



**Upper Tribunal
(Immigration and Asylum Chamber)**

Appeal Number: EA/02928/2018

THE IMMIGRATION ACTS

**Heard at Field House
On 20 February 2019**

**Decision & Reasons
Promulgated
On 28 February 2019**

Before

UPPER TRIBUNAL JUDGE KAMARA

Between

MR BERNARD KOFI ADJEI
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms Z Harper, counsel instructed by Fursdon Knapper Solicitors

For the Respondent: Mr N Bramble, Senior Home Office Presenting Officer

DECISION AND REASONS

Introduction

1. This is an appeal against the decision of First-tier Tribunal Judge Buckwell, promulgated on 15 November 2018. Permission to appeal was granted by First-tier Tribunal Judge Grimmett on 28 December 2018.

Anonymity

2. No direction has been made previously, and there is no reason for one now

Background

3. On 4 January 2018, the appellant sought a permanent residence card as the former family member of a European Economic Area or Swiss national exercising Treaty rights in the United Kingdom who had retained a right of residence. That application was refused on 23 March 2018 because the Secretary of State determined that the appellant had not provided adequate evidence that the former spouse was a qualified person or had a right of permanent residence on the date of the termination of the marriage and the appellant had not demonstrated that he had resided in the United Kingdom in accordance with the Regulations for a continuous period of five years. Essentially, the evidence provided by the appellant showed only that his former spouse was exercising Treaty rights from 27 April 2012 until 29 February 2016 with the latter date being 10 months prior to the divorce.

The hearing before the First-tier Tribunal

4. The First-tier Tribunal judge was invited to find that on balance, the former spouse had been working right up until the time of the divorce and as such there was no need to make an application under section 40 of the UK Borders Act 2007. The judge concluded that the appellant had failed to discharge the burden upon him because he had relied upon at least one false document, namely the payslip for week 34 of 2016 which showed a lower gross pay to date figure than that shown in an earlier period.

The grounds of appeal

5. The grounds of appeal argued firstly, that the judge erred in making a finding that the appellant had relied on a false document without giving him the opportunity to respond. Secondly, it was said that the judge erred in failing to grant an application under section 40 for the disclosure of HMRC records if he had concerns regarding the reliability of the evidence adduced.
6. Permission to appeal was granted on the basis sought.

The hearing

7. Ms Harper advised me that the appellant's divorce was initiated on 9 November 2016 and that the respondent accepted that the EEA sponsor was a qualified person until 29 February 2016. For the period between 1 March and 9 November 2016, there were two payslips, in one of which the judge identified an error. It was argued that there was no lawful basis for this and there was procedural unfairness in not raising it with the appellant. Ms Harper argued that such an allegation needed to be

established to a high degree of proof. In this case, the respondent was unrepresented, no concerns had been raised by the respondent regarding any documents previously submitted by the appellant who had given an account as to how he had obtained it.

8. Fairness dictated that the judge should have given the appellant or his representative an opportunity to address his concerns.
9. In relation to the second ground, Ms Harper stated that counsel at the hearing sought a direction for the respondent to approach HMRC for the sponsor's records which the judge declined to grant. At that point no concerns were raised regarding the payslips. If the documents were insufficient the application for a direction ought to have been granted and both these errors were central to the case.
10. On behalf of the respondent, Mr Bramble conceded that the hearing was procedurally unfair although the judge might have thought there were payslips which covered the appropriate period and that there might not be a need for the respondent to obtain documents. He indicated that this was a matter which needed to go back to the First-tier Tribunal for proper consideration.

Decision on error of law

11. As accepted by Mr Bramble, the judge fell into procedural error in finding that the documents were "false" [28] owing to an issue with the payslips provided by the appellant to address the gap in the evidence. The judge's concerns were not put to the appellant or his counsel and it was unfair to make a finding that all the documents were false without hearing from the appellant or inviting a submission on this point.
12. As to the second ground, the documents before the judge which were relevant to the gap in the evidence, amounted to two payslips covering two weeks' employment by the former spouse, ending in around 4 November 2018. In view of the judge's concerns as to the reliability of at least one of these documents, it would have been appropriate for the application under section 40 of the Borders Act to have been granted.

Decision

The making of the decision of the First-tier Tribunal involved the making of an error of on a point of law.

The decision of the First-tier Tribunal is set aside.

The appeal is remitted, de novo, to the First-tier Tribunal to be reheard at Taylor House, with a time estimate of 2 hours by any judge except First-tier Tribunal Judge Buckwell.

The appeal is to be considered at a case management review hearing with a view to a direction under section 40 of the UK Borders Act being sought.

Signed

Date 08 April 2019

Upper Tribunal Judge Kamara