



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: EA/00599/2017

THE IMMIGRATION ACTS

Heard at Field House
On 6th September 2018

Decision & Reasons Promulgated
On 13th September 2018

Before

UPPER TRIBUNAL JUDGE REEDS

Between

AKINLABI [A]
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr Karim, Counsel instructed on behalf of the Appellant, Chris Alexander Solicitors
For the Respondent: Mr Walker, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The Appellant, with permission, appeals against the decision of the First-tier Tribunal (Judge Oliver) who, in a determination promulgated on 20th April 2018 dismissed the

Appellant's appeal against the decision of the Respondent to refuse his application for a residence card under the Immigration (European Economic Area) Regulations 2006 ("hereinafter referred to as the 2006 Regulations").

2. The history of the application is set out in the decision of the First-tier Tribunal. The Appellant is a national of Nigeria who applied on 15th June 2016 for a residence card as a confirmation of right to reside in the United Kingdom. He had entered the United Kingdom on 15th April 2007 having entered the UK as a student. During the period in the United Kingdom he met his former wife who was a dual Slovenian and Norwegian national. They subsequently married on 6th August 2010. They have a child who was born in 2012. The Appellant was issued with a residence card on the basis of his relationship with his spouse valid from 10th January 2011 until 10th January 2016.
3. It is unclear from the chronology and the papers provided as to when the relationship broke down completely but there is reference to a period in 2013 where there were difficulties within the relationship as a result of his former wife's mental health. In the papers before the First-tier Tribunal there were court orders relating to an injunction which had been sought by the applicant. The court order is not dated in the papers before the Tribunal but according to the witness statement at paragraph [8], that was made on 17th June 2013. There is also an order made on a later date in or about 2014 which granted a residence order to the applicant (now made as a Child Arrangements Order).
4. The applicant has remained in the United Kingdom since the parties separated. It is unclear also when proceedings were initiated for the divorce. There is some information that a divorce petition or proceedings for divorce were initiated in or about December 2014 (see letter at E1) and there is further provision of information which states that there was a period of time until 2016 when the documents were resubmitted however, it is unclear from the material when proceedings in fact were initiated, and when the parties separated and the dates in relation to those events. There is however a decree absolute which was pronounced on 26th August 2016.
5. The application made by the Appellant was refused by the Secretary of State in a decision letter dated 9th January 2017. In the notice of immigration decision, it is stated that there was a refusal to issue a permanent residence card under Regulation 15(1)(f) with reference to Regulation 10(4), 10(5) and 10(6). The reasons given in the decision itself were stated as follows; that the applicant had failed to provide evidence that he met the requirements of Regulations 10(4) and 10(5) and 10(6) and therefore had not retained a right of residence.
6. Accompanying the decision was a reasons for refusal letter of the same date. It set out the requirements in order to qualify for a retained right of residence following divorce from an EEA national in accordance with Regulation 10(5) of the 2006 Regulations, including evidence from the EEA former spouse who was exercising free movement rights in the United Kingdom at the time of the divorce, evidence that the marriage lasted for at least three years and that the applicant and former spouse resided in the UK for at least one year during the marriage and that he was currently in employment,

self-employment or economically self-sufficient as if he were an EEA national. The decision letter also went on to state that in addition, as the application was for permanent residence he must demonstrate that he had resided in accordance with the Regulations for a continuous five year period, which would mean that the EEA national former spouse continuously exercised free movement rights up to the point of divorce and that he had been employed, self-employed or self-sufficient since the divorce. Collectively the evidence must cover a continuous five year period to meet the requirements of Regulation 15(1)(f). As the Appellant had indicated that the marriage was no longer subsisting, to meet the criteria of Regulation 10(5)(a) who would need to supply evidence that the marriage was terminated through the production of a divorce certificate. The applicant had failed to provide a divorce certificate and therefore there was no evidence that the marriage had been terminated and that he could not therefore retain a right of residence until the decree absolute is obtained. The decision letter also went on to state that the applicant would need to provide evidence that the EEA national was a qualified person and that he was residing in accordance with the Regulations at the point of divorce. Thus, the applicant would need to provide evidence that the EEA national had been exercising free movement rights when the decree was issued and as no such decree had been provided and there was no evidence from the former Sponsor with the application he cannot meet the conditions. There was also reference to Regulation 10(3) and 10(4) but that it was stated that he had failed to meet the requirements relating to those paragraphs in addition.

7. The Appellant lodged Grounds of Appeal against that decision and as a result the appeal came before the First-tier Tribunal on 28th March 2018 before First-tier Tribunal Judge Oliver.
8. In a decision promulgated on 20th April 2018 the judge set out part of the history that I have referred to earlier in this decision at paragraphs [1] and [2] of the determination. It is plain from reading the decision that the Appellant had given evidence however the only evidence that is recorded is at paragraph [6] in very brief terms. The conclusion reached by the judge is set out in a brief paragraph at paragraph [8]. The judge found that the refusal did not deal with the fact that the marriage ended in a decree absolute on 26th August 2016. The judge recorded that with the lack of specific evidence it is unsurprising that the application was also refused on other basis. The judge then went on to state “when the Presenting Officer suggested that the application should have been made for a derivative right of evidence (I presume that meant residence), the Appellant asserted that he had done so but that there was no evidence of this”. The judge made reference to an argument advanced under Regulation 10(4) but the judge found that the child had not satisfied any of the conditions in Regulation 10(3). Thus, the judge reached the conclusion that he was not satisfied that the Appellant had met the requirements for a retained right of residence. He made an observation that the Appellant would “appear to have a strong case under derivative rights and the Respondent may wish to consider how best to resolve the situation in the interests of the child.”

9. The applicant sought permission to appeal that decision on the grounds that are set out in the papers on 25th May 2018. Permission was granted by Upper Tribunal Judge Kekic on 2nd July 2018. In her decision granting permission, she stated as follows:

“Arguably the judge, in setting out his brief conclusions at paragraph 8, fails to give reasons for the finding that the requirements of Regulations 10(3) and (4) were not met. I am less persuaded that there is arguable merit in the third ground, given that there is no removal decision and so no issue of separation from the child at this stage, but all the grounds may be argued.”

10. It is not necessary for me to set out any of the arguments of the parties in any greater detail as it is accepted on behalf of the Secretary of State that the First-tier Tribunal Judge failed to make any or any adequate findings on the relevant issues that were before the Tribunal on the hearing date. As Mr Karim submitted the judge had failed to engage with the evidence in the case either dealing with the issue of whether the applicant had any retained rights of residence under Regulation 10 and in accordance with the evidence that there was before the Tribunal and also in relation to Regulation 10(4) and whether or not he qualified for permanent residence. Both parties were in agreement that the short paragraph within the determination set out at paragraph [8], which was the only paragraph that dealt with the reasoning to uphold the dismissal of the appeal did not deal with any of the relevant issues. It is plain from the grounds that the Appellant had given evidence relating to a number of issues including his own status in the United Kingdom, the circumstances of his ex-wife and their child. The witness statement, as I have said, does not give full details, but it is not known what other evidence was given in the light of the short recitation at paragraph [6].
11. Given the concession made on behalf of the Secretary of State and that the parties are in agreement that the decision of the First-tier Tribunal involved the making of an error on a point of law, the correct outcome is to set aside the decision of the First-tier Tribunal.
12. When canvassing the issue of remaking the decision, Mr Karim submitted that this was a case which should be remitted to the First-tier Tribunal for a de novo hearing. He submitted that the case fell squarely within the Practice Direction of the Tribunal and that this would give the opportunity for further evidence to be given concerning the relevant issues. Mr Walker, who appeared on behalf of the Respondent was in agreement with that approach. Having heard the advocates I am satisfied that the decision should therefore be remitted to the First-tier Tribunal as both advocates have set out.
13. In addition, it is unclear from the evidence on the papers as to the position of the Appellant's ex-wife and Mr Karim considered that an “**Amos**” direction should be given to assist the Tribunal. Therefore, the following direction is issued:

The Respondent shall carry out the necessary enquiries with the HMRC in relation to his former spouse from the date of 2013 until 2016. Those enquiries shall be sent to the

applicant within four weeks of the date of this direction. The name of the applicant's former spouse is within the papers and her national insurance number is given. It is not necessary to set it out on this document.

Notice of Decision

The decision of the First-tier Tribunal involved the making of an error on a point of law; the decision is set aside and is remitted for a fresh hearing before the First-tier Tribunal on a date to be fixed and in accordance with the direction given.

No anonymity direction is made.

Signed

Date

Upper Tribunal Judge Reeds