



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: EA/10220/2016

THE IMMIGRATION ACTS

Heard at Field House
On 2 July 2018

Decision & Reasons Promulgated
On 15th August 2018

Before

UPPER TRIBUNAL JUDGE JACKSON

Between

SUSAN ADEBUKOLA GBENRO
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr J Walsh of Counsel, instructed by Universe Solicitors

For the Respondent: Mr I Jarvis, Home Office Presenting Officer

DECISION AND REASONS

1. The Appellant appeals against the decision of First-tier Tribunal Judge Housego promulgated on 5 February 2018, in which the Appellant's appeal against the decision to refuse her application for an EEA Residence Card dated 12 August 2016 was dismissed.
2. The Appellant is a national of Nigeria, born on 22 November 1981, who applied for an EEA Residence Card to reflect permanent residence on the basis of retained rights following divorce from her EEA national spouse under regulations 10 and 15 of the

Immigration (European Economic Area) Regulations 2006 (the “2006 Regulations”). The Appellant had previously been issued with an EEA Residence Card as the spouse of an EEA national exercising treaty rights in the United Kingdom.

3. The Respondent accepted that the Appellant had been married for the required three-year period and that at least one year of that was spent in the United Kingdom, but refused the application on the basis that there was insufficient evidence of the Sponsor’s exercise of treaty rights prior to divorce. In particular, the Sponsor’s earnings for the tax years 2012 and 2013 were below the Primary Earnings Threshold (PET) and there was insufficient evidence to conclude that in any event it was genuine and effective employment. The Respondent accepted that the Sponsor had been exercising treaty rights from 6 April 2013.
4. The Respondent also did not accept that the Appellant was exercising treaty rights at the date of decision, as she had left the employment that she was in at the date of application by that time and no other evidence of the exercise of treaty rights was submitted. The application was therefore refused under regulation 10(5) and (6) of the 2006 Regulations.
5. Judge Housego dismissed the appeal in a decision promulgated on 5 February 2018. Although it was accepted that the Appellant was employed at the date of hearing and before (having started new employment immediately after leaving her previous employment), the evidence in relation to the Sponsor’s exercise of treaty rights was not accepted. At the appeal hearing, the Appellant sought to rely on evidence of additional self-employment in the tax years 2012 and 2013 to show earnings above the PET and therefore no need to establish that the employment was genuine and effective. The further documents, including a new SA302, were produced very late with no credible explanation as to how they had become available and they were not accepted.

The appeal

6. The Appellant appeals on four grounds as follows. First, that the First-tier Tribunal erred in requiring the Sponsor to have exercised treaty rights for five years when the Appellant herself has completed five years’ residence in accordance with the 2006 Regulations and has retained rights of residence on divorce. Secondly, that the First-tier Tribunal erred in concluding that the Sponsor was not exercising treaty rights in the tax years ending 2012 and 2013 given findings in an earlier appeal in 2011 and the evidence before it in the present appeal. Thirdly, that the First-tier Tribunal was not entitled to reject the SA302 as an official HMRC document. Fourthly, that the First-tier Tribunal erred in treating the PET as a hard threshold and failed to go on to consider whether employment was in any event genuine and effective.
7. Permission to appeal was granted by Judge Grimmett on 5 March 2018 on all grounds.
8. At the outset of the oral hearing, Mr Jarvis confirmed that the Respondent accepted an error of law in paragraph 51 of the First-tier Tribunal decision requiring the Sponsor to have exercised treaty rights for a continuous five year period (the first ground of appeal) and further agreed in relation to the fourth ground of appeal that the PET

should not be a hard-edged approach but if earnings were below it, further enquiries should be made to determine whether employment is genuine and effective.

9. The focus of Mr Walsh's submissions were therefore on the remaining grounds of appeal and addressing whether the errors were material to the outcome of the appeal.
10. In relation to the Sponsor's earnings in the tax years ending 2012 and 2013, the Appellant's claim was originally put on the basis that he was a worker and his earnings as an employee were included with the application. At the hearing before the First-tier Tribunal, the Appellant also claimed that the Sponsor was additionally self-employed, earning £8000 for the relevant years and his combined income was therefore in excess of the PET. Although the HMRC document dated 25 June 2015 from HMRC only showed employment income for the Sponsor for the tax years ending 2012 to 2015, an earlier letter from HMRC dated 23 December 2013 enclosed an SA302 for the tax year ending 2013 which included profit from self-employment of £8,326 for the Sponsor. Further documents showed class 2 national insurance contributions for the Sponsor in 2013 and 2014. It was submitted that the reasons given by the First-tier Tribunal for rejecting the documents showing self-employment and suggesting the SA302 was fraudulent were not sufficient.
11. The Appellant sought to rely on further documents sent to the Upper Tribunal shortly before the hearing but which had not yet reached the appeal file. It was however accepted that there was no rule 15(2A) application to rely on these documents at the error of law hearing and no explanation had been given as to how further documents relating to the Sponsor's earnings had been obtained since the last hearing before the First-tier Tribunal. In these circumstances, Mr Walsh did not seek to rely specifically on these new documents.
12. As to the fourth ground of appeal, Mr Walsh submitted that the error was material as it could not be said that if the First-tier Tribunal undertook a proper consideration of whether the employment was genuine and effective, that it would inevitably have found that it was not. It is not disputed that the Sponsor was in genuine employment with the same employer over a number of years and had previously be found to be a worker by a differently constituted First-tier Tribunal in 2011.
13. On behalf of the Respondent, Mr Jarvis submitted that there was no material error of law in the First-tier Tribunal's decision. In particular, sufficient reasons were given as to why the documents purporting to show the Sponsor's self-employment were not reliable and therefore why little weight should be placed on them. Those findings were open to the Judge on the evidence before the First-tier Tribunal, particularly given the lateness with which the documents were produced by the Appellant.
14. Further, the Sponsor's earnings from employed income were significantly less than the PET for two years. Although the genuineness of employment was not disputed, the real issue is whether the employment was effective rather than marginal. Consideration of whether the employment was effective has to be taken in the broad sense of the employment market and not just the relationship between this

employer/employee. There was nothing before the First-tier Tribunal which could have established that the employment was effective.

15. Although not within the pleaded grounds of appeal, Mr Walsh also submitted that the First-tier Tribunal erred in failing to consider in the alternative, whether the Appellant was entitled to a Residence Card on the basis of retained rights of residence even if she failed to meet the requirements for permanent residence. Mr Jarvis accepted that it may be better practice for a First-tier Tribunal to have dealt with this more expressly but the point was dealt with by the Judge in paragraph 50 of the decision. In any event, he submitted that this does not affect the lawfulness of the decision dismissing the appeal and the findings reflect the reality of a retained right of residence. It was accepted on behalf of the Respondent that the Appellant has a retained right of residence following her divorce and can obtain an EEA Residence Card on that basis if she so wishes, although technically one is not required as a matter of law.

Findings and reasons

16. In relation to the first ground of appeal, it is rightly accepted by the Respondent that the First-tier Tribunal has erred in law in paragraph 51 of the decision when stating that the appeal turned on whether the former spouse had exercised treaty rights for a continuous period of five years before the date of divorce. For a permanent right of residence, the requirements are set out in regulations 10 and 15 of the 2006 Regulations and it is the Appellant who must show residence in accordance with the 2006 Regulations for a continuous five-year period to meet the requirements in regulation 15(1)(f). It was accepted that the requirements in regulation 10(5) were met, that the Appellant had continuously been and was a worker at the date of hearing; that the parties had been married for the required period and the couple had lived for at least one year together in the United Kingdom. This error of law is not itself material to the outcome of the appeal as there remained a dispute as to whether the Sponsor was exercising treaty rights at a time when he was required to do so, in the tax years ending 2012 and 2013. It is only if the First-tier Tribunal erred in its findings on that issue that the first ground of appeal would be material to the outcome.
17. The second and third grounds of appeal can be considered together and in doing so, it is necessary to set out more fully the First-tier Tribunal's reasons for the findings made. These are as follows:

"48. The letter of 25 June 2015 sets out the income for 4 years and then after states "We have no record of any taxable income for you as a self-employed individual." That is plain referring to all 4 years.

49. I do not find the other documents provided by the appellant reliable, for reasons that follow.

...

52. The appellant has not shown that her former husband was exercising treaty rights for a continuous period of 5 years. The application form showed no self employment. The

HMRC form sent with the application showed a categorical statement that there was no record of any self employment. This is after the information for the 4 tax years had been given, and plainly refers to all 4 years.

53. There is now produced a form SA302 dated 23 December 2013 stating that there was £8326 income from self employment. No reason is apparent as to why that document was obtained in the first place, nor why it was not tendered with the application made on 15 February 2016, nor why it was not sent to the Home office when the refusal letter was received and the appeal filed in August 2016. The document was provided only with the bundle for the hearing. There is no credible reason why the documents at A1:48 (27 December 2012) and A1:49 (30 March 2013) could not have been produced with the application form in 2016. The same applies to the documents from HMRC at A1:50 of 3 October 2013, and A1:51 at 23 January 2014 relating to self-employment.

54. On balance I do not find the documents upon which the appellant now depends, reliable documents. The application form and the documents sent in with the appellant are not capable of being misunderstood. The application made no reference to self-employment. The account of the appellant is that all the time she had the documents on which she relies today, in a big box. The account of the appellant is that recently she rummaged through that box and came across these documents. This is not a credible account, as on a refusal being received this would have been the first step to be taken, even if it was not done before the application was made. I attach little weight to these documents as a counterweight to the document tendered at the time, given the importance of the application for the appellant, the combination of the blank box in the form and the submission of a document that clearly stated on its face that there was no self employment. The appellant's account is that the letter that was submitted with the application form was within the same box of documents as the documents now submitted. It does not assist the credibility of the account that the appellant looked for and found the documents that were submitted but missed finding the documents that she now produces to show that her former husband was self employed as well as employed.

55. The appellant used for the application the same solicitor as today. It is not likely that the appellant considers the representative at fault in the application of 2016 (and she does not say so) given that the same solicitor is presenting this appeal.

56. The income of the former husband of the appellant for the 2 tax years 2012/2013 and 2013/2014 was below the PET, and without some other explanation (and there was none) that is income that is below the starting point for the test for the exercise of treaty rights. Accordingly the former husband has not been shown to have exercised treaty rights for a continuous 5 year period."

18. It is apparent that there was a conflict in the evidence before the First-tier Tribunal between two sets of HMRC documents, with the original documents submitted with the application being on the basis of no self-employed income and other, earlier dated documents but submitted only shortly before the hearing, evidencing self-employed income. The documents all originate from HMRC and are to a great extent contradictory. The task faced by the First-tier Tribunal was therefore to resolve the

conflict between the evidence and explain why one was considered to be reliable compared to the other.

19. As set out above, I find that the First-tier Tribunal Judge did just that by reference to the evidence and gave cogent and sustainable reasons for placing reliance on the original application and document accompanying it and not on the late produced additional documents whose late submission was not adequately explained. There is no error of law in the assessment of this evidence, all of which are purportedly from the same official source and the appeal is therefore dismissed on the second and third grounds. For the same reasons and as set out above, there is no material error of law identified in ground 1 either.
20. The final ground of appeal is accepted by the Respondent that the First-tier Tribunal erred in treating the PET as a hard-edged test of employment without going on to consider whether in any event the employment was genuine and effective. However, the finding in paragraph 56 expressly recognises that the PET is the starting point for the exercise of treaty rights and on a plain reading, goes no further in the assessment because there was no other explanation or matters to consider. I do not find that the First-tier Tribunal erred in only asking itself whether the PET was met and going no further, it did not, the findings went no further as there was no material beyond this to consider. That is not entirely surprising given the Appellant's primary claim before the First-tier Tribunal was that the PET was met when the employed earnings were taken together with the self-employed earnings.
21. The evidence of employment included payslips and a contract of employment but no other information or evidence upon which a fuller assessment of whether the employment was 'effective' could be made, for example by reference to the lifestyle of the Sponsor or the family situation. The Respondent has not disputed the employment is genuine.
22. For these reasons and on the basis of the limited evidence before the First-tier Tribunal, I do not find on the facts that it materially erred in law in failing to go on to consider whether the Sponsor's employment was genuine and effective having found that the PET was not met. There was insufficient evidence before the First-tier Tribunal to allow a finding that the employment was effective as well as genuine.
23. Mr Walsh's final point that the First-tier Tribunal should in any event have allowed the appeal on the basis that the Appellant was entitled to an EEA Residence Card on the basis of a retained right of residence did not form part of the grounds of appeal in this case and permission was not therefore granted on this point. There was no application for permission to raise a new and distinct ground of appeal and no reason why this was only raised at the error of law hearing. Further, there is nothing to suggest that the Appellant raised this or relied upon it before the First-tier Tribunal as an issue in the appeal to deal with.
24. In these circumstances, there is no error of law in this regard. In any event, in practical terms, the matter has been dealt with by the First-tier Tribunal in the findings made as

to satisfaction of regulation 10(5) of the 2006 Regulations and the Respondent has expressly accepted the Appellant has a retained right of residence. The Appellant is of course at liberty to apply for an EEA Residence Card on that basis, or on the alternative basis noted by Mr Walsh at the hearing that she would now satisfy the requirements in regulation 15(1)(f) of the 2006 Regulations for permanent residence as the Sponsor's exercise of treaty rights has been accepted since April 2013 to the termination of the marriage and five years has passed since that date.

Notice of Decision

The making of the decision of the First-tier Tribunal did not involve the making of a material error of law. As such it is not necessary to set aside the decision.

The decision to dismiss the appeal is therefore confirmed.

No anonymity direction is made.

Signed



Date

2nd August 2018

Upper Tribunal Judge Jackson