IAC-FH-AR-V1

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/33028/2013

THE IMMIGRATION ACTS

Heard at Field House	**Decision Promulgated**
On 6th October 2014	**On 12th November 2014**

Before

DEPUTY UPPER TRIBUNAL JUDGE RIMINGTON

Between

ADEDOYIN OGEBULE
(Anonymity Direction Made)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr J Walsh instructed by Graceland Solicitors
For the Respondent: Mr S Walker, Home Office Presenting Officer

DECISION AND REASONS

The Appellant

1. The appellant is a citizen of Nigeria born on 14th April 1959 and he appeals against a decision made by the respondent dated 22nd July 2013 to refuse him a permanent residence card under Regulation 10(5) and 15 (1)(f) of the Immigration (European Economic Area) Regulations 2006.

2. He appealed under Regulation 26 of the Immigration (European Economic Area) Regulations 2006.

3. Judge of the First-tier Tribunal Eban dismissed his appeal on 7th July 2014 concluding that he could not meet Regulation 10(6) of the EEA Regulations. She found that he met Regulation 10(5)(a), (b) and (d)(i). She found that the EEA national was a worker as at the date of divorce as she was working for Eddenham High School in August 2012 and there were payslips for the month of September and a P60 indicating that she had earned a salary from her work from April 2012.

4. However the judge found there was no independent evidence that the appellant himself was a worker, a self-employed person or a self sufficient person under Regulation 10(6) at the date of termination of the marriage and therefore he could not succeed in his claim for a permanent right of residence..

5. An application for permission to appeal was made. It was submitted that there was no requirement for independent evidence of the appellant's working as referred to in paragraph 8 of the determination. The appellant adduced some evidence showing self-employment, self-assessment returns and NI contributions of work at other dates and although there was no documentary evidence showing he was a worker at the date of divorce, his appeal statements dated 3rd June 2014 confirmed he was engaged in self-employment throughout the divorce proceedings. The judge was required to decide what rights of residence the appellant had built up by the date of divorce and then determine only then if those rights were retained. The structure and legally necessary approach was required for proper disposal.

6. The application for permission to appeal was refused by Judge Levin of the First-tier Tribunal. However the renewed application was submitted to the Upper Tribunal and permission was granted by Upper Tribunal Judge Pitt.

7. At the hearing Mr Walsh submitted that the judge had found at paragraph 9 that the EEA national was a worker at the date of divorce and that the appellant therefore had a right in existence at the date of divorce in August 2012. However the appellant has to demonstrate in order to obtain a permanent right of residence under 15(i)(f) that he can comply with the relevant Regulation 10. In particular the condition was Regulation 10(6) that the person A is not an EEA national but would, if he were an EEA national, be a worker, self-employed person or self-sufficient person under Regulation 6.

8. Mr Walsh submitted that the judge did not take into account the appellant's oral evidence which was before her and instead merely stated that there was no independent evidence but that was not a requirement.

9. In reply, Mr Walker stated that the self-assessment information which was now attempted to be placed before the Upper Tribunal was not before the First-tier Tribunal and the judge had directed herself correctly. There was no independent evidence.

10. Mr Walker placed before me, with the consent of Mr Walsh, an earlier determination from Immigration Judge Knowles dated 10th October 2011 which confirmed that the appellant's EEA national wife was not working in 2011 and thus the appellant had to leave Tesco's where he was employed.

11. Regulation 10 (6) of the EEA Regulations reads as follows:
'The condition in this paragraph is that the person—
(a) is not an EEA national but would, if he were an EEA national, be a worker, a
self-employed person or a self-sufficient person under regulation 6'

12. I find that the judge clearly took into account the evidence from the appellant and it is noted at paragraph 3 that she heard his evidence together with submissions from Counsel. I have checked the record of proceedings which record that the appellant made an assertion that he was self employed. The judge identified that it was for the appellant to demonstrate that he met the requirements of the EEA Regulations and she noted correctly that she could take into account evidence concerning a matter which was raised after the date of decision. She correctly identified that he would have to meet Regulation 10(6) to show that he was a worker, self-employed person or self-sufficient further to Regulation 6, as at the date of the termination of his marriage. She stated "In the circumstances I find the appellant is not a family member who has retained the right of residence".

13. Nonetheless as stated at paragraph 9(7) the judge found that the appellant's wife was working at the date of divorce but she added "There is no ***independent*** evidence that the appellant was a worker at the of termination of his marriage" and further "There was no independent evidence that the appellant was a worker at the date of the hearing".

14. Clearly the judge took into account the appellant's oral evidence because it is recorded in the determination but placed little weight on this in view of the lack of independent evidence, that is evidence apart from the appellant's oral evidence. Indeed, the evidence enclosed within the bundle only related to 2011 which was prior to the termination of his marriage. There were hand completed self assessment tax calculations to April 2011 but without any confirmation of tax assessment from the HMRC and bank statements to January 2011 and the appellant divorced in August 2012. It is a matter for the judge to determine her assessment of the evidence. On a reading of the whole of the determination it is clear the judge considered in this particular case that evidence independent of the appellant's own testimony was required. The grounds of appeal accepted that there was to date no documentary evidence going to show that the appellant was a worker at the date of divorce. The judge considered the evidence in the context of the appeal, that is someone claiming to be a worker and though her reasons are very short, I find that they are sufficient. A mere assertion of the appellant in his statement and orally that he was working at the said date, the judge found to be insufficient as it was not independent of the appellant.

15. Further criticism was made of the judge in respect of **Amos** [2011] EWCA Civ 552 that the judge did not establish what rights of residence the appellant had built up to the date of divorce. It was contested that the judge had stated that she considered whether the EEA national was a qualified person in every year of the appellant's marriage and this was not a requirement. However the judge did not reject the appellant's appeal on this basis. The appellant had made an application for a permanent right of residence and thus he needed to establish that he had achieved five years continuous residence in accordance with the EEA Regulations. However, the judge clearly found that there was insufficient evidence to show that the ***EEA national***, upon whom the appellant's rights depended, had resided in the UK for a continuous period of five years in accordance with EEA Regulations at the date of divorce and thus the appellant could not show this. Indeed the judge set out the table of evidence at paragraph 7. No challenge was made to the findings of the judge in respect of the EEA national. Subsequently and after 2008 the appellant did not have five years continuous residence until the date of termination of his marriage at which time he could not show that he complied with Regulation 10(6).

16. Even though the EEA national was found by the judge to be working at the date of the divorce, the appellant could not comply with the Regulations and thus any retained rights of residence (bearing in mind he could not show 5 years continuous rights of residence because the EEA national could not) would not assist him. As stated in **Amos** only if that person had acquired a right of residence did the question of retention arise. The judge set out effectively that the appellant could not have built up the necessary five years residence

17. In the face of the mere assertion of the appellant that the appellant was working and in the absence of documentary evidence which it was open to the appellant to produce, I am not persuaded that even if there was an error by the judge it was an error which is material. The witness statement produced by the appellant and which stood in evidence in chief gave no dates as to his working and merely stated at paragraph 27 'I have worked and have contributed to the economic well being of this country '. This gives no specifics about his working at all. There was no documentary evidence from HMRC with tax receipts in relation to 2012 to show that the appellant was working and a mere assertion in his oral evidence (as in the Record of Proceedings) that he was self-employed. I therefore find that there was no material error of law in the determination and the determination shall stand.

Signed Date 5th November 2014

Deputy Upper Tribunal Judge Rimington