**Upper Tribunal**
**(Immigration and Asylum Chamber)** Appeal Number: EA/03249/2016

**THE IMMIGRATION ACTS**

| **Heard at Field House** | **Decision & Reasons Promulgated** |
|---|---|
| **On 24 April 2018** | **On 2 May 2018** |

**Before**

**UPPER TRIBUNAL JUDGE WARR**

**Between**

**TOMI OLALEKAN AGBOOLA**
**(ANONYMITY DIRECTION NOT MADE)**

Appellant

**and**

**THE SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Respondent

**Representation:**
For the Appellant: Mr M Din of Counsel instructed by Nathan Aaron Sols
For the Respondent: Mr P Nath, Home Office Presenting Officer

**DECISION AND REASONS**

1. The appellant is a citizen of Nigeria born on 28 April 1982 who applied for an EEA family permit on the basis that he had retained a right of residence as the former spouse of an EEA national. His application was refused on 8 March 2016. The appellant appealed the decision and his appeal came before a First-tier Judge on 16 January 2018. The appellant was represented by Counsel at that hearing (not Mr Din).

2. The First-tier Judge summarised the Secretary of State's reasons for refusal as follows:

"9. The respondent accepted that the marriage to the EEA national had been dissolved. The respondent also accepted that the marriage had subsisted for three years; the EEA national and the appellant married on 13 May 2009 and divorced on 5 June 2015.

10. The appellant failed to provide sufficient evidence to show that the EEA national resided in United Kingdom for one year whilst married to the appellant.

11. The appellant also failed to provide evidence that the EU National was a qualified person and that she therefore was residing in accordance with the regulations at the point of divorce. The respondent considered that in order to do this the Appellant would need to have provided evidence that the EEA national was exercising free movement rights when the decree was issued.

12. The appellant had provided evidence of the EEA nationals self-employment in the form of tax returns HM RC online tax year overviews, National insurance contributions letters, self-assessment statements, invoices and Santander bank statements. Nevertheless the respondent considered that none of this supporting evidence covered all of the requisite period including an especially the date of the divorce.

13. The respondent also raised the issue of whether the appellant's marriage was a marriage of convenience. The respondent considered that the marriage had been one of convenience for the sole purpose of his remaining in the United Kingdom. The respondent based this conclusion on the lack of evidence of a subsisting relationship prior to the force for example photographs common shared financial commitments, travel together, and meeting each other's families et cetera".

3. The judge heard oral evidence from the appellant and concluded her determination as follows:

"18. I remind myself that I must consider whether the appellant has demonstrated that he had resided in accordance with the EEA regulations for a continuous five year period. This would mean that the EEA national former spouse was continuously exercising free movement right up to the point of divorce and that the appellant had been employed, self-employed or was self-sufficient since the divorce. Collectively this would cover a continuous five year period to meet the requirements of regulation 15(1)(f).

19. The date of the divorce was 5 June 2015. I find therefore that the five year period in question started on 26 September 2010 and ended on 25 September 2015.

20. I find that there are gaps in the evidence concerning the EEA national former spouse's income. First, in the period April 2010 – April 2011 (**AB 96**) the EEA national had no income. This means that for a period within the five years that is 26 September 2015 to 5 April 2011 the EEA national was earning nothing and therefore not exercising her treaty rights.

21. I find that that omission alone is fatal to the appellant's appeal. Even without this difficulty, the appellant's appeal faces other difficulties. National insurance payments are only evidenced for

the year 2012 to April 2015. In particular the period which would have included the date of divorce, 5 June 2015 does not feature. In addition, receipts allegedly showing payment by customers only cover September 2012–January 2014. I note furthermore in respect of the books of receipts that the name is Angel not Angela. There is no evidence to support the contention that these were the receipt books of the EEA national in her hairdressing business.

22. I also find that I can place little weight on the tax returns for the year ending 2013 and 2014 because they are not signed by the EEA national. No reasonable explanation or any explanation has been given for this omission.

23. The appellant says that he obtained tax calculations (**AB 95–101**) from a friend of his who was also a friend of the EEA national. According to the appellant, the EEA national gave her permission to this friend to access these records. I note that they were all printed in August 2017. This is inconsistent with the skeleton argument on behalf of the appellant which states that these documents were obtained in April 2015 during the divorce proceedings (**AB6 paragraph 10**). Furthermore this casts doubt on the evidence given by the appellant as to how he obtained a document at A B101 for the tax year ending 2016.

24. Given the above findings, I find that the EEA national was not exercising treaty rights for part of the five year period (26 September 2010–5 April 2011) and I find on the balance of probabilities that the documentary evidence does not support that she was working at other times during the five year period. The appellant therefore has failed to satisfy one of the key elements of the test (as set out in the applicable law section).

25. I now turn to another key element of the test which gives rise to the second difficulty in the appellant's appeal. This is whether the EEA national was exercising treaty rights at the date of divorce 5 June 2015. The only document showing that the EEA national was exercising treaty rights on 5 June 2015 is the document at **AB 101**. I can give no weight to this document because as already stated I know nothing about the circumstances in which it was printed; I do not accept the appellant's account. I furthermore do not know who posted it to him. There is no other evidence in the appellant's bundle capable of corroborating the authenticity of the document at **AB101**. For example, there are no tax returns for the tax year ending 2016 and no self assessment document for that tax year. Accordingly I find on the balance of probabilities that the EEA national was not exercising her treaty rights on 5 June 2015.

26. In the light of the two problems identified above, I find that the appellant has not satisfied regulation 10(5) of the 2006 regulations. As a result, I do not need to make any findings about the genuineness of the appellant's marriage to the EEA national as the appellant fails for other reasons (as set out above). Consequently I make no findings about his marriage.

> 27. In view of the above and in view of a lack of evidence to the contrary, I find that on my own analysis having independently considered the totality of all the evidence now before me, I come to like conclusions as the Respondent. The Respondent's conclusions have not been controverted by the Appellant either in his grounds of appeal or evidentially. Therefore, I find that the Appellant does not meet the requirements of Regulation 10(5) of the EEA Regulations. Accordingly, the Appellant has failed to discharge the burden of proof to show that he can comply fully with the relevant regulations applicable for the granting of an EEA family permit as confirmation of a right to reside in the UK".

4. At the hearing Counsel informed me that he had been put in an embarrassing position in relation to ground 1 of the grounds of appeal. In that ground reliance had been placed on P60 documents covering the period April 2010–April 2011. Counsel had relied on this point in good faith on the basis of what he took to be his instructions but the appellant had candidly admitted that the P60s had not been before the First-tier Tribunal. Counsel referred to paragraph 2(d)(i) of the grounds and the submissions in the skeleton argument in relation to ground 1. Ground 1 was on instructions withdrawn. Grounds 2 and 3 overlapped. Material had been provided before the First-tier Judge covering the 2009–2016 period. However, the judge had erred in giving no weight to the document relied upon in paragraph 25 of her decision. The appellant had discharged the burden on him by producing relevant material for the relevant period.

5. It was submitted that the judge ought to have exercised her powers under Rule 4(3) of the Procedure Rules to acquire additional information under Section 40 of the UK Borders Act 2007 from HMRC. He acknowledged that there did not appear to have been any request to the judge to exercise such powers. The judge had been inconsistent in paragraph 25 in not relying on document AB101 (tax calculation for 2015–2016) having relied on a tax calculation for 2009–2010. This was an inconsistent approach; both documents showed that they were printed on 25 May 2017. It was submitted that the judge had erred in relation to the date of divorce – the divorce had been on 5 June 2015 and not 25 September 2015. I note in this connection that the judge does refer in paragraphs 9 and 19 to the correct date of divorce.

6. Mr Nath acknowledged that ground 1 was not pursued. In relation to ground 2 Mr Nath submitted that the findings made by the judge in paragraphs 23 ff were open to her. The judge was entitled to find as she did in paragraph 24 that the EEA national was not exercising treaty rights from 26 September 2010 to 5 April 2011. In paragraph 25 the question of what weight to be given to a particular document was a matter for the judge. There was an absence of material to cover the 2010–2011 period. The judge had considered the evidence at paragraphs 23 to 25 of the decision. There was nothing wrong with the decision under the EEA Regulations. There was a difficulty from the start as the documentary evidence had not been put in as had been conceded. In reply, Counsel in relation to ground 1 submitted that a number of documents had not been

considered but the ground was not pursued in the light of instructions. Ground 3(f) included ground 1 material. If an error was made out the appeal should be remitted.

7. At the conclusion of the submissions I reserved my decision. I can of course only interfere with the judge's decision if it was flawed in law. I acknowledge that Counsel was in effect taken aback by very late instructions to the effect that ground 1 could no longer be relied on as documentary evidence to support the ground had not in fact been put before the First-tier Judge. I entirely accept that the point had been argued in good faith by Counsel on the basis of what he understood to be his instructions but the fact remains it is no longer pursued and the judge cannot be faulted for failing to consider material that was not in fact before her. Questions of what weight to put on aspects of the evidence were matters for the judge as Mr Nath Submits. I also note that it was a candid admission made by the appellant that this material had not been put before the judge. The problem with the admitted deficiency in the evidence is that there is a degree of overlap, as acknowledged by Counsel, between ground 1 and other grounds. An example is ground 3(f), as developed in the skeleton argument where it was argued that the material that the applicant sought to rely upon covered the period of 2009–2016. In the original grounds it was contended that the judge was prejudiced in overlooking material.

8. It does appear to me that the judge did consider the material before her and was entitled to conclude that there were gaps in the evidence concerning the EEA national's income for the reasons she gives in paragraph 20. In paragraph 24 I do not consider that the judge erred in law her in concluding that the documentary evidence did not support that the EEA national was working at other times during the five year period and that the appellant had failed to satisfy one of the key elements of the Regulations as explained. The judge refers to a second difficulty with the appellant's case in paragraph 25 of her decision. It was suggested that the judge should have made enquiries exercising her powers under the Procedure Rules to obtain evidence from HMRC. There is no evidence of any request to the judge to make such enquiries; the appellant was represented by Counsel before her. The appellant had instructed solicitors to act for him. The judge did not arguably err in law in determining the appeal on the documentary evidence provided. It appears that the appellant could have lodged additional material before the First-tier Judge. As I have said, I make no criticism of Counsel who was acting on what he believed to be his instructions. Nevertheless, it appears that permission to appeal may have been granted erroneously on what was a key matter.

9. The absence of the material and the withdrawal of ground 1 (which appears to have a degree of overlap with other grounds) does place a considerable obstacle in the appellant's way. The judge found in paragraphs 20 – 21 that there were gaps in the evidence covering 2010-2011 and "that that omission alone was fatal to the appellant's appeal."

Ground 1 covers the “gaps in the evidence” point and Ground 1 has been withdrawn.

10. I am not satisfied in the circumstances that the grounds as qualified before me at the hearing raise a material error of law on the part of the First-tier Judge and I dismiss the appeal and direct that her decision shall stand.

**Notice of Decision**

Appeal dismissed.

**Anonymity Direction**

The First-tier Judge made no anonymity direction and I make none.

**Fee Award**

The First-tier Judge made no fee award and I make none.

Signed Date: 2 May 2018

G Warr, Judge of the Upper Tribunal