IAC-FH-NL-V1

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: DA/01334/2014

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 14 January 2016	**On 1 February 2016**

Before

UPPER TRIBUNAL JUDGE ESHUN

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MR DANIEL WILLIAMS
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:
For the Appellant: Mr S Whitwell, Home Office Presenting Officer
For the Respondent: Mr E Fripp, Counsel instructed by TM Legal Services

DETERMINATION AND REASONS

1. The respondent is a citizen of Nigeria born on 24 December 1970. He appealed the decision of the Secretary of State, dated 3 July 2014, to deport him by virtue of Regulation 19 of the Immigration (EEA) Regulations 2006 with reference to the criteria found at Regulation 21. The respondent had been convicted, in the Inner London Crown Court of four counts of possession/control of an article for the use in fraud and sentenced to fourteen months' imprisonment on 3 December 2013.

2. The respondent's appeal was allowed by First-tier Tribunal Judge Nightingale. The Secretary of State was granted permission to appeal the judge's decision by First-tier Tribunal Judge J M Holmes on the following grounds:

> "2. The Applicant is not an EEA national, and so his disputed claim to have acquired a permanent right of residence under the EEA Regulations was the preliminary issue. His 1.7.14 application for the issue of a permanent residence card had been refused by the Respondent on 9.1.15. That application had depended upon the Appellant's marriage to a French citizen on 15.9.08, which had ended in divorce on 4.6.14. The application was refused because the Respondent decided that the Appellant could not show residence in the UK with the EEA national in accordance with the Regulations for a continuous period of five years; requirements 15(1)(b), and, could not show residence in the UK in accordance with the Regulations for a continuous period of five years at the end of which period he was a family member who had retained the right of residence; requirements 15(1)(f).
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> 3. As to the first ground, it is arguable that the Judge's approach to the credibility of the Appellant's disputed claim that he met the requirements of Reg.15 was flawed, or even irrational. The Judge appears to have accepted that the Appellant lied to the Family Court about the length of his cohabitation with the EEA national sponsor [19, 47]. On his current partner's evidence, he had been cohabiting with her, and not his EEA spouse, for at least the last four years [19]. Thus the Appellant's account of a subsisting marriage in which he cohabited with his EEA spouse, and that did not begin to break down until 2013 could not also have been true [39]. Arguably Reg.15(1)(b) could not be satisfied in those circumstances. The Judge also appears to have accepted that the Appellant could not produce independent evidence to show that the EEA national had been a 'qualified person' for the whole of the period relied upon, so arguably Reg.15(1)(f) could not be satisfied either. In these circumstances it was arguably perverse to accept the Appellant's bald assertion that the EEA national sponsor had been a 'qualified person' for the whole of the requisite period.
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> 4. As to the second ground, it is difficult to see how the Judge could accept and place the weight that he did upon the Appellant's expressions of remorse given the finding that the Appellant had lied to the Family Court, and, the sentencing judge's comment that the Appellant had not co-operated with the police and the length of time over which his offending behaviour had taken place, and its sophistication. Arguably there were inadequate reasons offered to justify that approach. Moreover the Judge's approach to the seriousness of the offending behaviour was arguably at odds with that of the sentencing judge, and it is arguable that it was not open to the Judge to go behind the basis on which the Appellant had been sentenced, since it was the sentencing judge who had access to all of the prosecution material, and the Judge did not."

3. The facts in this case are that the respondent married an EEA national on 15 September 2008. The judge held that at that time he became the family member of an EEA national. The judge held that any right of residence would run from the time that he became the family member of a qualified person and not, in fact from the time he applied for, or was issued with the residence documentation. The judge found that it was not in issue that the respondent was issued with an EEA residence

card n 11 December 2009. She had regard to the decree absolute which is the legal end of the marriage and this was on 4 June 2014 and not, as stated in the Secretary of State's letter, 9 January 2013. Therefore the marriage existed from 15 September 2008 up until 4 June 2014, a period of five years and nine months.

4. The judge noted that the respondent went to prison in December 2013 and may not rely on any such period as residence for the purposes of the EEA Regulations. The five years would have been completed by 15 September 2013 and it is that period she had to have regard to.

5. The judge noted from the Secretary of State's letter dated 9 January 2015, that the Secretary of State accepted that the respondent's former wife was employed at MacDonald's from September 2008 until July 2009. The judge was fully satisfied that at the time the couple married, the EEA national was exercising treaty rights. The Secretary of State accepted from 2008 until 2009 the EEA national had income from employment and self-employment and that during 2009 to 2010 she had PAYE income. It also appears to be accepted that during 2010/2011 the EEA national spouse had an income from both employment and self-employment. The Secretary of State accepted that the sponsor was a qualified person during the tax years 2008 up to 2011, therefore from the respondent's marriage in September 2008 up until the end of the tax year ending April 2011. The Secretary of State accepted that the EEA national was a qualified person. This was a period of around 2½ years.

6. The respondent produced a number of documents which were not challenged in the course of cross-examination by Mr Williams, who represented the Secretary of State, the records for the EEA national run up to the tax year from April 2011 to April 2013. The judge noted however that they did not run on until September 2013 which would have amounted to five years in the course of their marriage. There was therefore a gap of five months in the documentary evidence on the exercise of treaty rights.

7. Dealing with the five month gap, the judge said there was nothing in the Regulations or the Directive which indicated that only documentary evidence was capable of establishing permanent residence. Whilst she had borne in mind that the respondent had convictions for fraud and consequently was a person who was not adverse to the use of deception, she found no reason to suspect that his former wife would not have continued in her business after April 2013 when she had, quite clearly, been in both employment and self-employment for four or five years prior to their date.

8. The judge noted that it was the respondent's case that his marriage began to break down by 2013 and, indeed, that his wife was staying with him less and less and only "coming and going". His description of a dysfunctional situation which, it appears that he was in two relationships at the same time was a credible reason for the marriage breakdown. He was also facing criminal prosecution and was sentenced to prison at the end of the year. Despite the respondent's somewhat vague manner of answering questions, the judge was prepared to accept that he retained some contact

with his former wife until very recently, and that he was aware that she was continuing with her longstanding business as a self-employed hairdresser.

9. The judge noted that there had never been any allegation that this was a marriage of convenience. Indeed the Secretary of State issued the respondent with a residence card. That was never revoked, and there has been no allegation that this was improperly issued to him. He was, therefore, the family member of an EEA national up until the date of his divorce. The marriage lasted for five years and nine months, and she was satisfied that the HMRC records, and other evidence, that the couple lived in the United Kingdom for the whole of that marriage. She was therefore satisfied that the EEA national's exercise of treaty rights had been evidenced by way of documents for a period of four years and seven months. Taking all this evidence before her in the round, reminding herself that the burden was on the respondent, the standard was the balance of probabilities, the judge found it more likely than not that in the period between April 2013 and September 2013 the EEA national continued to be a qualified person by way of employment or self-employment in the United Kingdom.

10. From the evidence the judge concluded that the respondent had achieved permanent residence in September 2013. Consequently, she did not go on to consider whether or not a right of residence was retained.

11. The judge was satisfied that the respondent attracted the higher level of protection from removal under Regulation 21(3). While she did not wish to play down the seriousness of the offending here, the judge held that this was not an offence involving drugs, violence or firearms, neither was it a sexual offence.

12. The respondent accepted that he had been convicted of four counts of use of false instruments. He was sentenced to fourteen months and three further sentences of nine months to run concurrently. His laptop was confiscated. She noted from Regulation 21 that a criminal conviction may not of itself justify a decision under Regulation 19.

13. The judge considered the judge's sentencing remarks that the offence was a skilled and planned fraud which the respondent was ready to bring into action. The sentencing judge found it of note that the respondent refused to co-operate with the authorities to identify others engaged in this fraud. The respondent's involvement was not regarded as peripheral, but of the highest level of culpability. The respondent had a responsible job working in the NHS as a care assistant at the time and so it was unclear to the sentencing judge as it was to the First-tier Judge why the respondent, a man of hitherto good character and in a responsible job would involve himself in this type of activity. She held that his criminal conduct appeared to have been motivated by greed rather than need.

14. Notwithstanding the sentencing judge's remarks, the judge bore in mind the case of **Vassallo** which held that the applicant must pose a present threat on serious grounds of public policy or public security, and it is not permissible to deport an EEA

claimant on the basis of criminal offending in order to deter others from becoming involved. She noted that the Upper Tribunal held in cases such as this that an EEA national, or their family member, facing deportation must represent a present threat by reason of a propensity to re-offend.

15. The judge considered the National Offender Management Service Report. The offender management professionals regarded the respondent as presenting a low risk of re-offending and a low risk of serious harm. He has not been convicted of any further offences since December 2013, and has now been released from prison for two years.

16. The judge also noted that the respondent had become involved in taking qualifications whilst in prison and there was a glowing report from the "Bad Boys Bakery" about his enthusiasm and involvement doing his time in prison. He appears to have taken such opportunities that were offered to him by way of training and education. The respondent said in his statement that he was remorseful for his conduct, and the judge found that this reflected in the fact that he had not offended before and has not offended since the offences in question.

17. The judge then went on to consider the respondent's particular circumstances. He is still a reasonably young man and appears to be in generally good health. He has a partner in the UK, but she too is fighting deportation. The couple have a child born here, but his partner has also an older child from a previous relationship. While the respondent appears to have been given parental responsibility by the family court for the child AH, the judge had concerns about the claim that the respondent had been living with AH and his partner for four years. She said he clearly has not. Nevertheless she was satisfied on the balance of probabilities that he is now established with his partner and her two children. He is the father of the younger of these two children and that the elder child is a British citizen. While she was unpersuaded by his account to have cared for AH for many years, she was persuaded that he has some role in her life presently and that this is likely to have been since the breakdown of his marriage.

18. The judge found that there was no evidence to support the contention that the respondent represents a present and sufficiently serious threat affecting one of the fundamental interests of society.

19. The judge held that Mr Williams did not seek to persuade her that if she found that five years' residence under Regulation 15 was established, then the respondent's conduct would amount to a serious ground of public policy or public security. She found this was an entirely correct analysis. She found little in the reasons for decision letter which went to the applicable criteria, Regulation 21, for the expulsion of a person with permanent residence. She did not find that the criteria in paragraph 21 applied so as to justify exclusion here under Regulation 19. She therefore found that the Secretary of State's decision was not in accordance with the law.

20. I note that the grant of permission raised other issues which had not been challenged by the appellant. The appellant raised only two grounds. The first was that the judge made a material error in accepting, despite the five month gap, that the respondent had been living in accordance with the Regulations for a period over five years and therefore should be considered under the serious grounds test. The grounds argued that the judge simply accepted the respondent's evidence that his ex-partner may have been exercising treaty rights. This was wholly incorrect because the respondent had been convicted of an offence for fraud and therefore could not be called a credible witness. It was further argued that the respondent was not entirely truthful in the evidence he gave to the family court and the sentencing judge had found that he had not been living with AH for four years, despite claiming he had done so. It was therefore unclear why the judge found the respondent's oral evidence compelling enough to outweigh the concerns raised by the appellant, especially since the judge noted that he was a vague witness. Even if it could be said that the respondent was a credible witness, the evidence taken about the ex-partner's employment should be treated with caution. It was the respondent's own evidence that towards the end of the relationship they were barely talking and not living together, therefore the respondent cannot be entirely sure if his ex-partner was definitely in employment and exercising treaty rights. The judge should have taken a holistic approach and considered everything in the round rather than taking his oral evidence at its highest.

21. The second ground was that the judge sought to minimise the respondent's offending behaviour by stating that the offence did not involve violence, drugs or firearms nor was it a sexual offence. It was submitted that this was incorrect because fraud is not a victimless crime and the judge noted that the respondent was heavily involved in the offence.

22. Mr Whitwell whilst relying on the second ground did not pursue it to any great extent because he noted that Mr Williams, the HOPO below, did not push this argument forcefully. He relied principally on the first ground.

23. I was persuaded by Mr Fripp's argument that the appellant's challenge was a disagreement with the conclusion reached by the judge that the EEA national spouse had worked for five years from April 2008 to September 2013.

24. The judge's dealt with this issue at paragraph 39:

> "39. I have considered whether the lack of documentary evidence covering what is, in effect, a five month period should prevent the achieving of permanent residence. There is nothing in the regulations or the directive which indicates that only documentary evidence is capable of establishing permanent residence. Whilst I have borne in mind that the appellant has convictions for fraud and, consequently, is a person who is not adverse to the use of deception, I find no reason to suspect that his former wife would not have continued in her business after April 2013 when she had, quite clearly, been in both employment and self-employment for a full five years prior to that date. It is the appellant's case that his marriage had begun to break down by 2013 and, indeed, that his wife was staying with him less and less and only 'coming' and 'going'. His description of

> a dysfunctional situation in which, it appears, that he was in two relationships at the same time is a credible reason for the marriage breakdown. He was also facing criminal prosecution and was sentenced to prison at the end of the year. Despite the appellant's somewhat vague manner of answering questions, I am prepared to accept that he retained some contact with his former wife until very recently, and that he was aware that she was continuing with her long standing business as a self-employed hairdresser."

25. It can be seen from this paragraph that the judge did not solely rely on the respondent's oral evidence. In reaching her decision, the judge considered that the respondent had convictions for fraud and was a person who was not adverse to using deception. Nevertheless following consideration of the evidence that was before her, she found no reason to suspect that his former wife would not have continued in her business after April 2013 when she had clearly been in both employment and self-employment for a full five years prior to that date. I found that this conclusion was not perverse. The judge's acceptance that the respondent had retained some contact with his former wife until very recently and that he was aware that she was continuing with their longstanding business as a self-employed hairdresser, was also not perverse or irrational following her assessment of the evidence.

26. I find that the judge's decision does not disclose an error of law.

Notice of Decision

27. The judge's decision allowing the respondent's appeal shall stand.

Signed Date

Upper Tribunal Judge Eshun