



Upper Tribunal  
(Immigration and Asylum Chamber)

Appeal Number: IA/23255/2015

THE IMMIGRATION ACTS

Heard at Field House  
on 26 June 2017

Decision and Reasons promulgated  
on 01 September 2017

Before

UPPER TRIBUNAL JUDGE HANSON

Between

SAHEED OLAWUNMI OGUNREMI  
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr M West instructed by Shan & Co Solicitors.

For the Respondent: Ms J Isherwood Senior Home Office Presenting Officer

ERROR OF LAW FINDING AND REASONS

1. This is an appeal against a decision of First-tier Tribunal Judge Callender-Smith promulgated on 26 September 2016 in which the Judge dismissed the appellant's appeal against the respondent's refusal to grant him a Residence Card confirming a permanent right of residence in the UK.

## **Background**

2. The appellant, a citizen of Nigeria, was born on 13 February 1972. The Judge noted the appellant entered the UK on an unknown date but on 17 May 2010 applied for a residence card as recognition of a right to reside in the United Kingdom as the spouse of an EEA national exercising treaty rights in the UK. On 18 October 2010 the application was granted.
3. On 15 January 2015, the appellant applied for a Permanent Residence Card which was rejected in a notice dated 3 June 2015. The respondent's formal refusal stated she was not satisfied the appellant had provided evidence that the EEA national resided in the UK in accordance with the Immigration (European Economic Area) Regulations during the five-year period relied upon by the appellant and also noted that the marriage was considered as bigamous and one of convenience.
4. The Judge sets out findings of fact between [19-26] of the decision under challenge which may be summarised in the following terms:
  - a. The appellant's marriage ended in divorce. The appellant did not know where his wife was which meant he could not produce any extra evidence of her having been in the UK for the last five years although he produced documents showing his former wife had been exercising treaty rights for the period 2010 to 2014. They were divorced that September [20].
  - b. The appellant maintains the respondent would have been able to check his former wife's records [21].
  - c. The appellant maintains the respondent had not considered properly whether the appellant satisfied Regulation 15(1)(f) [22].
  - d. The Judge was asked to accept that because the decree absolute is dated 18 September 2014 it follows on the balance of probabilities that the former spouse, an EEA national, was working and exercising treaty rights on that date [24].
  - e. The Judge was not satisfied, in what was a substantial documentary appeal bundle of some 436 pages, that there was sufficient evidence to determine, on the balance of probabilities, that the couple had lived together for over five years and that the appellant was able to satisfy Regulation 15 in such a way as to allow this appeal to succeed [26].
5. The appellant sought permission to appeal which was initially refused by another judge of the First-tier Tribunal but granted on a renewed application by the Upper Tribunal on 17 May 2017, on limited grounds. The operative part of the grant being in the following terms:

In order to show that he had acquired permanent residence, the appellant had to show he had been resident either as the family member of an EEA national exercising Treaty Rights or as a family member who had retained the right of residence.

It is arguable that the judge erred in failing to make findings (a) as to the period in which the appellant's wife had been exercising Treaty Rights; (b) as to whether the other requirements of Rega.10(5) were met; and, whether the requirements of reg.10(6) were met. The judge appears at [26] to have misdirected himself in concluding that evidence was required that the couple had lived together where is the requirement is only that (during the validity of the marriage) they resided in the same country - Ogierakhi [2014] C-244/13. Permission is granted on the grounds that the judge arguably erred in his application of the EEA Regulations.

6. In her rule 24 response dated 31 May 2017 the Secretary of State accepted the First-tier Judge misrepresented himself at [26] but in the absence of the appellant's appeal bundle, did not concede that the error was material to the outcome of the appeal.

### Error of law

7. Discussions at the outset of the proceedings disclosed that the bundle provided to Mr West, which his solicitors claimed was that before the First-tier Tribunal, was not the same as there were over 60 pages missing from the bundle in his possession. It was not therefore clear whether this bundle was that before the Judge containing information on which the decision was based. The bundle was not admitted for if it contained different information it was not served until the day and if fresh documents were relied upon the permission of the Tribunal would have been required. Ms Isherwood confirmed that what she wanted to see was evidence of the EEA national exercising treaty rights in the UK. During the course of the hearing those instructing Mr West provided him with additional documentary evidence which ensured he had the missing 60 pages in his possession.
8. Mr West also accepted the scope of the grant of permission to appeal in its limited terms, which had not granted permission in relation to the grounds of challenge asserting legal error in the assessment of the human rights ground which was found to be a ground that had no merit in an EEA Regulation appeal.
9. It was accepted the issue before the Upper Tribunal was the materiality of the identified error.
10. Mr West referred to the finding by the Judge at [26] which he submitted was misconceived. The exact wording of this paragraph reads:
  26. I am not satisfied however, on the evidence in what was a very substantial documentary appeal bundle running to 436 pages, that there is sufficient evidence for me to determine, on the balance of probabilities, that the couple had lived together for over five years and that he had been able to satisfy Regulation 15 in such a way as to allow this appeal to succeed.
11. At [20] the Judge refers to evidence regarding the position of the EEA national from 2010 to 2014. Mr West referred to a document at page 428 of the bundle before the Judge which is a document from HM Revenue and Customs addressed to the EEA national dated 24 July 2014 referring to an amended Tax Credit award for the period 6 April 2014 to 15 April 2015. This relates to a Child Tax Credit although of the six pages of the original document only pages 1, 3 and 5 have been disclosed. It may have assisted if a complete copy of the

document had been provided as Part 1 should show an applicant's circumstances, including their income.

12. The extent of the disclosed information is of some importance for a person may claim Child Tax Credit if they are responsible for children either: aged 16 or under - until 31 August after their 16th birthday, or under 20 and in eligible education or training. A claimant does not need to be working to claim Child Tax Credit. Being a recipient of this benefit is therefore not determinative of the EEA national exercising treaty rights as a worker.
13. It is also noted on page 3 of 6 under the heading 'Part 2 How we work out your tax credits' that the following text appears:

*The amounts shown in this Part are provisional to your actual income and personal circumstances are known and we make a final decision after 5 April 2015.*

*Tax credits are made up of elements. The elements you receive in the period you receive them for are shown below. Your income may reduce the amount of tax credits you receive. We show any reductions below.*

14. Under the heading "Working Tax Credit elements" the following text appears:

*You are not entitled to Working Tax Credit.*

15. Working Tax Credit is designed to top up a claimant's earnings if they work and are on a low income. Persons not earning therefore not liable to receive Working Tax Credit.
16. Depending on circumstances, a person may be able to claim Working Tax Credit if they are aged between 16 and 24 and have a child, or a disability, or 25 or over and working a minimum number of hours. For a single person with one or more children this is 16 hours, for a couple with one or more children usually at least 24 hours between them, of which one is expected to work at least 16 hours. No evidence has been provided relating to the EEA national's employment situation to ascertain whether she is employed.
17. The Tribunal is also aware that in relation to Working Tax credits there is an income threshold. An example in the 2017-18 assessment is that if a person is annual household income is £6,420 or below, they will get the maximum amount for each Working Tax Credit element they qualify for but if their income is above that limit this will reduce the amount of benefit they receive.
18. It is possible for a person to be excluded from Working Tax credit if they or their partner earn over a certain amount, commonly referred to as the annual household income limit. The difficulty for the appellant is that the lack of evidence provided prevents a finding been made that the reason the EEA national has not been awarded Working Tax Credit is because the income available to her exceeds the annual household income limit.
19. The evidence provided to the Upper Tribunal does not ascertain the reason the EEA national was not entitled to Working Tax Credits or the rate of income against which the Child Tax Credit was assessed. What is hoped is that information regarding the method of calculation has not been deliberately omitted from the disclosed documents as that would give rise to concerns of a lack of candour on the appellant's behalf.

20. The requirement for the appellant to prove his marriage lasted three years and that he lived in United Kingdom for a period of one year is not an issue in this appeal for although the respondent refers to an element of bigamy in the refusal notice the Judge noted at [23] that the Presenting Officer was unable to provide any evidence about the bigamy allegation. Although no specific findings made it can be inferred from the decision that the Judge found this element not to have been proved in relation to which there is no cross-appeal by the Secretary of State.
21. Mr West referred to a number of documents in the bundle and copy wage slips for the EEA national including at page 349 what appears to be a blank P60 for the year ending 5 April 2013 although at page 350 a completed P60 for the year ending 5 April 2014 showing a gross income of £5,700.
22. At page 180 is a copy of the appellant's wage slip for the work he has undertaken with the NHS. It is stated the appellant continues to be employed by the NHS.
23. The assertion by the appellant that the burden was upon Secretary of State to undertake checks to prove the EEA nationals position has no arguable merit as the burden is upon the appellant to establish his position. There is no transfer or sharing of the burden of proof in cases of this nature.
24. It is accepted on the respondent's behalf that the appellant had proved that he personally satisfied the requirements of the Regulations as a result of his ongoing employment with the NHS and that the only issue was that relating to the status of the sponsor.
25. The Judge referred to the sponsor's payslips and concern was raised as to how the appellant had obtained the blank P60 although it is accepted the P60 for the year to 5 April 2014 reflects the EEA national's address appearing on other items of correspondence. There is reference to various bills including the payment of a catalogue account addressed to the EEA national at an address in [ ], the address appearing on the 2014 P60, dated 21 May 2016 showing a balance due for purchases. Ms Isherwood submitted the evidence provided to the Judge did not support the appellant's assertion with regard to the relevant period in 2014 and then jumps to 2016.
26. It was submitted that it is clear in the decision that although the Judge may have misdirected himself at [26] it is not material as the Judge considered the documents that have been provided did not prove the point that the EEA national was exercising treaty rights at the date of the dissolution of the marriage.
27. In reply Mr West accepted the P60 referred to above was blank but submitted the evidence showed the EEA national worked to April 2014. It was submitted the Judge failed to take the April 2015 Child Tax Credits into account and that when all this evidence was taken together it proved the EEA national was exercising treaty rights and working at the date of divorce.
28. Whilst no explanation for the 2016 documents could be given, it was submitted on the appellant's behalf that he satisfied the requirements of Regulation 10(5) as the EEA national had been exercising treaty rights for the period of five years working back from the date of divorce. Mr West accepted the relevant starting

period was April 2010. It was also submitted that the requirements of Regulation 10(6) are also satisfied.

29. In relation to the three elements the appellant was required to prove to the Judge being (1) that a genuine marriage had lasted three years and the couple had spent one year together in United Kingdom, this is not an issue in dispute; (2) that the couple had spent one year together in the United Kingdom is not an issue in dispute; (3) that the EEA national spouse was exercising treaty rights at the time the appellant ceased to be a family member, i.e. at the date of divorce, this an issue in dispute.
30. The assertion by the appellant that to establish the EEA national spouse's position there was a shared burden with the Secretary of State has no arguable merit -see *Amos v Secretary of State for the Home Department [2011] EWCA Civ 552* in which the Court of Appeal held that a divorced spouse had to establish that he or she had the right of residence before the question whether, notwithstanding the divorce, the right had been retained could be determined.
31. The Court of Appeal found the EEA national must have been exercising treaty rights up to the date of divorce, but thereafter that is not required. What is required is that after the divorce, the non-EEA national former spouse must himself exercise 'Treaty rights', in the sense of being a worker or self-employed or self-sufficient. That is the requirement in Article 13 of the Citizens Directive reproduced of regulation 10(6) of the 2006 Regulations. If the third country national continues to do that up to the five-year point, he will have "resided in the United Kingdom in accordance with these Regulations" and will have acquired a permanent right of residence under regulation 15(1)(f).
32. The five-year period from the date of the dissolution of the marriage has not yet passed meaning this discreet point does not arguably assist the appellant at this stage. The Court of Appeal in *Amos* also held that it must still be shown that the EEA national was working or otherwise exercising treaty rights until the termination of the marriage.
33. The issue is, therefore, as identified at the outset the hearing whether the Judge erred in finding that the appeal must be dismissed. If, having considered the material made available this was the only arguable conclusion the Judge could have arrived at if he had applied the correct test, any error based upon the misdirection at [26] is not material.
34. It is not disputed the EEA national has worked in the United Kingdom for a considerable period of time, indeed there are a number of documents referring to employment in 2010. The blank P60 for 2013 raises a number of questions as to how the appellant came into possession of a formal tax document although all that can be said if this document is produced as evidence is that there is no indication this relates to the EEA national and does not confirm the EEA national was in employment during that tax year.
35. There does appear to be evidence indicating the EEA national has a variable employment history. There is for example a letter from a credit card company albeit dated 5 July 2016 providing an opportunity to settle a credit card balance following which the company will not pursue a Capital One Bank (Europe) credit card debt further, which is ordinarily a solution undertaken for those who have financial problems and are unable to settle an outstanding debt.

36. The P60 for the year ending 5 April 2014 is said to relate to the EEA national but does not prove details of the period within this tax year for which the EEA national was employed. A total of £5700 gross income for the tax year is a gross income of £109 per week gross but insufficient evidence has been provided to establish employment after this period.
37. Mr West submits the Tribunal should infer that as the EEA national was working for the period 2010 to April 2014 it was more likely than not that she continued to remain in employment at the date of the dissolution of the marriage. Reliance was placed upon the Child Tax Credit award for the period 2014 2015 to support this argument.
38. As noted above, the difficulty with this submission is that there is insufficient evidence to establish the EEA national was actually working at the relevant period and the Child Tax Credit documents confirm that such an award may be made even if a person is not in employment. The EEA national was not entitled to Working Tax Credits but the failure to disclose any evidence regarding her income does not establish whether this is because she was not working and therefore did not have a qualifying income or because the income earned took the EEA national outside the income threshold for receiving this benefit.
39. It is also noted above that there has been a partial disclosure of the Child Tax Credit award omitting from the documents provided the information which sets out the basis on which the assessment had been made which includes details of any income earned by the claimant, i.e. the EEA national.
40. Considering the evidence made available the balance of probabilities favours a finding the appellant has failed to discharge the burden of proof upon him to the required standard to show the date of the decree absolute the EEA national was exercising treaty rights in the United Kingdom. Although there is a long history of previous employment documentary evidence for the relevant period, including that relating to 2013, raises more questions than the previous history answers in relation to this key issue. The exercise of treaty rights by the EEA national from April 2010 to 5 April 2014 was arguably established before the Judge but not further.
41. Whilst there is sympathy for individuals in the position of the appellant in this case it is clear some information has been obtained and the whereabouts of the EEA national must be known, as disclosed by the address on the financial documents provided in the bundle. As noted by the Court of Appeal in *Amos*, the appellant could have sought a direction for the Secretary of State to provide any necessary information for the determination of the appeal from the First-tier Tribunal but failed to do so. It is accepted the Secretary of State can only provide information she already holds although it is known the Home Office has an informal arrangement with HMRC enabling a number of enquiries to be made each month. The evidence does not suggest that even a request for the Secretary of State to use such a facility was made in relation to this appeal.
42. On the basis of the evidence considered by the Upper Tribunal, and despite the best endeavours of Mr West, it has to be found that the appellant has failed to discharge the burden of proof upon him to establish that the identified legal error made by the Judge is material to the decision to dismiss the appeal. Accordingly, the determination shall stand.

**Decision**

43. **There is no material error of law in the Immigration Judge's decision. The determination shall stand.**

Anonymity.

44. The First-tier Tribunal did not make an order pursuant to rule 45(4)(i) of the Asylum and Immigration Tribunal (Procedure) Rules 2005.

I make no such order pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008.

Signed.....  
Judge of the Upper Tribunal

Dated the 31 August 2017