



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: EA/05165/2016

THE IMMIGRATION ACTS

Heard at Birmingham
on 10 May 2018

Decision and Reasons promulgated
On 15 May 2018

Before

UPPER TRIBUNAL JUDGE HANSON

Between

DORCAS YAA KUMI
(anonymity direction not made)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr Ahmed instructed by Jusmount & Co Solicitors.

For the Respondent: Mr Mills Senior Office Presenting Officer

ERROR OF LAW FINDING AND REASONS

1. The appellant appeals with permission against a decision of First-tier Tribunal Judge Gurung-Thapa promulgated on 17 March 2017 in which the Judge dismissed the appellant's appeal against the respondent's decision to issue him a residence card as recognition of an entitlement to permanent residence on the basis of a retained right to reside in the United Kingdom.

Background

2. The appellant, a citizen of Ghana born on 24 May 1977, was issued with entry clearance to join her EEA family member on 13 January 2009. The appellant entered the United Kingdom on 11 February 2009 and on 27 September 2010 was issued a residence card as an EEA family member. On 26 August 2012 the Judge notes the appellant was divorced by proxy in Ghana from her EEA family member spouse.
3. The Judge noted the basis of refusal that no issue arises in relation to the fact the marriage was dissolved on 28 August 2012. It is not disputed the appellant was married for more than 3 years and that she resided with her former EEA family member in the UK for more than one year. The respondent asserted the appellant would need to provide evidence that the EEA national was a qualified person and that she was therefore residing in accordance with the Regulations the point of divorce.
4. The respondent notes the appellant provided evidence of the EEA national's employment up to 16 December 2012 when he ceased employment with City Facilities Management UK Ltd but had not demonstrated that the EEA national was in employment at the date of divorce.
5. The Judge sets out findings of fact from [18] of the decision under challenge. At [19] the Judge refers to a letter from HMRC dated 19 January 2017 confirming the EEA national was employed from 17 August 2012 to 23 February 2013 which demonstrated that the EEA national was in employment at the time of the decree absolute and was therefore exercising treaty rights as a worker.
6. The Judge states the other issue is whether or not the EEA national was exercising his treaty rights for a continuous period of 5 years. The Judge finds from the evidence that there is a gap for the period 17 December 2010 to 14 May 2012 in relation to the EEA national's exercise of treaty rights in the UK. On this basis, the Judge finds that the appellant has failed to establish that she has resided in the UK in accordance with the Regulations for a continuous period of 5 years pursuant to Regulation 15(1)(f).
7. The grounds of appeal assert the Judge erred in failing to apply the test of fairness and erred in failing to apply a proper approaching and to carry out a proper assessment of the evidence. It is argued there has been overall credibility findings on the basis of the evidence the EEA national was exercising treaty rights at all material times, based on the evidence before the Judge, and continues to be a qualified person genuinely exercising treaty rights in the UK. The grounds also referred to a further letter received from HMRC dated 21 March 2017 regarding the EEA national's employment at the relevant time setting out in detail employment recorded in HMRC's records for the tax years 2008/9 to 2013/14.
8. Permission to appeal was granted on 19 October 2017. Although it is stated there is no merit in the "fairness" point the judge granting permission stating at [4] that there is an arguably obvious point not raised in the grounds, namely, that the Judge found that the EEA national was in fact a worker at the date of the divorce [19]. Although the appellant applied to the respondent for a permanent residence card the ground of appeal to the First-tier Tribunal was that the respondent's

decision breached rights under EU law. Once the finding on the EEA national's employment status was made, it is arguable that the Judge should then have concluded that the appellant had retained right of residence under Regulation 10(5) and allowed the appeal on that alternative basis.

9. The respondent opposed the appeal in the Rule 24 reply of 8 November 2017 submitting that the First-tier Tribunal considered all the evidence and that whilst accepting that the EEA national had been exercising treaty rights at the date of divorce, she found that there was a gap in the evidence from 17 December 2010 to 14 May 2012 and that it was open to the Judge on the evidence to find the appellant had not established that the EEA national had been exercising treaty rights for a continuous period of 5 years.

Error of law

10. Is not made out that the findings made by the Judge were not available to her on the evidence the appellant had provided. There is no basis for the "fairness" argument in relation to which permission has not been granted.
11. The letter from HMRC was not before the Judge. It cannot be an error of law for a judge not to consider evidence not made available. The fact this letter has been produced clearly shows that it could have been obtained if effort had been made by the appellant or her legal advisers.
12. The Rule 24 response is silent as to the key point made in the application seeking permission to appeal, that on the basis of the findings made by the Judge the appellant was entitled to a grant of a residence card pursuant to regulation 10(5).
13. Before the Upper Tribunal Mr Mills conceded the error in relation to regulation 10(5) and on that basis the decision of the Judge is set aside.
14. In proceeding to remake the decision the Upper Tribunal is entitled to take into account the letter from HMRC. The Judge identified in the decision what she saw as a gap in the evidence relating to the exercise of Treaty rights by the EEA national. The reasons for refusal letter accepted a period of employment had been properly evidenced with the application and I find the letter from HMRC fills in the gap identified by the Judge.
15. On the basis of a combination of the evidence now available it is found the appellant is entitled to a grant of a residence card in recognition of a right to permanently reside in the United Kingdom and I allow the appeal on that basis.

Decision

16. **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 allowed.**

Anonymity.

17. 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 10 May 2018