Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/20756/2012

THE IMMIGRATION ACTS

Heard at : Field House	**Determination Promulgated**
On : 1 October 2013	**On : 2 October 2013**

Before

UPPER TRIBUNAL JUDGE KEBEDE

Between

CELESTINE EZEANI

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr D Medhurst, instructed by The Legal Resource Partnership
For the Respondent: Ms S Vidyadharan, Senior Home Office Presenting Officer

DETERMINATION AND REASONS

1. Following a grant of permission to appeal against the decision of the First-tier Tribunal dismissing his appeal against the respondent's decision of 15 June 2012 to refuse to issue him with a permanent residence card under the Immigration (European Economic Area) Regulations 2006 ("the EEA Regulations"), it was found, at an error of law hearing on 27 March 2013, that

the Tribunal had made errors of law in their decision. The decision was accordingly set aside and directions made for it to be re-made.

2. The appellant entered the United Kingdom in early 1999 and was granted limited leave to enter, but overstayed. He married a French national on 26 March 2003 and on 17 June 2003 he was issued with a residence document as the spouse of an EEA national. On 15 June 2008 he applied for permanent residence but his application was refused on 12 February 2010 and his appeal against that decision was dismissed in October 2010. In the meantime, he was divorced from his wife, the divorce being finalised on 17 June 2010. On 14 December 2011 he re-applied for permanent residence.

3. The appellant's application was refused on 15 June 2012 on the basis of the findings of the immigration judge in his previous appeal to the effect that he had failed to demonstrate that his EEA sponsor had been exercising Treaty rights at the time of the divorce in June 2010, in particular given the indication in his representative's letter of 10 June 2008 that she had left the United Kingdom on 15 April 2006. The respondent noted that the appellant had since provided letters and certificates for his EEA spouse's educational qualifications but considered that he had failed to explain why he had not produced such information previously and why he had confirmed to the immigration judge at his previous appeal that he had no idea what his spouse was doing at that time. The respondent noted further that the appellant was required to provide evidence that the EEA national had comprehensive sickness insurance (CSI) in place for the duration of the time spent as a student but had failed to do so. Furthermore, two of the colleges for which certificates had been provided had had their accreditation status suspended in 2009. The respondent was therefore not satisfied that the EEA sponsor was exercising Treaty rights as a student for the period up to and including the date of the divorce proceeding. Accordingly the appellant had failed to provide evidence that he had retained a right of residence in the United Kingdom and the respondent refused to issue him with the confirmation he sought with reference to regulation 10(5) of the EEA Regulations.

4. The appellant appealed against that decision and his appeal was heard on 13 December 2012 by First-tier Tribunal Judge Phillips.

5. In her determination promulgated on 31 December 2012, Judge Phillips recorded the appellant's evidence. She noted his claim that his ex-spouse had travelled outside the United Kingdom in April 2006 following a misunderstanding, but had returned a month later and had resumed their relationship until she left him in April 2007. He had made a fresh application in November 2010, not November 2011, and once he received acknowledgement of that application he was able to secure employment as a mental health nurse which he had been unable to do previously owing to a lack of evidence of entitlement to work and despite having qualified as such in 2010. He also continued in his previous work as a security officer. He claimed that his ex-spouse had been working as well as studying and she had provided him with documentary evidence including her tax returns for 2010 to 2011. He had not

previously mentioned her employment as it was not all official and the hairdressing business that she had was cash-based. She was working as a hairdresser at the time of the divorce.

6. Judge Phillips did not accept the appellant's evidence in regard to his ex-spouse's employment and studies and considered that his previous claim, that he did not know what she was doing, was inconsistent with his current account of her employment and studies. The judge did not accept that the evidence produced demonstrated that the appellant's ex-spouse was exercising Treaty rights in the United Kingdom prior to or at the time of the divorce. Neither did she accept that there was satisfactory evidence of the appellant's own employment or self-employment at the time of the hearing or from 5 April 2012. She found that the appellant was unable to satisfy the requirements of regulation 10(5). She also found that the respondent's decision was not in breach of Article 8 of the ECHR and she accordingly dismissed the appeal under the EEA Regulations and on human rights grounds.

7. Permission to appeal was sought on various grounds, but in essence on the basis that the judge had made various errors in the assessment of the evidence and had set the burden of proof too high. Permission was granted on all grounds relating to the EEA Regulations.

8. At a hearing on 27 March 2013, Upper Tribunal Judge Chalkley found that the judge had erred by finding that there was an inconsistency in the appellant's evidence as to his knowledge of the whereabouts of his ex-spouse and his contact with her and that in fact there was no such inconsistency. He concluded on that basis that the determination had to be set aside in its entirety and the decision re-made with none of the First-tier Tribunal's findings preserved. He directed the respondent to make enquiries about the grant of a residence permit to the appellant's ex-spouse and to request from HMRC and DWE any information demonstrating whether she was exercising Treaty rights in the United Kingdom.

Appeal hearing and submissions

9. The appeal then came before me following a Transfer Order. I sought to clarify the issues with the parties.

10. Ms Vidyadharan advised me that she did not have any written response to the Tribunal's directions, but she was able to confirm, from enquiries made, that the appellant's EEA national ex-spouse was working at the time of the divorce and was exercising Treaty rights. However she did not have comprehensive medical insurance during the period of her studies. Mr Medhurst submitted that that confirmation must have arisen as a result of the tax returns which appeared at pages 77 to 86 of the appellant's appeal bundle and which therefore confirmed employment since 1 May 2010 (page 83). That was not disputed by Ms Vidyadharan, who also accepted that the appellant and his ex-spouse had been married for at least three years prior to the date of termination of the marriage and had resided in the United Kingdom for at least

one year during their marriage, as required by regulation 10(5)(d). She therefore accepted that the appellant had retained the right of residence provided he could demonstrate that he was in employment himself. She accepted further that, in accordance with regulation 14, he would not lose that retained right unless he ceased employment and that that was the only basis upon which he could lose that right. However she did not accept that the evidence demonstrated that he was employed or that he had been employed throughout the period since his divorce.

11. Accordingly, it was established that the only contentious issue in the appeal was the appellant's status subsequent to his divorce and at the current time. I heard oral evidence from the appellant and submissions from the parties in that regard.

12. The appellant said that at the time of his divorce he was working as a security officer for Securitas, formerly Reliance. He had been employed as such since December 2006 and whilst employed had qualified as a mental health nurse in 2010. He was not able at that time to work as a mental health nurse because he required confirmation from the Home Office that he was able to work, which he did not receive until February 2012. Once he received that confirmation he found employment with No.1 Recruitment and had been working through them since then, but on a self-employed basis. He had set up his own company, Chice Limited, and was paid by No 1 Recruitment in the name of his company, as shown by his salary slips. He still did some shifts for Securitas, although he was on zero contract hours, and they would call him now and again to do some work for them. He last worked for them two days ago, in Marks & Spencer. He had produced his P60s for his employment with Securitas and he had his tax return for 2012 to 2013 for his self-employment. The appellant produced his tax return together with a financial statement which he said had been prepared by his accountants, although he had no documentary evidence to confirm that. The financial statement confirmed that he had no tax liability as yet for his company.

13. Ms Vidyadharan submitted that the appellant had failed to discharge the burden of proof to demonstrate that he had been employed since 2006. However, when reminded that the appellant had only to demonstrate employment since the date of his divorce and when referred to the P60s for the years 2011 and 2012, she accepted that he had been employed throughout that period. She did not accept that there was satisfactory evidence of his claimed self-employment from February 2012 and considered the evidence in that regard to be vague, noting in particular that there was no evidence to confirm his claim not to be liable for tax.

14. Mr Medhurst pointed to the appellant's P60s, salary slips and bank statements showing his income throughout the relevant period. He submitted that the payslips showed payments made to Chice Limited, which was in fact the appellant, as it was his company. The bank statements showed payments from LTSB CF T/A Cashfr, which were the payments made from No. 1 Recruitment, as well as some payments from Securicor. The regulations did not

require that the appellant paid tax, just that he was self-employed. In any event the appellant had explained why he was not yet required to make any tax payments.

15. Mr Medhurst sought a decision in regard to regulation 10(5) before deciding whether or not to proceed with the matter of permanent residence, which he acknowledged would be more difficult to establish. I indicated that I was minded to allow the appeal on that limited basis and accordingly, having taken further instructions from the appellant, he decided not to pursue the grounds relating to permanent residence.

Consideration and findings

16. Following the concessions made by Ms Vidyadharan on behalf of the respondent in regard to regulation 10(5)(b) and (d)(i), as stated above, the only issue before me is the appellant's ability to satisfy the condition in paragraph (6), as required under regulation 10(5)(c). That condition is that he would, if he were an EEA national, be a worker, a self-employed person or a self-sufficient person under regulation 6.

17. In order to meet the requirements of regulation 10(6) the appellant therefore needs to establish his status since the date of his divorce on 17 June 2010. It is his case that he has been employed by Securitas since that time (and since December 2006) and that claim is indeed supported by a letter of confirmation from Securitas at page 111, salary slips at pages 38 to 51 and P60s at pages 21 to 24 and 92, from which there can be little doubt that he was employed by that company until at least April 2012. I accept that he has continued to undertake some limited work since that time, as evidenced by entries in his bank statements and as confirmed by his own oral evidence.

18. Ms Vidyadharan's concern arose not so much from that evidence of employment, but from the evidence of self-employment thereafter and at the current time, which she considered to be somewhat vague. However, having had regard to the documentary evidence, the appellant's oral evidence and the explanations from the appellant and Mr Medhurst about the methods of payments made to him in the name of his company Chice Limited and the various agencies involved in those payments, I find that he has demonstrated that he has been involved in work as a mental health nurse, on a self-employed basis, since February 2012. That employment is confirmed in the letter from No.1 Recruitment at page 112 of the appeal bundle, the performance review at pages 113 and 114 and the statement at page 115, the payslips at pages 116 to 136 and the bank statements showing corresponding deposits at pages 149 to 156. I note the concerns expressed in regard to the lack of deductions for tax, but I have had the benefit of what I consider to be a clear and reasonable explanation from the appellant and Mr Medhurst, supported by the appellant's tax returns and financial statement, albeit not accompanied by correspondence from his accountants. I am satisfied, on the basis of that evidence, that the appellant has met the burden of proving his ability to satisfy the condition in regulation 10(6)(a), for the purposes of regulation 10(5)(c).

19. In all the circumstances I find that the appellant is able to meet the requirements of regulation 10 and is thus entitled to a continued right of residence under the EEA Regulations as a family member who has retained the right of residence. I would allow the appeal on that basis.

20. Mr Medhurst properly acknowledged that the appellant would be in some difficulty demonstrating that he had resided in the United Kingdom in accordance with the regulations for five years, for the purposes of entitlement to a permanent right of residence. That was particularly so, in the light of his evidence before the First-tier Tribunal, as recorded at paragraphs 36 and 64, in regard to his lack of knowledge about his ex-spouse and the lack of documentary evidence of her employment prior to May 2010. He would also have to overcome the matter of the requirement for comprehensive sickness insurance during her periods of study, in particular in light of the Court of Appeal judgement in Lekpo-Bozua v London Borough of Hackney & Ors [2010] EWCA Civ 909. In the circumstances he decided not to pursue the application for permanent residence and I have therefore not gone on to consider the matter further.

DECISION

21. The original Tribunal was found to have made an error of law. I re-make the decision by allowing the appellant's appeal under the EEA Regulations, with specific reference to regulation 10(5).

Signed

Date

Upper Tribunal Judge Kebede