



Upper Tribunal

(Immigration and Asylum Chamber)

Appeal Number: EA/00966/2019 (P)

THE IMMIGRATION ACTS

Decided under rule 34 (P)

On 9 October 2020

Decision & Reasons Promulgated

On 16 October 2020

Before

UPPER TRIBUNAL JUDGE KEKIĆ

Between

HABEEB OLUSOLA SULAIMAN
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation (by way of written submissions)

For the appellant: Church Street Solicitors

For the respondent: No submissions received

DECISION AND REASONS

Background

1. This appeal comes before me following the grant of permission to appeal to the appellant by First-tier Tribunal Judge Wilson on 27 May 2020 against the determination of First-tier Tribunal Judge Scott-Baker, promulgated on 7 January 2020 following a hearing at Taylor House on 25 October 2019.
2. The appellant is a Nigerian national born on 12 September 1972. he appears to have entered the UK unlawfully in 2005 with the help of an agent. No details are provided for what he did then or why he had chosen to enter in that way. In 2009 he married an EEA national. He was issued with a residence card in November 2010 but that was revoked on 18 May 2015 when his application for permanent residence was refused. His appeal against that decision was dismissed by First-tier Tribunal Judge Bradshaw in October 2016 and the decision was upheld on appeal by Deputy Upper Tribunal Judge Roberts in July 2017. The appellant then sought a residence card on retained rights of residence in October 2018. That was refused on 12 February 2019 and he now appeals that decision.
3. The respondent did not accept that the appellant's former wife had been a qualified person or had the right of permanent residence at the relevant time. The previous decisions of the Tribunal were relied upon which raised concerns over whether the EEA national had been employed throughout the requisite period. In support of his current application the appellant had provided payslips and P60s for his former spouse but the respondent made checks and found them to be false. Checks with HMRC disclosed no record of employment / income for the tax year 2013/2014 which would have covered the period when divorce proceedings were initiated. The application was accordingly refused under reg. 10(5).
4. The appellant was not in attendance when the hearing came before Judge Scott-Baker however the appellant's representative attended and explained that the appellant had felt sick and had gone to hospital. An adjournment was requested. The judge indicated that she would give the appellant seven days to submit evidence of his illness. The judge stated: "*Even if such evidence was received the appeal would be determined on the evidence that there was before me at the hearing save that Mr Omoniruvbe would have the opportunity to make written submissions provided that the same were received by 4 pm on Friday 1 November 2019*" (at 8). As of 7 January 2020 when the determination was signed, no further evidence had been placed before the judge. The judge proceeded to determine the appeal and dismissed it.
5. The appellant lodged a successful application for permission to appeal on 15 January 2020. He adduced with his grounds a copy of a fax sent to Taylor House on 28 October 2019 which had included a hospital attendance card for 25 October 2019. The grounds argued that the appellant should not be disadvantaged by the failure of the administrative staff to place the evidence

before the judge. It was argued that the refusal by the judge to relist the appeal was procedurally unfair.

Covid-19 crisis: preliminary matters

6. The matter would have normally been listed for hearing following the grant of permission, but due to the pandemic this did not happen and on 5 August 2020 directions were issued instead, inviting the parties to make submissions on the proposal that the appeal be determined on the papers. Submissions were also invited as to the merits.
7. The appellant replied on 17 August 2020. There has been no response from the Secretary of State, as far as I am aware.
8. I now consider whether this matter can be determined on the papers. In doing so I have regard to the Tribunal Procedure (Upper Tribunal) Rules 2008 (the UT Rules), the judgment of Osborn v The Parole Board [2013] UKSC 61, the Presidential Guidance Note No 1 2020: Arrangements during the Covid-19 pandemic (PGN) and the Senior President's Pilot Practice Direction (PPD). I have regard to the overriding objective which is defined in rule 2 of the Tribunal Procedure (Upper Tribunal) Rules 2008 as being "*to enable the Upper Tribunal to deal with cases fairly and justly*". To this end I have considered that dealing with a case fairly and justly includes: dealing with it in ways that are proportionate to the importance of the case, the complexity of the issues, etc; avoiding unnecessary formality and seeking flexibility in the proceedings; ensuring, so far as practicable, that the parties are able to participate fully in the proceedings; using any special expertise of the Upper Tribunal effectively; and avoiding delay, so far as compatible with proper consideration of the issues (Rule 2(2) UT rules and PGN:5).
9. I have had regard to the submissions and to all the evidence before deciding how to proceed. I note that despite being given the opportunity the appellant's representatives have made no submissions on the manner in which the error of law issue should be determined. I assume their silence to mean they do not object to a paper decision.
10. I am satisfied that the directions were properly served on the respondent and that she has had the opportunity to reply but has declined to do so.
11. I take the view that a full account of the facts are set out in those papers, that the arguments for and against the appellant have been clearly set out and that the issues to be decided are straightforward. There are no matters arising from the papers which would require clarification and so an oral hearing would not be needed for that purpose. I have regard to the importance of the matter to the appellant and consider that a speedy determination of this matter is in his best interests. I am satisfied that neither party would be disadvantaged by a paper determination and that I am able to fairly and justly deal with this matter on the evidence before me.

Submissions

12. The appellant repeats his grounds in his submissions. It is argued that evidence of his attendance at a hospital on the date of his hearing had been forwarded to Taylor House within the seven days permitted by the judge and that the appellant had been deprived of a fair hearing by the judge's failure to relist the appeal.
13. With respect to the merits of the appeal, it is submitted that the appellant's ex-spouse was a qualified person at the date of the commencement of divorce proceedings in May 2014¹ and also at the date of the termination of the marriage in September 2014. It is submitted that the previous judge had accepted the sponsor's earnings of £350 a month over a five month period between May and September 2014. Reliance is placed on a letter from the sponsor's former employer, Heathfield Solutions, dated 14 May 2019 confirming she was employed by them between March 2013 and September 2014. It is submitted that if the sponsor's employer did not deduct national insurance contributions and tax from her earnings, the appellant should not be penalised. It is submitted that the appellant was and still is in full time employment, that the marriage lasted three years and that they lived in the UK during that time. The Tribunal is invited to set aside the determination of the First-tier Tribunal Judge and to allow the appeal or remit it for re-hearing.

Discussion and conclusions

14. I have considered the evidence, the determination, the grounds for permission and the submissions.
15. I deal first with the complaint that there was a procedural irregularity in the making of the decision in this appeal. I have had sight of the attendance note and the accompanying fax sent on 28 October 2019. I note that neither the fax nor the note was on the Tribunal file when the judge came to determine the appeal but it is clear that a fax was sent by the solicitors in accordance with the judge's instructions and I am satisfied that it was sent to the Taylor House fax number. Whatever the reason, the documents were not passed on to the judge.
16. I would note here, however, that the judge's clear instructions as can be seen from the determination and the Record of Proceedings were that even if evidence of the appellant's illness was adduced, and there has been no evidence or details of the nature of the illness, she would make her decision on the basis of the evidence already before her but that she would allow written submissions to be made. No such submissions were forwarded to the Tribunal by the appellant's representatives and no explanation for the failure to do so has been offered.

¹ It is noted that the appellant's chronology in the appeals bundle puts forward a different date for the commencement of divorce proceedings.

17. Nevertheless, the judge proceeded on a factually incorrect premise because she was under the impression that no evidence of the appellant's failure to attend his hearing had been sent, when the evidence now shows that it had. That amounts to an error of law.
18. I now turn to the issue of whether the error is material and whether I can set aside the decision of the First-tier Tribunal Judge and allow the appeal as the appellant's representatives urge.
19. The evidence before the First-tier Tribunal Judge did not greatly assist the appellant's case. Whilst the documents in the appellant's bundle from Heathfields Solutions confirm that the sponsor was employed by them between March 2013 and September 2014, the payslips in the supplementary bundle from the respondent are from a different employer even though at least one covers the same period. They also show the sponsor residing at a different address. The P60 for the year ending 5 April 2014 show a third alleged employer. HMRC records, however, show no employment or income details for 2010-2011, 2012-2013, 2013-2014 or 2014-2015. The evidence as recorded in the determination of First-tier Tribunal Judge Bradshaw dismissing the appellant's appeal in October 2016 was that there was a P60 showing the sponsor worked for Heathfield Solutions in 2009/2010 (not referred to in the letter from that company now relied on) (at paragraph 17). The evidence previously given to the Tribunal by the appellant as to the sponsor's hours of work a week conflicted with the documentary evidence also relied upon. None of these issues have been engaged with in the present written submissions. Clearly they need to be resolved if the appellant has any hope of succeeding in his appeal. This is not, therefore, an appeal that I can allow as the appellant invites me to do.
20. I, therefore, set aside the decision of the First-tier Tribunal Judge as it was procedurally unfair for the judge, though through no fault of her own, to proceed to determine the appeal on the mistaken belief that the appellant had not forwarded evidence of his hospital attendance as directed.
21. The appellant seeks remittal to the First-tier Tribunal. In accordance with the Senior President's Practice Statement at 7.2(a), I am satisfied that the appellant has been deprived of a fair hearing and that remittal is the appropriate course of action in these circumstances.

Decision

22. The decision of the First-tier Tribunal contains errors of law and it is set aside. A fresh decision shall be made by another judge of the First-tier Tribunal at a date to be arranged.

Anonymity

23. No application for anonymity has been made at any stage and I see no reason to make one.

Directions

24. Directions shall be issued in due course by the First-tier Tribunal at Taylor House.

Signed

R. Kekić

Upper Tribunal Judge

Date: 9 October 2020