



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: IA/45841/2014
& IA/48501/2014

THE IMMIGRATION ACTS

Heard at Field House
On 8 February 2016

Decision & Reasons Promulgated
On 15 February 2016

Before

DEPUTY UPPER TRIBUNAL JUDGE SYMES

Between

EUPHEMIA ADA ANITA NWAKIBU

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(ANONYMITY ORDER NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr E Waheed (counsel instructed by Graceland Solicitors)
For the Respondent: Mr S Kotas (Senior Home Office Presenting Officer)

DECISION AND REASONS

1. This is the appeal of Euphemia Ada Anita Nwakibu, a citizen of Nigeria born 20 December 1982, and her son [EE] born [-], against the decisions of 22 September 2014 to refuse their applications for residence cards confirming their right of residence. That appeal having been dismissed on 26 August 2015, the Appellant now appeals to the Upper Tribunal with permission.

2. The application of 2 June 2014 that gives rise to these proceedings was for permanent residence cards for her and her son [EE] born [-] in the light of her having retained a right of residence following her divorce from Sherwn Biangelo Isaac Girigorie on 24 February 2014. They had previously been issued residence cards on 26 September valid for five years.
3. The application was refused because, whilst the fact of divorce and custody of a relevant child were accepted, as was the Appellant's own economic activity, so establishing that the gateway criteria for consideration under the retained residence route were established, the Secretary of State did not accept that her former husband was shown to have been exercising Treaty rights at the time of the divorce: although evidence had been supplied of him working at various times from 2009 until September 2014, it did not tally with "internal records" held by the Home Office which did not record any such activity for him. A HMRC document of 27 August 2014 produced in response to an inter-departmental enquiry under section 40 of the UK Borders Act 2007 recorded that there were no self-assessment or PAYE records held for Mr Girigorie.
4. Evidence relied upon included a letter from Cyber Café identifying Mr Girigorie as an employee who had been earning £625 monthly as a computer/office assistant since 5 June 2013; HMRC records for 14 January 2013 and 30 March 2013 stating that he owed £68.90 of national insurance class 2 payments; a late payment notice of 31 March 2012 stamped by Thamesmead Post Office as paid on 28 May 2012; and a pay slip from Concepts College on 31 October 2009 recording that he had paid tax of £72.08 and national insurance of £46.57 on earnings of £900 so far in the relevant tax year.
5. The First-tier Tribunal noted that Mr Girigorie's name was an unusual one that would reduce the chance of some mistake when his records were investigated by HMRC. As to the evidence put forward purporting to show his exercise of Treaty rights, the material from Cyber Café did not give a leaving date for the work it said commenced 5 June 2013; there was no evidence as to the nature of the self-employment said to be evidenced by national insurance contribution records; there was no evidence that she had sought to contact her husband, who she said wanted nothing further to do with her. The Tribunal concluded that even if he was working (as might be the case if Cyber Café or Concepts College did not report his earnings, recorded as cash, to HMRC), his earnings of £7,500 gross did not suggest any real link between him and the domestic labour market. Given the categorical response of HMRC to the enquiry as to his economic activity she had failed to establish that her ex-husband had ever been a qualified person.
6. There was no evidence before it of connections with the United Kingdom other than the child's attendance at school and whilst [EE] had spent more than seven years here, there was nothing to suggest that their removal would be disproportionate, even acknowledging that his evidence might be viewed to have been on the more stable end of the precariousness scale.
7. Grounds of appeal challenged the decision on the basis that

- (a) The human rights ruling was contrary to the principles regarding the best interests of children established by the case law (it was correctly acknowledged before me that this ground fell away in the light of *Amirteymour & Ors* (EEA appeals; human rights) [2015] UKUT 466 (IAC) finding that the Tribunal has no jurisdiction to consider human rights issues within the ambit of an appeal under the EEA Regulations);
 - (b) The Tribunal had overlooked the fact that the address searched against by HMRC was 209 [-] Road [-], not a residence where her ex-husband had ever lived;
 - (c) The national insurance contribution records showed it was more likely than not that the husband had worked;
 - (d) The findings regarding Cyber Café were not well reasoned;
 - (e) The Tribunal failed to take account of the fact that the level of pay of the ex-husband did not reach the level at which he would have paid tax;
 - (f) The Tribunal wrongly focussed on the entirety of the ex-husband's residence rather than on circumstances at the date of divorce.
8. Judge Plimmer granted permission to appeal on 13 January 2016 on the basis that the Tribunal had not adequately considered the possibility that Mr Girigorie would not have paid tax given his income level and thus would not have appeared on HMRC records.
9. Before me Mr Waheed expanded on the grounds of appeal, emphasising that the Tribunal could take judicial notice of the fact that the Appellant's ex-husband did not earn enough to attract any tax or national insurance liability. Mr Kotas submitted that the findings of the First-tier Tribunal were perfectly rational and could not be shown to be unreasonable.

Findings and reasons

10. I do not consider that the approach of the First-tier Tribunal is legally sustainable.
11. There are two concerns with the section 40 request: firstly the third of the Appellant's names was correctly given by the Secretary of State's officer making the enquiry as Isaac; however the response gave it as Isaal. Secondly the address against which the search was requested was 6 [-], Thamesmead, London [-]. The response of 27 August 2014 was made with respect to the address 209 [-] Road, Cartford, [-]. Patently a search conducted via a computer, whose world is a notoriously binary one where either there is a precise hit or there is not, would not necessarily retrieve the appropriate information for Mr Girigorie if the wrong data was input in the first place.
12. One might have thought that a data search of this kind would routinely search for potential positive returns that included likely variations of the name sought: but nothing to that effect is asserted within the section 40 return. But then again one might equally well have imagined that HMRC would manage, in a document that only included a few words that were bespoke to the enquiry in hand, to correctly spell the well known London suburb "Catford".


13. It is clear that the First-tier Tribunal's approach to the assessment of the evidence overall attributed significant weight to the section 40 return. However I do not consider that the document necessarily should have received such weight without having regard to the material considerations identified above.
14. The other considerations identified by the grounds of appeal will fall to be assessed as part of the general assessment of the case on a re-hearing. The argument that the Appellant did not earn at a level that would attract tax or national insurance liability is not a clear-cut one, whatever the relevant thresholds might be, given the fact that the documents relied on by the Appellant do in fact record him as making such contributions.
15. Furthermore, the statement that even if earnings of £7,500 were established as genuine, nevertheless no genuine economic activity relevant to the exercise of Treaty Rights was shown, failed to apply the relevant test, which is whether the work in question is genuine and effective in the sense set out in authorities such as *Lawrie-Blum v Land Baden-Württemberg* Case 66/85, [1986] ECR 2121. As summarised in the later case of *D.M. Levin v Staatssecretaris van Justitie* [1982] EUECJ R-53/81 at [17]: "the rules on freedom of movement for workers ... cover only the pursuit of effective and genuine activities, to the exclusion of activities on such a small scale as to be regarded as purely marginal and ancillary".
16. It is accordingly necessary for the appeal to be reheard. The First-tier Tribunal will wish to follow the guidance in *HS (EEA: revocation and retained rights) Syria* [2011] UKUT 00165 (IAC) which clarifies that Regulation 10 of Immigration (EEA) Regulations 2006 requires the applicant to demonstrate that the EEA national spouse was exercising treaty rights at the time he ceased to be a family member.

Decision:

The decision of the First-tier Tribunal contains a material error of law. As there are no lawful relevant findings upon which to build, the matter is suitable for re-hearing in the First-tier Tribunal. I accordingly remit the appeal to that forum.

Signed:

Date: 8 February 2016



Deputy Upper Tribunal Judge Symes