Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: EA/01102/2016

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 20th December 2017	**On 2nd March 2018**

Before

THE LORD MATTHEWS
DEPUTY UPPER TRIBUNAL JUDGE PARKES

Between

DAVID KINGSLEY AKANLO ADOCTA
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: In person
For the Respondent: Ms N Willocks-Briscoe (Home Office Presenting Officer)

DECISION AND REASONS

1. This is an appeal by the Secretary of State against the decision of First-tier Tribunal Judge Cohen who heard the appeal of David Adocta at Taylor House on the 20th February 2017. In this decision we refer to the Secretary of State as the Respondent and Mr Adocta as the Appellant to retain consistency with the terminology of the First-tier Tribunal decisions.

2. In a decision promulgated on the 22nd February 2017 the judge purported to remit the decision to the Respondent on the basis of the decision in

Greenwood Part 2 relying on an earlier decision by Judge Hutchinson that had been promulgated on the 16th June 2015. Judge Cohen said at paragraph 10:

> "10. The burden of proving that the decision of the Respondent was not in accordance with the law and the relevant Regulations rests upon the Appellant. The standard of that proof is the balance of probabilities. The relevant date for the purposes of this appeal is the date of the hearing. I must therefore look at those facts in existence on that date.
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> 11. As indicated above, the previous Immigration Judge made a finding that whilst the Appellant did not meet the requirements of Regulation 15(1)(f)(i) of the Regulations that he did meet the requirement in Regulation 10(5)(a). The Respondent did not however action the decision of the previous Immigration Judge. I have regard to the case of **Greenwood Part 2**.
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> 12. In the light of my findings above, I find that the Respondent's decision herein is not in accordance with the law and I therefore allow the appeal under the Immigration Rules to the limited extent indicated above of remitting the decision to the Respondent in order to action the findings of the previous Immigration Judge and grant the Appellant appropriate leave based upon retained rights of residence.
>
> **Decision**
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> This appeal is allowed under the Regulations."

3. There are a number of problems with that decision. The first is that it was not open to the Judge to allow it under the Immigration rules because it was a decision under the EEA Regulations. The Judge was not allowing it under the Regulations because the Judge had found that there had been no action but in any event I need to turn to the decision of Judge Hutchinson to see what it was that the Secretary of State was supposed to have actioned.

4. The appeal before Judge Hutchinson was considered on the papers on the 11th June 2015 and promulgated on the 16th June 2015. I do not need to go through that decision in detail. The relevant part is paragraph 9 which read as follows.

> "9. Although neither party provided me with the divorce document as this was not contested I accept the Respondent's finding that the Appellant and his ex-wife were divorced in July 2014. Therefore the Appellant satisfies 10(5)(a). On balance I am satisfied that the Appellant has demonstrated that he was working at the date of the divorce.
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> 10. However in order to obtain permanent residence to which the Appellant has applied for on the basis of his divorce and residence in the UK the Appellant must demonstrate under 15(1)(f)(i) that he is a person who has resided in the UK in accordance with these Regulations for a continuous period of five years and was at the end of that period a family member who has retained the right of residence."

5. In the following paragraphs the Judge noted that there was a lack of evidence that would have justified a finding under 15(1)(f).

6. Finally in paragraph 17 the Judge decided that the evidence was inadequate and in paragraph 18 said

> "The correct approach is for the Appellant to reapply to the Respondent with appropriate evidence of continuous residence in accordance with the Regulations for a full period of five years or alternatively of course an application could be made in the Regulations 17(2) with reference to Regulation 10(5) for a residence card on the basis of a claimed retained right of residence."

7. The Judge went on to dismiss the appeal.

8. It is clear from the earlier decision of Judge Hutchinson that there was no decision to allow the appeal. There was therefore nothing for the Secretary of State to action. It was not open to Judge Cohen to take the course of action described in the decision that I have quoted above which is clearly erroneous. There were no findings made on any of the evidence or documents that had been submitted.

9. The correct approach we are satisfied, and by agreement between the parties, is that this decision should be remitted to the First-tier Tribunal to be heard at Taylor House but not before Judge Cohen. However we do not see why it cannot be heard by Judge Hutchinson who has not made findings adverse to this appellant on credibility and who retained an open mind as to how the appeal might proceed.

10. The appeal of the Secretary of State is therefore allowed. The decision of Judge Cohen is set aside and this appeal is remitted to the First-tier Tribunal for rehearing on all points.

No anonymity direction is made.

Signed  Date 22nd February 2018

Deputy Upper Tribunal Judge Parkes

As this is an appeal by the Secretary of State the issue of a fee award does not arise in these proceedings but remains an issue for the First-tier Tribunal to decide consequent upon the result in the remitted hearing.

Signed  Date 22nd February 2018

Deputy Upper Tribunal Judge Parkes