



**Upper Tribunal  
(Immigration and Asylum Chamber)**

Appeal Number: EA/02051/2017

**THE IMMIGRATION ACTS**

**Heard at Field House  
On 5 March 2018**

**Decision & Reasons  
Promulgated  
On 26 March 2018**

**Before**

**UPPER TRIBUNAL JUDGE ALLEN**

**Between**

**THE SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Appellant

**and**

**FREDERICK QUAI MENSAH-CRENTSIL  
(ANONYMITY DIRECTION NOT MADE)**

Respondent

**Representation:**

For the Appellant: Ms A Everett, Senior Home Office Presenting Officer  
For the Respondent: Mr M Ume-Ezeoke instructed by Chris Solicitors

**DECISION AND REASONS**

1. The appellant, to whom I shall refer hereafter as “the respondent”, as she was before the First-tier Tribunal, appeals to the Upper Tribunal with permission against the decision of the Judge of the First-tier Tribunal who allowed the appeal of the respondent (hereafter “the appellant”) as he was before the First-tier Tribunal, allowing his appeal against the Secretary

of State's decision of 9 February 2017 refusing his application for a grant of permanent residence in the United Kingdom under the provisions of the Immigration (European Economic Area) Regulations 2016.

2. The appellant was last admitted to the United Kingdom on 14 August 2008 and was issued with a residence card valid until 1 October 2014 as the spouse of Ms Pudelko, who is a citizen of Poland. On 24 October 2014 he applied for permanent residence and his application was refused. On 19 September 2016 he divorced his wife in Ghana and was issued with an order of dissolution dated 4 October 2016. He made the application which is the subject of this appeal on 10 October 2016 on the basis of retained rights under the Regulations.
3. The judge at paragraph 9 of his decision referred to the documentary evidence and to a miscellany of documentation relating to the appellant's and his former wife's working history. He commented that the Secretary of State had acknowledged that the appellant had provided evidence of his former wife's working history for the period 2008 to 2016. The appellant had acknowledged that he did not give evidence that he was working prior to the time of the divorce because he had erroneously assumed that he had already supplied sufficient evidence of his own employment and he therefore enclosed further evidence which he contended met the requirements of Regulation 10(6) of the EEA Regulations. The judge considered the documents and was satisfied that the appellant had satisfied the requirements of Regulation 10(5) and 10(6).
4. The judge went on to conclude, bringing these matters together at paragraph 18 of his decision, that the appellant had discharged the burden of proof to show he had resided in accordance with the Regulations for a continuous five year period and that his EEA national former spouse continuously exercised free movement rights up to the point of divorce. He concluded that the appellant had been in employment and a taxpayer for the relevant continuous five year period and as a consequence allowed the appeal under the EEA Regulations.
5. In her grounds of appeal the Secretary of State argued that the judge had failed to particularise what evidence he had seen that led him to conclude that the appellant's ex-wife was in the United Kingdom exercising treaty rights at the relevant dates. It had been a paper hearing and the judge had not been provided by either side with a copy of a determination in February 2016 in which the appellant's oral evidence was that he separated from his wife in November 2010 when she returned to Poland and he remained in regular contact with her by telephone and he was therefore able to confirm that she had remained in Poland ever since.
6. Permission was granted by a Judge of the First-tier Tribunal on the basis that though it could not be said to be an error of law for the judge to fail to take into account evidence which had not been before him, he had failed to give adequate reasons as to how he had concluded that the appellant's

ex-spouse was in the United Kingdom exercising treaty rights at the relevant dates.

7. In her submissions Ms Everett accepted that the judge had not had the previous determination before him so could not have applied the Devaseelan guidance to it, but nevertheless there was a paucity of reasoning for concluding that the sponsor was exercising treaty rights at the time of the dissolution of the marriage. The judge had purported to accept a concession in the refusal letter, that in fact the letter had said that the appellant would need to provide evidence that the EEA national (his ex-wife) was a qualified person and he was therefore residing in accordance with the Regulations at the point of divorce, and in order to do this he would need to provide evidence that she was exercising free movement rights when the decree was issued. It was then said that he had submitted an HMRC OCA41 document which confirmed continuous employment for Ms Pudelko from 6 April 2008 to 5 April 2016. Ms Everett argued that this was not a concession but a rehearsal of the documents, but in any event the dissolution of the marriage was in October 2016 and this was not a matter dealt with by the judge.
8. In his submissions Mr Ume-Ezeoke noted what had been said but argued that it was not part of the grounds or the reasons why permission had been granted. The judge had considered the evidence before him and made the decision as could be seen, for example from paragraph 7 and paragraph 18 on the basis of the papers before him. He had not relied on a concession but considered the papers, as was clear from paragraph 9.
9. At this point it became necessary to adjourn briefly in order to establish what documentation there was before the judge which could have led him to conclude that the sponsor was indeed exercising treaty rights at the relevant time. This was done on the basis of consideration of the documents in the court's files, since it was clear that those documents had been before the judge, whereas it was less clear that documents on either party's file would have been in front of the judge.
10. After the adjournment reliance was placed by Mr Ume-Ezeoke on a letter from HM Revenue & Customs with attachments, to the sponsor. This letter was dated 9 September 2016 and referred to her employment and benefits history. He argued that this showed that the sponsor was still active and exercising treaty rights at the date of the divorce. She was self-employed. Her accounts were done every year to 5 April and the appellant had put in evidence to the 5 April 2016 and the next return was due on 5 April 2017 and hence there was a lack of evidence per se to show exercise of treaty rights in 2016. The HMRC letter of 9 September 2016 showed that she was still active in self-employment as at the date of divorce.
11. By way of reply Ms Everett argued that it was clear that the judge appeared to accept the Secretary of State had made a concession and

dealt with the appellant's evidence of working on the basis of a rectified mistake. He had never addressed separately the issue of whether the sponsor was exercising treaty rights at the date of the dissolution of the marriage. The grounds referred to the earlier determination at paragraph 3 and there were no findings made in respect of the sponsor's situation. The appellant could make a further application if he had evidence.

12. By way of reply Mr Ume-Ezeoke referred to the letter of 9 September 2016 and argued that the judge had not relied solely on a concession but had referred to considering the documentary evidence before him and the working history of both the appellant and the sponsor. All the evidence had been considered. The Secretary of State had conceded that and it was of relevance to 2016.
13. I reserved my decision.
14. I do not read the second paragraph on the second page of the refusal letter as a concession that the sponsor was working on 6 April 2008 to 5 April 2016. The decision maker made it clear that the appellant would need to provide evidence that Ms Pudelko was a qualified person and exercising free movement rights when the decree of divorce was issued and in referring to the document produced was doing no more than recording evidence that had been provided.
15. Nor do I consider that the letter of 9 September 2016 from HMRC to the sponsor takes matters materially further. This consists of no more than a response to a phone call of 8 September 2016 in which she asked for her employment history and tax calculations were provided for tax years to 5 April 2013, 2014, 2015 and 2016. The marriage was dissolved on 4 October 2016. The letter from the Revenue therefore takes matters no further than 5 April 2016. As Ms Everett pointed out, even if the respondent could have been said to have made a concession with regard to the HMRC OCA41 document, that only took matters up to 5 April 2016. It is necessary for the sponsor to have been shown to have been exercising Community rights at the time when the marriage was dissolved, and clearly as it seems to me on the evidence before the judge that was not the case.
16. Accordingly I find that the judge erred as a matter of law in concluding that the appeal fell to be allowed under the EEA Regulations. I bear in mind the further documentation produced at the hearing today by Mr Ume-Ezeoke which might have some bearing on the matter and there may be other evidence also. Accordingly I consider the most appropriate disposal of this matter is for it to be referred back to the First-tier Tribunal at Newport for rehearing before a different judge.
17. No anonymity direction is made.

A handwritten signature in black ink, appearing to be 'Allen', written in a cursive style.

Signed

Date 23<sup>rd</sup> March 2018

Upper Tribunal Judge Allen