



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: EA/02972/2015

THE IMMIGRATION ACTS

Heard at Field House
On 11th January 2018

Decision & Reasons Promulgated
On 08th February 2018

Before

DEPUTY UPPER TRIBUNAL JUDGE MAHMOOD

Between

MS PATIENCE ICHAKO OJUGO
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr S Karim, Counsel instructed by Toltops Solicitors
For the Respondent: Mr T Wilding, Senior Presenting Officer

DECISION AND REASONS

1. The Appellant appeals with permission against the decision of First-tier Tribunal Judge Fox sitting at Hatton Cross on 16th February 2017 when by way of a decision and reasons promulgated on 22nd March 2017 the judge dismissed the Appellant's appeal in respect of an EEA residence document.
2. The position appears to be that the judge was dealing with various floating cases and indeed the judge said at paragraph 8:-

"The appeal had been listed as a floating case. This was the second floating case I was asked to hear. However, I had already released the Home Office Presenting Officer Mr S Vaghela after the first floating case had been concluded

as I was not expecting to do another. Therefore, the respondent was not represented.”

He said at paragraph 9:-

“As the appeal turned on documents appertaining to the ex-partner’s economic activity it was agreed that the appeal would proceed by way of submissions only.”

Then at paragraphs 13 to 17 the judge made various findings and said that in the absence of reliable evidence the Appellant had failed to demonstrate that her ex-partner was economically active for the purposes of Regulation 6 of the EEA Regulations.

3. Mr Karim relied on the written grounds which were drafted by his instructing solicitors. They explain that the Appellant was married to a Mr Rene Jolo, an EEA national exercising treaty rights on 31st October 2008. On 29th January the Central Family Court dissolved the Appellant’s marriage and it was subsequent to that that the Appellant had applied for a permanent residence card. It was said that the Respondent had accepted that the Appellant met the requirements of Regulation 10(5) but in the refusal letter it was said that the Appellant had not established that her ex-husband was working at the time of her divorce. The grounds said further that,

“7. It is submitted that Judge Fox materially erred in proceeding as he did without hearing evidence from the Appellant who after all had requested and paid for an oral hearing. Importantly, the judge erred by concluding that the Appeal turned on paper evidence only given that the Appellant’s oral evidence regarding her ex-husband’s economic activity at the time of divorce [and perhaps throughout that was a 7 year marriage] is also germane to the issue in contention; the Appellant’s evidence, it is submitted cannot be discounted and it may well have been that the Appellant’s oral evidence together with the assessment of her credibility in conjunction with the Accountant’s report would have been persuasive in respect of the only question in dispute particularly as the Appellant had been the beneficiary of a Residence Card previously.”

4. It is said that the Appellant who was not heard did not receive a fair hearing. It is said further in the grounds that the judge materially erred in concluding without the benefit of oral evidence from the Appellant, rather than just focussing on expediency of time, the circumstances under which the Appellant obtained the accountant’s report or the ease or otherwise of being able to obtain other evidence would have been apparent.
5. It is right to say that the written grounds are not the easiest to follow but Mr Karim explained skilfully the basis of the Appellant’s appeal. He said that at paragraph 9 when the judge said there was an “agreement” as to how the case was to proceed, that agreement must have been between the Appellant’s solicitor Mr T Okunowo and the judge. It was said that insofar as paragraphs 14 and 15 were concerned that they

merited further consideration. Paragraph 15 concerned the need for there to be a proper finding in relation to there being no reliable evidence. In this regard reference was made to paragraph 14 of the Appellant's witness statement at page 8 of the original FtT bundle. Within that the appellant explains how her husband would go out to work as a barber and indeed others would visit the home. It is said nowhere did the judge engage with that aspect of the case. It was submitted that was probably because the judge was dealing with the case on a misconceived basis. In any event former partners do not always have access to all of the documents. Insofar as paragraph 14 of the judge's decision is concerned where he said that the accountant's report was insufficient, the judge did not adequately explain why the report was insufficient.

6. In his submissions Mr Wilding said that there was no material error of law. He said it was simply not a valid argument for the Appellant to say that this case should not have proceeded on the basis of submissions only. It was quite clear from paragraph 9 of the judge's decision that there was an agreement then that would be the way the case would proceed. The same solicitors who appeared then remained on record now. There was no evidence from those solicitors seeking to dispute paragraph 9 of the judge's decision. It was wrong of the grounds and indeed in the grant of the permission to appeal to criticise this case having proceeded on the basis of submissions only when that was the course agreed by the Appellant's representative. There was no unfairness and there was no unlawfulness. Where there had been an explicit agreement as to the course the case would take then the Appellant cannot seek to argue thereafter to demonstrate that there was an error of law. Another way of putting that was to say that the argument was doomed to fail.
7. Mr Wilding said what the submissions really turned on in relation to firstly the Appellant submitting that the judge was wrong to say the financial documents were more than marginal or ancillary and secondly, to examine the economic activity up to and prior to the divorce. He submitted that the observations at paragraph 15 of the judge's decision were referring to a lack of reliable evidence. It was a finding which was within the judge's remit to come to. The relevant accountant's report was for the one year ending April 2015. I was taken to that document at page 16 in the original bundle which showed a profit of some £5,718 which is about £110 a week. It was submitted that this fell squarely within "marginal and ancillary" given the cost of living. It was submitted that this was exactly the type of amount which can be marginal or ancillary. The judge had come to that decision and that was by way of the evidence which had been submitted. There was no issue with the Appellant's own activity. She, as it were, had picked up the baton after the divorce. It was said that there was little to be gained by looking at the Appellant's witness statement because in reality, as I understood the submissions, this was not a case where the Appellant would have been able to see the economic activity taking place. When one looked at paragraphs 14, 15 and 16 in conjunction it was clear that the judge had given reasons as to why the accountant's report was insufficient. It was the entirety of the findings which led to the decision being made in respect of the contents of the accountant's report. In the end the judge had found against the Appellant on a narrow point and this ultimately was the issue before me. Interference in effect with these sorts of cases would require there to be a material error of law. Ultimately it

was said the appeal had failed before the judge because of the limited evidence which was presented. The findings were open to the judge and that there was no material error of law.

8. Mr Karim in his response said that earnings of around £110 per week were not so low as to not be genuine economic activity. £110 a week was equivalent to the approximate public funds which would be available to a person if claiming state benefits and thereby Mr Karim in effect was saying if that was sufficient for living purposes in accordance with public funds regulations then it should be for these considerations as well. Therefore, he said it was irrational for the judge to have said that these aspects were marginal. Mr Karim also said that in any event the Secretary of State had never raised this point in the refusal letter. The Secretary of State had not said this was a case where there was no genuine economic activity. The Secretary of State instead had said the Appellant's husband had not been exercising treaty rights. There was a difference.
9. As to whether or not the accountant's report was unreliable Mr Karim pointed out that this was a sole trader so the submissions in relation to drawings was irrelevant, but the expenses were set out in any event, such as cost of telephones and the like. Mr Karim said it was not open to the judge to reach the conclusions that he did. Where the judge said "access to other documents" he had not heard the evidence and where he said "everything turned on the documents" these issues should have been put to the Appellant.
10. When coming to my decision in this case I do have sympathy for what is being said by Mr Wilding in respect of the apparent agreement which was reached between the judge and the Appellant's solicitor namely as to whether this was going to be a case by way of submissions only. It does appear the way in which the grounds were drafted that the major complaint was that the hearing should not have proceeded by way of submissions only. Insofar as that aspect of the appeal is concerned as I say I have sympathy for what Mr Wilding has submitted.
11. There are however three features of the case which caused me considerable concern, and which had been highlighted by Mr Karim. Firstly, even if the judge was merely going to deal with the case on the documents available to him then it was incumbent for him to deal with the witness statement which the Appellant herself had presented. That did indeed present further detail and background to her former husband's work. The failure to refer to that in the decision does require one to hesitate about the soundness of the judge's decision. Then, when I look to the grounds which were submitted against the Secretary of State's decision dated 24th November 2015 there was reference to the Appellant's husband's work and what the Appellant's husband had been doing previously. It therefore was necessary for the judge to either have said that he agreed or disagreed with the evidence that the Appellant had presented in her witness statement.
12. Secondly, there is the issue of the accountant's report. In the relatively short paragraphs at 14, 15 and 16 of the judge's decision the judge, in reality was looking to see if there was anything to support what was set out in the accountant's report and

the judge referred at paragraph 15 to seeking evidence of drawings or other sources of income for the ex-partner. I am persuaded by what Mr Karim had said in this regard that this was, as one can see, a small sole trader business. There should not ordinarily be the expectation of drawings within those documents. The document at page 16 is in a proper form. It sets out what the expenses were, such as telephone and other expenses. It then sets out what the income was. If that was a document that was not going to be accepted, even if this was a case which was being dealt with by way of submissions, then at the very least it should have been raised by the judge so that it could have been dealt with.

13. The third aspect of the case is in relation to whether or not the earnings were marginal and/or ancillary. Again, I am persuaded by Mr Karim that earnings of £110 a week in a sole proprietor business is not marginal or ancillary activity. In my judgement although £110 per week was a relatively small sum of money, it is equivalent to the amount for public funds. In my judgment the judge was not entitled to come to the conclusion that he did about "marginal and ancillary". Overall, I have to say it appears to me that the judge was put in a difficult position having to deal with this second floating case but that was a task before him and there was no Presenting Officer but nonetheless the judge had to deal with the matters before him. Cumulatively, the errors amount to a material error of law albeit individually they may not have shown a material error of law.
14. In the circumstances the decision of the judge is set aside. There will have to be a re-hearing on all issues. None of the current findings shall stand. The re-hearing shall take place at Hatton Cross.

Notice of Decision

The decision of the First-tier Tribunal contains a material error of law and is set aside. There shall be a re-hearing on all issues at the First-tier Tribunal.

No anonymity direction is made.

Signed: A Mahmood

Date: 11 January 2018

Deputy Upper Tribunal Judge Mahmood