



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: IA/44089/2014

THE IMMIGRATION ACTS

Heard at Field House
On 2 December 2015

Decision and Reasons Promulgated
On 8 December 2015

Before

UPPER TRIBUNAL JUDGE GILL

Between

Kwaku Agyenim-Boateng
(Anonymity Order Not Made)

Appellant

and

The Secretary of State for the Home Department

Respondent

Representation:

For the Appellant: Mr R. Youssefian, of Counsel, instructed by D J Webb & Co Solicitors.
For the Respondent: Mr Staunton, Senior Home Office Presenting Officer

DECISION AND REASONS

Introduction and background facts:

1. The appellant is a national of Ghana, born on 1 November 1972. He has been granted permission to appeal the decision of Judge of the First-tier Tribunal ("FtT") Kelly who, following a hearing on 15 May 2015, dismissed his appeal under the Immigration (European Economic Area) Regulations 2006 (the "2006 Regulations") against a decision of the respondent of 17 October 2014 to refuse to issue him with a permanent residence card as the spouse of an EEA national (a Ms Asantewaa Ama Aadae, the "sponsor") exercising Treaty rights.
2. The respondent refused the application for a residence card because enquiries received by the respondent revealed that the Dutch identity card which the appellant had submitted with his application in order to establish the identity of his EEA spouse had been reported lost or stolen to the relevant authorities. The respondent therefore

decided that the appellant had failed to provide the necessary evidence to show that his spouse was an EEA national as claimed. The decision letter proceeds to state as follows:

“In making the decision to refuse your application consideration has been given to the following:

...

...

...

...

Evidence of the EEA sponsor exercising treaty rights

...”

3. The applicable provisions are described by the judge at para 4 of his decision. The appellant relied upon regulation 15(1)(b) of the 2006 Regulations which provides for the grant of a permanent right of residence in the UK to a non-EEA national spouse of an EEA national if he/she has resided in the UK with the EEA national in accordance with the 2006 Regulations for a continuous period of five years.

The decision of the FtT

4. The sponsor did not attend the hearing before the judge. The judge’s Record of Proceedings shows that Ms A Torr, a legal representative of DJ Webb & Co Solicitors, informed the judge at the commencement of the hearing that the sponsor had worked late the night before and could not attend the hearing. Ms Torr informed the judge that there was no application for an adjournment.
5. The judge heard oral evidence from the appellant and submissions from the parties’ representatives. The evidence and the submissions are set out at paras 9 to 16.
6. The judge found that the appellant had not established that the sponsor was exercising Treaty rights. His reasons are given at paras 18-22.

The grounds

7. The grounds may be summarised as follows:
 - i) (Ground 1) The judge had failed to attach proper weight to the documentary evidence. There were over 90 pages of documents. He failed to make findings on the documentary evidence. He failed to say why the documentary evidence could not be relied upon. It is contended that, given the wealth of the documentation, the judge’s conclusion that the appellant had failed to establish that his sponsor was exercising Treaty rights was perverse.
 - ii) (Ground 2) The judge erred by placing undue weight on the appellant’s lack of knowledge about the sponsor’s employment. The appellant had explained that the reason why he had little knowledge of his wife’s employment was at the time was because he had suffered a stroke in 2012 and was in recovery. Furthermore, the absence of the sponsor did not diminish the weight or credibility of the documentary evidence in the appellant’s bundle.
 - iii) (Ground 3) The respondent had the burden of proving her allegation that the documents relied upon by the appellant were forged. The judge erred in failing to state whether he accepted the respondent’s allegation that the documents were false.

iv) (Ground 4) There was procedural unfairness. The decision letter did not raise the issue of the sponsor exercising Treaty rights. The sole basis of the refusal was that the appellant had not provided adequate evidence to show that his wife was an EEA national. The respondent raised the issue of whether the sponsor was exercising Treaty rights for the first time at the hearing. The appellant was not put on notice that this was a live issue.

8. Ground 4 was developed further at the hearing by Mr Youssefian submission that the respondent had conceded in the decision letter that the sponsor was exercising Treaty rights for a continuous period of 5 years. In this respect, Mr Youssefian relied upon that part of the decision letter that is quoted at my para 2 above.

The grounds

9. At the commencement of the hearing, I gave the parties copies of the decisions of the Asylum and Immigration Tribunal in **RM** (Kwok On Tong: HC395 para 320) India [2006] UKAIT 00039 and **CP** (Section 86(3) and (5); wrong immigration rule) Dominica [2006] UKAIT 00040.

10. Mr Youssefian asked me to consider the grounds cumulatively. In relation to ground 2, Mr Youssefian drew my attention to the appellant's explanation before the judge for not being able to provide information about the sponsor's employment, i.e. that he had recently had a stroke which was affecting his memory (para 10 of the judge's decision). Mr Youssefian submitted that this ties in with ground 4, that the appellant had not been given notice that it was a live issue as to whether the sponsor was exercising Treaty rights and he therefore had not been given a fair opportunity to deal with the issue.

11. Initially Mr Youssefian agreed that the decision letter did not concede that the sponsor was exercising Treaty rights, making the submission initially that there was no need for an express concession given the terms of that part of the decision letter quoted at my para 2 above which Mr Youssefian submitted made it clear that the respondent *had* considered the evidence that was submitted as to the sponsor's employment. However, by the end of the hearing, Mr Youssefian accepted that he was in effect saying that the decision letter conceded that the sponsor had been exercising Treaty rights for a continuous period of 5 years. He submitted that the appellant had no notice that this was a live issue and that it only became clear in the course of the closing submissions on the respondent's behalf before the judge.

12. I asked Mr Youssefian why there were any documents concerning the sponsor's employment in the appellant's bundle if it was not considered by the appellant and his representatives that it was necessary for the appellant to establish that the sponsor was exercising Treaty rights. In addition, it was argued in the skeleton argument that was before the judge that the evidence adduced showed that the sponsor had been exercising Treaty rights for a continuous period of 5 years. Mr Youssefian informed me that the documents were included by way of good practice.

13. Mr Youssefian submitted that, although not in his grounds, the fact that the judge had not made a finding on the issue whether the sponsor was an EEA national notwithstanding that this was the core issue in the decision letter shows that the decision of the judge as a whole was vitiated by errors. If he had found that the sponsor was an EEA national, the proper course would have been to allow the appeal on the ground that the decision was not in accordance with the law and remit the

case to the respondent for a decision on the question whether the sponsor was exercising Treaty rights.

14. In this respect, I referred Mr Youssefian to **Greenwood (No. 2)** (para 398 considered) [2015] UKUT 00629 (IAC), in which a panel led by the President of the Upper Tribunal (Immigration and Asylum Chamber) held that the Tribunal no longer has power to remit a case to the Secretary of State. Furthermore, it appeared from the appellant's skeleton argument that was before the judge that it was not argued that the case should be remitted to the Secretary of State.
15. In relation to ground 3, Mr Youssefian submitted that it was not clear whether the respondent had contended at the hearing that the documents concerning the sponsor's employment were false or whether it was said that their contents were not reliable. The judge did not make a finding on this point.
16. In response and in relation to grounds 1 and 2, Mr Staunton submitted that it was fully open to the judge to assess the evidence and decide what weight was to be given to the documentary evidence and what weight was to be given to the oral evidence. He was entitled to place greater weight on the oral evidence.
17. In relation to ground 3, Mr Staunton said that it was the respondent's position that she had not made an allegation that the documents were false. The submission advanced on the respondent's behalf before the judge was that the documents were not reliable as to their contents. Accordingly, the respondent did not have the burden of establishing that the documents were false. It was open to the judge to decide that the documents were not reliable as to their contents.
18. In relation to ground 4, Mr Staunton drew my attention to the fact that para 10 of the appellant's witness statement stated that the sponsor was exercising Treaty rights. It was open to the respondent's representative before the judge to question the appellant about documentary evidence that had not been placed before the respondent when she made her decision. The respondent's decision letter did not concede the issue. In the part of the decision letter relied upon by Mr Youssefian, the respondent had merely listed the nature of the documents that were before her. This did not amount to a concession. It was clear from the first page of the decision letter that the application was refused because the identity card submitted had been reported lost or stolen and that the respondent had not gone on to consider the remainder of the documents. In other words, the application failed to the first hurdle.
19. Mr Youssefian submitted that even if I was against him on his submission that the appellant had not been given sufficient notice that it was necessary for him to show that the sponsor was exercising Treaty rights, the judge had failed to give adequate reasons as to why the documents could not be relied upon. There were 90 pages of documents. The judge had failed to consider the fact that the appellant was not able to provide answers about the sponsor's employment because he had problems with his memory due to the stroke he had suffered. At para 20 of his decision, the judge had only mentioned the applicant's explanation. Para 20 does not show that the judge had considered the explanation properly nor did the judge indicate the weight that he attached to the explanation.
20. I reserved my decision.

Assessment

21. I will first deal with grounds 3 and 4.
22. Ground 3 is misconceived. It is plain that it was not the respondent's case before the judge that the documents were false. It is only if the respondent had made such an allegation that the burden would have been upon her to establish that the documents were false. It is plain from the judge's summary of the submissions of the respondent's representative (para 15) that the submission advanced was that the documents and the other evidence to the effect that sponsor had been exercising Treaty rights for a continuous period of 5 years were not reliable.
23. Ground 4 is also misconceived. In the first place, any concession needs to be clearly stated. A concession on the part of the Secretary of State that a particular requirement is satisfied cannot be inferred.
24. I agree with Mr Staunton that it is clear when the decision letter is read as a whole that the decision maker had refused the application on the single ground that the appellant had not established that his spouse was an EEA national; the decision maker had not considered whether the remaining requirements of regulation 15(1)(b) were satisfied. It is clear from **RM** and **CP** that absent a specific acceptance by the respondent that particular requirements are satisfied (and, in that respect, there was such acceptance by the respondent), it remains for an appellant to establish that he does satisfy any relevant requirements. This would have been apparent to the appellant and his representatives.
25. I do not accept that the appellant was not in fact aware that he had to establish that the sponsor had been exercising Treaty rights for a continuous period of 5 years. His witness statement stated that the sponsor had been exercising Treaty rights. The skeleton argument relied upon before the judge argued that the documentary evidence submitted showed that the sponsor had been exercising Treaty rights. The appellant's two bundles contained many documents as to the sponsor's employment over some years. Mr Youssefian submitted that it only became apparent during the submissions of the respondent's representative before the judge that it was a live issue whether the sponsor was exercising Treaty rights for a continuous period of 5 years. I reject this submission. It is clear from the appellant's cross-examination that he was being cross-examined on this issue. At no point did Ms Torr, who represented the appellant, object to the questioning on the basis that the appellant had not been given notice of this being a live issue. She did not say anything in her closing submissions to that effect, nor did she at any point request the judge for an adjournment to enable the appellant to deal with the issue. It has not been suggested before me that, if the appellant had been given such notice, he would have produced more evidence.
26. In all of the circumstances, I have no hesitation in rejecting the submission of Mr Youssefian, who did not appear on appellant's behalf before the judge, that the documents in the appellant's two bundles were submitted as a matter of good practice and that the appellant did not have any notice that the requirement that the sponsor was exercising Treaty rights for a continuous period of 5 years was a live issue.
27. In any event, the relevant part of the decision letter relied upon (quoted at my para 2) reads: *"In making the decision to refuse your application consideration has been*

given to Evidence of EEA sponsor exercising Treaty rights". All that this refers to is "evidence that the sponsor is exercising Treaty rights". Thus, even if I am wrong in what I say at my paras 23 and 24, it simply cannot be inferred from this quote that the respondent had conceded that the sponsor was exercising Treaty rights *for a continuous period of 5 years*. I therefore reject ground 4. This is sufficient to reject ground 4, whatever may be said about my reasoning in paras 23-26 above.

28. I therefore reject ground 4.
29. Before turning to the remaining grounds, this is a convenient point at which to deal with Mr Youssefian's submission, raised for the first time at the hearing, that the judge had erred in failing to make a finding as to whether the sponsor was an EEA national and that, if he had found that she was an EEA national, the appropriate course of action would have been to remit the case to the Secretary of State for her to consider whether the sponsor had been exercising Treaty rights. This ground was not in the grounds of application for permission to appeal. No application was made for the grounds to be amended. In any event, it was held in **Greenwood No. 2** that the Tribunal does not have power to remit a case. Furthermore, and by analogy with the reasoning of the Court of Appeal at paras 18-23 of the judgment in **AJ (India), SP (India) and EJ (Nigeria) v. Secretary of State for the Home Department** [2011] EWCA Civ 1191, the judge was entitled to proceed and determine all the issues.
30. In relation to ground 2, the judge had considered (at para 20) the appellant's evidence that he had experienced problems with his memory following the stroke he had suffered. It is obvious from the judge's reasoning as a whole that he was not prepared to place much weight on the appellant's explanation. He was entitled to place little weight on the explanation, especially given that it was not supported by any medical evidence to the effect that his memory of events at the relevant time was affected by his stroke. Equally, it would have been open to another judge to have accepted the explanation. In my judgment, there is nothing of substance in ground 2.
31. In relation to ground 1, I have considered the documentary evidence in the appellant's bundle. There are documents, for example, from HM Revenue & Customs and from various employers, including Tesco Metro and the Imperial London Hotels Limited, which appear to cover the relevant 5-year period and which, if reliable, do show that the sponsor has been exercising Treaty rights for the relevant period. When seen in that context, the judge's reasoning at paras 29 and 30 shows that he rejected the documentary evidence of the sponsor's employment in the main because she had not attended the hearing.
32. I do not consider that, even if the judge had attached little weight to the appellant's explanation for not being able to give evidence about her employment since his stroke, this is adequate by way of explanation to deal with the documents in the two bundles submitted on the appellant's behalf. This is because of the large number of documents, that they appear to cover the entirety of the relevant period and because the judge did not say that there were any difficulties with the documents. In my judgment, in the particular circumstances of this case, the judge did not adequately deal with the documents contained in the appellant's bundles.
33. Given the failure of the judge to descend into any detail about any of the documents in the two bundles of documents, the inescapable conclusion is that the judge did not consider it necessary to even embark upon a consideration of any of the documents.

I am satisfied that he effectively ignored the documents simply because (or largely because) the sponsor had not attended to give evidence.

34. I have therefore concluded that the judge did err in law as contended in ground 1. I am satisfied that, given that the documents appear to cover the relevant 5-year period, the error was material.
35. I have therefore decided to set aside the decision of the judge in its entirety.
36. The effect of Practice Statement 7 of the Senior President's Practice Statement of 25 September 2012 is such that, in most cases where a decision of the First-tier Tribunal (FtT) is set aside, the Upper Tribunal will go on to re-make the decision, instead of remitting the case to the FtT. The position is, however, otherwise in the circumstances described in Practice Statement 7.2(a) and (b). These circumstances are where (a) the effect of the error of law has been that a party has been deprived of a fair hearing or other opportunity for that party's case to be put to and considered by the FTT; or (b), there are highly compelling reasons why the decision should not be re-made by the UT (these will be rare).
37. Having regard to para 7 of the Practice Statement and the Court of Appeal's judgment in **JD (Congo) & Others** [2012] EWCA Civ 327, I am of the view that in this case Practice Statement 7(2)(a) applies. This is because the appeal needs to be heard afresh with all issues at large.
38. Accordingly, pursuant to s.12 of the Tribunals, Courts and Enforcement Act 2007, read together with the above Practice Statement, I find that Judge Kelly erred in law. I set aside his decision and remit the case to the FtT with the direction that it not be dealt with by Judge Kelly.
39. Paras 9 to 13 of the determination of Judge Kelly stand as a record of the oral evidence given at the hearing before the judge.
40. The following directions are issued to the parties:

Directions

The appellant to produce at the hearing the originals of all of the documents in his bundles submitted under cover of a letter dated 11 May 2015 and a letter dated 12 May 2015 from DJ Webb & Co Solicitors.

Signed
Upper Tribunal Judge Gill

Date: 7 December 2015