



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

Appeal Number: EA/06286/2018

Heard at Field House

**Decision & Reasons
Promulgated**

On 3 January 2020

On 4 February 2020

THE IMMIGRATION ACTS

Before

UPPER TRIBUNAL JUDGE HANSON

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

**OLUWASEUN OLUYOLE
(anonymity direction not made)**

Respondent

Representation:

For the Appellant: Ms Bassi Senior Home Office Presenting Officer.

For the Respondent: Mr E Yerokuh of A&E Solicitors.

ERROR OF LAW FINDING AND REASONS

1. The Secretary of State appeals with permission a decision of First-Tier Tribunal Judge L K Gibbs promulgated on 4 July 2019 in which the Judge allowed Mr Oluyole's appeal against the refusal of the above Secretary of State to issue him a Permanent Residence Card as the family member of his spouse, a citizen of the Republic of Ireland and the United Kingdom.

Background

2. Mr Oluyole is a citizen of Nigeria born on 26 April 1981.
3. The Judge accepts Mr Oluyole's spouse, Ms Gibson, has since birth had dual Republic of Ireland and British citizenship.
4. The Judge found that Mr Oluyole and Ms Gibson were married on 12 March 2011. A previous application for a Residence Card as the family member of his spouse was refused on 24 January 2012 as the Secretary of State was not satisfied that Ms Gibson was a Qualified Person in accordance with Regulation 6 of the Immigration (EEA) Regulations 2006.
5. Mr Oluyole was ultimately issued a Residence Card on 10 June 2013.
6. In light of the chronology the Judge was satisfied that Ms Gibson should be treated as an EEA national [22].
7. The Judge then considered whether Ms Gibson had been a Qualified Person throughout the required 5-year period. The Secretary of State accepted that Ms Gibson was a jobseeker between 19 September 2011 and 15 February 2012 and a worker between April 2012-July 2012, and again from 3 April 2013 to 5 April 2016 and was currently in support of Employment Support Allowance (ESA) as she was unable to work due to illness [23].
8. At [24 -25] the Judge writes:
 24. The appellant's witness statement only briefly deals with the issue of his wife's employment and it does not, I find, provide any helpful detail on this issue. I also do not have any witness statement from Ms Gibson and she did not attend the appeal hearing. There is however undisputed documentary evidence from the Department of Work and Pensions that she started to receive ESA on 1 April 2016 and that she continues to receive this benefit up to and including the date of the appeal hearing.
 25. I am satisfied that ESA is a benefit paid to people who are assessed to be unfit to work. It is not disputed that for 3 years, 2013 - 2016, Ms Gibson met the requirements of Regulation 4(1)(a) of the 2016 Regs as a worker. Based on her receipt of ESA since 1 April 2016 I am satisfied that, in accordance with Regulation 5(7) of the 2016 Regs Ms Gibson has retained a worker status and that consequently the appellant meets the requirements of Regulation 15(1)(b) of the 2016 Regs and must be issued with a Permanent Residence Card in accordance with Regulation 19 of the 2016 Regs.
9. The Secretary of State asserts the Judge failed to address a material issue namely whether Mr Oluyole could satisfy Schedule 3 of the Immigration (EEA) (Amendment) Regulations 2012: section 2(3)b(i) - "held a valid registration certificate or residence card issued under the 2006 Regulations" at the relevant date. It is stated Mr Oluyole did not hold either of these documents.
10. It was also submitted Mr Oluyole had no right of residence under the 2016 Regulations in any event, as an application made on 1 June 2012 was withdrawn before any consideration was made or any right to residence established, and no further application was received until January 2013. As such Mr Oluyole cannot meet transitional arrangements for his sponsors dual British and EEA nationality.

11. The grounds assert the errors are material as they render Mr Oluyole unable to meet section 2(3)b(i) at the relevant date which must be considered together with section 2(3)b(ii) and (iii) of Schedule 3 of the Regulations.
12. The Secretary of State asserts Mr Oluyole cannot meet Regulation 9 of the 2016 Regulations as there was no evidence of the sponsor exercising treaty rights in another Member State either.
13. Permission to appeal was granted by another judge of the First-Tier Tribunal on the basis it is said to be arguable the Judge has fallen into error in considering the application of the scope of Schedule 3 and in relation to the position appertaining to the holding of documents. It also said to be arguable the Judge has fallen into error in relation to the question of there being a right of residence. It is therefore arguable that the outcome has been affected and further it is arguable that the Judge has set out in insufficient analysis in relation to the core issues leading to the conclusion in respect of the context identified in the permission application.

Error of law

Submissions

14. The Immigration (EEA) Regulations 2006 have undergone a series of amendments to reflect decisions of the European Court. One such exercise resulted in the EEA (Amendment) Regulations 2012 referred to by the Secretary of State in her pleadings. The relevant provision in this appeal is SCHEDULE 3 of the 2012 EEA (Amendment) Regulation which sets out the transitional provisions in the following terms:

Transitional Provisions Interpretation

1. In this Schedule—

(a) the “2006 Regulations” means the Immigration (European Economic Area) Regulations 2006; and

(b) the terms “EEA family permit”, “EEA State”, “family member”, “registration certificate” and “residence card” have the meanings given in regulation 2(1) of the 2006 Regulations.
Amendments to the definition of EEA national

2.—(1) Where the right of a family member (“F”) to be admitted to, or reside in, the United Kingdom pursuant to the 2006 Regulations depends on the fact that a person (“P”) is an EEA national, P will, notwithstanding the effect of paragraph 1(d) of Schedule 1 to these Regulations, continue to be regarded as an EEA national for the purpose of the 2006 Regulations where the

criteria in subparagraphs (2), (3) or (4) are met and for as long as they remain satisfied in accordance with subparagraph (5).

(2) The criterion in this subparagraph is met where F was on 16th July 2012 a person with a permanent right to reside in the United Kingdom under the 2006 Regulations.

(3) The criteria in this subparagraph are met where F—

(a) was on the 16th July 2012 a person with a right to reside in the United Kingdom under the 2006 Regulations; and

(b) on the 16th October 2012—

(i) held a valid registration certificate or residence card issued under the 2006 Regulations;

(ii) had made an application under the 2006 Regulations for a registration certificate or residence card which had not been determined; or

(iii) had made an application under the 2006 Regulations for a registration certificate or residence card which had been refused and in respect of which an appeal under regulation 26 could be brought while the appellant is in the United Kingdom (excluding the possibility of an appeal out of time with permission) or was pending (within the meaning of section 104 of the Nationality, Immigration and Asylum Act 2002(19)).

(4) The criteria in this subparagraph are met where F—

(a) had, prior to the 16th July 2012, applied for an EEA family permit pursuant to regulation 12 of the 2006 Regulations; or

(b) has applied for and been refused an EEA family permit and where, on the 16th July 2012, an appeal under regulation 26 against that decision could be brought (excluding the possibility of an appeal out of time with permission) or was pending (within the meaning of section 104 of the 2002 Act).

(5) Where met, the criteria in subparagraph (2), (3) and (4) remain satisfied until the occurrence of the earliest of the following events—

(a) the date six months after an EEA family permit has been issued if F has not within that period been admitted to the United Kingdom;

(b)the date on which an appeal against a decision referred to in subparagraph (3)(b)(iii) or (4)(b) can no longer be brought (ignoring the possibility of an appeal out of time with permission) where no such appeal has been brought;

(c)the date on which any appeal against a decision referred to in subparagraph (3)(b)(iii) or (4)(b) is finally determined, is withdrawn or is abandoned (within the meaning of section 104 of the 2002 Act) (save where the outcome of the appeal process is that the document in question falls to be granted);

(d)the date on which F ceases to be the family member of an EEA national; or

(e)the date on which a right of permanent residence under regulation 15 of the 2006 Regulations is lost in accordance with regulation 15(2) of those Regulations.

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(6) P will only continue to be regarded as an EEA national for the purpose of considering the position of F under the 2006 Regulations.

15. It was submitted by Ms Bassi that an application made in 2012 had been withdrawn. The Judge at [21] writes:

21. The appellant made a further application on 1 June 2012 for a Residence Card and was issued with a Certificate of Application on 6 September 2012. The respondent's Employer Checking Service issued a letter on 2 October 2012 confirming that the appellant had an outstanding application at that time and that he was able to work. On 27 December 2012 the respondent wrote to Ms Gibson confirming that the appellant's application had been withdrawn further to her instructions of 20 November 2012. The respondent also wrote in these terms to the appellant. Ms Gibson and the appellant disputed that she had withdrawn her support for the application and in a letter dated 15 February 2013 the respondent accepted this and stated that the application remained under consideration. The appellant was ultimately issued with a Residence Card on 10 June 2013.

16. It was also submitted by Ms Bassi that the Judge's finding that the Secretary of State had accepted that the application remained under consideration is factually incorrect.

17. A printout from the Secretary of State's Case Management System records an entry for 6 February 2013 in the following terms:

"Female called identifying herself as the partner of the subject, Gemma Gibson.

She stated that she had received a letter stating that she had withdrawn her sponsorship from the application (of June 2012) and advising her to call the LIT.

I asked if she had since made any further applications and she stated that they have, by just changing the date and sending the same application. I informed her that this remains outstanding and that the withdrawal of sponsorship only applies to the previous application which is now concluded and that the new one remains outstanding.

She adamantly stated that she did not withdraw her sponsorship from the previous application. I told her that the new one will be considered and that her claims and that if she wants to reinforce this again to be considered as part of the new application, she can write to the team in Liverpool where it is being considered."

18. There was no challenge by way of judicial review to the lawfulness of the Secretary of State's decision to treat the application as withdrawn.
19. On behalf of Mr Oluyole it was argued the Secretary of State does not argue an error of law but an error of fact insufficient to warrant the Upper Tribunal interfering further in this matter.
20. Mr Oluyole also argued that if he had not made an application in 2012 the later grant of a Residence Card would not have occurred. It was also argued there was no copy of the alleged new application produced and that it was disputed that such an application had been made.
21. Mr Yerokuh referred to a Freedom of Information Act (FIA) request having been made and claimed there was no copy of the further application in the bundle received as a result of the application. He submitted the application allegedly withdrawn was the application which resulted in the Residence Card being granted. It was submitted the letter of 3 February 2012 is the basis for Mr Oluyole's claim that the original application had not been withdrawn.
22. It was further submitted on Mr Oluyole's behalf that the evidence produced by the Secretary of State, referred to above, did not show that the sponsor confirmed that a fresh application had been made and that there was no evidence to support the claim that the earlier application had been treated as withdrawn.
23. It was accepted by Mr Yerokuh that all the Judge had was Mr Oluyole's appeal bundle even though the result of the FIA request had been in the position of the representative. The documentary evidence relied upon by the Judge was that in Mr Oluyole's bundle only. Mr Yerokuh claims the Judge was given every chance to look at the evidence but that the Judge did not give a direction for such evidence to be produced. It was also argued that directions given by the First-tier Tribunal did not say that the burden was upon Mr Oluyole to disclose all the bundles.
24. Mr Yerokuh submitted that the alleged error is disputed but even if it was made out this did not satisfy the required tests to enable the Upper Tribunal to find error of law. It was submitted the Secretary of State was attempting to amend the grounds and that the claim by Ms Bassi that this issue had been raised in the refusal letter was not correct. If an error may have been made it was not material as the evidence which showed that an application had been made in 2012 and not withdrawn.

Discussion

25. The question of whether the 2012 application had been withdrawn is of importance for had it been withdrawn and a fresh application made Mr Oluyole would not be able to meet the requirements of the transitional provisions which would be fatal to his appeal, as had Mr Oluyole not shown he could satisfy the transitional provisions the Judge's decision is not consistent with decision in McCarthy v UK (Case C-434/09).
26. The question of whether the 2012 application had been withdrawn was clearly a matter that was live before the Judge. The Secretary of State is therefore entitled to pursue the grounds of appeal that she has especially in light of the grant of permission to appeal.
27. When the Tribunal asked Mr Yerokuh to pass up the bundle he had following the FIA request a degree of hesitancy was detected resulting in it having to be made clear that the Tribunal wished to see these documents. They had not been disclosed to the Judge despite the fact they were in the representatives possession which also meant the Presenting Officer did not have sight of the same and was not given the opportunity to address whether the application of January 2013, which Ms Bassi states is the one which led to the grant of the Residence Card, was treated as a continuation of the withdrawn 2012 application as Mr Oluyole alleges, or not.
28. The reason for Mr Yerokuh's hesitancy became clear once the FIA documents were considered. It had been submitted on Mr Oluyole's behalf that there was no evidence in those documents to show that the earlier 2012 application had been withdrawn. There had been provided in Mr Oluyole's bundle a copy letter written by his sponsor to the Secretary of State claiming not to have withdrawn her support for his application, which must indicate the author of the letter was aware of the decision maker's position that the application had been withdrawn. There is in the FIA bundle a copy of a document headed "Return of Document Request" dated 20 November 2012 stating the reason for the document request was withdrawal of sponsorship, setting out the Home Office reference, applicant's names as that of Mr Oluyole and Gemma Sarah Gibson, correct dates of birth and nationalities, and the date the application was submitted on 1 June 2012.
29. There is within the bundle a letter dated 13 May 2012 from Patterson & Co, Immigration Advisers in London, filing an application for a Residence Card following the refusal of an earlier application for a Residence Card dated 12 January 2012.
30. The FIA papers include a document headed "GCID" Case Record Sheet relating to an application made on 1 June 2012 for an EEA Residence Card of which the case outcome is noted as "Withdrawn application" in the outcome section dated 27 December 2012. There is a specific reference to an entry dated 20 December 2012 stating that the application has been withdrawn as the sponsor has withdrawn her

sponsorship and is in the process of filing for divorce. An internal minute records a letter sent to Mr Oluyole on 14 January 2013 which contains the following:

“I have noted that Mr Oluyole’s application was withdrawn in a letter dated 20 November 2012.”

31. The Note records a fax from the sponsor stating she did not wish to have the application withdrawn, dated January 2013, and a complaint received on 23 January 2013 from the sponsor stating she had not withdrawn her support for the application.
32. A further entry dated 2 February 2013 records Mr Oluyole was refused a residence card on 12 January 2012 and his passport retained as he had no current leave. It is also stated a letter submitted to say the sponsor was withdrawing her application provided no reason to suggest it was not the applicant’s letter as it contained the address that the applicant had supplied with a previous application. It is also noted the sponsor appeared to withdraw support for the application in a subsequent telephone call. The person making the entry notes there was no reason for UKBA to question the genuine nature of that application to withdraw. There is also a copy of the note recording the telephone call by Miss Gibson referred to by Ms Bassi in her submissions in which she stated that she had not withdrawn the application but had made a further application by changing the date and sending the same application which Ms Gibson was advised would be considered. This shows a fresh application was made.
33. A further Case Record Sheet dated 4 June 2013 refers to the conversation noted above and consideration of the application that was pending at that date.
34. I find that there is clear evidence to support the Secretary of State’s assertion that the application for a Residence Card made in 2012 was treated as withdrawn following notification by the sponsor that she was withdrawing her support for the same. I find Mr Oluyole’s current representative was fully aware that such evidence existed following receipt of the FIA request papers. I note the claim the Judge could have issued a direction for such documents to be produced, but did not, as if this somehow absolves the representative for the failure to make a full, frank and open disclosure, has no merit. It is not made out the Judge was even aware of these documents which had also not been disclosed to the Upper Tribunal and only came to light as a result of a comment made by Mr Yerokuh during his submissions.
35. The Overriding Objectives together with the obligation owed by advocates to any Court or Tribunal they appear before means there is an obligation to make a full and frank disclosure of all evidence they have in their possession relevant to the issues in the appeal in accordance with their duty of candour. Mr Yerokuh argued that such issues had not been raised in the reasons for refusal letter, but they were clearly raised at the hearing before the Judge and by the Secretary of State in relation to this appeal, yet the denial of there being any relevant material continued.

36. I find the balance of the evidence supports Ms Bassi's submission that as a result of the 2012 application having been withdrawn later that year Mr Oluyole was unable to satisfy the requirements of the transitional provisions set out in the 2012 Amendment Regulations. As such Mr Oluyole was not entitled to a Residence Card.
37. Although it was submitted on Mr Oluyole's behalf that the Secretary of State was seeking to rely upon an error of fact such can amount to an error of law. In this appeal, as a result of not having been given the full evidential picture, the Judge has erred in law in allowing the appeal when the correct examination of the evidence shows Mr Oluyole has no legal basis to be granted a Residence Card. The decision to allow the appeal is infected by legal error.
38. As Ms Gibson has been a British and Irish citizen since birth it is not made out she is able to show she has exercised treaty rights in a Member State of which she is not a national in exercise of her right of free movement.
39. It is not made out therefore that this is a case in which Mr Oluyole has any realistic prospects of success.
40. Even if granted a Residence Card subsequent to the withdrawal of the 2012 application on the further application this does not support the claim that Mr Oluyole is entitled to a Residence Card on the application leading to the impugned decision under appeal.

Decision

41. **The First-Tier Tribunal Judge materially erred in law. I set aside the decision of the original Judge. I remake the decision as follows. This appeal is dismissed.**

Anonymity.

42. 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.....
Upper Tribunal Judge Hanson

Dated the 28 January 2020

