorce from his wife Ms A Fragkaki, a Greek national. However, the appellant provided no acceptable evidence of how the sponsor was exercising treaty rights in the UK from April 2008 to April 2010 and this was the reason for the refusal.
3. It was the appellant's case before the First-tier Judge that his estranged EEA spouse had been exercising treaty rights by way of self-employment for which she submitted yearly self-assessment tax calculations and paid self-employed class 2 national insurance contributions as and when due.
4. A family member of an EEA national who is not himself an EEA national but who has resided in the United Kingdom with the EEA national in accordance with the Regulations for a continuous period of five years acquires a right to reside permanently in the UK (Regulation 15(1)(b)). What was argued then and was put in submissions at the hearing before me was that the respondent failed to take into consideration that even if the appellant's application was refused under Regulation 15(1)(b) he ought to have succeeded under Regulation 10(5)(b) because there was compelling evidence that the marriage subsisted for five years, that the parties lived in the UK for the duration of five years and there was evidence that the EEA national exercised treaty rights by way of self-employment up until the date of termination of the marriage.
5. The submission was that the appellant did not need to prove that his former spouse was exercising treaty rights for a continuous period of five years in order to establish that he retained the right of residence under Regulation 10. A perusal of Regulation 10(5) indicates that the focus is on whether the wife retained the status of worker at the time of the divorce and not on whether she had that status throughout the years preceding the divorce. Following the decision of the First-tier Tribunal Judge to dismiss the appeal the grounds seeking permission quoted passages from the cases of **Amos [2011] EWCA Civ 552** and **Samsam (EEA: Revocation and Retained Rights) Syria [2011] UKUT 00165 (IAC)**. It is argued that the First-tier Tribunal Judge focussed on whether the appellant was able to prove that his former wife had worked for a continuous period of five years before the application for the right of permanent residence was made. He did not investigate and did not make the necessary findings of fact as to whether the appellant satisfied the requirements of Regulation 10.

My considerations.

6. In the determination the judge sets out the background facts and also recites Regulations 10 and 15 in their entirety, so he was clearly aware that those Regulations were applicable to the appeal. At paragraphs 9 and 10 the judge appears to make a finding that by the time the application was made in 2012, and presuming

that the appellant and his wife entered the UK in October 2006, the appellant would have been in the UK for some six years. On that basis the marriage lasted at least three years and the appellant and his former spouse would seem to have resided together in the UK for one year prior to the divorce in April 2012. The judge then went on to say that nonetheless the appellant still needs to show for permanent residence on the basis of his five years' residence that his ex-wife was a qualified person during that period, i.e. that she was working and exercising treaty rights.

7. Whereas I agree with Ms Lagunju that that is the wrong test to find that the appellant did or did not meet the requirements of the Regulations and I would have found that there is a material error of law in the determination, in the particular circumstances, as I announced at the hearing, the judge has not erred materially. The judge found, as described in paragraph 51, that because of substantial flaws in the evidence of claimed employment of the EEA sponsor since 2006 the whole edifice purporting to establish the exercise of treaty rights is a contrivance and fiction erected by the appellant himself with the help of equally dishonest third parties.
8. The point about that finding is that the judge set out many reasons as to why he did not accept the evidence provided by the appellant to show that his wife was a qualified person for the purpose of the Regulations for the five year period prior to the application being made but that reasoning also disclosed, read overall, that the judge did not accept that the appellant's wife was a qualified person at the date of the divorce in 2012. The entirety of the evidence purporting to prove the exercise of treaty rights was as applicable to the situation at the time of the divorce as to the earlier years, and the judge did not accept it as true.
9. Because the judge was entitled to conclude as he did for the reasons given there was no good evidence before him that the appellant could prove that he retained the right of residence under Regulation 10(5). The judge found that a national insurance notification claim dated 31 March 2012 (therefore close to the date of the decree absolute) addressed to the appellant's wife at 50 Commercial Way for due payment of £65 which bore a Post Office stamp showing payment in Lewisham on 11 July 2012 did not provide good evidence that the appellant's wife was working at the relevant time. Why he came to that finding is explained by paragraphs 40 onwards of the determination. The judge refers at paragraph 44 to -

"obscurity and confusion (of the appellant's evidence) is typical of the evasive and conflicting, even incoherent, evidence on the circumstances surrounding the submission of the 2009-2010 tax return, which contradicts the evidence of the accountants that this was merely to be explained on the basis of a 'delay'."
10. In paragraph 47 the judge found that it was open to any third party to submit online tax returns in the appellant's wife's name without her having actual knowledge that this was the case, and indeed it was open to such third party to pay such tax as was due. Also at paragraph 48 there is reference to the appellant himself paying minimal tax liability as was due from the EEA National on two occasions and also to the minimal national insurance payments that were made.

11. Although the judge focussed on paragraph 15 of the Regulations only and not, additionally, Regulation 10 his conclusions for the reasons given show inevitably that the appellant failed to prove on the balance of probabilities that he can meet the requirements of the Regulations. Any error therefore on the part of the judge was not material on the facts as found as the appeal would inevitably have failed in any event.
12. For these reasons the decision of the First-tier Tribunal Judge stands.
13. I note that there was an Article 8 claim made in the original grounds of appeal. The judge deals very briefly with this in paragraph 51 of the determination. No issue was taken with that finding that any private life dimensions arising from the appellant's presence in the UK since 2006 cannot be engaged and therefore that matter has not been taken further.
14. No anonymity direction was made given the judge's finding that the appellant has based his application upon a fiction and I see no good reason for an anonymity direction to be made now.

Signed

Date

Upper Tribunal Judge Pinkerton