Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/36585/2014

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
Oral determination given following hearing	**On 22 September 2015**
On 20 August 2015	

Before

UPPER TRIBUNAL JUDGE CRAIG

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

AFOLABI SUNDAY OTULAJA

Respondent

Representation:

For the Appellant: Mr T Wilding, Home Office Presenting Officer
For the Respondent: Mr S Nwaekwu, Moorehouse Solicitors

DETERMINATION AND REASONS

1. This is an appeal brought by the Secretary of State against a decision of First-tier Tribunal Judge Nichols who had allowed the appeal of Mr Otulaja

against the Secretary of State's refusal to grant him a permanent residence card. For ease of reference I shall throughout this determination refer to Mr Otulaja who was the original appellant as "the claimant" and to the Secretary of State, who was the original respondent, as "the Secretary of State".

2. The claimant was married in 2009 to a national of Portugal. Unfortunately the couple were divorced on 23 July 2013. By virtue of the Immigration (European Economic Area) Regulations 2006 under Regulation 10(5) a person satisfies the conditions in that paragraph if he ceased to be a family member of an EEA national with a permanent right of residence on the termination of the marriage if at that date he was residing in the United Kingdom in accordance with these Regulations and he also satisfies the conditions in subparagraph (6) of Regulation 10 and (which is relevant in this case) prior to the initiation of proceedings of the termination of the marriage the marriage had lasted for at least three years and the parties had resided in the United Kingdom for at least one year during its duration.

3. In the hearing before Judge Nichols the judge found and there is no challenge to this finding that the parties had been married in 2009 so that the marriage had lasted for at least three years prior to the instigation of divorce proceedings, that the claimant's wife had been working as at the date of divorce and that the couple also had been residing in the United Kingdom for over one year. Accordingly this claimant had acquired the right to reside and continue residing in this country under the 2006 Regulations.

4. By virtue of Regulation 15, however, in order to be entitled to the permanent right of residence under the 2006 Regulations the claimant needed to show that as at the date of decision he had been residing in the UK in accordance with the Regulations for a "continuous period of five years". In the context of theses Regulations that means that he had to show a combination of his wife having worked in accordance with the Regulations before the divorce and he himself having then worked in what would have been in accordance with the Regulations were he an EEA national after the divorce.

5. The decision in this case was made by the Secretary of State in September 2014 and on any view it is accepted that there was no evidence before the judge that the claimant's wife had been exercising treaty rights in this country before April 2010. So on any view as at the date of the Secretary of State's decision the application could not have succeeded.

6. Judge Nichols while finding, as I have already noted, that the requirements under Regulation 10 had been satisfied found also in terms at paragraph 13 that "The evidence before me does not establish residence in accordance with the Regulations for the required period of

five years" although he acknowledged that this might be "simply on the basis of an absence of clear evidence".

7. In light of this finding what ought to have followed was a decision dismissing the appeal because the claimant had not satisfied the necessary requirements to entitle him to a grant of permanent residence. However, notwithstanding this finding, which the judge repeated at the end of paragraph 13 when he said that "I am unable to record a finding whether the appellant has resided in the UK in accordance with the Regulations for the required period of five years", the judge nonetheless allowed the appeal.

8. Unsurprisingly the Secretary of State has appealed against this decision on the basis that in light of the finding that the requirement to establish that the claimant had been living in this country in accordance with the Regulations for a continuous period of five years had not been satisfied there was no proper basis on which the appeal could have been allowed.

9. On behalf of the Secretary of State Mr Wilding submits that in any event there is no clear evidence showing continuous working before 2013 but this is not a matter which I have to determine.

10. On behalf of the claimant, Mr Nwaekwu does not seek to assert that there had been any evidence before the Tribunal to show that the claimant's ex-wife had been exercising treaty rights in this country prior to 12 April 2010 and in these circumstances was unable to mount a submission that the decision was sustainable. It is accordingly clear that this Tribunal has no alternative other than to find that there was a material error of law in Judge Nichols' decision such that it must be set aside and remade by this Tribunal and in the absence of any evidence showing that the claimant had been residing in this country for a continuous period of five years in accordance with his treaty rights prior to the date of decision it follows that the appeal against the respondent's refusal to issue him with a permanent residence card must be dismissed.

Decision

The decision of the First-tier Tribunal allowing the claimant's appeal is set aside as containing a material error of law.

The Tribunal remakes the decision, dismissing the claimant's appeal.

Signed:

Upper Tribunal Judge Craig

Date: 18 September 2015