Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: EA/04368/2018

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 7 January 2020	**On 15 January 2020**

Before

UPPER TRIBUNAL JUDGE KEBEDE

Between

ANTHONY SUNDAY OGBO

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr G Davison, instructed by Edmans & Co Solicitors
For the Respondent: Mr C Avery, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellant is a Nigerian national born on 19 April 1978. He appeals, with permission, against the decision of the First-tier Tribunal dismissing his appeal against the respondent's decision to refuse to issue him with a permanent residence card under the Immigration (European Economic Area) Regulations 2016 as the former family member (spouse) of an EEA national with a retained right of residence on divorce.

2. The background to this appeal is as follows. The appellant claims to have entered the UK on 12 February 2008. On 27 November 2010 he married [TG], a Portuguese national, and on 25 June 2012 he was granted a right of residence

as the family member of an EEA national, valid until 25 June 2017. In October 2015 legal proceedings commenced to end the marriage and on 21 March 2016 the decree absolute for divorce was issued. On 23 August 2017 the appellant applied for a permanent residence card on the basis of a retained right of residence on divorce, but his application was refused on 1 December 2017. He made another application on the same basis on 10 January 2018, but that was also refused on 3 June 2018.

3. The appellant's application was refused on the grounds that he had failed to submit a valid passport or national identity card as evidence of his former spouse's identity and nationality and had failed to provide sufficient evidence to show that his sponsor was exercising treaty rights to the date the marriage was dissolved. Although photocopies of tax returns had been submitted, there was nothing official from HMRC to confirm that the returns had been submitted and paid.

4. The appellant appealed against that decision. His appeal was initially listed for hearing on 8 January 2019. However, following the appellant's representative's request on 20 November 2018 for an "*Amos*" direction, the First-tier Tribunal issued directions, on 7 December 2018, for the respondent to make enquiries of the DWP and/or HMRC in relation to the EEA national sponsor's employment, and the hearing was adjourned until 26 April 2019 in order to await a response.

5. The appeal then came before First-tier Tribunal Judge MA Khan on 26 April 2019, by which time the respondent had filed evidence from HMRC in relation to the EEA national's employment records, confirming no self-assessment tax record being held for the subject and no PAYE employment records for the tax years 2015-16 and 2017-18. Prior to the hearing, on 5 April 2019, the appellant's representatives requested a further "*Amos*" direction, on the basis that the HMRC checks had only been conducted in relation to one of the EEA national's NI numbers, whereas she had two numbers and further checks therefore needed to be made on the other NI number in order to confirm the evidence of her self-employment.

6. At the hearing, the appellant's counsel applied for an adjournment for the further *Amos* enquiries to be made, but the judge refused to adjourn and proceeded to hear the appeal. The appellant gave oral evidence before the judge, claiming that his ex-spouse was working as a care assistant, on a self-employed basis, at the time the divorce proceedings commenced in October 2015. He did not understand why there were two NI numbers for his wife, since she only had one number. The appellant relied upon the tax returns for his ex-wife for 2014/15 and 2015/16 which had been submitted, together with a letter from T.T. Accountancy Services confirming her self-employment as a carer, and the fact that the respondent had accepted the evidence of her self-employment until the time of the divorce in the previous refusal decision of 1 December 2017.

7. The judge noted that the respondent had conceded the first reason for refusal concerning the sponsor's identity documents and that the only issue was whether the sponsor was exercising treaty rights at the time of the commencement of the divorce proceedings. The judge found the appellant's evidence with regard to his ex-wife's employment to be neither credible nor consistent and considered that the accountant's letter was of no evidential value. The judge concluded that the appellant had failed to provide evidence to demonstrate that his former wife was exercising treaty rights at the time of the divorce and that he therefore did not meet the requirements of regulations 10(5) and 15(1)(f) of the EEA Regulations 2016. He accordingly dismissed the appeal.

8. The appellant sought permission to appeal to the Upper Tribunal on the grounds that the judge had failed to make findings on the tax returns which had not been checked by the respondent against HMRC records; that he had erred in rejecting the accountant's letter and had erred by failing to give reasons for finding the appellant's evidence not to be credible; and that he had erred by failing to adjourn the appeal in order for further information to be sought from HMRC.

9. Permission was granted by the First-tier Tribunal on 21 November 2019.

10. The matter then came before me.

Hearing and submissions

11. Mr Davison submitted that the judge had erred by failing to adjourn the proceedings for full *Amos* enquiries to be carried out, further to the request of the appellant's solicitors, as it had become apparent that the appellant's ex-wife had two NI numbers and two temporary numbers, whereas the HMRC statement produced for the appeal only contained the results of enquiries made in respect of one of the numbers, SL632208A, as stated in the First-tier Tribunal's Directions of 7 December 2018. Had the full checks been made against all the numbers, including the second NI number SL632983A, the HMRC records would have confirmed the appellant's ex-wife's self-employment at the time the divorce proceedings commenced. Mr Davison submitted further that the judge had erred by concluding at [35] that the appellant's evidence with regard to his ex-wife's employment was not credible or consistent as there was no basis for such a finding, since he had always maintained that she had two NI numbers. The judge had erred by finding that the accountant's letter was self-serving. He had also erred by failing to make findings on the evidence which was before him, such as the tax returns for 2014/15 and 2015/16, and the divorce petition referring to the appellant's ex-wife's occupation as a mental health worker. Mr Davison also relied on the previous refusal decision of 1 December 2017 in which the respondent had accepted that the appellant's ex-wife was exercising treaty rights at the time of the divorce.

12.Mr Avery submitted that the appellant had had an opportunity to put all the relevant information forward and the judge was entitled to have reservations about a second NI number, to consider the documentary evidence to be unusual and to give the documents the weight that he did. The grounds are simply a disagreement with the judge's decision.

Discussion and conclusions

13.The main challenge made by the appellant to Judge Khan's decision is in regard to the refusal to adjourn for a further *Amos* direction and further enquiries to HMRC related to a second NI number. It is of some note that, whilst permission was granted in relation to that ground of challenge, the permission decision also stated that the refusal to adjourn appeared to meet the test of fairness in the circumstances. I am entirely in agreement. This was a case which had already been adjourned for an *Amos* direction to be made and for enquiries to be carried out by the respondent with HMRC, based upon the information provided by the appellant in a letter from his solicitors dated 6 December 2018. It was not until shortly before the adjourned hearing on 26 April 2019 that mention of the second NI number was made in the appellant's representative's letter of 5 April 2019, with no explanation as to why, when that number appeared within the documentary evidence produced for the appeal, it had not been included in the previous request of 6 December 2018. That was precisely the point made by the judge at [7] when considering the adjournment request.

14.I also pointed out to Mr Davison that the HMRC statement appeared, in any event, to already have provided all the information held for the appellant's ex-spouse and to have not been limited to information held against the one NI number SL632208A. The HMRC statement provides details of Ms [G]'s PAYE employment with Hestia Housing and Support and Life Opportunities Trust Ltd which were consistent with the salary slips and P60s produced by the appellant under NI number SL632083A. By way of example, the final salary slip for Hestia Housing and Support at page 116 of the appellant's consolidated bundle is consistent with the figures in the HMRC statement for 2012/13, as is the salary slip dated 31 March 2014 for Life Opportunities Trust at page 100 with the information in the HMRC statement for the year 2013/14, to which I referred Mr Davison. Further, the P45 at page 62 for Life Opportunities Trust is consistent with the entry in the HMRC statement for 2014/15, but contains the NI number SL632208A. Accordingly it seems that the HMRC statement is a complete statement of all records held for the appellant's ex-spouse for all relevant NI numbers and that the relevant search must have been made against her name and date of birth as opposed to the one NI number provided in the Tribunal's directions. That is indeed consistent with what is said at [65] of Kerr v Department for Social Development(Northern Ireland) [2004] UKHL 23, as extracted at [41] of Amos v Secretary of State for the Home Department [2011] EWCA Civ 552, in regard to the information required by the HMRC to make its relevant enquiries. In such circumstances the request for a further *Amos*

direction and enquiry was unnecessary and the refusal of the judge to adjourn the proceedings was of no consequence. The judge was perfectly entitled to rely upon the HMRC statement already submitted as full and complete evidence of the appellant's ex-wife's employment and self-employment tax record.

15. In the circumstances I do not consider that there was any error of law made by the judge in refusing to adjourn the proceedings. There was nothing in the judge's refusal to adjourn that was inconsistent with the judgment in Amos. On the contrary, the Court of Appeal in that case held at [42] that the case of Kerr was "*not authority for the proposition that the Home Secretary is bound to make enquiries of other government departments*". There was no unfairness in the judge's decision to refuse to adjourn the proceedings and there was no prejudice to the appellant in the appeal proceeding as it did.

16. Neither do I find any error of law in the judge's assessment of the evidence or his adverse credibility findings made at [35]. I do not agree with Mr Davison that there was no basis for his adverse findings. The appellant's evidence about his ex-wife's employment was confusing and inconsistent. The documentation showed two different NI numbers. The appellant stated before the judge (recorded at [34]) that his ex-wife had only one NI number, yet, as the judge found at [7], he must have known that there were two numbers as the documents he relied upon contained two numbers. The judge considered the explanation provided by the appellant at [23] but was fully entitled to conclude that his evidence was simply not reliable. Likewise, the judge was fully entitled to accord no weight to the accountant's letter, for the reasons cogently given at [36]. The judge provided the appellant with ample opportunity to provide an explanation for his concerns, as recorded at [27] and [29] and was entitled to conclude that the letter was not reliable evidence of his ex-wife being self-employed at the relevant time. Whilst the appellant's grounds assert that the judge failed to make any findings on the self-assessment tax returns for 2014/15 and 2015/16, it is clear that the judge's findings at [36] related to those returns and tied in with the submissions recorded at [28] and [29] and the observations at [33]. The judge plainly accorded no weight to the tax returns, given that there was no evidence that they had been submitted to the HMRC, and he was fully and properly entitled so to conclude. In so far as Mr Davison sought to argue that the HMRC statement did not include checks made against the NI number SL632083A referred to in those tax returns, I refer to my observations above in relation to the information held about Hestia Housing and Support and Life Opportunities Trust Ltd under the same NI number which showed that checks were made against that number.

17. As for Mr Davison's submission that the judge ignored the evidence showing the appellant's ex-wife's economic activity at the time of the divorce proceedings, I do not accept that that is the case. As I have found above, the judge gave detailed consideration to the accountant's letter and made proper findings open to him in that regard. The suggestion that the divorce petition was evidence of employment is without any merit, as it referred to the

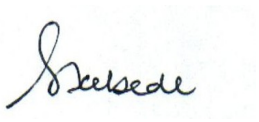
appellant's ex-wife's occupation and not her current employment, and in any event was not evidence relied upon by the appellant for that purpose at the hearing. With regard to the respondent's comments in the previous refusal decision of 1 December 2017, I do not consider that to be any formal and binding concession by the respondent that the appellant's ex-wife was exercising treaty rights at the relevant time, and indeed Mr Davison did not expect me to do so. That decision has been followed by the current decision of 3 June 2018 where the respondent clearly did not accept that that was the case and it was for the judge to make his decision on the basis of all the evidence before him, which is what he did.

18. As for the further evidence produced for the hearing at page 4 of the consolidated bundle, namely an email said to be from the appellant's ex-wife stating that the HMRC had confirmed that they held her self-assessment records, I do not give any weight to this. It is clearly not relevant to the question of whether the judge erred in law as it was not evidence which was before him at the time. In any event it adds nothing of value to the appellant's case, given the adverse observations and findings properly made by the judge.

19. For all of these reasons I do not find any merit in the challenges to the judge's decision. The judge considered all the evidence, gave cogent reasons for according the evidence the weight that he did and was fully and properly entitled to conclude that the evidence did not demonstrate that the appellant's ex-wife was exercising treaty rights at the time of commencement of divorce proceedings. The judge's decision, that the appellant was unable to meet the requirements of the EEA Regulations 2016 on the basis of a retained right of residence upon divorce, was fully and properly open to him on the evidence before him. There are no errors of law in his decision.

DECISION

20. The making of the decision of the First-tier Tribunal did not involve an error on a point of law. I do not set aside the decision. The decision to dismiss the appeal stands.

Signed:  Dated: 8 January 2020

Upper Tribunal Judge Kebede